

## **Legal Decisions should be automated using algorithms. Discuss.**

As automation becomes increasingly prevalent in workplaces, it's crucial to establish guidelines for the future of AI within law. It cannot become a question of solely humans or machines; we need a combination. Whilst automation will lead to improvements, with cost and time benefits, using algorithms for legal decisions raises many questions; practical, academic and ethical.

One issue is the tendency of AI to have a 'black box' effect<sup>1</sup>, where it's difficult to understand how the algorithm reached a conclusion. The importance of transparency is linked to the 'right to a fair trial', in the US enshrined in the sixth amendment which states defendants have the right to be 'confronted with the witnesses against him'<sup>2</sup>. If algorithms are considered similar to expert witnesses, it seems illogical that defendants are unable to understand or contest their conclusions. One solution to this might be 'Explainable AI', which produces 'transparent explanations and reasons for the decisions'<sup>3</sup>.

It's important to understand algorithms' risks and limitations. There may be cases where circumstances go beyond the algorithm, where human intervention is required to decide the best strategy. For example, problems arise when new laws or concepts emerge as AI is 'trained' with past data, so it would be difficult to 'teach' a machine changes, whilst humans adapt better.

Algorithms can also be systematically biased, raising questions on their fairness in decisions. An example is the COMPAS risk algorithm, used in the US to assess the risks of probation. Here, twice

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<sup>1</sup> A. Završnik, "Criminal justice, artificial intelligence systems, and human rights", *ERA Forum* 567:583 (2020): 568

<sup>2</sup> Constitution of the United States, US Congress [<https://constitution.congress.gov/constitution/> last accessed 31<sup>st</sup> August 2020]

<sup>3</sup> R. Schmelzer, "Understanding Explainable AI", *Forbes*, July 2019, [<https://www.forbes.com/sites/cognitiveworld/2019/07/23/understanding-explainable-ai/#64e0660f7c9e> last accessed 30<sup>th</sup> August 2020]

the number of black criminals than white criminals were wrongly predicted to reoffend.<sup>4</sup>

Nevertheless, AI can improve on potential human bias. A recent study showed that disadvantaged African Americans prefer computerised judges over human ones, with under-representation of minorities in a role dominated by white middle-aged men.<sup>5</sup>

The impact of wrong judgements is a critical consideration. Different decisions lead to consequences of different severity if incorrect. For example, in Estonia, a machine is being designed to judge claims cases of less than €7,000<sup>6</sup>. For small issues, where both parties agree, it might be an acceptable way of getting a result in a shorter time. The consequences of wrong decisions in serious cases are less acceptable. And if it fails, who is responsible?

Despite this, algorithms are useful in many aspects of legal decisions. The ability to quickly analyse large datasets provides many opportunities to improve legal processes, for example in comparing cases to past precedents to develop recommendations on how best to represent a person. This frees up lawyers' time and offers 'young lawyers more than spending their first two years in a data room.'<sup>7</sup>

In conclusion, using algorithms in the legal profession is inevitable and should be welcomed, but completely automating decisions should be avoided, due to the incapability of a machine to replicate

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<sup>4</sup> J. Angwin, J. Larson, S. Mattu and L. Kirchner, "Machine Bias", *ProPublica*, May 2016, [<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> last accessed 30<sup>th</sup> August 2020]

<sup>5</sup> A. Završnik, "Criminal justice, artificial intelligence systems, and human rights", *ERA Forum* 567:583 (2020): 581

<sup>6</sup> A. Završnik, "Criminal justice, artificial intelligence systems, and human rights", *ERA Forum* 567:583 (2020): 572

<sup>7</sup> P. Rawlinson, "Will lawyers become extinct in the age of automation?", *World Economic Forum*, March 2018, [<https://www.weforum.org/agenda/2018/03/will-lawyers-become-extinct-in-the-age-of-automation/> last accessed 29<sup>th</sup> August 2020]

human judgement and challenges with transparency. A blend of ‘Human and Machine’ where ‘humans work with smart machines to exploit what each party does best’<sup>8</sup>, will best enable the legal profession to advance. This hybrid approach is already recognised, for example in GDPR which says people “have the right not to be subject to a decision based solely on automated processing which produces legal effects”<sup>9</sup>, but further consultations, like that of the Law Society in 2019, will be required to determine standards on best practice.

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<sup>8</sup> P. Daugherty and H. Wilson, “*Human + Machine: Reimagining work in the age of AI*”, Harvard Business Review Press: Boston, Massachusetts, 2018, 8

<sup>9</sup> Article 22(1), *General Data Protection Regulation*, [<https://gdpr-info.eu/art-22-gdpr/> last accessed 31<sup>st</sup> August 2020]

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