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CAN YOU IMAGINE A WORLD WITHOUT JUDGES (OR A WORLD WITH ROBOT-JUDGES)?

Abstract: The article examines AI systems making automated judicial decisions. The analysis begins with the relationship between law and imagination, specifically the idea that legal rules adhere to a criterion of formal validity and are not subject to external influences and social changes. From a legislative perspective, some governments have favored a laissez-faire approach, allowing IT companies to thrive and achieve monopolistic positions in the market through data collection and usage. The article discusses how the use of AI technologies can be a support but emphasizes the need for an anthropocentric approach that prioritizes the protection of fundamental rights and acts as a barrier against technological solutions that appear neutral but are actually driven by the need to perpetuate discrimination and prevent social mobility.

Keywords: Artificial Intelligence | Law | Legal Decisions | Judges | Comparative Law

Reflecting on the relationship between law and imagination may seem a peculiar exercise for a legal scholar. Anyone engaged in professions related to the legal world gradually realizes – as we will shortly explain, albeit seemingly – that the scientific method of interpreting and analyzing legal norms is at odds with imagination, which is associated with art, passion, and invention. Law, on the other hand, should be based on reality, the analysis of data, and the deductive consistency of its arguments (Costa, 1993, 12).

The legal discourse, as is still often taught in universities, is founded on scientific accuracy and thus must be empirically verifiable. This perceiving is an inheritance (bulky, uncomfortable) of legal positivism, which traces its roots to Hobbes and political absolutism, where the sovereign is placed on a pedestal of superiority over the norms that produces. This perspective is further reflected in the era of legal

codification, which imaginarily begins with the Napoleonic Code of 1804 and ends with the entry into force, on January 1, 1900, of the BGB (Bürgerliches Gesetzbuch), the German civil code (Zimmermann, 1993, 95).

This position was later revisited and reworked by neopositivism and the normative theory of Hans Kelsen, a jurist from Prague, who taught in Vienna, Cologne, and Berkeley. Kelsen's theories developed the positions expressed by nineteenth-century legal positivism, opposing the natural law thinking, which suggests that alongside positive law, enacted by the State, there exists natural law, within which eternal and universal rights and values reside.

Kelsen (and his followers) start from the idea that norms are neither just nor unjust but solely adhere to a criterion of validity.

It seems necessary to explain this point further. As known, Kelsenian theory holds that all legal norms derive their validity from a higher-order norm and that the hierarchy of sources culminates with the Grundnorm, the fundamental norm, the source of validity for all legal norms.

In this perspective, according to Kelsen, the legal system assumes a pyramidal structure, with the fundamental norm at its apex. Indeed, in order to qualify a precept as a legal norm, it is necessary for it to be "validated" by a superior norm, which must nevertheless be in conformity with the fundamental norm.

In this way, Kelsen breaks free from the connection between the norm and justice: the legality of the norm does not depend on its correspondence to a principle of natural justice, but rather on its placement in the hierarchy of sources. The legal system, therefore, becomes, in the Kelsenian view, the result of all norms that meet the validity criterion dictated by the fundamental norm, regardless of the content of the norm itself (given that, as mentioned, there is no consideration of the norm's just or unjust nature).

For decades, fortunately, legal positivism has been in crisis, and different, anti-formalistic theories have emerged, challenging the supposed objectivity and impartiality of legislative choices.

In particular, the critical legal studies, emerged in the United States in the 1970s, according to which the task of legal analysis is to demystify the legal processes and to demonstrate the ambiguity and potential biased outcomes of purportedly impartial and inflexible legal doctrines (Mangabeira Unger, 1983; Douzinas – Perrin, 2011).

Therefore, law should not be perceived as dogma, but as a complex system, whose influences are manifold. Think about property rules: we teach what the rules are, forgetting the social, political, and economic issues that may have generated certain disparities (Mattei – Quarta, 2015, 304).

This starting point is also necessary in relation to the legal discourse concerning artificial intelligence technologies.

