

# ARTIFICIAL INTELLIGENCE AND LAW

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Artificial intelligence (AI)<sup>1</sup>, together with big data, is the driving force behind the ever-accelerating digital revolution. AI has what it takes to call into question our fundamental concepts and processes of political, social, economic etc. order (Macron, 2018; Zuboff, 2018), and the law will not be spared. Therefore, all societal actors (inter alia from politics, the economy, legal practice and academia) must take responsibility for the crucial twin tasks of determining the right, balanced relationship between AI and the law, and even to hybridise them.

In a nutshell, "AI and Law" thus manifests a relationship of interdependence and mutual penetration. The following three examples illustrate this:

- The use of AI (e.g. in self-driving cars, as "members" of corporate boards, or in the context of bank lending decisions) leads to seemingly classic legal questions (for example, in regard to tort liability: damages may occur because the underlying algorithm has been incorrectly programmed, the output of a self-learning AI process was unpredictable for human beings, or the system was set up in a non-transparent manner). Here, the law is binding upon AI. This highlights the general regulatory dilemma of "law and technology": legal (e.g. tort law) requirements must not hamper AI innovations, or even make them impossible. However, AI innovations must not compromise legally protected goods and interests (e.g. bodily integrity).
- AI applications often strive for and enable "legal compliance by design". As such, legal compliance is integrated into the source code. Despite the inherent challenges, the law – or rather, the legal community – should accept this "invitation" to make its knowledge of the normative content of and background to legal decision making IT-compatible (Herberger, 2018: p. 2828). Once this is accomplished, the law will no longer emerge from social (interpersonal) practices, but rather as an IT component that determines social interactions from their outset. In extremis, the law as we know it is even likely to become partially superfluous: for instance, traditional traffic criminal law will no longer be

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<sup>1</sup>The term AI is enigmatic at best. I am not referring to AI in the sense of artificial general intelligence or strong AI, which covers all human cognitive abilities. I am rather referring to automated and self-taught decision making and classification processes that usually use big data and that are also increasingly being used outside of the usual clearly defined context of so-called weak AI or machine learning.

necessary if road traffic control becomes automated and controlled by AI (Schwintowski, 2018, p. 1608). Note, however, that this implies a change of focus, where criminal law will, for example, focus on the automation process, or on attacks against it. These processes of hybridization, replacement and refocusing must also be incorporated into legal research and education, which in turn calls for support from the relevant political actors.

- AI facilitates the development and use of so-called legal tech, which supports legal work processes, or prepares or even fully automates legal decision making. These practices have traditionally been reserved for human beings. This applies to both the private sector (e.g. if due diligence checks are no longer carried out by lawyers but instead by “machines”) as well as to decision making in the public sector (e.g. once bail or probation decisions are automated, or once divorces are carried out using “online” tools). In this way, AI will significantly change job descriptions in the legal profession. This again must be mirrored in legal education (e.g. first studies suggest that thousands and thousands of lawyers will be “automated” in the years to come). Further, when public officials turn to AI and legal tech, this will raise pressing concerns about democratic legitimation and control. (This, for example, will hold true once the police resorts to predictive policing applications that are programmed and developed by private companies, which neither disclose the underlying algorithms, since they are treated as corporate secrets, nor account for the data used to train these algorithms.)

These examples, though few, suggest that the potential of “AI and Law” to mutually transform and merge with one another is significant. However, it is too early to make the call on precisely how AI will transform our existing general political, economic, societal etc. order – and especially our legal order. These days, AI fuels many hopes and fears, which are at times exaggerated. Indeed, the (in many cases inevitable) superficial grasp of complex topics such as AI, the law, and “AI and Law” leads to overstatements, simplifications and distortions. European policy making in the area of “AI and Law” must therefore be rational and cool-headed in order to comprehensively assess its opportunities and hazards from a European and a geostrategic vantage point.

Such an assessment of "AI and Law", which by its very nature calls for interdisciplinary efforts, must not lose sight of two challenges (also cf. Burchard, 2018):

- Firstly, AI is not unbiased – despite the idealisation that associates AI with objectivity and rationality. Rather, AI is – whether consciously or unconsciously – normatively charged. It can thus perpetuate (e.g. political, economic or social) asymmetries, strengthen existing discrimination and make the quantification of the social sphere appear unavoidable. This is worrisome, for example, when AI systems are trained with existing data so that their biases and prejudices etc. are thus “bred into” AI applications.
- Secondly, it is unclear where the political, economic, and social transformations enabled by "AI and Law" will lead us. The use of AI can lead to emancipation and liberation. However, it can also be used to foster and strengthen authoritarianism and populism, to perpetuate (economic, social, etc.) asymmetries, or to concentrate power within private companies. Policy makers who are dealing with “AI and Law” must therefore be committed to fundamental European values. Though there is a wide scope of policy design options, policy makers are called upon to use their decision-making power in a way that lives up to the expectations of democratic legitimacy and the protection of human and fundamental rights etc. If, for example, one wanted to have employment agencies algorithmically rate the employment prospects of unemployed people based on current data which systemically discriminates against elders and women, this would amount to a conscious political decision to "Keep it up!". This illustrates that “AI and Law” does not render politics mute; to the contrary, it calls for good and sensible policy making.

## References

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