Human rights and technology:

Marya Akhtar

Danish Institute for Human Rights

June 2023

SHORT INTRO

- A little bit about me
- A bit more about DIHR
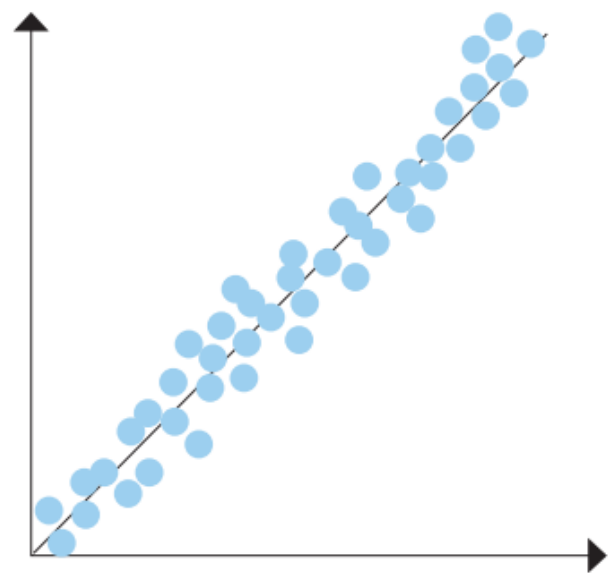- And then some about the morning session

ADM USAGE

Public sector, bank, insurance, recruitment, parole, policing, court case screening etc.
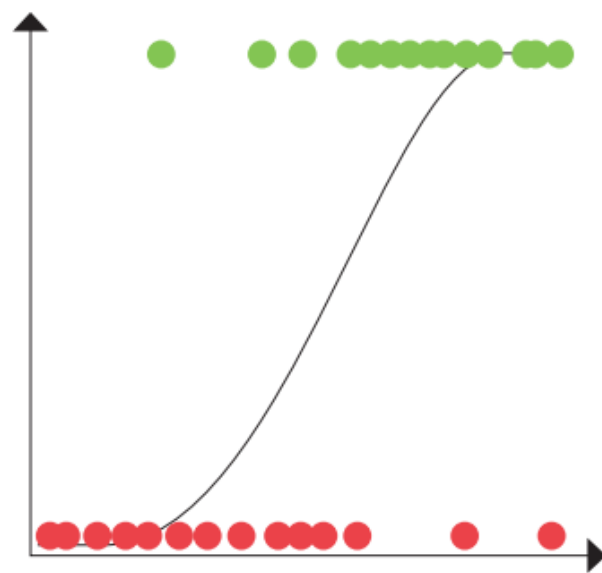
TRANSLATIONS

AI ethics, design choices and Human Rights…

TRE MODELTYPER

Lineær regression
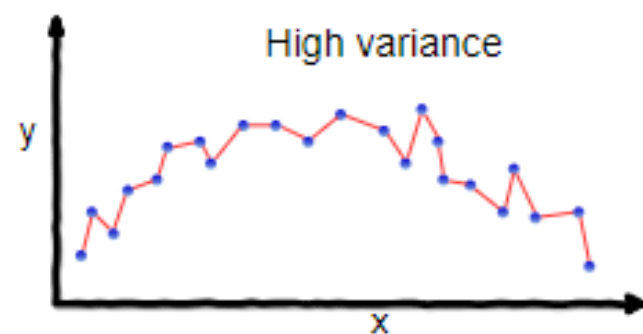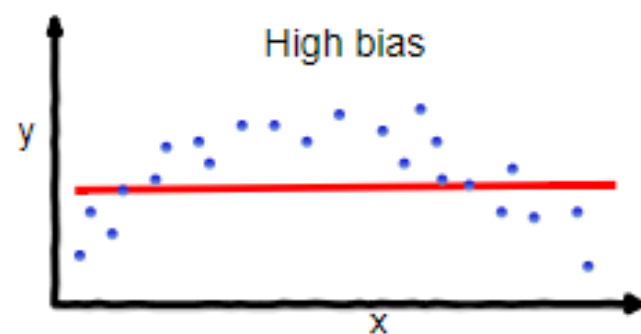
Logistisk regression

Beslutningstræ

ADM RAISES NEW TYPES OF CONCERNS

- The element of discretion in a legal decision

- Transparency – which type and why?

- Non-discrimination vs. algorithmic bias: similarities and differences

High variance — overfitting

High bias — underfitting

Low bias, low variance — Good balance

”A GOOD BALANCE” (I)

- Alf Ross: "Finding the right solution, i.e. the one that will be accepted with common approval is an art that requires not only insight, but also empathy, prudence, tact – in short, that which is called legal judicium."