Also, ethical issues have progressively eroded the legal arguments. The limits of ethics are double: on the one side, law is enforceable, ethics is not; the second point is that law-making is a process with implies democratic (at least in our view) choices made by governments, while who is entitled to decide on ethical issues?

1.   The alleged neutrality of law and technology

Furthermore, the premises outlined emphasize a similarity that equally accompanies law and technology. In both cases, it is assumed that they are neutral, that law adheres to a formal order, and that technology is merely an innovative evolution.

Law is based on a selection of interests and, therefore, it is a political choice of which interests to protect and which not to protect. Thus, the law is never neutral; rather, legal norms are often based on social issues.

Similarly, technology and innovation are also based on political choices: the adoption of new systems has historically determined the transformation of the job sector, as well as human habits. The advent of the internet has represented, on one hand, access to potentially infinite and in the past unimaginable resources; on the other hand, it has led to the numbing of public discourse and the depth of arguments.

Law is politics, and it is political. The same applies to technology.

This starting point – which would deserve to be further explored comprehensively - is necessary to address the relationship between law and technology, especially in light of artificial intelligence technologies.

Larry Downes, an internet analyst, stated that "technology changes exponentially, but social, economic, and legal systems change incrementally." (Downes,15). Downes emphasizes the problem of the 'rhythm' of the law: technology advances rapidly, while legal rules progress more slowly. Moreover, one aspect to consider is that the intervention of regulation may slow down the process of improvement and development and could be inefficient in governing future evolutions, as the real impact of an innovation can only be perceived after its development and widespread adoption. However, this argument overlooks the fact that once technology becomes deeply entrenched, it becomes difficult to regulate effectively. Perhaps it would be interesting to learn more about Downes' biography.

In the early years of his career, he was a consultant with Andersen Consulting and McKinsey & Co. Years after, in addition to being an excellent analyst and columnist for major journalistic publications (such as The Washington Post, Harvard

Business Review, Forbes), he served as a law clerk for Richard Posner. Posner, before becoming Chief Judge of the United States Court of Appeals for the Seventh Circuit, was one of the leading proponents of the economic analysis of law, a doctrinal current (known as the Chicago School) that argues that legal rules should primarily adhere to principles of economic efficiency. Therefore, the law should be Pareto-efficient, consequently determining that value choices are subordinate to economic outcomes (Posner, 1, 9):

"economics is pretty value-neutral, or at least aspires to be value neutral, and there are many liberal practitioners of economic analysis of law".

Comparing the slowness of regulatory processes with the speed of technological innovations is an old trick, concealing a clear political intent. The first season of the internet, between the late 1990s and the first decade of the new millennium, teaches us that some governments, foremost among them the American government, preferred a flexible and minimally invasive rules system.

Two examples deserve to be remembered because, although apparently schizophrenic, they demonstrate a unified logic. In 1998, the Digital Millennium Copyright Act (DMCA) was enacted, whose §512 provides that copyright holders may request internet site managers (hosting providers) to remove content protected by intellectual property. The notice and take-down mechanism require hosting providers, upon receiving notification from the copyright holder, to inform the individuals who uploaded the disputed content to a platform (e.g., YouTube), and these individuals may then send a counter-notification. In practice, therefore, most illicitly uploaded content is removed. Thus, the American system – which in Europe will be almost slavishly imitated by Directive on Electronic Commerce No. 2000/31 – opts for favoring property rights.

Conversely, in the same years, the Communication Decency Act (CDA) of 1996, with Section 230, merely establishes that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Therefore, the American legal system provides greater protection for property rights than personal rights, particularly in cases of defamation. Once again, if we look at the legal rule from a practical perspective, Section 230 effectively immunizes individuals who engage in defamation, making it very difficult for the defamed to obtain judicial relief.

At the same time, CDA has protected and still protect social media platforms. A case held by the U.S. Supreme Court is useful to explain this short circuit.

