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La sistemática del Reglamento Europeo de Inteligencia artificial en el contexto de los derechos fundamentales de la Unión: el mito del constitucionalismo digital

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Abstract: In recent years, Artificial Intelligence (AI) bases on data driven and machine learning have been at the centre of debates on the implications of certain uses of this technology on fundamental rights in terms of individual and social risks. At the national level, reflections on whether or not AI systems have their own ontological determinism seem to have come up against the obstacles of the staticity of constitutional frameworks that are still analogical. In the European legal order, the most disruptive digital effects of the so-called knowledge economy on the subject and his or her rights seem to be conditioned by the telos of the centrality of the human being in his/her objective-axial dimension (guarantee of the Union's values) and subjective dimension (protection of the Union's fundamental rights). The European Union

Artificial Intelligence Act would be its most recent legal-normative concretisation, in line with other norms of secondary law that would outline the dynamics of the so-called digital constitutionalism.

Key words: homo digitalis, historicity of the subject, digital rights, technological power, form of production, form of existence, normative irrationality.

Resumen: La Inteligencia Artificial (IA) basada en datos y el aprendizaje automático ha centralizado en los últimos años los distintos debates sobre las implicaciones de determinados usos de esta tecnología en los derechos fundamentales en términos de riesgos individuales y sociales. En el plano nacional, las reflexiones en torno a la posesión o no de un determinismo propio ontológico de los sistemas de IA parecen haberse topado con los obstáculos de la estaticidad de unos marcos constitucionales todavía analógicos. En el orden jurídico europeo, los efectos digitales más disruptivos de la denominada economía del conocimiento para el sujeto y sus derechos parecen condicionarse por el telos de la centralidad del ser humano en su dimensión objetivo-axial (garantía de los valores de la Unión) y subjetiva (tutela de los derechos fundamentales de la Unión). El Reglamento Europeo de IA sería su concreción jurídico-normativa más reciente, cohonestándose con otras normas de derecho secundario que trazarían las dinámicas del denominado constitucionalismo digital.

Palabras claves: homo digitalis, historicidad del sujeto, derechos digitales, poder tecnológico, forma de producción, forma de existencia, irracionalidad normativa.

Introduction: AI as a form of production of semiotic capitalism[1]

The aim of this paper is to analyse whether the European Union (EU) Artificial Intelligence Act (AI Act)[2] can be configured as a paradigm of a rights-based model of regulatory production on digitalisation, following Bradford's classification[3] (2023, 105-145); or, on the contrary, whether it is limited to regulating a new form of commodity production (in the form of AI systems[4]) whose potential impacts on EU fundamental rights and values are modulated by the structural and structuralising guarantee of the materiality of the European legal order: internal market, free competition and fundamental economic freedoms.

The difference is not superficial, while in the first interpretation rights and the axial are configured as insurmountable barriers to the

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[1] This work is an extended version of the communication presented at the ICON•S (International Society of Public Law) Annual Conference 2024, «The Future of Public Law: Resilience, Sustainability, and Artificial Intelligence», held in Madrid on 8-10 July. Moreover, it has been carried out in the framework of activities of the following research project: "Biosurveillance through Artificial Intelligence (AI) in the post COVID era: Corporality, Identity and Fundamental Rights" (TED Code 2021-129975B-C21), Main researcher: Leire Escajedo San Epifanio.

[2] On 21 May 2024, the Council of the European Union approved the compromise amendments of the IA Act (https://www.consilium.europa.eu/es/press/press-releases/2024/05/21/artificial-intelligence-ai-act-council-gives-final-green-light-to-the-first-worldwide-rules-on-ai/), which had already been endorsed by the European Parliament on 24 March of the same year (https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf). This concluded the trilogue process started three years earlier, in 2021, when the European Commission presented the legislative proposal (COM (2021) 206 final), https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF

[3] The author approaches the unstoppable advance of the degrees of technological realisation from the consideration of digitalisation as a social fact of geopolitical scope, hence the recourse to the terminology of "digital empires", thus illustrating, therefore, the institutionalised technological vision as an element that can go in different directions according to the objectives of the political actors who embody its development trajectories. To this end, she traces the differences among the market-driven US regulatory model, the Chinese model of state regulation and the already referenced normative-"iusfundamental" model of the European Union. While acknowledging that the latter does not entirely escape indirect regulation or politically imposed deregulation of the market. Consequently, at the present stage the difference between Western and Eurasian realities seems to be that the former adopts the superstructures of pluralism, liberalism and individualism to clothe the substance of technocracy, while the latter is guided by a political model that tends to be autocratic/liberal or communitarian.

[4] The AI Act establishes a regulation of AI systems and models based on risk (unacceptable, high, low or non-existent), being classified according to the degree of risk and its impact into: prohibited AI systems (Article 5), high-risk AI systems (Article 6), general purpose AI models with systemic risk (Article 51).

instrumental and calculating techno-scientific rationality of AI that prevent the subject and his or her rights from being shaped by the ontology of human capital; in the second approach, from the intertwining of the production form of AI, as a commodity form, with the legal form of the Act whose iusfundamental and axial bases are accessory to the legal basis of the market, the individual becomes a mere incarnation of an abstract and impersonal subject of rights (user/consumer), a pure product of the social relations of digitalisation as a form of existence.

The interpretation of AI as a form of existence implies attributing to it the identity of a project of anthropological change, in the sense of a new existential identity. The transition from the analogical human to the digital human or *homo digitalis* (Han 2014, 28) that possesses an immediate and automated knowledge of reality, increasing his/her relational intelligence. The relationship as a meta-category, the absolute ontological principle that theorises the generalised connection of all living beings, of all material and immaterial reality, in a communication/information network that grants identity to technological singularity (Cristianini 2023).

This characterisation as a form of existence implies situating AI within the framework of the new knowledge economy, where data science and the development of AI lead to theorising that the world is a massive information process. So we are mutually connected informational organisms and part of an informational environment (the infosphere) that we share with other informational agents, natural and artificial, which process information logically and autonomously (Floridi 2017, 79-106). This claimed independence and dissociation of the mind from the body, that a thought, to be such, does not need the processing of sensory data generating the exchange between information and knowledge, transforms the former, information, into chains of signs that are processed obeying the primary principle of non-contradiction and the formal rules of mathematical calculus (Finelli 2022).

Information thus distorted (independence and dissociation of the mind from the body, or disconnection of verbal language from natural language, a thought that, abstracted from the body, can only compose abstract and universal codes) generates a knowledge composed of connections and calculation operations that formally avoids discursive contradiction. A digitalised knowledge that is nothing but the product/commodity of digital capitalism or semiotic capitalism, insofar as infinite flows of signifiers, of disembodied signs, break all links with the real referent, mutually exchanging each other (Berardi 2021, 31).

