Policy Lab:
Fundamental Rights in AI Digital Societies:
Towards an International Accord

Sub-Committee 2:
Transatlantic approaches to protect fundamental rights
in AI & digital spaces

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1. Introduction

Artificial intelligence (AI) is a disruptive technology, with profound implications in individual life, in society and in geopolitics. It has given us new tools for daily life, from smart utilities to virtual assistants, and revolutionized how we - citizens, businesses, governments and others – relate to each other. Our information ecosystem, our economic relations and our decision-making systems, from credit ratings to school admissions and public resource allocation, are all increasingly driven by algorithms. And this transformation is altering the global balance of power, changing the factors that drive economic growth and occasioning growing tensions around technological innovation, data collection and governance, and the relationship between citizens and digital technologies.

As any major societal transformation, digital transformation is bringing about new threats and opportunities for fundamental rights. It is opening up new channels of expression, association and citizen engagement in public affairs, and new tools for institutional transparency and accountability. Assistive technologies based on AI and robotics can help large groups of citizens fulfil their rights to safety, autonomy and dignity, while AI-assisted decision-making can improve the quality and efficiency of public service delivery, from education to healthcare and security services.

But digital transformation is also posing new threats to fundamental rights. It is concentrating economic and political power in the hands of giant corporate actors; providing human rights offenders, including repressive governments, with new tools for censorship, monitoring and crack-down; and opening new pathways for foreign surveillance, interference and warfare. The use of AI-assisted decision-making tools is also jeopardizing the crucial role of human judgement and raising questions of accountability for all sorts of decisions, in business, public service and military areas alike.

There is no question that legal and governance frameworks must evolve in order to ensure that the continued development and deployment of AI and digital technologies protects rather than threatens fundamental rights. And since technology advances faster than law-making, at least in deliberative democratic systems, it is also clear that the governance framework on AI and digital technologies must provide forward-looking guardrails, protecting fundamental rights in the face of future, as well as current, technology.

There is also broad agreement around the need for international coordination on this score. The UN Secretary-General's [Roadmap for Digital Cooperation](#) calls for "supporting global cooperation on artificial intelligence that is trustworthy, human-rights based, safe and sustainable and promotes peace". Yet the locus of global leadership to protect fundamental rights in the face of digital technologies remains unclear. How can the global community reach agreement on a basic set of fundamental rules to guide future technology development? And how should such an agreement, hypothetical as it might be, be enforced?

The strategic approaches of China and Russia to develop and deploy technologies unhindered by human rights considerations undoubtedly leave the world's democratic powerhouses – the EU and the US -- on the same side of the issue. For this reason, it has been argued that a Transatlantic alliance could be a natural starting point for a global accord on AI governance aimed at protecting fundamental rights. But it does not follow that Transatlantic cooperation on AI governance is a straightforward enterprise. Could the EU and the US, together, lay the groundwork for a global agreement on a basic set of fundamental rules to guide AI technology development?

The aim of this paper is to present the EU and the US' approaches to AI and digital technologies, with a view to gauging the possibility for joint EU-US leadership towards a global accord to protect fundamental rights in the AI and digital spaces. It is one of three papers that will feed into the discussions hosted by Club de Madrid and the Boston Global Forum at the Policy Lab on *Fundamental Rights in AI Digital Societies: Towards an International Accord* on 7-9 September 2021.

2. The EU's rights-oriented approach to AI governance

The EU is neither a global leader in digital technology innovation, nor a quick adopter of large-scale AI applications. Despite recent efforts to stimulate investment in AI, its tech industry continues to trail behind US and Chinese innovators, marred by the scarcity of private funding, the lack of a European hub for AI expertise, severe brain drain, low appetite for AI solutions in the public sector and the relatively limited availability of data to feed AI solutions under the EU's General Data Protection Regulation. Regulatory fragmentation, in the absence of a complete Digital Single Market, also limits the possibilities for European innovators to scale up.

The relatively slow development of home-grown digital technologies, combined with the centrality of human rights protection in the European project, have led the EU to approach AI primarily as a rights issue. Stimulating the digital industry while ensuring that the deployment of AI technologies does not hinder citizens' rights has become the central axis of the EU's AI policy; and individual data ownership, wherein data belongs to the individual that produces it rather than the company that harvests it, its basic tenet. Sometimes portrayed as the "third way" between so-called American technological libertarianism and Chinese technological authoritarianism, the EU aims to lead in the rights-based, ethical governance of AI technologies.

