To what extent do provisions for special category data within the General Data Protection Regulation (GDPR) help or hinder the achievement of evidence-based equality goals?

Introduction

Article 9 of the General Data Protection Regulation (GDPR)[1] establishes special categories of personal data which enjoy greater protection under the Act as compared with other types of general data. The rationale underlying this higher standard is a simple proportionality calculus: the use (and misuse) of special category data poses a greater risk to the integrity of an individual's fundamental rights and freedoms than general data, thus requiring a greater degree of protection.[2] As highlighted by the Information Commissioner's Office, this aligns with the risk-based approach of the GDPR[3] towards the use of personal data, which is guided by principles of prevention and protection rather than promotion and progress. However, as is often pointed out by the Silicon Valley doyens of our age, regulation comes at the necessary cost of innovation and efficiency.

In this essay, I will argue that the special category data provisions in the GDPR hinder, rather than help, the achievement of evidence-based equality goals. I make this point by illustrating the impact of Article 9 on three potential stakeholders concerned with evidence-based equality goals: a statutory body, a private institution, and a researcher. In each case, I show how the GDPR hinders the pursuit of evidence-based equality goals, albeit to varying degrees. I then briefly consider how Article 9 might be used by a government with an anti-equality agenda to actively prevent the achievement of equality goals. I conclude that while Article 9 does pose a hindrance to the achievement of evidence-based equality goals, this is proportional when balanced against potential gains in individual privacy and fundamental rights protection and its application is thus justifiable on those grounds.

Part I: What are the special category data provisions?

The special category data provisions are enshrined in Article 9 GDPR. Article 9(1)[4] prohibits the processing of personal data which reveals the following: racial or ethnic origin, political opinion, religious or philosophical beliefs and trade union membership, genetic data (for example, chromosomal analysis), biometric data (for example, fingerprint scans), data concerning health, and data concerning a person's natural sex life or sexual characteristics. Article 4(15) clarifies that data concerning health includes physical and mental health data as well as data on pregnancy.

Article 9(2) lays down the exceptions to the Article 9(1) prohibition and delineates the legal basis for processing special category data (in addition to the Article 6 general processing requirements). The exceptions

[1] General Data Protection Regulation, Article 9

[2] Information Commissioner's Office, 'What is special category data?' <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-is-special-category-data/>

[3] ibid

[4] ibid

relevant to this essay are: where a data subject consents (9(2)(a)); where processing serves a reason of substantial public interest (9(2)(g)); and where it serves a purpose of public interest, scientific or historical research, or statistical purpose in accordance with law (9(2)(j)). With the exception of explicit consent, the availability of each exception is subject to appropriate safeguards and the necessity limitation, which means that for any processing to be deemed lawful it must be necessary to achieve a particular aim. In general, this aim must be justified on public interest grounds and any processing must be in accordance with Member State law, which in turn must be proportionate to the public interest aim pursued and must respect the essence of the right to data protection, providing suitable protections of fundamental rights. The provision also requires the maintenance of extensive documentation to record compliance with the GDPR.

Read together, the special category data provisions indicate a high level of protection for the processing of any data capable of uniquely identifying an individual and it is clear from the restrictions that individual privacy is at the heart of the regulation. The question is whether this has an unintended restrictive impact on the pursuit and achievement of evidence-backed equality goals.

Part II: What are evidence-based equality goals?

Equality goals are targets that institutions set and actions that they take to address inequality and achieve fairer, more inclusive systems. Evidence-based equality goals are when these targets are set and pursued on the basis of data and research. Evidence-based goal-setting means taking into account inequities particular to the institution, identifying their root cause, and developing evidence-based policies which seek to rebalance them; as these policies are implemented, evidence-based goal-tracking can help measure whether and how well they are working and inform future adjustments. Given the nature of equality goals, they often require the collection and processing of special category data over long periods of time. This means that to be GDPR-compliant, evidence-based equality goals must fall within one of the exceptions listed in Article 9(2); I argue that this restricts the achievement of these goals.

Part III: Three Case Studies

The impact of Article 9 on the achievement of evidence-based equality goals can be analysed with the help of three case studies which highlight three stakeholders and their respective goals.

The first example is of a public authority who, under the Public Sector Equality Duty[5], is required to have due regard to certain equality considerations when exercising its functions. This includes taking positive steps towards eliminating discrimination and advancing equal opportunities for people with protected characteristics. The protected characteristics have significant overlap with special category data and include disability, sexual orientation, race, pregnancy, and religion. The duty also requires the public authority to publish information

[5] UK Public Sector Equality Duty Guidance 2023

regarding its compliance once every four years. This means that to comply with its Equality Duty, the public authority must also ensure compliance with Article 9.