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1. Some considerations on digital materiality and its legal-political implications

The main characteristic of AI and the computational logics that support it is that of formalism: that is, of a syntax that, by means of mathematical and topological rules, writes and rewrites, according to the levels of processing and calculation, a set of signs (Finelli 2022). However, the chains, topologies and spatial architectures of signs that function according to a syntax of precise rules of displacement and calculation do not themselves possess a semantics, which must also be assigned to them by the specific intentions and utilities of the programmer who establishes and organises the modality of a given accumulation and processing of data (Numerico 2021, 25-55). Hence, computerised information is not autonomous. It needs to be interpreted, endowed with a meaning that does not derive from the formalism of computational rules. In other words, algorithms are automatic processes, but programmed by human beings, with mathematical programming or data selection being the materiality where the semantics of meanings are used[5].

A semantics of meanings that leads us, in turn, to rethink two intertwined dynamics in the framework of AI: on the one hand, what I call the externality of AI, which leads to the extractivist practices of data on which weak (deduction) or deep (reasoning-planning-compension of causality) learning is fed (Mitchell 2024, 32:57); on the other hand, the internality of AI, understood as a process of extracting information value from data through algorithms that will reproduce and amplify the analogical inequalities present in legal and social orders (Crawford 2023, 195). Both dynamics belong to the logic of materiality, they are tangible because they are framed in the strategy of capital accumulation, however much they pretend to be represented as abstract moments disconnected from their concrete projections, for they are still mechanisms of valorisation, forms of power and politics that they present as legal measurements/rules of objective relations.

For this reason, I do not share those theses that refute the implications of AI in the configuration of the legal world, redirecting its

[5] "In the communicative spaces designed by the big technology companies and ordered through algorithms, the digital culture that is being imposed is based on uncertainty… The confusion that these algorithms are causing in communicative processes and in the public space has no known historical precedent. The result is the weakening, if not the destruction, of the shared social perception of reality that existed before the digital society" (Balaguer and Balaguer 2023, 78).

field of action only to the spaces of politics, as if the legal were nothing more than the concretisation of legislative political development. A 'Political Constitution' redirected to the space of decisional politics and a 'Legal Constitution' whose formal guarantees are fortresses impenetrable by the technological context. On the contrary, I consider AI to be the result of a precise development of a new mode of production of the social order of capital in its digitalised phase, which delegates to technology the new form of production/extraction of value, of accumulative profit, automating human lives and transferring the new form of production to the communicative processes themselves. Messages, data, as commodities are the product of the productive mechanisms of AI that 'discovers' correlations and extract rules. AI is therefore a creator of rules that construct a representation with not only political, but also juridical effects (Chiaritti 2021, 15). There is no political-economy or state-society split that makes it possible to immunise the legal from digital reality.

Neutrality towards the digital in contemporary constitutional states is only possible if the digital is relativised as a *locus naturalis*, as it was during the liberal state with the market. In a different sense, if we analyse the structural isomorphism of capital and the digital (in which AI is situated) from the interrelations between Power-Law and forms of states, we come to the conclusion that there is no spontaneous emergence of the digital fact as a natural fact detached from its relevant factual-normative context, since it lacks autonomous consistency in itself.

From this perspective that shapes AI in the digitalisation as a process of relational social action of capitalism that endlessly accumulates electronic and digital transactions generating a spatio-temporal rupture, I intend to emphasise the concomitance of digitalised capitalism with the unlimited expansion of the global power of the market. The objectives of efficiency, of amplifying human rationality in decision-making through the use of algorithms, are instrumental to the economic objective of profit maximisation. AI is thus embedded in an interpretation of digitalisation as another process of the advance of the market in its financialised form that began to take shape in the late 1970s, when the expectation of unlimited growth in the rate of profit began to stagnate (Betancourt 2015, 215-224).

Digital capitalism and its legal-political connotations do not, as I have pointed out, reactivate a state-society separation, like the liberal state. In any case, we are witnessing a recomposition of political-economic relations that produces a reconversion of society into a 'digital performance society', as the source or raw material of digitised

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power legally mediated by Law in the form of the global power of the market. This connection between the factual and the legal reproduces the legal mediation of social relations in the different forms of state or institutionalised relational compositions between the state and the market, such as the current market constitutionalism, where statehood as a symbiotic framework of global market power accentuates the juridification of the spaces of control of the conflicts that hinder the centrality of the market through technological and financial progress. In accordance with this last premise, I contextualise the so-called technological challenges to analogical constitutional spaces and their reconduction to the supranational space of the Union in order to address the moment of control of system providers and those responsible for the deployment of AI systems, which has been substantiated in the AI Act. Interrelational ensemble, global market power in its digital form, market Law - market-state form, which will be dealt with in the second section to elucidate the legal nature and constitutional (digital) scope of the AI Act.

In parallel, the recitals of this EU secondary legislation emphasise the political and legal determinism of AI as a human-centred technology, giving it an anthropocentric telos where AI systems are tools whose ultimate goal is to enhance human welfare. However, algorithms merely analyse the relationships in the data, not the values or meaning they represent. In other words, they act the relational form by questioning, only in appearance, relational materiality because they are generators of their own matter or substance. Concretely, digital space is the digitalised form of the once physical factories, the space of organisation and management of digital capital. The producers of algorithmic subjectivisation are the digital users in the form of the transfer of large masses of (economically relevant) information that are captured on the global platforms of Google, Apple, Facebook, Amazon and Microsoft, vastly increasing their market shares (and profits) in key segments such as advertising and data retailing to third parties. In this space we no longer capitalise on things, objects, products, coins, banknotes, but on personal information regarding our feelings, our desires, our emotions, our behaviour (Zuboff 2020, 315-364).

The process of digitalisation that has characterised recent decades corresponds to a new phase of capital and capitalism that is no longer based on the accumulation of money, whether real or virtual, but on big data. In short, when we do a Google search, look at Wikipedia or make a purchase on Amazon, we move an infinite amount of data that in its sheer movement emulates that of capital and is self-valorising. Capital and the digital are operators of interactions between

individuals and, therefore, imply a relationship that develops its own subjectivity[6].

This digital social order generates its own subjectivity because the digital connection is an economic activity carried out by a multiplicity of subjects who are situated within the framework of an economic activity, acquiring the status of economic subjects (suppliers, those responsible for deployment, importers and distributors, users, consumers) under the guarantee of economic freedoms that in EU Law are configured as fundamental rights. These economic freedoms, and not the fundamental rights of the Constitutional State, are those that shape the parameters of development of the subjects in their digital interactions and their concretisations, in terms of privacy and property. Economic freedoms as negative freedoms are the ones that determine the spaces and limits for the exercise and effectiveness of rights. Positive freedom, the equality of positions, becomes unrealisable in the constitutional paradigm of the market in its digital form. To the study of these questions and their projection in the EU's fundamental values and rights, to which AI Act is circumscribed, we will also dedicate the second of the sections, questioning the legality of the digital subject in the constitutional state of law.

On the other hand, by reasoning about AI and its mode of subjective production, it seems that I intend to reproduce the transition from ownership to appropriation of an immaterial good (data) by digital capitalism. However, what is relevant is not the reproduction of the digital social order, understood as the new modes of production of 'profits', in the sense of recital 4 of the AI Act[7]; but the moment of power as control[8] over who decides and on the basis of what they

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[6] "Our basic illusion is that big data appears to us as a substance, a kind of magical natural resource to be extracted from a mine: we even use terms like data mining to consolidate this fantasy of ours, mimicking the same mechanisms that underpinned the so-called first industrial revolution" (Lanier 2013, 131).

