The AI Act, its travel companion, and a constitutional question (of survival)

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The AI Act is a European legislative act, technically a regulation, expressing a choice of governance by rule of law. This concept matured after a cultural and ethical gestation period that began several years earlier. Along with other similar instruments in the digital field, it is an expression of the global regulatory power that European standards have throughout the world, a phenomenon known as the 'Brussels effect'.

We will shortly examine some aspects of this dual dynamic, from ethics to law and from the national to the global. However, we must first acknowledge that the AI Act is at the forefront of what Sabino Cassese wittily and ironically termed *'regulatory fervour on AI'*. Finally, we will consider the current situation and possible developments of a constitutional issue, and one of survival of the EU.

1. The AI Act and its travel companion

There was a time when the AI Act (and the draft regulation) coexisted with numerous similar regulatory tools, each unique yet united by a shared characteristic that defined their membership of the same family: the family of those who wanted to regulate artificial intelligence and its applications through various ethical or legal norms. Even in 2024, there are widespread calls for rules that limit the development of AI not only in Europe. Some interpret this as an attempt to 'put AI on a Leash' (Wall Street Journal», March 25, 2024), while others see it as a necessity that has developed over time and is now so urgent that it is shared, to some extent, by the private powers themselves, the large US companies that dominate the scene and whose activities may jeopardize people's rights.

Over the past decade or so (roughly 2010–2020), the idea that certain rules, particularly ethical ones, were necessary for artificial intelligence had taken hold.

During this period, a large number of documents were produced by various entities based on their own experience and vision. Examples include documents from the Council of Europe, the European Commission, the Institute of Electrical and Electronics Engineers (IEEE), the Organization for Economic Co-operation and Development (OECD), the International Telecommunication Union (ITU) and the World Health Organization (WHO), as well as the House of Lords report (UK, 2017) and the Executive Office of the President of the United States report (2016). In 2018, UNESCO asked the COMEST commission to draft a preliminary study on the ethics of AI. This was published in 2019 and formed the basis for the 2021 Recommendation on the Ethics of AI.

In turn, the European Commission launched a European initiative on AI in a communication to the European Parliament on 25 April 2018. This led to the publication of the Ethics Guidelines for Trustworthy AI by a panel of high-level experts on 8 April 2019.

At the start of this debate, there is such a jumble of perspectives and proposals for different instruments that it is difficult to say whether this orientation towards ethics is the result of a deliberate choice given the difficulty of establishing legal rules in a rapidly developing technology sector or a strategy to adopt a less rigid approach according to what is defined as 'soft law', which includes the legal aspect to a limited extent as well as ethical interventions.

The relationship between ethics (both hard and soft), governance and legal regulations (both hard and soft) is complex and open to different interpretations, depending on the perspective of the author. According to Luciano Floridi's approach, for example, digital governance can be understood in two ways. The first, proper and narrow interpretation sees digital governance as one of three regulatory forces that can shape and guide digital development, alongside ethics (both hard and soft) and actual legal regulations. The second approach sees digital governance as the set of regulatory interventions, including ethical and legal ones.

The interplay between different regulatory systems, and therefore the tension between ethical and legal rules, is not always clear-cut. Some people prefer to use the term 'human rights' rather than 'ethics' because they believe that, although both ethics and human rights protect the same set of values, a legal infrastructure already exists for human rights and legal protections can be invoked to obtain effective remedies. Not to mention that the ethical approach presents the additional problem of selecting the relevant ethics (given the plurality of ethics and the cultures that express them) and identifying an authority with the power to make decisions. In the European Union, human rights have been institutionalized in the Charter of Fundamental Rights of the European Union, which brings together and summarizes a series of other European regulatory instruments; therefore, we can speak of their juridification. In contrast, the human rights framework in non-EU countries is much more fragmented and problematic.

By the end of 2023, the situation regarding AI could be summed up by the headline, "The world wants to regulate artificial intelligence, but doesn't know how."[1] However, a new fact seems to be emerging: the major model producers, such as Alphabet and Microsoft, and smaller companies, such as Anthropic and OpenAI, who had previously opposed regulations, are now pushing for them, perhaps out of fear that unbridled competition would cause them to act recklessly by releasing models that could easily be abused.[2] In any case, even when technology companies support regulation, as they did at the U.S. Senate hearings in July 2024, they request that it be limited to addressing only extreme risks.