Early impulses for AI regulation came from the European Parliament during the Juncker Commission (2014-2019). The 2018 Communication on Artificial Intelligence for Europe laid out the Commission's first approach to AI, articulated around investment promotion, socio-economic change and ethics. Two years later, a High-Level Expert Group on AI advised the Commission on necessary policy and regulatory changes, leading the von der Leyen Commission (2019-2024) to make *Europe fit for the digital age* one of its priorities, under the leadership of Executive Vice-President Margrethe Vestager. Building on the rights-based approach underpinning its now rolled-out General Data Protection Regulation, the Commission issued in early 2021 a proposal for harmonized rules on AI in the EU – the Communication on Fostering a European Approach to AI, or EU AI Act.

The EU AI Act is still far from becoming law, and has received heavy criticism from technology enthusiasts and human rights defenders alike. The former have called it a regulatory straightjacket that will stifle innovation, while the latter lament that it does not go far enough to protect the rights of end-users, that is, citizens. Nevertheless, the EU AI Act is laudable as the world's first attempt at a comprehensive rights-based AI regulation, and relevant as an illustration of the EU's approach to AI governance. It sets out a three-tiered regulatory structure that would ban some uses of AI altogether (such as social scoring and indiscriminate surveillance), heavily regulate high-risk uses, and lightly regulate less risky AI systems -- complete with *ex ante* conformity assessments and the creation of light monitoring structures. While no other jurisdiction in the world has a similar scheme in place for AI, White House National Security Advisor Jake Sullivan pointed out that it bears similarity with systems used by US financial regulators.

The EU AI Act, like the policy reflections that preceded it, is comprehensive in its treatment of AI as a domestic fundamental rights issue. While putting rights first, it also seeks to enable, through greater market integration and regulatory certainty, the role of AI as a motor of future economic growth in the region. However, it entirely leaves aside the military uses of AI, as well as any discussion of the associated considerations related to strategic interests and geopolitics. EU institutions, who are naturally shy of military matters for which they lack competencies, are not entirely to blame for this omission. Since 2018, the EU has been encouraging its Member States to adopt national AI strategies, as part of the Commission's Coordinated Plan on AI. Of the 21 Member States who have adopted or drafted strategies so

far, only France and the Netherlands – two exporters of AI-based military technology -- touch upon the geopolitical implications of AI, pointing out the strategic importance of the EU's digital autonomy. For all others, AI remains a fundamentally domestic issue.

Yet there have been calls for the EU to engage with the geopolitical dimension of AI, and for EU leadership for the governance of AI in the military space. Continuing to disregard the implications of AI for its foreign relations and geopolitical influence, warns the European Council on Foreign Relations, would lock the EU into the role of mere mediator between the real technological powers, the US and China.

The European Parliament has also called for human dignity and human rights to be respected in all EU defence-related activities, including those involving AI systems; and it has expressed its support for a ban on lethal autonomous weapon systems (LAWS), also known as killer robots. The European Defence Agency – an EU Agency mandated to promote collaboration among EU Member States on defence matters -- has been working since 2016 on plans for EU collaboration on AI in defence, but results have been slow to come, an indicator of the difficulty of EU leadership in military matters.

3. The US' military-strategic approach to AI governance

While the term *technological libertarianism* exaggerates and oversimplifies the US' approach to AI governance, it is undeniable that, compared to the EU, the US has been approaching AI with a lighter regulatory foot. Protective of the global leadership of the country's tech sector, and undesiring to risk muffling innovation with red tape, both the Obama and Trump administrations have stayed away from comprehensive regulation on AI. The cession of data ownership by individuals to tech companies through informed consent – such as that given in User Agreements – has been deemed legitimate, and tech companies have been encouraged to adopt voluntary standards of responsibility in the use of such data. Adjusting existing regulatory frameworks with the minimum touches necessary to address known risks, has been the preferred approach to AI government regulation.

Federal guidance on AI ethics is not entirely absent – the White House Office of Management and Budget released in 2020 a set of policy principles for regulating AI articulated around the objective to promote innovation while protecting privacy, civil rights and American values – but the most ambitious regulations on AI in the country have come from local and state administrations. Federal efforts, such as Obama's twin reports on Preparing for the Future of AI and National AI R&D Strategic Plan (2016), Trump's American AI Initiative (2019) or the recent announcement by the Biden administration of a National Artificial Intelligence (AI) Research Resource Task Force (2021), emphasize the strategic importance of AI and AI innovation for the US economy and security; and while they do mention the implications of AI for human rights, they fall short of suggesting that regulation is the solution. The creation in 2019 by the US Congress of the National Security Commission on Artificial Intelligence (NSCAI)

confirms that the focus on the strategic dimension of AI is not an Executive feat – it is the American approach.

