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

From driverless cars to Amazon’s infamous ‘Alexa’, ‘artificial’ technology is encroaching upon our everyday lives in this hyper-digitalized age, often in ways we do not even realise. As Boris Johnson suggests, digitalisation is ‘not, alas, the stuff of dystopian fantasy but of an emerging reality’, affecting every one of us.¹ With even small-scale civil disputes resulting in thousands of pounds worth of legal fees, and ‘justice [becoming] increasingly unaffordable to most’, it seems hardly surprising that there is continued investment for private tech companies to develop software which will act in place of traditional judges.² Nonetheless, with the nuances and intricacies of the law, it is also increasingly evident that we should not forego our current system for a cheaper, ‘easier’, less accountable, alternative. Whilst the use of technology to determine the outcome of legal disputes seems superficially attractive, it cannot sufficiently account for existing uncertainties in the law, would leave the law unduly rigid, and could contain inbuilt algorithmic bias. Moreover, the act of determining cases through artificial means itself disregards the very human demands of the law from the perspective of the recipients of legal decisions. A legitimacy is gained through being judged by an ‘equal’ who can provide sound, transparent reasoning of their decisions. This essay will therefore outline the necessary retention of human figures as the final arbiters of justice in (civil) legal disputes.

Firstly, a definition of ‘artificial’ must be established, which I take to mean ‘artificial intelligence’ (AI). AI has a broad colloquial understanding, often referring to systems which are able to process, manipulate and trawl through large amounts of data. An example of this is ‘electronic billing’ which can automatically calculate billable working hours.³ However, unlike a mere processing and sorting of information, the concept of AI for the purpose of this essay ‘[involves] machines which are capable of analysing situations and learning for themselves and then generating answers which may not even be foreseen… by their programmers’.⁴ AI is an automated system, and one, in this particular scenario, that would be used to independently

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determine the outcome of legal disputes, mimicking sophisticated and adaptable human learning, but without human interference.

To examine whether AI ‘should’ be used, one must take into account both the ethical and practical impacts of its use. On a practical level, existing uncertainties in the interpretation of the law mean that human, rather than artificial, intelligence should determine legal disputes. Without clear definitions of terms, AI would not be able to effectively interpret the language when encountering new scenarios. For instance, as Lord Bingham suggested, ‘There are few expressions more routinely used by British lawyers than “reasonable”’.\(^5\) Despite this, there is no settled consensus on the interpretation of ‘reasonable’: it simply depends on the context of the particular dispute. The Unfair Contract Terms Act 1977 contains a ‘reasonableness test’; that is, in order for a term within a contract to be ‘reasonable’, it will ‘[have] regard to circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made’.\(^6\) Thus, what can be interpreted as ‘reasonable’ must be determined with a strong reliance on the context of the dispute and the common understanding of both parties. This is something that AI cannot sufficiently ascertain. There is no metric for ‘reasonableness’ which could gauge whether a party had acted in accordance with a contract. Such broad terms are not binary or particularly quantifiable, leaving AI incapable of dealing with existing uncertainties which must therefore be left for human interpretation.

Furthermore, another uncertainty in the law which calls for human, rather than artificial, interpretation, is the difference between the terms ‘best endeavours’, ‘reasonable endeavours’, and ‘all reasonable endeavours’. The distinction between them is markedly difficult to discern. For example, in *Rhodia International Holding Ltd. v Huntsman International LLC*, it was suggested that ‘all reasonable endeavours equates with using best endeavours’.\(^7\) Despite this, the judge in in *Jolley v Carmel* placed ‘all reasonable efforts (endeavours)’ between ‘best’ and

\(^5\) Judgments of Ashworth Frazer Ltd v Gloucester City Council [2001] (para 5)
See: [https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011108/ashwth-1.htm](https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011108/ashwth-1.htm)

\(^6\) Unfair Contract Terms Act 1977 (section 11)

‘reasonable’ endeavours. This is just one example that illustrates the lack of consensus on the definition of broad legal terms. Admittedly, some may contend that these ‘inconsistencies’ are an example of what AI is proposing to offer a solution to. Nonetheless, the system in which AI works (by extrapolating patterns from past data) means that without standardised and clear definitions of terms within contracts, AI systems have no way of applying them to new, unfamiliar cases. Human intelligence is necessary.

AI would also leave the law unduly rigid, which could be potentially damaging. It is essential for the law to change in order to respond flexibly to different situations and shifts in public perception. This is demonstrated by landmark cases in the US such as Brown v Board of Education, which deemed racial segregation unconstitutional, as well as US v Windsor and subsequently, Obergefell v Hodges, which both secured same-sex marriage as a fundamental right. Crucially, Brown v Board of Education is singular in that its ruling went against stare decisis (it went against the ‘separate but equal’ ruling in Plessy v Ferguson). Indeed, US v Windsor and Obergefell v Hodges went against Clinton’s 1996 Defence of Marriage Act. Whilst all aforementioned cases were essential in establishing human rights, they also display the importance of revising past acts or rulings. This is something that AI simply cannot be programmed to do: by relying on past data to draw out conclusions, it must rely on past decisions to be ‘correct’ in order to apply it to new situations. This is not always the case. AI cannot possibly determine the ‘social acceptability’ of a law in an ever-changing societal context, and, without a mechanism to revise past flaws, all future rulings will be similarly ‘sequentially’ flawed.