The path to regulatory intervention is open, and several measures that are not easily classified emerged between 2023 and 2024[3]. If we were to organize them by legal force and geographical scope, we could list them as follows:

a. The Council of Europe Framework Convention; b. The European AI Act (July 12, 2024); c. The Final Declaration of the Bletchley Meeting (November 2023, UK); d. The UNESCO Recommendation (2021); e. The US Presidential Executive Order (October 2023); f. The Governing AI for Humanity Report (September 2024, UN High-Level Advisory Body on Artificial Intelligence)

There is also considerable activism in the United States. On October 30, 2023, the President of the United States issued the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. The 100-page, 20,000-word document outlines the administration's approach to AI development and use. Announced some time ago, the Executive Order is part of the U.S. administration's efforts to develop bipartisan legislation, including the draft Bill of Rights on AI, which will be discussed later. The Executive Order's contents follow steps taken by European institutions in previous years.

[1] «The Economist», November 2, 2023.

[2] Again, according to The Economist.

[3] A wider analysis is in A. Santosuosso - G. Sartor, *Decidere con l'IA*, Il Mulino 2024

It identifies principles to guide the design, use, and deployment of artificial intelligence systems. The decision to issue the Executive Order is also linked to the need to reaffirm the US's global leadership and mitigate the impact of British Prime Minister Sunak's initiative. This initiative brought together delegates from 28 countries, including the United States, China, the European Union, Singapore, and the Gulf states, as well as leaders from major tech companies. It resulted in the Bletchley Declaration.

Despite its nature as an internal US regulation with limited legal force, the Executive Order can be likened to international instruments due to the US administration's influence on manufacturing companies, which still hold de facto global leadership in AI.

The executive order is accompanied by the Blueprint for an AI bill of rights: The White House Office of Science and Technology Policy published a white paper called Making Automated Systems Work for the American People. The paper's aim is to "support the development of policies and practices that protect civil rights and promote democratic values in the construction, implementation, and governance of automated systems" and therefore to ensure that automated systems align with democratic values and protect civil rights, civil liberties, and privacy.

The text clearly states that the Blueprint is merely "an exercise in imagining a future in which the American public is protected from potential harms and can fully enjoy the benefits of automated systems". It describes principles that can help ensure these protections, some of which are already provided for in the U.S. Constitution or implemented by existing laws. The AI Bill of Rights Program aims to help governments and the private sector implement these principles.

In conclusion, the transition from ethical rules to more stringent ones can be seen as part of a regulatory fervor surrounding AI and technology. This group of regulatory tools includes various types of offshoots that are very different from each other but all respond to a certain spirit of the times. Above all, they strengthen each other. The rules produced in the European Union have the power to apply to an area populated by 450 million people, one of the richest areas in the world, a phenomenon known as the "Brussels effect". The American Executive Order and Blueprint movement resulted from various forces, including those within the US, the Brussels effect, and the Bletchley Declaration. Notably, it was the Chinese delegation that insisted on creating binding international legal regulatory instruments during the preparatory work of the Bletchley Declaration. Clearly, the motivations behind these attitudes were inconsistent (e.g., the Chinese pressure for binding international rules had clear geopolitical objectives toward U.S. companies). However, a regulatory fervor acted as the glue of these efforts, its distinctive trait, overshadowing the lack of clearly identified authorities capable of exercising internal power and defending specific pieces of rules from external aggression.

2. A constitutional approach

In this turbulent and chaotic context, a subgroup of EU legislation was playing an internal, constitutional game, in addition to the Brussels effect (which could be described as extra-EU commercial expansionism).