Viewing AI as a primarily strategic issue, it is only natural that the US should trail behind the EU on the governance of AI as a domestic fundamental rights issue, but lead on governing its applications in the strategic sphere. In 2020, the US Department of Defense adopted a series of ethical principles for the design, deployment and adoption of military applications of AI, becoming the first US public administration to prescribe an AI norm that goes much further than corporate voluntary standards. The principles establish *inter alia* that human beings must remain responsible for the development, deployment, use and outcomes of AI systems; algorithms used in combat must avoid unintended bias; and AI systems must be programmed to stop themselves if they see that they might be causing problems.

While there have been calls for the US to lead the development of joint military standards on AI, not least through NATO, it has so far been choosing its partners carefully. NSCAI recommended the Five Eyes Alliance (US, UK, Canada, Australia and New Zealand) as a first locus of collaboration, and in 2020 the Pentagon expanded its consultations to a group of 13 countries through the AI Partnership for Defence (Australia, Canada, Denmark, Estonia, Finland, France, Israel, Japan, Norway, the Republic of Korea, Sweden, and the United Kingdom).

Beyond this normative effort, the US is also making it a priority to leverage AI to strengthen its military capacity, and that of its allies, through improved systems for asset protection and information processing. This has been encouraged by NSCAI as an essential measure to preserve national security and remain competitive with China and Russia. AI safety in military operations – protecting US military AI systems from foreign interference – is next on the list of priorities. The ultimate objective of these efforts is obviously to build a countervailing force against China, who is also seen to be investing heavily in new technologies and implementing them in new advanced weapon systems, without – it is suspected – the kind of ethical considerations to which the US has yet remained committed.

4. Transatlantic cooperation: Where to start?

The two different AI approaches put forward by the EU and the US -- with the former focused on the domestic socio-economic implications of AI and the latter on leveraging technology to preserve and strengthen its geopolitical power – appear to be rather complementary than incompatible. While the US does not share the EU's appetite for comprehensive regulation, and the EU has neither the competence nor the strategic unity to match US leadership in the military space, their different strategic objectives are not conflicting and rest on shared values. Their different approaches to data ownership, however, wherein the EU seeks to give individuals full control over their data and how it is used, while the US allows the unfettered cession of data rights to private companies, limits the scope for agreement on what guardrails are needed to guide the development of future digital and AI technologies.

In December 2020, the European Commission greeted the incoming Biden administration with an ambitious blueprint for Transatlantic cooperation (New Transatlantic Agenda for Global Change), including two proposals related to digital technologies: the creation of a Trade and Technology Council, and working together on global standards for AI governance. Leaders on both sides officially established the EU-US Trade and Technology Council at the EU-US Summit of June 2021, stating among its goals "to cooperate on compatible and international standards development; to facilitate regulatory policy and enforcement cooperation and, where possible, convergence; [...] and to feed into coordination in multilateral bodies and wider efforts with like-minded partners, with the aim of promoting a democratic model of digital governance." The Council will operate through working groups, whose initial agendas will focus on technology standards cooperation, including on AI, data governance and the misuse of technology threatening security and human rights.

If the US-UK Science and Technology Agreement of 2017 is any precedent, there are reasons to hope that the EU-US Trade and Technology Council could serve not only to reach agreements in areas where interests align, but also to build enough goodwill to open discussions on divergent issues. Regulatory changes to the business environment surrounding AI is one area in which the EU and the US could see eye to eye quickly. Market concentration in the data economy is testing the limits of anti-trust laws on both sides of the Atlantic, and the creation of a EU-US Joint Technology Competition Policy Dialogue, alongside the Trade and Technology Council, shows a willingness to cooperate in the quest for solutions.

4.1. Cooperation on AI regulation

Despite the willingness expressed at the EU-US Summit and engrained in the mandate of the EU-US Trade and Technology Council to cooperate on technology standards for ethical and trustworthy AI, the EU's appetite for comprehensive regulation will in all likelihood continue to meet with opposition from US business interests. But there is scope for cooperation around the shared objective to provide companies with regulatory stability and administrative facility.

The concept of *high-risk uses of AI* is a central element in the proposed EU AI Act; only high-risk AI systems would be subject to the toughest restrictions and controls. Agreeing with the US on a common definition of high-risk AI, even if subject to different frameworks on either side of the Atlantic, would provide more clarity for companies operating in the two regions, and lay the foundation for cooperation on the governance – through regulation or other instruments - of high-risk applications.

