Should legal disputes be determined by artificial, rather than human, means?

by Márton Vida

The ability of artificial intelligence to replace certain complex human roles is becoming increasingly real as we are shortly entering the third decade of the century. There are certain repetitive, mechanical, dehumanising jobs where robotisation or automation – the replacement of the human workforce by machines – can be quite liberating. In the case of more complex human roles (where the performance of the given tasks requires the possession of certain abilities which seem to be uniquely and exclusively attributable to humans) - robotisation, replacement of humans by AI - poses fundamental moral, social and political dilemmas.

In this essay, I will argue that the adjudication of legal disputes is one of these irreplaceable human roles. I will demonstrate that the underlying reason for this is law's dependence on and relativity to complex social reasons, which a judge has to perceive and understand (or as will be seen: has to be assumed to be capable of perceiving and understanding). It will eventually be concluded, that the complex legal task this entails may never satisfactorily be resolved by an AI.

Law is an artificial order created by a given society. Before proceeding any further, there are two clarifications to be made on this axiomatic statement. First, a legal system is nothing more than an order created by a community of human beings. Second, reasons for a society to create and then uphold the law are both complex and relative. Under complexity, it is meant that these reasons may vary from being moral values to mere psychological factors. Therefore, throughout the essay, I use the term 'reasons' in the broadest possible sense, where it may refer to any set of human motifs towards upholding the legal, political or moral order. By relativism, it is meant that no universal reason is presupposed within a single-, or among distinct societies. That is to say, that many of our reasons may vary based on our own circumstances, or the circumstances of our entire society relative to other ones.[1] The only thing that remains fixed is that a society where a legal system exists has (at the current time, under the current circumstances) some general reasons towards upholding it.[2]

It follows from this designation of law that legal truth does not exist in the form mathematical truth does: it is always determined in the way (and in so far) society recognises

[1] Harman, Gilbert. "Moral Relativism Defended." *The Philosophical Review* 84, no. 1 (1975): 3-22.

[2] Fuller, Lon L. "The Forms and Limits of Adjudication." *Harvard Law Review* 92, no. 2 (1978): 359.

it. Hence, there exist several competing normative views on law, should that be on the relation between law and morality,[3] proper legal interpretation[4] or the nature of a constitution.[5] On this basis, a judge wishing to interpret and apply the law always has to make an implicit choice among these conceptualisations of law and the legal system in order to make any decision at all. This point needs to be further stressed, since it is no secret that a positivist view of law seems to be the most compelling for the majority of judges and jurists in our current time. However, the positivist claim that 'morals ought not to have place in legal judgement' also derives from some sort of moral consideration that law could best serve the needs of the society that way. Therefore, all claims on how the law should be interpreted and applied necessarily derive from some sort of understanding of the reasons of a given society. Since a judge has to interpret and apply the law in *some* way, they have to make this given decision every time they deliver a judgment, even if such decision will mostly be done implicitly and intuitively.[6]

As a related matter, one may legitimately claim an account for a judge's legitimacy and criteria for making such normative choices in the name of the entire community. Such concern may easily be dismissed by referring back to the relativity of reasons different societies may have for upholding and determining the nature of law and their legal system. What follows from this is that different societies may equip judges having the authority for making such decisions in different ways, should that be the possession of the needed skills or certain characteristics they hold virtuous.[7] Similarly, different societies may expect their judges to make that decision based on different criteria, that is to say, while a democratic community may tend towards judges making that choice based on some sort of majority social or moral view, a more autocratic one could simply accept the view held by a ruling elite. Nevertheless, it has to be seen that it would make little sense for any society to uphold a legal system where those issues are never settled. It is so because a legal system where legal disputes are never determined would hardly be sensible to uphold besides an already existing moral order, which suffers from the same issue.

So far, this essay has established that the process of judicial decision-making necessarily involves understanding certain reasons of the society towards upholding the legal system. However, it was merely assumed that an AI would not have the ability for that. It was

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[3] Hart, H. L. A. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (1958): 593-629.

[4] Fallon, Richard H. "The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation." *The University of Chicago Law Review* 82, no. 3 (2015): 1235-1308.

[5] Dyzenhaus, David. "The Idea of a Constitution: A Plea for *Staatsrechtslehre.*" In: *Philosophical Foundations of Constitutional Law* edited by Dyzenhaus, David and Thorburn, Malcolm (Oxford: Oxford University Press, 2016): 9-32.

[6] Posner, Richard A. "The Role of the Judge in the Twenty-First Century." *Boston University Law Review* 86. (2006): 1053-1059.

[7] Fiss, Owen M. "Objectivity and Interpretation." *Stanford Law Review* 34, no. 4 (1982): 746-755.

not argued for that there are any human capacities which cannot possibly be replaced by artificial means. It may seem so, that what we now have to do is to take a stance in the complex contemporary philosophical debate on materialism versus dualism, and then argue that certain human mental capacities are above and beyond matter, not possibly modelled by a computer. Yet, it will be seen that taking such a radical stance is not necessary. Since adjudication is just as much a social construct as the law itself, its sufficiency is also dependent on the views of the society. Therefore, instead of what the real truth may be on AI's capacity to understand human reasons, what really matters is whether the society would see it as possessing the mental faculties relevant for judging legal disputes.