In an article published in May 2024[4], Franco Pizzetti sees the emergence of a new European constitutionalism. The process of creating a digital constitution began at the Tallinn summit on September 29, 2017, when digital evolution was incorporated into the European agenda through topics such as e-government, cybersecurity, and the digital economy. Next came the Digital Markets Act (2022), the Digital Services Act (2022), the Data Governance Act (2023), and finally, the AI Act (2024). These were followed by the proposed Regulation 2024/1183 (eIDAS 2), which establishes the European framework for digital identity, and the NIS2 Directive 2022/2555 on cybersecurity. Pizzetti recalls that the Tallinn Summit produced a framework "in which it was immediately clear that the EU would either be able to ensure shared digital development dominated by the choices and needs of its citizens or the Union's very existence could be at risk".

Pizzetti identifies an emerging, albeit undeclared, new constitutionalism based on fundamental values and rights of freedom, as developed in Europe. He sees this new constitutionalism not only in the dense regulatory framework, but also in the transition from a contractual to a public perspective. The EU's digital data exchange regulations require digital service providers to comply with EU rules when the user is in the EU or the European Economic Area. This principle contrasts with US laws, which are based on private law and apply the legislation of the state in which the service providers are based, often the US itself. These EU regulations essentially introduce a public law rule that can be considered constitutional because it expresses the EU's sovereignty in the European digital space. Thanks to their territorial effectiveness, independent of contractual relationships, the rules contained in these regulations constitute the first embryo of a "European digital constitution," thus giving legal meaning to the concept of EU digital sovereignty.

According to the author, this is an implicit constitutional process that begins with the regulatory development of relationships inherent in digital society, particularly with regard to the provision and use of its services. This perspective aligns with the EU's tradition of building the union through incremental steps, a tradition that appears to be reaching its limits in light of new geopolitical developments.

3. In Search of the Founding Fathers

When discussing constitutional perspectives, it is important to remember that the term "constitution" encompasses a broader scope than the Bill of Rights. It also pertains to the rules that govern the exercise and organization of public powers, including legislative, executive, and judicial powers. While these two aspects – the Bill of Rights and constitutionalism (or constitutional democracy) – may intersect and complement each other, they remain distinct.

Furthermore, when discussing declarations of rights, it is necessary to clarify the implied power and its form in relation to the safeguarded rights. Many declarations, recommendations, and conventions on AI and technologies view nation states as having dual responsibilities: monitoring private entities, which sometimes wield immense power, and themselves as public entities, such as police forces or the judiciary, which use these technologies. In fact, some of the aforementioned instruments (notably the UNESCO Recommendation) have adopted the concept of an "AI actor," defined as "any actor involved in

[4] *Da Tallin all'AI Act, così l'UE costruisce la sua costituzione digitale*, in Agenda Digitale, May 7.

at least one phase of the AI system life cycle, [...] whether natural or legal persons, such as researchers, programmers, engineers, data scientists, end users, commercial enterprises, universities, and public bodies."

This definition includes public entities (e.g., mass surveillance), which fall within the category of AI actors and are subject to prohibitions.

As a functional receptor (private or public), the AI actor opens up a culturally significant perspective that overcomes the resistance of non-interference theorists in state sovereignty and could lead to significant developments. This kind of perspective has also become necessary in subsequent experiences, such as the Framework Convention at the Council of Europe (see above). The explanations refer to the involvement of relevant non-state actors in the negotiations: a total of 68 representatives of civil society and industry participated as observers. The convention aims to ensure that public and private actors comply with its obligations, standards, and commitments throughout the life cycle of artificial intelligence systems.

At this point, who are the founding fathers of the European Constitution in progress for AI? What is the source of the constituent power, and what is its territorial reference? Is it national, with its limited scope in comparison to the actual existing powers? Or is it regional, like the European Union? Or perhaps it is global, following the model of the United Nations? However, the United Nations has not been performing well in protecting fundamental rights in recent years.

Recognizing these problematic aspects does not preclude the possibility of a "constitutional necessity" emerging: the gradual development of something that cannot be measured solely by conformity with the existing legal system and that could become part of an international or global constitutional framework when the political conditions are favorable.

This is precisely the double-edged question today: Does this body of EU legislation have the structure and nature to acquire constitutional status as a bill of rights? Furthermore, are the current political conditions at the international level fertile ground for this constitutional necessity to emerge and take shape?