AI should not be used as it threatens core legal principles such as equal treatment. Indeed, as Lord Bingham rightly suggested, ‘The laws of the land should apply equally to all’. Admittedly, a compelling ‘advantage’ of using AI to determine the outcome of legal disputes compared to the status quo is its apparent lack of bias. Nonetheless, algorithmic bias found in existing forms of AI in fact show that AI cannot effectively safeguard against discrimination. For example, criminal risk assessment software used in America to predict the likelihood of

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9 US cases cited
See: https://www.oyez.org

criminals reoffending, thus influencing the length of their sentence, was found to be ‘remarkably unreliable’ in its predictions, and with striking racial disparities.\(^{11}\) The algorithms used were ‘likely to falsely flag black defendants as future criminals’.\(^{12}\) As AI extrapolates patterns from past data sets in order to arrive at a decision, it is also relying on data which already contains human bias. Future AI decisions will only ‘exacerbate unwarranted and unjust disparities’ that are already present.\(^{13}\)

Crucially, whilst these disparities in treatment should not be tolerated under any circumstances, AI’s lack of accountability is further problematic. Under current legal systems, every ruling can be attributed to a specific person, meaning they can be held accountable to any ill-reasoned decision. However, if AI were to be used, final decisions seem ‘beyond challenge’.\(^{14}\) Whilst one reckless judge may be removed for biased judgements during their tenure, the ‘faulty’ part of AI resulting in biased judgements is near impossible to locate in isolation, meaning it is hard to fix or be rid of these inbuilt issues.

AI cannot effectively safeguard against bias as technology and software is also vulnerable to the biases of human coders. In order for AI to be created, subjective (though admittedly, not necessarily intentionally discriminatory) data selection must take place which could apportion more leniency towards one arbitrary sector of society or people from similar socio-economic backgrounds. Coders would have to ‘[choose] what datasets to use, what data to exclude or include’, all of which could contribute to inbuilt bias.\(^{15}\) This is inherently unfair, obscuring justice and undermining the core legal value of equal treatment mentioned above. Moreover, this is extremely difficult to regulate. Often, governments delegate the creation of such software to privately-owned tech businesses (for instance, through the UK government’s ‘AI Sector Deal’ in 2018), which must largely be unregulated so as not to stifle creativity. Also,


\(^{12}\) Ibid.


with the nature of such systems being unintelligible to the lay person, an undue amount of
power is handed to the minority who are creating such software.

Lastly, if we surrender to AI decisions, we are also, as Surden suggests, ‘[undervaluing] the
necessary humanistic and performative components of legal adjudication’. The importance
of active participation in court proceedings should not be underestimated. With civil disputes
often being highly personal and emotionally-charged (for instance, concerning medical
malpractice, defamation or divorce), it is little consolation to be provided with a complex
mathematical judgment in lieu of a traditional judicial opinion, no matter how sound it may be.
The very human desire to be acknowledged and heard by those we consider learned and
experienced should not be pushed aside. Indeed, this scenario also again highlights the
problematic nature of AI. As AI deals with complex mathematical principles which are not
widely understood by a lay audience, it becomes increasingly difficult to scrutinise its decisions
and steps: it lacks transparency. As Tegmark suggests, defendants and claimants ‘want to know
why…they have the right to a better answer than “we trained the system”’. Therefore, as a
legitimacy is gained by being judged by something we understand, connect with, and deem
‘equal’- something AI is not- human decisions are necessary in legal disputes.

In conclusion, human, rather than artificial, means must be used to determine legal disputes.
Though the promise of a perfect, unbiased, and more efficient system is alluring, AI, rather
than helping society, could worsen disparities and stop the law from making important social
adjustments as times progress. AI’s inability to deal with the practical application of the law
also means that it should not be used. In an increasingly digitalised age where computers have
transformed the nature of work across all disciplines, often in positive ways, it seems difficult
to ‘leave the law behind’. Indeed, in some respects, technology must be embraced. The use of
computerised systems for menial, time-consuming ‘groundwork’ can be helpful. However,
must realise that the concept of AI is something quite different from just a ‘computerised
system’. As Johnson summed up in his recent address to the UN, ‘Can these algorithms be
trusted with our lives and hopes?’.

16 H. Surden, ‘The Ethics of Artificial Intelligence in Law: Basic Questions’
See: https://ssrn.com/abstract=3441303

18 ‘PM speech to the UN General Assembly: 24 September 2019’ See:
matched with a human interpretation of disputes, and AI’s inscrutable, unregulated and largely incomprehensible system, at least for now, is simply too uncertain.

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