- Can be speak of automated mercy, pragmatism, Realpolitik? (all of which may occur in administrative or judicial decisions)

- Aletras et. al: Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective

"A GOOD BALANCE" (II)

Can discretion be automated?

What is the difference between discretionary and arbitrary decisions?

Are decisions good or right because of their result or because of their reasoning?

TRANSPARENCY (I)

ADM systems may be opaque in two ways (*very simplified*):

- Firstly, they create statistically reliable, but illogical/unintuitive results – which we may never understand (*the why*)

- Second, they operate on such a complex level that it is hard for humans to understand what the algorithm is doing (*the what*)

Explainable AI as a tool can help somewhat in understanding *the what*, but…

TRANSPARENCY (II)

…there are trade-offs (what I call design dilemmas):

- Explainability vs. accuracy

- What do you want explained? (holistic, modular, global and local transparency)

- Which quality should the explanation have? (fidelity, stability, usage)

  - Can we accept reasons which are understandable, but tell a lie?

TRANSPARENCY (III)

Transparency as a constitutional principle has its basis in rule of law. Traditionally, transparency serves to balance power and information asymmetry which exists in the relationship between the state on the one hand and the citizen on the other.

- Forseeability
- Providing reason
- Oversight and control
- Public interest
- The role of Big Tech in government

DISCRIMINATION (I)

Risk of discrimination in ADM may occur on three separate levels:

1. Repetition

2. Enhancement

3. Trade-offs/design dilemmas including…

DISCRIMINATION (II)

- Protection against discrim. vs. overall accuracy

- Protection against direct vs. indirect discrimination

- Protection of all groups

- And which type of action and/or impact do we want to protect against when we protect against discrimination?

  - Discriminatory decision, discriminatory error rate or discriminatory error type?

Add to this complex proxyinfo (opaqueness)

TECH GIANTS AS GATEKEEPERS

Where is the conversation taking place? Where do we seek information?

IMPACT ON HUMAN RIGHTS (I)

The content

- Platforms are essential for freedom of expression and information

- … but also used for quick and vast dissemination of illegal content. They amplify hate speech, extremism and disinformation which may create polarization and harassment leading to chilling effects on the participation public debate as well as suppression of democratic dissent

IMPACT ON HUMAN RIGHTS (II)

"It's the Business Model, stupid"

- inherent part of the business model to collect vast amounts of data about users is, analysed and shared with third parties including for state surveillance purposes.

Human dignity

- most recently, it has been highlighted that automatic curation and microtargeting may lead to intrusion into the individuals' right to form ideas free from manipulation.

SO HOW DO TECH GIANTS RELATE TO HUMAN RIGHTS?

International human rights law does not establish directly enforceable duties on private companies

- However, the power held by tech giants makes for a compelling argument to hold them responsible as duty-bearers.

- But: tech giants are diversified, transnational and technically complex. In many cases, human rights harms go beyond individual products or services and transcend the decisions and conduct of individual corporations.

(Jørgensen, Akhtar & Koch: The impact of tech giants on human rights, Oxford Handbook on Digital Constitutionalism *(forthcoming)*)

HUMAN RIGHTS TOOLS

- Balance between self-regulatory mechanisms and binding (procedural) obligations

- Risk-based approaches

SELF-REGULATION AND LEGAL OBLIGATION

Because the acknowledgement of freedom of contract is the starting point in the relationship between platforms and their users, self- or co-regulation is an inherent part of regulating private power.

Self-regulation allows for discretion in regulatory choices for companies, thus providing a degree of autonomy also in the assessment of complex legal human rights questions.

(Jørgensen, Akhtar & Koch: The impact of tech giants on human rights, Oxford Handbook on Digital Constitutionalism *(forthcoming)*)

RISK-BASED APPROACHES

Initially, "risks to rights" may seem problematic from a human rights perspective, ranking rights on a sliding scale from trivial to serious.

- However, a risk-based is not only reconcilable with the effective protection of rights; the approach is in many ways similar to the human rights law assessment of infringements in which proportionality forms an inherent part. The purpose of a risk-based approach is to use risk as a tool to prioritize and target enforcement in a manner which is proportionate.

- Examples include: GDPR, DSA, AIA in three distinct approaches.

(Jørgensen, Akhtar & Koch: The impact of tech giants on human rights, Oxford Handbook on Digital Constitutionalism *(forthcoming)*)

PROCEDURAL RATHER THAN SUBSTANTIVE PROTECTION?

Transparency or openness as a principle of constitutional law implies that actors with power (in this case tech giants) are held accountable for their activities which are subject to public and legal scrutiny and control.

(Jørgensen, Akhtar & Koch: The impact of tech giants on human rights, Oxford Handbook on Digital Constitutionalism (*forthcoming*))