[7] "AI is a fast-evolving family of technologies that contributes to a wide array of economic, environmental and societal benefits across the entire spectrum of industries and social activities. By improving prediction, optimising operations and resource allocation, and personalising digital solutions available for individuals and organisations, the use of AI can provide key competitive advantages to undertakings and support socially and environmentally beneficial outcomes, for example in healthcare, agriculture, food safety, education and training, media, sports, culture, infrastructure management, energy, transport and logistics, public services, security, justice, resource and energy efficiency, environmental monitoring, the conservation and restoration of biodiversity and ecosystems and climate change mitigation and adaptation".

[8] "Because the truth is that many of the decisions that are adopted in the spaces of uncertainty opened up by technological development have an ostensible legal

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decide, because control, if it is emptied of conflict, of the social question, is emptied in the specific form of a technocratic governance or technocracy of numbers. To avoid this, they appeal to the guarantees of a digital juridification or mediation of digital singularity through regulation by design (obligation to programme or codify the technology so that it complies with certain legal obligations) in the form of co-regulation (Van Cleynenbreugel 2022, 203-205). A regulatory framework involving both digital operators and public institutions (the European AI Office under the Commission, the European AI Board, scientific panel of independent experts, national competent authorities… Chapter VII. Governance of the AI Act) in the establishment, implementation or enforcement of regulatory standards with the objective of achieving "a uniform legal framework, in particular for the development, the placing on the market, the putting into service and the use of AI systems in the Union" (Recital 1 of the AI Act). However, this technical harmonisation, which is brought back to the question of power, control and law in the European legal order, is traced within the contours of a relationship between politics and economics juridified by a constitutional paradigm, that of the market, which is confronted with the fideisms of a constitutionalism characterised as digital under the institutionalised form of the constitutional state. The last of the sections of this contribution is devoted to exploring this confrontation.

2. **Constitutional paradigms and AI**

Data-driven AI and machine learning have in recent years been at the centre of various constitutional debates on the implications of certain uses of this technology on fundamental rights in terms of individual and societal risks (Simoncini and Longo 2022, 27-41). At the state level or at the level of domestic legal systems, the reflections have essentially focused on the effects of AI systems on the rights of people in their individual and collective dimensions, warning of the difficulties of addressing the digital challenges for the subject and his/her rights from the frameworks of still analogical constitutions (Presno 2022). From these limitations, methodologies of analysis have been articulated which, in their most finished formulations, redirect the possible

significance and conflict as soon as they are situated on the line where diverse rights, values and interests converge, worthy of legal protection and often in conflict" (Esteve and Tejada 2013, 30).

solutions under the legal form of the 'Constitution of the algorithm', harmonising the regulatory algorithms of the digital reality with the constitutional principles and values, in order to modernise, digitalising, the constitutional device to the new conditions of the digital era (Balaguer 2022).

A digitised constitutional law that, while normatively capturing the digital by incorporating the axiology of constitutional rights into the design and implementation of new technologies, apprehends the form and mode of digital production by generating a legal rationality that is superimposed on the algorithmic.

The aim would thus be to articulate a normative state response to the constitutional impasse generated by the technological impulse of the political economy of the digital world, recovering the function of the Constitution as a structural and structuring space for legal relations between public authorities and BigTech. In any case, the theorisation described above is aware of the spatial shortcomings of the fundamental national texts for the legal organisation of private actors that transcend the territorial spaces where such texts deploy their normative nature and scope. Hence, these attempts to constitutionalise the digital by national rights have been surpassed by other proposals of global scope which have their most complete formulation in the construct of digital constitutionalism.

The differences with the previous approaches are that, while the proposals of domestic law advocate limiting the constitutional emptying from the State-private power relations; the theses of digital constitutionalism are aimed at articulating a middle way between the regulation of the digital challenge oriented towards the market and the regulation of such a challenge from the orbit of state sovereignty (De Gregorio 2022, 290-296). In relation to the former, as opposed to a digital capitalism that predetermines its rule of tech, there is an intersection with the rule of law of a digital humanism where the duality of objectives converge through a set of principles and values centred on human dignity that does not imply an intervention in the digital market (De Gregorio 2023, 22), in accordance with the redistributive logic of social constitutionalism, but rather an anchoring of the legal form and mode in the actions of private operators in this market, an indirect regulation, closer to the ordoliberal model. This intersection would be present in the AI Act, where the guarantee of a digital single market in harmony with the digital political economy and free competition converges with the indivisible and universal value of human dignity, as enshrined in the Charter of Fundamental Rights of the European Union.

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Nonetheless, I believe that this approach to AI tangentially borders on two essential questions: why do digital social relations acquire a legal character, and why do they require legal mediation? A priori these questions may seem simplistic, even meaningless, because if it has been argued that AI produces effects on rights in their individual and collective dimension, the application of constitutional normative logic cauterising potential AI-rights conflicts follows. However, if we reduce Law to purely normative legality, we are excluding from the analysis the social conditions that make the efficacy of the legal form possible. In other words, we are avoiding why the constitution ascribed to a specific form of state that emerged after the Second World War continues to be a guarantee of normalisation as a legal process and project despite spatial limitations (technological operators act on a global scale) and, we add, of legal technique (is it possible to speak of digital rights from a theorisation of rights designed for disputes between public authorities and individuals -whether natural or legal-)?

The theorists of digital constitutionalism themselves develop their reflections around the spatial insufficiencies of the state and the need to articulate a normative legal response on a supranational scale. However, they then advocate reproducing the state constitutional legal arsenal for dealing with digital phenomenology in the supranational framework. The state political framework would be insufficient, but not the constitutional legal framework. These considerations ignore two decisive elements in the analysis of financialised capitalism in its digital phase: the unquestionable protagonism of states through their political and legal actions to guarantee the project of global market power in its financial form and its current digital process; and, consequently, the inseparable relationship between digital power - state and Law.

According to this methodological approach, Law, the Constitution, is not abstract Law. Fundamentally because I understand that the Constitution cannot be shaped as a stony text independent of the concrete content of the legal norms, in the sense that it retains its meaning, even if this concrete material content varies. Constitutional normativity, its formal and material supra-legality, is linked to the effects of the force of form, understood not as a legal formalism that positivises an artificially constructed legal order, but as a legal materialism linked to the social foundations of the force of form. In other words, the singularity of the Theory of the Constitution should not consist of limiting itself to the mere description and formal and logical analysis of the norms, but should explain according to what interests the norms have been produced, what meaning the relations

they regulate have in reality and what are the real forces that guarantee their application in practice (De Cabo 1993, 271).