4. On the characteristics of the EU legislative corpus (structure, content, and purpose).

There are many aspects of the AI Act worthy of comment. One is the break with the original risk-based approach's coherence, caused by the understandable desire to include rules on large language models in the final phase. These rules are based on different and uneven criteria, such as computing and usage potential, rather than risk. However, one prominent and general aspect stands out: the AI Act is a lengthy text of 144 pages, with an official summary of 2,157 words and 113 articles, preceded by 180 recitals. Even experts in the field find it difficult to read and navigate. In terms of a Bill of Rights, size matters! The report The Future of European Competitiveness (2024), commissioned by the European Commission from Mario Draghi, points out that new EU regulations are growing disproportionately faster than those of other comparable economies. While it is impossible to make a detailed comparison between such different legal systems, nevertheless, there is an impressive overall figure for the EU and the US. "In the United States, approximately 3,500 pieces of legislation and 2,000 resolutions have been enacted and passed, respectively, at the federal level during the last three congressional terms (2019–24). During the same period, the EU approved approximately 13,000 pieces of legislation."

Considering the characteristic verbosity of the AI Act and other European regulatory texts, as well as the well-known phenomenon of gold-plating—the widespread practice among states of adding additional national rules that diverge from EU rules—it's clear that a massive dose of goodwill is needed to see, even in embryonic form, a Bill of Rights in such a huge heterogeneous mix (net of the importance of the shift from contractual to territorial logic).

5. A constitutional approach and a matter of survival.

When discussing the political conditions for establishing a constitutional perspective, Mario Draghi's opening words at the Rimini meeting in August 2025 cannot be overlooked: "For years, the European Union believed that its economic size—with 450 million consumers—would bring geopolitical power and influence to international trade relations. This year will be remembered as the year in which this illusion evaporated." Draghi's reference to the Brussels effect is clear. The illusion evaporated when US President Donald Trump canceled his predecessor Biden's executive orders on digital matters with the stroke of a pen. The international political landscape and the bloody wars currently underway have brought a policy of power to the forefront rather than respect for alliances.

As of late August 2025, US-EU negotiations on tariffs are ongoing, and the removal of EU digital regulations remains a crucial issue among the non-tariff barriers that the US is adding to tariffs. This issue touches on the core of EU digital sovereignty and hints at a constitutional path. On August 27, Jeanna Smialek-Adam Satariano on The New York Times were very clear under the title "Trump Wants Europe to Stop Regulating Big Tech. Will It Bend": The stakes are high for Europe. Officials here have long made it clear that they see their regulations as a matter of national sovereignty. Given that, bending to Mr. Trump would amount to allowing the United States to write Europe's rules."

Anu Bradford, professor at Columbia Law School and author of the successful Brussels Effect formula, acknowledges that "the US withdrawal from AI governance is a blow to those concerned about the individual and societal risks of AI. This withdrawal undermines the EU's previous collaboration with the US on digital policy and gives China and other autocracies the opportunity to promote their authoritarian digital standards. "However, she also sees this situation as" an opportunity for Europe to take a leading role in shaping the technology of the future, an opportunity it should seize, without abandoning it out of acquiescence or unfounded fears."

On closer inspection, the authors cited so far, despite differences in tone and expectations, agree that the digital challenge for Europe is something that goes beyond specific rules or specific tariffs, but is an issue on which the very existence of the Union is at stake. Ultimately, the AI Act (and EU legislation on digital matters) loses much of the momentum gained by similar regulatory attempts outside the EU, especially in the US. Additionally, the traditional Brussels effect is called into question, leaving it without a political or institutional entity capable of defending it from malicious external incursions. It looks like a Bill of Rights without the institutional powers to enforce it.

In summary, the AI Act and European digital regulations, in addition to their intrinsic value, indicate a broader evolution. This evolution starts with technological development and extends to the regulation of global conflicts and ultimately, the world's political structure. Due to Russia's invasion of Ukraine, Europe is heavily implicated in this evolution.

On September 5, newspapers reported on the sanctions that the EU Commission imposed on Google and the strong American reaction. The game is in full swing.