Easing the administrative burden on companies by arranging for the mutual recognition of certification schemes is another objective around which EU and US interests could meet. In the (likely) event that the EU moves first with a comprehensive AI regulation, an arrangement to allow US companies to obtain certification through the US government could help set basic standards accepted on both sides and facilitate inter-operability. Mutual recognition agreements could also be built piece-by-piece, through bilateral consultations between

specialized agencies, who are often responsible for technical norms in the US, with support from the new Trade and Technology Council.

4.2. Cooperation on AI geopolitics

While cooperation on the geopolitical implications of AI was not explicitly mentioned at the EU-US Summit last June, there are some encouraging signs that closer collaboration on that score might be in the cards for the near future. The Summit declaration refers to new arrangements for closer partnership in security and defence, such as US participation in an EU military mobility project and closer engagement with the European Defence Agency. It also includes a commitment to cooperate on "the full range of issues" in their relationship with China.

On the EU's side, there are also early signs that awareness of the geopolitical implications of AI is beginning to take root. The concept of digital and technological sovereignty has appeared in the conversations on the Future of Europe; the European External Action Service has started regarding technology, connectivity and data flows as a key dimension of the EU's external relations; and the European Council has called for a geostrategic and global approach to connectivity. In public interventions calling for the protection of fundamental rights in the digital space, the European Commission has also started referring specifically to China as a source of concern in its own territory and globally. This bodes well for a growing willingness from the EU to engage with the US' geostrategic approach to AI.

Should the EU and the US wish to make a common front against China's AI advances – whether for ethical or for geopolitical reasons -- US researchers have put forward a number of commercial strategies that would not require military competence yet would make a huge strategic difference. This could include, for example, coordinating investment screening procedures and establishing common export controls on key supply chain components going into the Chinese AI industry.

There are also many opportunities for cooperation on military uses of AI, that would both promote an ethical approach and strengthen mutual capacity. EU-US cooperation on the ethical use (or ban) of killer robots and other combat-related AI systems appears highly unlikely – but cooperation on non-controversial uses of AI in military services such as logistics, financial management, personnel services, and health care could help bring allies closer together, establish joint procedures, and ensure interoperability.

Of course, NATO provides an additional – and some have said an ideal -- forum to bring together EU and US approaches to the geopolitical dimension of AI and set standards for military AI. But the same barriers that have hindered both EU engagement and EU-US cooperation in these areas apply with equal force within NATO. Its members' widely divergent priorities make consensus unlikely on key issues, including those – like a ban on killer robots –

that seem most obvious to human rights defenders and civil society organizations across the alliance's territory.

NATO's AI strategy – in the works since 2019 and slated to be released sometime soon - is expected to identify ways to operate AI defence systems responsibly, identify military applications for AI, and set up joint AI testing facilities. It should also set ethical guidelines around the governance of AI systems, with a focus on human control over and accountability for the actions of AI systems.

5. From Transatlantic to global

In sum, despite fundamentally different approaches to AI, there appear to be a number of promising avenues for greater Transatlantic cooperation around the governance of AI-based technologies, whether in the domestic sphere to protect fundamental rights, or in the geopolitical sphere around common national and global security interests. The Summit for Democracies, convened by President Biden for 9-10 December 2021, may provide an additional forum where leaders from both sides of the Atlantic may reinforce their common commitment to fundamental rights, including in the digital sphere. The possibility for the EU and the US to see eye-to-eye on the full range of issues pertaining to the development of a common set of basic rules to guide the development of AI technologies, however, remains limited by the different values that each region is strategically choosing to prioritize.

Going back to the initial premise of this paper, namely the quest for a locus of global leadership for the rights-based governance of digital technologies, it would appear that a Transatlantic alliance, even if it were reached, with the limitations imposed by the different approaches put forward by the EU and the US, may not have enough horsepower to pull the train.

The US' interest in the Transatlantic relationship has been waning, as its strategic considerations have been turning increasingly towards the Pacific. Both the EU and the US are emphasizing the importance of working with other actors, as well as with each other, on AI issues. The US' AI Partnership for Defence and the Global Partnership for AI (initially spearheaded by Canada and France, and now housed at the OECD) are two examples of collaborative structures that aim to bring a broader group of like-minded partners in the conversation on AI governance. A number of global organizations, including UNESCO, are also beginning to weigh in with specific initiatives related to AI governance.

The true test for international cooperation for the rights-based governance of AI, however, will come when someone dares to broaden the discussion from a group of relatively like-minded countries and traditional allies to a truly global forum. While the likelihood of that happening anytime soon seems thin, given the AI-driven "new Cold War", discussing AI governance among a broader and more geographically diverse group of countries certainly has the advantage of enriching the discussion with a wider set of regional perspectives to inform a possible future rapprochement.

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