A methodological approach of the kind described above is to seek a materialistic explanation of legal regulation, according to which Law expresses a specific socio-economic relationship before it is a norm, and as such must be investigated (Pašukanis 1976, 73-74). Hence, the inclusion of the social conditions that make the efficacy of the legal form possible makes it possible to understand the structure of the power relations present. In this construct, the insertion of constitutionalism in the capitalist mode of production and its structural relation constitutionalism-capitalism, the fundamental thing is to discover the relations with these structural elements.

2.1. *Digitalisation: the liquefaction of analogue legal orders? Or a new constitutional paradigm?*

According to this materialist approach to juridical regulation, social and economic relations, the social and the economic, are related through the state. For this reason, we speak of the Constitution in the form of the liberal State, of the Constitution in the form of the social State, and, although still a minority thesis, of the Constitution in the form of the market State (Maestro 2015, 53-94). In this form of market state, legally mediated by its Law, the power of the state is financialised, assuming functions of reordering politics and the economy, of recomposing the subjects of the conflict and the limits of state power. In this association, the Law is the embodiment of this correlation of social forces and the intensity of the conflict between them. The Law therefore acts as the structure linked to the conditions of social reproduction that make the effectiveness of the legal form possible. From this point of view, it is possible to see that, if the liberal state and the social state had their Law, which corresponded to the consecration of the political-economic division in the liberal state, and to the capital-labour pact in the social state, it can be inferred that the market state also demands a form of power and Law, which makes explicit the conditioning factors of the new conditions of the political-economic relationship.

It is therefore pertinent to take as a reference point the context that determined the reformulation of capitalism in the second post-war period, its reconfiguration under the global project of the financialisation of economies based on the unconditional centrality of the market, its correlate of free competition and the depoliticisation of

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economies. It is at this point of inflection of the old order and the emergence of a new one that the Gordian knot of the type of power, state and Law necessary for the reordering of the new foundations of social reproduction is condensed, where, as it has already mentioned, the stagnation of the rate of profit was the main trigger.

In relation to the Constitution, its function of social integration is limited through the translation of the decisions of constitutional systematics to procedural and regulatory rules, to the hermeneutics of constitutional justice and legislation, projecting a function of normativity understood in an ahistorical sense, which makes it possible to reconcile the moment of constitutional rupture without compromising its formalist validity or formal identity (García Herrera 2022, 239). The political Constitution assumes the changes underway, distancing itself from the legal Constitution, which acquires a tautological sense of indefinite validity, while its validity and efficacy is transited in the political and jurisdictional arena that endorses the new market order. Only in this way is it possible to conceive of a constitutional law whose functions of limiting power and guaranteeing rights are predicated without delving into the effects that the new social conditions of reproduction have on these functions. The interpretation of the causes as an external link to the national constitutional order (the global power of the globalising market) makes it possible to retain the affirmation of constitutional normativity, as it cauterises the interpretation of the causes from its consideration as an internal link that logically affects the reflection of the function of Law and the correspondence with the new state functions (García Herrera 2021, 109).

From the new function of global market power, consisting in undoing the function of the normative system of social constitutionalism (not of the aseptic constitutional state) of political direction of capital accumulation under the juridical mediation of the social integration of conflict, derive effects that affect the structure of the Constitution. The new function determines the material relativism of the constitutional order, which is now legitimised on the basis of guaranteeing terms that allow a formal articulation of the order, avoiding the confrontation between the material bases of social constitutionalism and the new market constitutionalism. The production of the legal norm is redirected to the opening of the constitutional contents that are not refractory to the redefinition of its contents, given the rupture of the global project of social constitutionalism that linked and founded the written constitution of the social state form. This opening is determined by the fact that the

production of the legal norm is now defined by the new needs of the market economic system (García Herrera 2015, 143-144).

The new relationship that is created between the State and the market, parallel to the new relationship established between the economy and politics presided over by the centrality of the market, supposes that the modes of production come from the ends assumed by the new form of market state. Hence, we are not dealing with a specific constitutional mutation, but with a material constitutional rupture, because the rupture of the material bases that legitimised the form of the social state and its constitutional law alter the function of the Law of social constitutionalism, affecting its structure and the form of the social State itself. The change in the functions of the State, from direction to management of the economic processes, through a system of economic and financial links to political power, defines the new material constitution (the new material conditions) by materialising the transformations that the new form of market State incorporates (Maestro 2022, 182-185). This loss of validity and legitimacy of the material constitution of the social state form, far from being settled with a crisis of validity and legitimacy of the formal constitution, has been resolved by situating the privatisation of power in the structure of the global market form, as a space absent of controls, and internalising the material constitution of the global market form in supranational (EU) and state spaces as spaces of control and guarantee of the constitutional order of the market.

The constitution-industrial capitalism relationship was juridified in the constitutional device through the constitutionalisation of the redistributive conflict in the form of Fordism. For its part, financialised capitalism, consisting of a process of recovery of the return on capital after a period of decline in the rate of profit due to the crisis of the 1970s and 1980s, is formalised through legal legality, incorporating an insuperable contradiction between state democracy and the markets, where the former is incapable of deciding on the conditions of life, on the foundations of social reproduction. In order to overcome this contradiction, the coexistence of systems-orders is called for, which are concretised at different levels of action, the state and, in our case, the European legal order. The latter legalises the new functions assigned by global market power to supranational and state spaces.

The deregulation of capital, the renunciation of fiscal progressivity, the dissociation of the market from the social interest, are the function of the new structures of state and supranational power. States become functional to reinforce the logic of subordination to the market externally and internally. Internally, through fiscal discipline to guarantee

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the macroeconomic balances necessary for the protection of the unconditional market against any redistributive intervention. Externally, states are articulated as globalising agents around projects that favour the global market. In this sense, although the EU can be interpreted as a supranational space that supports member states' capitals by improving the conditions of their competition in a global space, this approach cannot be attributed to a reconfiguration of the relations between politics and the market characterised by the social protection of member countries in the face of potential negative externalities of globalisation (Maestro 2011, 170-71). Basically, because the supranational space affirms the globalising strategy by organising the set of social relations around the centrality of the market. This implies the absence of any redistributive dimension and the connection of potential public spending policies to contexts of crisis of global market power, as experienced during the management of the financial crisis.

The crisis of financial capitalism in 2008 converges precisely with the advance of the dynamics of the digitalisation process aimed at safeguarding a strategy of financialised accumulation which, as a result of its own self-induced crisis, is incapable of expanding and therefore needs to find new spaces to reproduce itself through so-called immaterial capital (Rifkin 2001, 41). The uniqueness of this process of immateriality, however, is its concomitance with the material foundations of the market state: market centrality and autonomy. This implies that technical-scientific development does not exist as a denuded condition of the relations of production. In fact, capitalism has historically developed the productive forces through new scientific and technical innovations to overcome its crises.