In the case of Gonzalez v. Google (2023), the family of a 23-year-old student killed in an ISIS attack in Paris argued that Section 230 does not shield Google, the owner of YouTube, from civil liability for aiding and abetting terrorists under the Anti-

Terrorism Act. The plaintiffs contended that YouTube's algorithms, which recommended videos from the terrorist group ISIS, constituted content created by YouTube, and therefore, Google could not claim immunity from liability under Section 230.

Although the Court agreed to review the scope of Section 230's liability shield, it ruled that, based on its decision in Twitter v. Taamneh (2023), the plaintiffs would likely have minimal relief under the Anti-Terrorism Act. In Twitter, the Court determined that social media companies could not be deemed to aid and abet terrorists simply by hosting their content, failing to remove it, or recommending it to others. Consequently, the Court stated that "much (if not all) of plaintiffs' complaint seems to fail."

Beyond legal technicalities, the underlying thread of these regulatory paths is clear. Enacting rules favorable to internet operators - except for some aspects of intellectual property rights - has allowed these companies to grow exponentially, reinforced by a technological superiority that no European or, at least in those years, Asian company could possess. Moreover, the internet economy has a peculiarity. It consists of immaterial services, so unlike traditional economies based on the exchange of physical goods, the efficiency of a computer system has led to the creation of huge monopolies in just a few years: an experience unparalleled in history in terms of the breadth of monopolies and the speed at which they were established.

The internet "giants" (Google, Amazon, Meta) are all American companies. The only spaces where they have not gained a monopolistic position in the market are those of countries under dictatorships or authoritarian regimes, such as China or Russia, where citizens use - driven by governments for political and information control reasons - similar but national services.

The same is happening now with the advent of artificial intelligence. The market is divided between two major players (Microsoft and Google), which are now running solo, without any "chasers", especially when we look at European companies. Europe sets the rules (with the AI Act), but investments are scarce, with the only exception being France. This means that, even for the next decades, European companies (as well as public administrations) will continue to use services from companies based in the United States, and European states will continue to be technological colonies of the U.S.

Technological neutrality goes hand in hand with legislative neutrality, at least on the other side of the Atlantic.

The underlying idea is that the law should not hinder investments and that the market should be able to self-regulate, a market free from government

intervention. The legal theory of laissez-faire is a form of protection for capitalist economies, especially for neoliberalism.

The positions are well-known. According to Marxist theory, the owners of the means of production exploit the workers or the workforce. On the other hand, liberal theories oppose this thesis by arguing that workers can negotiate their salaries and that employers are nevertheless incentivized to offer fair and reasonable wages to ensure productivity, thus avoiding demotivating workers and prompting them to seek alternative employment.

If we move from the theoretical approaches, the reality is clear, and everyone can form their preferred opinion by observing, among the many examples, the working conditions in the large-scale distribution of online platforms (e.g. Amazon).

A situation that could worsen with artificial intelligence systems, which are replacing many traditional jobs. The number of unemployed individuals will continue to increase, allowing companies to find labor even under conditions reminiscent of the nineteenth century. Perhaps returning to Marx would not be a bad idea, not necessarily to become Marxists, but at least to see the steps backward that labor conditions have taken in the last two decades.

2.   *Legal Certainty and Imagination of AI Systems*

With these quick and necessarily incomplete theoretical premises, we may return to the subject of this paper.

What strikes the imagination of a jurist about artificial intelligence? Undoubtedly, like for any other science, it's the machines' computational power, their ability to store billions of data points and process and aggregate them together.

Is this a fate we must resign ourselves to, or, and this should be the task of jurists, should we systematize technological developments? The dilemma, not only in the field of law, remains unchanged: should we chase after the machines and be governed by them, or should we regain control of the machines?

As will be further elaborated later, the AI Act has adopted an anthropocentric approach from its very outset (Article 1), where it states that the purpose of the Regulation is to enhance the functioning of the internal market (a general objective in EU policies) and to promote the dissemination of anthropocentric and reliable artificial intelligence, ensuring the respect for the fundamental rights enshrined in the Charter of Nice. The European Commission, therefore, made a value-based choice, prioritizing fundamental rights over market logic: a choice that is particularly evident from the prohibition of certain AI practices deemed entirely

unacceptable and by establishing different rules for the other practices, with a risk-based approach according to the practices themselves.

