

How to legally regulate artificial intelligence?

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Abstract:

Artificial intelligence (AI), now omnipresent, is having an impact as it cuts across all sectors, such that very few human activities will be left untouched. As a lever for growth that can deeply modify modes of production and existing business models, AI prefigures, in the eyes of many observers, new types of social relations that will not be purely human. It is, therefore, important to set up a genuine legal framework for algorithms and design a strategy for regulating AI through ethics and, too, the law. The implication of the big players in the global digital economy, the financial stakes, the infatuation with research and the question of social acceptance provide an very solid ground for the emergence of a full-fledged body of law on artificial intelligence.

Artificial intelligence (AI) is going to deeply alter how we work and see the world. As they are generalized, AI techniques (data, algorithms, robots, etc.) are going to become “ordinary” and replace existing techniques. This is already very much so. In the wake of the digital transition, the shift toward AI is making economic agents reconsider current solutions and propose disruptive business models. Thanks to it, new services are emerging; AI is making their processes and organization evolve and improve performance.¹

Only the organizations capable of adopting the most creative and most disruptive solutions will be able to take advantage of this technological revolution, which offers novel prospects for creativity and business. They will profit on condition that an ethical and legal framework be established for this revolution. In any case, legal considerations are orienting these new models in many situations. Besides the issue of business growth, social expectations about to AI have soared.

Should we be scared of AI?

When a decision-making process, initially conferred on a human agent, is fully or partly automated, one point is evident: fundamental human rights still carry full force. The absence of discrimination must be assured; and human dignity, preserved, while violations of privacy, when unavoidable, should comply with the principle of proportionality (BENSOUSSAN & HENROTTE 2019).

AI techniques are “data-hungry”. Their performance depends on the volume and quality of the data, often personal, that are fed to them. There are many social aspects (medicine, justice, safety, jobs...) to this touchy issue; and tensions have formed around issues related to fundamental human rights, a domain where risk management and cost-benefit analyses always require tact for implementation.

¹ This article has been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor’s approval, completed a few bibliographical references. All websites were consulted in April 2021.

A more collaborative approach to regulations is, therefore, worthwhile, like the initiatives for an “ethics of artificial intelligence” that seek to work out a consensus in line with our value systems and have been formulated in legal instruments at the highest level: constitutions, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (BENSOUSSAN & BENSOUSSAN 2019).

“Soft law”, an appropriate means of regulation

While waiting for a legal framework to be set up, we have to make do with legal rules and regulations stemming, in part, from soft law, a miscellany of measures, some of them mandatory, others not. To the sector of digital technology that is waiting for answers and to the users of connected devices who want to be reassured about how their personal data are being used, these measures do, however, “show the way”. Resolutions, codes of conduct, directives, guidelines, white books, committees and work groups under the authority of various organizations... such are the breeding grounds for this body of law of a new sort, a regulatory framework for the exponential development of robots, algorithms and AI.

This soft law follows up on the first court decisions in this field and the measures scattered out among recent acts of general law. For instance:

- The European Commission released in June 2019 an updated version of its guidelines for an AI worthy of confidence.
- The European Parliament adopted in February 2019 a resolution on a global industrial policy for Europe about AI and robotics.
- The EU’s General Data Protection Regulation (GDPR), in effect since 25 May 2018, lays down the principle that decisions about persons may not be made exclusively on the grounds of automatic data processing.
- France’s Constitutional Council in June 2018 issued an administrative decision setting the conditions for using deep learning algorithms.

All these recommendations, though not mandatory or binding, show us the way toward a legal framework for AI.

Given the uncertainty about which rules of criminal and penal law are to be applied to “autonomous vehicles”, the French government decided, in 2019, to clarify liability in the case of accidents during experiments with such vehicles. The PACTE Act of 22 May 2019 sets the conditions for the vehicle’s system to delegate driving to a human being and clarifies the issue of responsibility under penal law. This amounts to a sort of recognition of that the robotic system is responsible when it is active.

In February 2020, the European Commission presented its strategies with regard to data and AI while emphasizing the development of an AI oriented toward the human factor. On this occasion, Margrethe Vestager, executive vice-president of the European Commission for a Europe Fit for the Digital Age, declared: “*We want every citizen, every employee, every business to stand a fair chance to reap the benefits of digitization. Whether that means driving more safely or polluting less thanks to connected cars; or even saving lives with AI-driven medical imagery that allows doctors to detect diseases earlier than ever before.*”² Europe is calling for this new legal ecosystem that will help to see that AI is in the public interest.

We realize that AI calls for a broad strategy of regulation by 2025, a strategy that will must be economic, technical, legal and political.

² Press release of 19 February 2020 available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_273.

Which strategy for economic, technical, legal and political regulation by 2025?

This was the heading of a master class organized by Mines ParisTech and PSL University, in a partnership with the cabinet of Lexing Alain Bensoussan Attorneys, on 25 and 26 November 2020. Inaugurated by A. de La Fortelle, director of the Robotics Center (Mines ParisTech), this master class sought to:

- understand the objectives and strategies of regulation at the international level (US, EU, China, France) and in major branches of industry (automobile, security, public transportation and health care);
- decipher the state's policy about AI and robotics;
- understand the scientific and technological issues that AI must address to uphold the objectives and restrictions contained in regulations;
- ask how public policies for regulating AI and robots may and must be made given scientific, technical and industrial innovations;
- identify the possible solutions for the regulation of AI and robots by comparing the approaches adopted in various sectors.

For this master class, stakeholders presented a state-of-the-art analysis of regulation as it is being undertaken in major sectors of industry and services.

Conclusion

One thing is evident about this regulatory framework for which we are calling: while waiting for the law to evolve, AI techniques must be “ethical by design”. This guideline, which figures in the honor code of programmers, means the forbiddance of algorithms that menace freedom or human dignity. It is urgent to draft a universal charter for coding that will enshrine the principles: that code should be ethical by design and that any code that menaces human rights should be refused. This charter would serve to regulate future algorithms with regard to human rights. The world tomorrow will need this sort of regulation.

References

- BENSOUSSAN A. & BENSOUSSAN J. (2019) *Robot, IA et Droit* (Brussels, BE: Bruylant).
BENSOUSSAN J. & HENROTTE J.F. (2019) *Legal Aspects of Artificial Intelligence* (Paris: LexisNexis).