The last century and a half have seen the second and third industrial revolutions. With the second, the modern factory system developed through Taylorism and Fordism, overtaken later, in the second half of the last century, by the progressive introduction of automation and digitalisation. The subsequent 'Toyotist model' laid the foundations of an industrial form based on 'just-in-time' production and aimed at increasing productivity by rationalising production. The progressive introduction of digitalisation in production, distribution and service processes has led to the coexistence of digitisation and interconnection processes over the years until the so-called 'fourth industrial revolution', whose main technologies include, among others, AI. Thus, technology is integrated into the economic and financial systems, reinforcing the guarantee of the telos of global market power, highlighting the conjunction of the evolution of technologies with the evolution of the configurations of economic and political power that we have pointed out.

2.2. *Analysis of the AI Act from the material-constitutional system of EU Law*

In line with the methodological approach developed, the AI Act is inserted in the European legal order that positivises the material bases of the market order. These material bases are institutionalised around weak governance (the disappearance from the European space of the institutionalisation of public intervention) and strong control (steering of economic processes as a guardian - guarantee of the autonomy of the market). Digital governance in accordance with these positivised material conditions forms the legal basis of the AI Act. In particular, Article 114, in conjunction with Article 26 of the Treaty on the Functioning of the Union, or the guarantee of the system decision on the functioning of the internal market. Precisely the function of European market constitutionalism, to avoid market fragmentation by consolidating its centrality, predetermines the chosen source of EU law, the Act, as its direct applicability and immediate vertical and horizontal legal effectiveness is syntonic with the legal mediation of the material bases of the order of social reproduction of digital capital. The permanence of the conditions of this order is produced through the technique of negative harmonisation of the (ordoliberal) order of the digital market (Farrand 2022, 112-116).

A functional approach where the fact that the objectives set out in national regulations are basically equivalent allows the elimination of obstacles to the free movement and provision of services even in the absence of harmonising provisions. This does not logically mean the withdrawal of Member States from the digital market, but the involvement of the state and its subordination to the same digital market rules that apply to private operators. A public-private inter-institutional relationship or cooperation between public and private actors 'in the AI ecosystem'. This last term, used by the AI Act in Article 58.2 f), seems to configure an organic digital sub-community within the organic-systemic community of the internal market, a presumed dialogic collaboration between public and private sectors.

However, it should be noted that the AI Act seeks to correct, by means of a uniform legal rule, the possible market failures of AI systems that arise from the existence of divergent national rules (intra and extra-Community). Thus, the configuration of this homogeneous legal framework takes place through the market guarantee rules on competition and the functioning of the common market, complementary in turn to the system of prohibitions derived from the economic freedoms that claim their definition from the unitary

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instance, sanctioning the leading role of the EU in the imposition of the constitutional paradigm of the market. Specifically, "this Regulation ensures the free movement, cross-border, of AI-based goods and services, thus preventing Member States from imposing restrictions on the development, marketing and use of AI systems, unless explicitly authorised by this Regulation" (Recital 1 in fine of the AI Act).

Thus, the difficulties for the functioning of a perfect market for inter-regulatory competition in the EU Law have led to the introduction of a number of substantive principles or strengthening mechanisms such as the provisions concerning the free movement of goods and services, and the maintenance of competition or the principle of mutual recognition that are a response to the presence of obstacles to mobility ad intra AI systems. Thus, an attempt to imitate the market, in the sense of causing the results that would have been achieved if competition between regulations had been able to operate freely.

The political problem of regulation is resolved in the negative freedom from state control and political power, and is based on the cooperation of market participants through the market itself. In this market priority, the AI Act prohibits all those elements that are considered to restrict competition and thus hinder the development, market introduction, commissioning and use of AI systems. It is therefore the principle of cooperation, rather than subordination to the political link, that is, the distinguishing feature of the market constitutionalism model as it is implemented in the functioning of the digital single market.

Notwithstanding the above, it can be counter-argued that the precursor policy documents for the supranational regulation of AI link the legal-normative regulation of the digital transformation to a human-centred approach. Specifically, in the European Declaration on Digital Rights and Principles for the Digital Decade of 2023[9], the European Parliament, the Council and the European Commission set out the necessary adaptation of this transformation to the values and rights of the Union's order, which are established as determining factors from which to approach any legislative proposal on digitalisation in the European framework. It thus seems to be assumed that the new form of digital power can produce positive and negative effects in the legal sphere of the subjects that participate in the digital single market. An ambivalent nature that is projected in the AI Act when it warns (Recital 48) about the possible adverse consequences of

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123(01)

an AI system (with special consideration for AI systems classified as high risk) for the fundamental rights protected by the Charter of Fundamental Rights of the Union (CFREU)[10], including

> the right to human dignity (Article 1), respect for private and family life (Article 7), the protection of personal data (Article 8), freedom of expression and information (Article 11), freedom of assembly and of association (Article 12), non-discrimination (Article 21), the right to education (Article 14), consumer protection (Article 38), workers' rights (Articles 27-28 and 31-31), the rights of persons with disabilities (Article 26), gender equality (Article 23), intellectual property rights (Article 17), the right to an effective remedy and to a fair trial (Article 47), the right of the defence and the presumption of innocence (Article 48), and the right to good administration (Article 41).

In the light of this supranational political consideration, we could point out that the digital single market deploys its horizontal effects on the participants in this market, which becomes a recognition of the effectiveness of the fundamental rights of the Charter *vis-à-vis* individuals (providers, suppliers, producers of services or goods on the basis of AI systems). To paraphrase Bilbao (2017), the fundamental rights of the Union also apply, ex Charter, to private-law relations. In fact, the fundamental rights that can be violated are located throughout the Charter's provisions, exhausting all the chapters that form its backbone: dignity, freedoms, equality, solidarity, citizenship and justice. The focus on the nature of the activity carried out, as opposed to the focus on the nature of the subjects, seems to transmute the once self-determination of private law to the asymmetries and inequalities that AI systems may entail, generating obligations to protect vulnerable subjects (Simoncini and Cremona 2022, 261, 263-264).

However, these theses of paradigm shifts between the categories of public and private law, blurring the boundaries of one and the other, which seem to mimic the virtuality of the single digital market, do not diminish how this subjectivity operates, acts within the framework of economic activities, free provision of services, free movement of goods, which circumscribe the potential vulnerability of the people to their status as consumers, even if their quality of vulnerability is emphasised. In this sense, the technique of the Union's

[10] https://www.europarl.europa.eu/charter/pdf/text_en.pdf

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co-legislators has been to create a digital single market from the perspective of the consumer-subject, where vulnerability becomes the lack of transparency of service conditions, of terms of use, etc., but not the vulnerability generated by an unequal position not only in the digital single market, but in all spheres of society. The digital subject brought back to the rationality of the functioning of the market predetermined by rules or indirect regulation of the failures of the digital market for its correct functioning, is a subject decontextualised from the systemic, socio-economic, political and cultural inequality of the digital power. A subject whose digital juridicity becomes the antijuricity of structural material equality both in internal constitutionalism and in the constitutionalism of the Union, converging the detonating causes of such desubjectivisation as a social being.

2.3. *The antijuricity (?) of the «digital» subject*

The market state form also unfolds its legal effects in the relationship between market and rights, which leads us to analyse this question from the coordinates of the historicity of the legal subject, the institutional (state forms) and material (social order of reproduction) determinants of its emergence at each historical juncture. Basically, because the guarantee of rights is also a consequence of the legal form of social reproduction.