In the legal practice, the use of computing has a long history, and for decades, judges and lawyers have been using software that collects and searches within databases containing laws and rulings.

For legal analysis, the excess of data is a huge problem, accepted as endemic and incurable. There is no certainty about the numbers. For example, the estimate of the number of laws in force in Italy is vague: according to some, there are almost 110,000 laws, according to others, they exceed 130,000; even more surprising, there are reportedly still 21 decrees from the fascist era in effect. It's almost impossible not to encounter antinomies in the normative ramifications, especially when dealing not only with the written rule but with its operational scope. A few years ago, a study that counted the number of judgments in Italy by different judicial bodies caused a stir: 6.5 million decisions, without taking into account the rulings of the European Union courts or those of independent administrative authorities.

Impressive numbers often evoked when recalling another fact: in Italy, a civil lawsuit, between the first and second instance, lasts over six years. The times, from 2014 to 2022, have also improved radically, but nevertheless, according to an estimate by the European Commission for the Efficiency of Justice (CEPEJ, 2022), Italy is the slowest country in Europe.

Faced with such data, it is difficult for the legal scholars approaching artificial intelligence machines not to feel that "Promethean shame", as Günther Anders spoke of, as the shame one feels in the face of the humiliating quality height of objects made by ourselves. Equally fascinating is the temptation to rely on these machines. Judges are few, the number of cases, in proportion to the population, is extremely high: why not rely on computational systems capable of deciding similar disputes in a few seconds?

Some premises, once again, are necessary. Firstly, scientific faith is widespread (and dangerous). We do not know exactly what the relation between data analysis and its results and what machines are capable of, what their margins of error are: the dominant narrative does not deny this, but merely asserts that even if we are unable to fully explain the processes of artificial systems, soon we will do, by eliminating the errors and biases of the machines (Tafani, 2024).

The second warning is that the humanization of machines often coincides with the dehumanization of people.

The question is not whether the justice system should be assisted by machines and their even more powerful analytical capabilities, but how the system should use

machines without being overwhelmed by them. It is indisputable that a judge should be assisted in their decisions by a computational model that classifies previous cases, analyzes them, and studies them. After all, for decades, the computerization of legal practitioners has been a challenge, an objective; for decades, we have been using software that collects the ratio decidendi of thousands of court cases and the thousands of laws that are enacted, helping us to navigate through the existing and repealed legal provisions.

As mentioned, lawyers and other legal practitioners already use advanced search engines for case-law as well as AI systems that help notaries in drafting deeds or lawyers in detecting divergent or incompatible contractual clauses. Also, some public institutions recur to similar tools, like chatbots, to inform litigants on trials and legal procedure (CEPEJ, 2022, 17).

So, pointing out that technology is useful in the legal domain, the issue to be inspected is another.

Can we imagine a judicial decision taken by an AI system?

A response to this question is provided by Recital 61 of the Artificial Intelligence Act, which states that "Certain AI systems intended for the administration of justice and democratic processes should be classified as high-risk, considering their potentially significant impact on democracy, the rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial. In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to be used by a judicial authority or on its behalf to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts. AI systems intended to be used by alternative dispute resolution bodies for those purposes should also be considered to be high-risk when the outcomes of the alternative dispute resolution proceedings produce legal effects for the parties. The use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity. The classification of AI systems as high-risk should not, however, extend to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks."

The AI Act categorizes systems based on risk parameters and identifies four categories: unacceptable risk systems, which are prohibited; high-risk systems, which must comply with specific obligations to be placed on the market; limited

risk systems, which mostly have transparency obligations; and minimal risk systems.

Systems used in the judicial field, as mentioned, are classified as high-risk systems and are subject to the following obligations: implementing effective risk assessment and mitigation mechanisms; utilizing high-quality datasets to minimize risks and prevent discriminatory outcomes; recording of all activities to ensure the traceability of results; drafting comprehensive documentation providing authorities with all necessary information to evaluate compliance; clear and sufficient information provided to the deployer; adopting appropriate human oversight measures to mitigate risks; ensuring a high level of robustness, security, and accuracy.