Now, it would be essential to make a brief note on why people may in fact have reasonable doubts about AI possessing the capacity to understand human reasons. The great hardship of grasping facts about the human mind is not only that we do not have an ultimately accepted definition of consciousness,[8] but that we also cannot prove that anyone other than ourselves (or even ourselves)[9] possesses consciousness. Furthermore, many doubt even among well-read scholars that human consciousness could be understood by empirical science,[10] and thus possibly be modelled by artificial intelligence.[11] This is why individuals may not *assume* that an artificial judge would understand their reasons. But why does such an assumption matter at all?

It was established previously that adjudication involves making normative choices for the community governed by the given legal system. The judge receives the authority to make such choices from the community in some way, due to some reasons, which again, have to be understood and internalised so that the judge may act as it has been intended by the people. People who accept this authority almost certainly cannot prove whether the judge possesses the relevant mental faculties to understand human reasons, but yet they live in some sort of moral community which already rests on this assumption.[12] Since morality can also be best seen as an order which its members have certain reasons towards upholding, no moral judgement could be made without understanding the reasons of our fellow moral subjects. I do not claim here that certain moral rules could not be followed blindly without any understanding of social reasons whatsoever. However, the *act of moral judgement* can only be meaningful in so far one has some general understanding of the reasons others may have towards upholding the moral order. Hence, it seems that judges are assumed to be capable of

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[8] Block, Ned. "Concepts of Consciousness." In: *Philosophy of Mind: Classical and Contemporary Readings* edited by Chalmers, David (Oxford: Oxford University Press, 2002): 206-218.

[9] Kenny, Anthony. *A New History of Western Philosophy, Volume III: The Rise of Modern Philosophy* (Oxford: Clarendon Press, 2006): 120-121.

[10] Nagel, Thomas. *Mind and Cosmos: Why the Materialist, Neo-Darwinian Conception of Nature is Almost Certainly False* (Oxford: Oxford University Press, 2012).

[11] Searle, John. "Minds, Brains and Programmes." *Behavioural and Brain Sciences* 3, no. 3 (1980): 417-457.

[12] Shoemaker, David. "Moral Address, Moral Responsibility, and the Boundaries of the Moral Community." *Ethics* 118, no. 1 (2007): 70-108.

understanding social reasons because they are already members of some sort of moral community with the rest of the society. This, however, could not be said of an AI judge.

What follows from all this? It was shown that us being a part of a community governed by a moral or legal order always necessarily rests on an assumption that the other members of such community understand the human reasons we have. It was further shown that the unsettled question of whether an AI could possess such faculties entails that it cannot be known whether the subjects of the given legal system may in fact believe that an AI judge understands their reasons. I do not claim that a current judge may perfectly understand all the human reasons a community may have, as neither do I claim that a perfect legal system exists. My claim is that a legal system must have adjudicators who have the capacity for that, at least in the eyes of the community.

Before arriving to my concluding remarks, I would like to show how my theory may manifest itself in real life. The history of operation of the United States Supreme Court offers numerous examples where judges had to understand complex moral, political and psychological reasons of their governed society. The Supreme Court is the highest judicial authority in the United States, all other courts are bound by its decisions. That is to say, any judge in the United States has to understand the reasoning of Supreme Court judgements in order to apply federal law in the way it was meant to. However, this authority of the Supreme Court extends beyond legal interpretation and reasoning as many of its decisions are as much legal as political, moral and social. Ever since the very beginning, the majority of constitutional changes went down in the United States by means of the Supreme Court interpreting and re-interpreting the text of the Constitution.[13],[14] These interventions by the Supreme Court can be assumed to follow from the judicial majority trying to understand the reasons people have towards upholding the Constitution and the legal system in general. Even if many lower-level courts may never acquaintance such task, by following the decision of the Supreme Court, the lower courts also give expression to this understanding of social and moral reasons that support US constitutional law. Besides, lower courts may also uphold even controversial Supreme Court precedents based on an understanding of the social need for some sort of final determination in legal systems, even if such may never be perfect.

To conclude, I have first argued that the law's existence and nature are both dependent on and relative to the reasons the society has for upholding it. As these reasons are complex, no legal system has a clear and undisputed theory of what its own nature is. By this, I have explained the existence of the multiple competing legal theories, out of which a judge always has to choose in order to make any legal decision at all. The exact source of such authority was not located since it was argued that it may also be relative from society to society, but yet it was maintained that it is also dependent on the general reasons of the community. It was

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[13] Strauss, David A. "The Irrelevance of Constitutional Amendments." *Harvard Law Review* 114, no. 5 (2001): 1457-1505.

[14] Griffin, Stephen M. "Constitutionalism in the United States: From Theory to Politics." *Oxford Journal of Legal Studies* 10, no. 2 (1990): 200-220.

finally shown that whether a given subject in fact understands human reasons is a matter of assumption, which judges can be assumed to receive due to them being part of a moral community with the rest of the society. Since such an assumption is far from being universally made on AI, it was concluded that it should not replace a human judge.