The impact of AI on fundamental rights has been present since the irruption of the digital market and the technological powers that guarantee the functions of cumulative logic in this market. The limitations to the exercise of techno-scientific capital, when it affects the constitutional dogmatic, is a constant in the analysis of the potential impact of AI systems on the so-called paradigm of the constitutional state. The reconduction of such parameters to constitutional dynamics, following a similar analogy to the categorisations of citizenship that are functional to models of social organisation, leads to the proposal of a mimesis of digital rights that would implicitly entail a digital citizenship. In any case, it has been warned of the difficulties of resorting to the traditional legal categories of limits to powers, not only because of the transnational scope of the companies that exercise technological dominance; and of guarantees of rights, since the object to be protected is dynamic given the continuously developing conformation of digitalisation (Balaguer 2022, 29-30). In short, the difficulties of an analogical Constitution called upon to regulate digital spaces (Castellanos 2023, 266).

However, in the descent into a taxonomy of such digital rights that either transform the contents of the traditional civil, political, economic and social rights of the so-called constitutional state in their connection with digital environments, or generate new rights, due to their singularity, such as neuro-rights (Reche 2024), which connect with the human neurocognitive sphere, paradoxically we continue to resort to the classifications of a general theory of rights whose universal validity is predicated, while pointing out its inadequacies (Castellanos, 2024, 271-300). In particular, the characterisation of the new digital rights as rights that connect with the material equality or objective dimension of rights do not warn about the material causes linked to a specific reality from which institutional and socio-economic conditioning factors derive (De Cabo 2001, 117-136).

In addition, and in relation to the objective dimension of the rights, the following clarification should be made: to the subjective dimension linked to the natural law idea of the individual, an objective dimension is added in the general theorisation of rights in the post-World War II period, which is substantiated, firstly, in an extension of the concept of freedom in the literal sense (negative freedom); to give way, secondly, to a content that transcends that established in the rights of freedom (positive freedom). In other words, it is about participation in political, economic and cultural life for the sake of the realisation of the principle of substantial equality, the axiological basis of which lies in human dignity.

However, the distinction between the objective and subjective dimension of the rights is not new, nor is it specific to the constitutionalism of the social state, because, together with other effects, the aforementioned objectification leads to the construction of the principles of the constitutional system on the basis of fundamental rights, which, considering the anti-statist and individualist imprint of the liberal state, implies spreading it throughout the constitutional and infra-constitutional system. This is connected with the denaturalisation of the transformations of the social state form through the systemic recourse to the constitutional state. It is therefore important to specify that, when I speak here of the objective dimension of rights in the framework of the social state form, which is not synonymous with the constitutional state, I am talking about realising the assumptions of the social state in rights, so that the aim is not to liberalise the system of rights, but to socialise it. To this end, rights must be extended from the sphere of the individual, of formal equality, to the sphere of inequality, which is the element of subjectivity of social constitutionalism.

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Returning to the assumptions of the historicity of the subject, and beginning with the institutional causes, these refer us to the individual-state relationship. If, as I have argued throughout this paper, we have witnessed a change in the way power relations between the state dimension and the economic dimension are articulated, establishing a new relationship between the state and the market, the impact on the subject and the rights of the social state form is total.

This nuance is not trivial, because characterising digital rights as benefit/welfare rights refers to one of the dimensions of social rights, that of the social reproduction order of Fordist capital, which acquired specific profiles in social constitutionalism. Specifically, the functional character of social rights to the regime of accumulation was articulated from a double perspective (Maestro 2017, 776-779).

Firstly, in terms of productivity and economic growth. The benefit character and economic content of social rights was presented as functional to economic dynamics, participating in the logic of the capitalist system. Not only did they not cost the economic system, but they contributed to its growth and expansion. In the redistributive process of the social state there was a coordination between the dynamics of demand and production. Through the socialisation of investment, the social reproduction of the labour force was promoted. In turn, through the link between the wage relation and the accumulation regime a virtuous circle was generated between the production capacities and the consumption progression of the working classes, which favoured the creation of wealth and its redistribution.

Secondly, social rights were presented as functional rights for the legitimisation of the system, in terms of social adherence and political stability. Thus, ensuring the enjoyment of social rights meant fulfilling the contents of the social-democratic pact represented by the social state, generalising welfare situations and reinforcing the legitimacy of the state. Social welfare rights contributed to maintaining the internal cohesion of the working class by preserving that capacity for mobilisation which allowed the conquest of full employment and which served to numerically increase the forces of the proletariat and to resolve the strategic struggle against capitalism on its own behalf. Double functionality, to the homogenisation of the working class and to the economic system, on which the flexibility of social constitutionalism and the weaknesses inherent in the redistributive pact were theorised.

From these coordinates, to predicate the benefit/welfare character of digital rights would mean situating them in the logics of the order of social reproduction of capital, and thus drawing a certain analogy

between the question of subjects and power in industrial capitalism and in financialised capitalism in its digital phase. In this regard, there has been an interesting debate from the perspective of the political economy of digital capital, that is, as a social relation of production that puts into operation certain characteristics of human nature, such as sociality and the ability to communicate, which are the foundations of companies such as Amazon, Google, Apple or Facebook, among other info-technological companies. The need to set limits to counteract this strategy of accumulation is shared, but differences arise when it comes to conceptualising how the digital economy works. For some, it is an accumulation by expropriation of intangible or immaterial goods such as knowledge (Zuboff 2020). For others, it is an accumulation by exploitation because the business model of infotech platforms is largely based on the production of a commodity, the result of the search –"real-time access to large amounts of human knowledge"- although they then offer it for "free" in order to sell advertisers selective access to their users (Mozorov 2022, 89-106).

In the first approach, privacy, digital anonymity, would be the element to be protected; in the second approach, the generation of new forms of free value should be remunerated through contractual relationships between users and technology companies, where the service provision would be bidirectional: the companies provide the infrastructure and the users provide the data structure from which the servers are fed to generate the information commodity.

But whatever form one or other form of accumulation, expropriation or exploitation takes, it remains embedded in the logics of capitalism. What changes radically is the relationship of the state to the strategy of capital accumulation, which is no longer oriented towards its direction, disciplining it, but towards its management, guaranteeing it. This is why the quality of provision must be inserted into the framework of this new relationship. A conclusion that we also draw from the EU Law.

The new political and legal decision places the market as the nuclear element that legitimises the new order to which it refers. In this sense, all those values connected with the centrality of the market are values that the political mode of being considers indispensable. The rights that reflect the values that accompany this new model are rights that are functional to the market's decision. The interests of these rights are not protected for their own sake, but as functional to mobilise the structures that serve the strengthening and functioning of the centrality of the market. This implies that the subjective dimension, which configured the original fundamental rights as rights of non-

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interference of the public apparatus in the private sphere, is translated in the market order into a prohibition of the public authorities to distort the dynamics of the capital markets. And the objective right, typical of social constitutionalism, which extended the axial content of human dignity to the sphere of material deprivation, disappears. In its place it is installed other dimension that sees the establishment of the axial nucleus of the market, competition and competitiveness, as the only possible content of the right. In other words, it would be the right to participate in an open market and free competition for the sake of the realisation of the fundamental political decision whose axiological support lies precisely in the economic logic introduced by the culture of market constitutionalism.