Since the Equality Duty is statutory, public authorities can likely benefit from the substantial public interest exception in Article 9(2)(g) or can seek to obtain employee consent under Article 9(2)(a). The restrictive effect of the GDPR is more likely manifested in the form of administrative red-tape; the public authority will have to maintain documentation about GDPR compliance, ensure that all data collected is not stored longer than necessary, and that any processing is strictly limited to discharging the statutory duty. The extra red tape may lead to inertia in the development of innovative equality goals, with public authorities preferring to reuse old initiatives and track the same data in order to minimise administrative costs. In this way, the regulation can clash with the proactive discharge of statutory duties.

The second example is that of a private institution wishing to record, process, and publish its data on the achievement of equality goals in order to attract funding and boost its prestige. Consider the example of the Oxford Law Faculty, which might want to process and publish student and employee racial data in pursuit of racial equality goals. Under the GDPR, racial data falls within special category data; its processing is prohibited. The Faculty may be able to circumvent this by obtaining consent– this would certainly be the easiest route. However, in the event that a student or employee declines to consent to sharing their racial data, it is unclear what avenue the Faculty can pursue. Given that the purpose of processing is to attract more funding, the public interest exception is unlikely to apply, and neither is the exception for research. Yet, it is arguable that publishing the data to attract more funding is crucial to the achievement of evidence-based equality goals; without evidence that policies geared towards equality are working, donors are unlikely to donate more money towards their achievement, which can stifle the achievement of the policies themselves.

The third example is perhaps the most straightforward: a researcher whose research is focused on understanding the cause of inequality and developing policies that help achieve equality goals. The researcher will easily be able to rely on the scientific research exception in 9(2)(j) however, as in the first example, will be bound by the administrative documentation requirements of the GDPR. Contrary to a public authority, this can be extremely burdensome on a researcher, especially if they are not part of a well-funded institution. Consider the example of a researcher who is not part of an academic program but wishes to conduct research in their own time, or a small, under-funded think-tank that is passionate about developing equality-focused solutions. For these stakeholders, the administrative restrictions can be a disproportionate drain on resources and require prioritisation at the expense of pursuing equality goals.

Part IV: Evaluating the Wider Impact

In Part III, I highlighted three case studies where the special category data provisions could have restrictive effects on the achievement of evidence-based equality goals. In cases where an Article 9(2) exception easily and obviously applies, such as in the case of a public authority bound by the statutory Equality Duty or an academic researcher,

the restriction constitutes no more than extra compliance documentation. While this is an inconvenience, it is unlikely to hinder the achievement of equality goals that the institutions in question hope to pursue. However, where a stakeholder cannot benefit from any exception other than consent or where the stakeholder has limited resources such that the administrative requirements result in narrowing the scope of equality goals, the special category data provisions can act as a hindrance.

Beyond the case studies, Article 9 is liable to be used as an instrument to actively prohibit the achievement of equality goals. Consider the hypothetical example of an anti-DEI government with an anti-equality agenda— the GDPR provisions can be a useful tool to achieving that end. Article 9(4) empowers the government to further restrict the scope of processing special category data as well as the availability of Article 9(2) exceptions. An anti-DEI government may exercise this power to make it virtually impossible to process special category data unless express permission is received from the government. In this way, the excuse of privacy and protection can be used to significantly hinder the pursuit of equality research.

Conclusion

In this essay, I have highlighted the possible ways in which the special category data provisions of the GDPR can hamper the achievement of evidence-based equality goals. I have demonstrated the administrative and financial burden they can impose on institutions and the limited availability of exceptions in the private sector, which can result in the stagnation and de-prioritisation of equality goals. On the other hand, the provision undoubtedly confers benefits in the realm of data privacy and protection. Additionally, it could be argued that since the easiest way to process special category data is via consent of the data subject, the provision brings more transparency and accountability to the pursuit of equality goals. While the high degree of state control over exceptions means that processing special category data in pursuit of evidence-based equality goals is contingent on the government's interest in their achievement, Article 9 appears to strike a fair balance between privacy and ease of data processing. It can be said that while restrictive, the Article 9 provisions are justified on the grounds that they aid in protecting individual privacy and are not so significant as to inhibit the achievement of evidence-based equality goals.

Saloni Sanwalka
BA Jurisprudence, Faculty of Law
University of Oxford