The AI Act dedicates the most of its rules to high-risk systems, which are based on the risk approach that covers the entire lifecycle of the AI system used (Article 9). An important role, which follows the GDPR model, is that of risk analysis related to possible violations of fundamental rights (Article 27). This requirement is not extended to all entities — which is a critical point — but only to public entities (including judges) and those providing public services.

Furthermore, AI systems must be reliable, as hold in Articles 10, 13, 14, and 15 of the AI Act. Article 10 prevents algorithmic discrimination by considering the governance of the data used and establishing a framework for the datasets, which must be designed to avoid distorting or discriminatory effects.

Article 13 plays a fundamental role because it addresses transparency for deployers, who must have access to information about the functioning of the systems and must receive usage instructions in an appropriate digital or non-digital format. These instructions must include concise, complete, correct, and clear information that is relevant, accessible, and understandable for the deployers.

Similarly, Article 50 requires AI providers to design systems so that people are informed when they are interacting with an AI system without the presence of a human being. This obligation is complemented by Article 86, which states that the person affected by the decision has the right to request an explanation of the decision-making process that impacts their rights (Gaudio, 2022, 1).

However, a doubt remains. The AI Act has imposed certain information obligations, which should address the information asymmetries between providers and deployers on one side, and users or other subjects to algorithmic decisions on the other. However, how much do we really know about the design systems of deep and machine learning, which determine the outputs of the machines themselves? How real is the risk of black boxes, and what level of detail in the information is reasonable to expect?

In any case, the AI Act adopted an anthropocentric approach, entrusting the judicial decision exclusively to a human being. Indeed, it is not insignificant that AI machines can only assist judicial authorities in decisions, not make decisions. The decision-making process is human-guided and can only be supported by machines (Covelo de Abreu, 2014, 410).

The determinations of the European Commission were certainly influenced by the "European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment" adopted at the 31st Plenary Meeting of the CEPEJ on December 3-4, 2018, in Strasbourg.

The Charter is based on five key principles:

a) respect for fundamental rights: the development and execution of artificial intelligence tools and services must adhere to fundamental rights;

b) non-discrimination: specific measures must be adopted to prevent the creation or exacerbation of discrimination among individuals or groups;

c) quality and security: When handling judicial decisions and data, certified sources and intangible data alongside models developed through a multidisciplinary approach must be used, within a secure technological environment;

d) transparency, impartiality, and fairness: data processing methods are accessible and comprehensible, and external audits must be authorized;

e) "under user control" principle: adopting a prescriptive approach must be avoided and ensure users must be well-informed and empowered to make their own choices.

However, artificial intelligence systems capable of making decisions have already been applied, with significant results, such as some AI models, which allowed for the cancellation of a series of unjust fines in England (Custers 2022, 218).

Among the EU member States, Estonia has also tested similar systems, developing an AI program designed to adjudicate small claims disputes valued at less than €7,000 (Ulenaers, 2020). At the end, this country has just piloted this possibility, without formally implementing it.

The choice, which seems reasonable, to entrust judgment to humans resides primarily in two aspects. Firstly, machines still exhibit numerous biases, resulting in distorted outcomes that could be perpetuated indefinitely. The machine learning system gathers data, but also biases (often discriminatory) associated with such information: for example, it may determine that a migrant is much more likely to commit crimes than a native citizen of a country, since, through scraping, it has obtained numerous results associated with crimes committed by non-native residents.

Secondly, the interpretation of the law through judges often leads to adapting rules to contexts and social changes without the need to wait for a (as we mentioned, slow) modification of legislative texts.

Law is not a monolith and changes thanks to what comparative law scholars call legal formants, which essentially include legislation, case law, and legal doctrine. Furthermore, law is influenced by cryptotypes, namely social and anthropological factors, as well as all elements that contribute to shaping a jurist's thinking (for example, his or her legal tradition) (Sacco, 1991).