However, this does not mean that the rights of the new order entail a recovery of the postulates that informed the liberal constitutions. Despite the structural analogy between the rights of the two models, insofar as they are articulated as rights of defence, it is not possible to establish continuity between the two formulas. Otherwise, the rights of the market order would come to represent a kind of mimesis of the rights of freedom, when in their construction and legal consequences, as we have just seen, their differences are notable.

In this constitutional model of the market, the market, not as a *locus naturalis*, but as a social institute, reflects the constitutional values inherent in the new constitutionalism. The prescriptive element does not lie in a harmonious composition of values and rights in principle of different signs, where free competition alternates with freedoms of expression, information, access to networks, highlighting the axial component of every aspect of social life; but in encouraging the conviction that the whole of society can function as a market.

This last aspect reflects the socio-economic causes or social order of reproduction. An order which is normativised and which, starting from the exclusive reference point of the market, is projected onto each and every space of the individual. On the one hand, the contents of the different claims in which the rights are articulated do not consist in the right to have for all demands a benefit from the public power (a social benefit right), but rather a competitive and open market, the single European digital market, because only through the market is it possible to increase general welfare by realising the most adequate satisfaction of the needs of the individual.

On the other hand, if the market is established as the preferred space for the realisation of citizens' demands, the latter acquire a subjectivity in accordance with the language and culture of the market.

The holder of rights is no longer the subject of the conflict on which the category of social rights was articulated, but the consumer, the user of the services provided or generated under the form of AI production. The transition from the subject of conflict to the subject of the market illustrates the formal dissociation of economic and social relations, although objectively linked to the inequalities of the subjects[11].

Thus, the vulnerabilities that in the social state represented the inequalities of redistributive conflict now take the form of formally juridified vulnerabilities, and are thus abstracted from the social force of digital power.

Final conclusions: the «constitutional» inconsistencies of digital constitutionalism

This reflection concludes by questioning, now at the European supranational level (although it should be pointed out that this autonomous approach is far removed from the pluralist approaches of multilevel cohabitation without systemic frictions between Internal Rights-EU), the thesis of the so-called digital constitutionalism of the Union which, roughly speaking, is based on the limits of the European digital single market outlined by the Charter of Rights of the Union, which, as has been pointed out, has human dignity as its backbone.

This thesis presupposes, as Terzis (2024, 14) observes, the power structures of technological corporations as a natural fact which, as such, must be modulated by the dynamics of digital constitutionalism, applying, as far as is of interest here, the narrative of the dogmatics of fundamental rights, without questioning that such structures have been generated by law, and not in the absence of law. That is, there is no constitutional normative vacuum in the framework of digital power that must be filled at the supranational level, in the absence of the competence of national laws, in order to limit the governance of private power in digital social interactions when these affect the structural principles of the national constitutional state (rule of law, democracy, rights).

In any case, there is a hollowing out of social constitutionalism from the logics of the form and mode of production of digital capitalism,

[11] "Data mining first creates statistical social groups, and then policymakers design tailored interventions for each segment of society. Tailor-made, individualised governance is more likely to exacerbate social divisions than to promote inclusion" (Eubanks 2021, 233).

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which is a different matter. And this decoupling that appeals to the rational logic of the normative and regulatory intervention of law is generated by what I have called the constitutional paradigm of the market. A paradigm that silences the asymmetries of power by deregulating the rules of political direction of the digital market and that generates its own axiology, principles and rights. On the basis of this observation, the following concluding reflections are derived, focusing on iusfundamentality as the alleged core of intangibility of digital supranational constitutionalism.

Firstly, it should be recalled once again that, just as it is not possible to consider the AI Act in isolation from the legal system on which it is based, neither is the EU Charter an autonomous text, but its analysis must also be carried out from a unitary perspective which places it in the legal, political and institutional context in which it has been developed. Its link with the material bases of the European integration project is what makes it possible to determine the true scope and meaning of the provisions it contains, of the values and objectives that inform it, and of the mechanisms envisaged for its effective action.

Secondly, the process of constructing the European system of fundamental rights has been carried out from the Union's own order and its sources (general principles), being the fundamental rights provided by the constitutions of the member countries a source of inspiration. Thus, the construction of rights from the aims and objectives of the EU Law connects them with the economic link, negative integration or centrality of the market. The market and the mechanisms that are articulated for its action are projected onto each and every one of the variables of the European order, and far from being configured as autonomous components, they are inserted into the gears of the market paradigm, constituting a virtuous circle that explores and exploits all the virtualities of the economic link.

Thirdly, fundamental rights participate in this inherent genetic of market constitutionalism expressing in their conceptualisation the values determined by it. Thus, the fundamental rights inherent in the Union's axiological code differ substantially from the classic idea of the fundamental rights of the individual. The subjects of these rights and the interests they protect are diverse, because the material bases on which the very idea of fundamentality is integrated are diverse.

Fourth, economic freedoms form the heritage of the most important 'fundamental' rights of the European order. The quotation marks are intended to highlight the functional use of fundamentality, which completely loses the meaning of the fundamental rights of the

constitutional state, where the status of a right as fundamental places it in a position of normative autonomy capable of conferring its own substantiality in its own right. On the contrary, in the European space, the fundamental status of a right is determined by its contribution to the market order, «freedom of consumption and freedom of economic activity must be 'felt' in the conscience of citizens as intangible fundamental rights (Demichelis 2018).

Finally, the market form becomes the social form, the socialisation from the market and its variables, in the one of interest here, the European digital single market as a technical and economic normative order that must be integrated into the Market Form, where the so-called digital constitutionalism can only be admitted from its convergence with the Market and its Law, as a complement to the competitive processes in a market society facilitating access and equality of opportunities (not of positions) to these processes. In this way, the market itself is the instance from which the vital (digital) needs of the Union or the Vitalpolitik of the 'Market Order' advocated by Rüstow (Kolev and Goldschmidt 2022, 453-460) are configured.

References

Balaguer, Francisco. 2022. *La Constitución del algoritmo*. Zaragoza: Fundación Manuel Giménez Abad.

Balaguer, Francisco, and María Luisa Balaguer. 2023. *Verdad e interpretación en la sociedad digital*. Pamplona: Aranzadi.

Berardi, Franco-Bifo. 2021. *La congiunzione*. Roma: Nero.

Betancourt, Michael. 2015. *The critique of digital capitalism: an analysis of the political economy of digital culture and technology*. New York: Punctum Books.

Bilbao, Juan María. 2017. «La consolidación dogmática y jurisprudencial de la drittwirkung: una visión de conjunto». *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 1: 41-74.

Bradford, Anu. 2023. *Digital empires. The global battle to regulate technology*. New York: Oxford University Press.

Castellanos, Jorge. 2023. «Sobre los desafíos constitucionales ante el avance de la Inteligencia Artificial. Una perspectiva nacional y comparada». *Revista de Derecho Político* 118: 261-287.

Castellanos, Jorge. 2024. «Una reflexión acerca de la influencia de la inteligencia artificial en los derechos fundamentales». In *Ciencia de datos y perspectivas de inteligencia artificial*, edited by Francisca Ramón, 271-300. Valencia: Tirant Lo Blanch.

Chiariti, Massimo. 2021. *Incoscienza artificiale. Come fanno le macchine a prevedere per noi*. Roma: Luis University Press.

Deusto Journal of Human Rights
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https://doi.org/10.18543/djhr.3189 • http://djhr.revistas.deusto.es/

Crawford, Kate. 2023. *Atlas de la IA*. Barcelona: Ned Ediciones.
Cristiniani, Nello. 2023. *La Scorciatoia. Come le macchine sono diventate intelligenti senza pensare in modo*. Bologna: Il Mulino.
De Cabo, Carlos. 2001. «El sujeto y sus derechos», *Teoría y Realidad Constitucional* 7: 117-136.
De Cabo, Carlos. 1993. *Teoría histórica del Estado y del Derecho Constitucional*. Vol. II. En *Estado y derecho en la transición al capitalismo y en su evolución: el desarrollo constitucional*. Barcelona: PPU.
De Gregorio, Giovanni. 2023. «The normative power of artificial intelligence», *Indiana Journal of Global Legal Studies* 55: 1-26.
De Gregorio, Giovanni. 2022. *Digital constitutionalism in Europe. Reframing rights and powers in the algorithmic society*. Cambridge: Cambridge University Press.
Demichelis, Lelio. 2018. «Ordoliberalismo 2.0 e ordopopulismo». *Economia e Politica. Rivista online di critica della economica politica*. Accessed March 23, 2024: https://www.economiaepolitica.it/_pdfs/pdf-8629.pdf
Esteve, José, and Javier Tejada. 2013. *Ciencia y derecho: la nueva división de poderes*. Madrid: Fundación Coloquio Jurídico Europeo.
Eubanks, Virginia. 2021. *La automatización de la desigualdad. Herramientas de la tecnología avanzada para supervisar y castigar a los pobres*. Madrid: Capitán Swing.
Farrand, Benjamin. 2022. «The ordoliberal internet? Continuity and change in the EU's approach to the governance of cyberspace». *European Law Open* 2: 106–127.
Finelli, Roberto. 2022. *Filosofia e tecnologia. Una via di uscita dalla mente digitale*. Torino: Rosenberg & Sellier.
Floridi, Luciano. 2017. *La quarta rivoluzione. Come l'infosfera sta trasformando il mondo*. Milano: Raffaello Cortina Editore.
García Herrera, Miguel Ángel. 2021. «Neoliberalismo y estado económico». In *Crisis de la constitución: globalización neoliberal e integración europea*, edited by Gonzalo Maestro et al., 39-135. Granada: Comares.
García Herrera, Miguel Ángel. 2015. «Estado económico y capitalismo financiarizado: propuestas para un constitucionalismo crítico». In *Constitucionalismo crítico. Liber amicorum Carlos de Cabo Martín*, edited by Miguel Ángel García Herrera et al., 137-242. Valencia: Tirant Lo Blanch.
García Herrera, Miguel Ángel. 2022. «Estado y soberanía en la nueva fase de acumulación: entre crisis de la integración europea y la reconstrucción del espacio global». In *La refundación de la Unión Europea y la nueva centralidad estatal*, edited by Ainhoa Lasa, Miguel Ángel García Herrera and Gonzalo Maestro, 225-276. Valencia: Tirant Lo Blanch.
Han, Byung-Chul. 2014. *En el enjambre*. Barcelona: Herder.
Kolev, Stefan, and Nils Goldschmidt. 2022.«Vitalpolitik». In *The Oxford Handbook of Ordoliberalism*, edited by Thomas Biebricher, Peter Nedergaard, Werner Bonefeld, 453–460, Oxford: Oxford University Press.
Lanier, Jaron. 2013. *Who owns the future?* New York: Simon & Schuster.

Maestro, Gonzalo. 2022. «Las precondiciones para la recuperación del espacio constitucional estatal». In *La refundación de la Unión Europea y la nueva centralidad estatal*, edited by Ainhoa Lasa, Miguel Ángel García Herrera, and Gonzalo Maestro, 176-185. Valencia: Tirant Lo Blanch.

Maestro, Gonzalo. 2017. «El Estado Social 40 años después: la desconstitucionalización del programa constitucional». *Revista de Derecho Político* 100: 769-798.

Maestro, Gonzalo. 2015. «Del estado social a la forma global de mercado». In *Constitucionalismo crítico. Liber amicorum Carlos de Cabo Martín*, edited by Miguel Ángel García Herrera et al., 53-94. Valencia: Tirant Lo Blanch.

Maestro, Gonzalo. 2011. «La globalización americana». *Teoria del diritto e dello Stato. Rivista Europea di Cultura e Scienza Giuridica* 1-2: 165-187.

Mitchell, Melanie. 2024. *Inteligencia artificial*. Madrid: Capitán Swing.

Morozov, Evgeny. 2022. «Critique of techno-feudal reason». *New Left Review* 133/134: 89-126.

Numerico, Teresa. 2021. *Big data e algoritmi. Prospettive critiche*. Roma: Carocci.

Pašukanis, Evgeny V. 1976. *Teoría General del derecho y marxismo*. Barcelona: Labor Universitaria.

Presno, Miguel Ángel. 2022. *Derechos fundamentales e inteligencia artificial*. Madrid: Marcial Pons.

Reche, Nuria. 2024. *Mens Iura Fundamentalia: La neurotecnología ante la Constitución*. A Coruña: Colex.

Rifkin, Jeremy. 2001. *The age of access: the new culture of hypercapitalism where all of life is a paid-for experience*. Los Angeles: TarcherPerigee.

Simoncini, Andrea, and Elia Cremona. 2022. «La AI fra pubblico e privato». *DPCE Online* 51 (1): 253-271.

Simoncini, Andrea, and Erik Longo. 2022. «Fundamental rights and the rule of law in the algorithmic society». In *Constitutional challenges in the algorithmic society*, edited by Hans-W. Micklitz et al., 27-41. Cambridge: Cambridge University Press.

Terzis, Petros. 2024. «Against digital constitutionalism», *European Law Open*, 1-17. doi:10.1017/elo.2024.15

Van Cleynenbreugel, Pieter. 2022. «EU by-design regulation in the algorithmic society: A promising way forward or constitutional nightmare in the making?». In *Constitutional challenges in the algorithmic society*, edited by Hans-W. Micklitz et al., 202-218. Cambridge: Cambridge University Press.

Zuboff, Shoshana. 2020. *La era del capitalismo de la vigilancia. La lucha por un futuro humano frente a las nuevas fronteras del poder*. Barcelona: Paidós.

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