Believing that artificial intelligence, without human input, can replace a judge's way of reasoning is naive, even before being incorrect. Judges are and must be influenced by various elements: they are not a mere calculator because their primary task is to interpret legal rules, which may remain formally identical but are shaped diachronically from a historical or geographical perspective. Therefore, a particular rule may make sense in the United States, but it will have a different meaning for a French or Italian jurist, who is a product of a different legal culture.

3.   The Necessity of Humans in Judicial Decisions

AI machines are rational, but not necessarily reasonable: their operation is based on a deductive method, rooted in Aristotelian logic, following logical processes. However, it is important to distinguish symbolic AI systems from sub-symbolic AI systems: the former are capable of explaining deductive processes, while the latter do not have the ability to provide explanations for the results produced, similar to humans. In this regard, it is important to remember Wittgenstein's teaching, according to which every command (including legal) presupposes a series of commands: if I tell my son or daughter to tidy up the house, they will know that they have to clean the kitchen, make the beds, and so on.

Legal discourse is rhetorical and not logical. The assumption is that the law is interpretation: if it were only mathematical logic and algorithmic deductions, simplifying greatly, legal operators would not be needed. Instead, in any legal process, a lawyer tries to convince the judge in two ways. On the one hand, by reconstructing that a historical fact, which the judge has not experienced but the parties have, has occurred in one way rather than another (which is the thesis that the opposing lawyer will probably argue). Secondly, they will try to convince the judge that a certain legal rule should be interpreted in a certain way (therefore assigning a semantic meaning to a textual formulation) or that a certain precedent should be applied because the assumptions are similar. Undoubtedly, an AI machine can do the same: argue both the claimant's and the defendant's theses.

However, the most scaring scenario in non-humans decisions seems to be mostly related to predictive decisions, i.e. on judgments influenced by potential risks connected with defendants in criminal cases.

The Loomis case explains this issue [Supreme Court of Wisconsin, State of Wisconsin v. Eric L. Loomis, Case no. 2015AP157-CR, 5 April – 13 July 2016].

In this judgement, the Court requested a Presentence Investigation Report, which was drafted using a software called COMPAS, which analyzed the defendant's personal history, including occupation, housing availability, and substance abuse, to assess the risk of recidivism.

Loomis contested the use of an artificial intelligence system and the ability of the trial court to resort to predictive mechanisms. Transparency is one of the key issues in the Loomis case. In fact, the operation of COMPAS is shrouded in industrial secrecy, and therefore, while the questions used by the system for scoring the defendant may be disclosed, the results are difficult to argue due to their lack of transparency.

The Supreme Court of Wisconsin held that risk scores cannot be used to decide whether the defendant can be effectively and safely supervised within the community.

This case also implies the discourse on humans' ability to self-determine. A fundamental distinction in legal history is the difference between persons and things: persons take decisions (even irrational or unpredictable ones), things do not. Therefore, individuals have the capacity to choose among different behavioral options and may even change their behaviors over time. Believing that it is possible to assign a scoring to a person's likelihood of recidivism based on personal or social factors is akin to resurrecting Lombroso's theories (Giannini, 2021, 179).

The same concerns apply to the world of work. The AI Act includes transparency obligations which, in labor law, are complemented by the forthcoming directive on digital platforms. This directive holds that a person performing platform work cannot be fired or dismissed based on a decision made by an algorithm or an automated decision-making system and imposes a series of informational obligations on companies, also involving trade unions and other representative worker associations.

Anthropocentrism is therefore fundamental in our relationship with technology. The idea of letting machines make decisions implies a political choice, and we must be aware of this. When we consider having machines select the university that a high school student should attend based on its grades and extracurricular activities, we are asserting the immutability of a life path, the impossibility of people changing. Even if we were to admit that machines are neutral (and they are

not, because biases are inherent in their programming), we must protect ourselves from those who would hide, behind an apparently scientific solution, to perpetuate discrimination and unchangeable social divisions.

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