**AI in Law or AI in the Place of Law**

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**Rule of Law’s Core idea**: When law rules in a political community, it *provides protection and recourse against the arbitrary exercise of power through law’s distinctive tools*.

The organizing *aim* of the rule of law is to temper the exercise of power; the *law* is the chosen *means* of doing so. The key to success of law’s rule lies in the existence of effective mechanisms to hold those who wield power *accountable* for its exercise.

**First Principles** **of the Rule of Law**

1. *Sovereignty of Law. Law must rule*: this idea implies two sub-principles.
2. *Exclusivity:* Governing power derives only from and is ordained only by law.
3. *Legality*. All governing power must be exercised through or by means of law; and law must meet key standards of formal and procedural *legality*.
4. *Reflexivity*: Law governs all, especially including those who govern by or with it.
5. *Equality.* Law’s protection and recourse must be available on an equal basis for all who are bound by that law.
6. *Fidelity.* All members of the political community are responsible for holding each other, and especially law’s officials, accountable under the law.

**Law’s Toolbox**

1. Laws are *normative*: Law seeks to *order* behavior by *addressing norms* to law subjects.
2. Laws are *positive*—a *product of human activity* or human processes.
3. Legal norms should be fully *public*.

* Law does its characteristic work *in* public, *addressed to* a public consisting of agents of all kinds constantly engaged in interactions. The success of the law’s guiding behavior depends on their mutual understanding.
* Law seeks to make the exercise of power *publicly visible*.

1. Law is a *discipline of deliberative reasoning.*
2. Law works through *institutions*.

**Moral Foundation of the Rule of Law: Membership**

*Membership* offers a vision of community in which members are subject *reciprocally* to each other. A membership community is characterized by mutuality, *peerhood* (members relate to each other on a footing of equality), individual dignity, and freedom. Membership grounds the rule of law’s concern about subjection to the arbitrary power of others. When law meets the demands of the rule of law, it plays a key role in securing and nurturing communities aspiring to realize the value of membership.

## **Legal Intelligence**

1. Law is *practical*, oriented toward action. Law’s rules *prescribe*: they signal things *to be done* (or ways of doing things) and offer *reasons* to do them.
2. Law is a reasoned—a reasoning—thing. Legal reasoning not only produces outputs that conform to rules; it also *follows* the rules in an intelligent way. It uncovers, weighs, assesses reasons for actions and choices among available options for action.
3. Legal reasoning essentially involves *judgment* in five points in the decision process.

* to recognize a proposition *as a rule*, as something that requires that one follow it and supplies a reason to do so.
* to assess evidence and the credibility of those who offer testimony.
* to bridge the gap between the rule and its application to concrete circumstances.
* to decide *what to do*. One must situate the rule’s directive in a larger framework of reasons, assess its weight or authority, and decide whether to follow it.
* in analogical thinking, judgment is needed to situate the target case in a context of comparables, and to identify the pattern or rule that *justifies* treating the target case as relevantly similar to source cases.

1. Legal reasoning has an essential *moral dimension*: reasoning persons *are implicated* in the practical conclusions they draw. They bear and must take responsibility for them.

## **Computational Intelligence**

AI devices uncover *correlations*, based on statistical analysis of the data fed to them, and on that basis “predict” another correlate, e.g., how judges will decide contested cases.

1. AI devices don’t read or comprehend texts; rather, they mine them for patterns and correlations. They don’t deliberate; they generate output, but don’t make decisions. Their mode of “reasoning” is that of a curator or consolidator of data.
2. The products of their analysis bear no relation to physical, moral, or legal world.
3. They don’t appreciate values or norms. They don’t recognize reasons *as reasons*. They reproduce normative arguments, but they can’t recognize them as expressions of values/norms, and weigh them as reasons of moral or practical significance.
4. Algorithmic reasoning is distinct from analogical reasoning. Computational reasoning *counts* to determine relevance of the similarities; analogical reasoning *evaluates*; it situates the target case in a context of comparables and identifies the pattern that *justifies* treating the target case as relevantly similar to source cases.

## **Uses of Computational Intelligence in Governing**

1. Exercise of governing power (e.g., in the administration of justice).
2. AI devices produce determinations of legal results in particular cases via algorithmic prediction of what a court would decide. Two versions:

* the AI device yields an output for the case, then a human “judge” implements it.
* or, the output of the AI device is automatically given legal effect.

1. For this only broad goals, stipulated by authorities are needed, not legislated norms.
2. Social Ordering
3. *Algorithmic regulation.* Two forms:
4. Precisely determined *instructions* outlining a person’s legal rights or duties.
5. Precisely determined *dictates* that produce subjects’ behavior.
6. *Architectural regulation* works behind the scenes to channel behavior or to reshape the deliberative frame.

**What is Lost?**

Regarding Law’s mode of governance

1. Respect for *moral agency* of those subject to governance. It removes governing from the realm of deliberation and decision, and hence of responsibility. Governance of persons is replaced with the administration of things.
2. An opportunity for meaningful *participation* by immediately affected parties in the administration of government policy.
3. *Connection with the world*. Human judgment engages the world; AI devices don’t inhabit our world; they don’t understand the meaning of acts and their impact on people’s lives. AI has no room for judgment-enhancing human elements like empathy and compassion.
4. Possibilities for *self-correction* of governing structures.
5. *Accountability*: computational accountability offers explanations of the mechanism, not justifications of its output. Accountability is replaced by accounting: offering reasons and arguments is replaced by counting and calculation in the hands of experts, so it can’t function in a network of mutual accountability that engages citizens and officials.
6. *Social ordering*; AI removes regulation from the deliberative domain of those who are regulated, rather than addressing it and engaging it. It removes regulation from our participation and our awareness.

Regarding Law’s Mode of Association

When it meets rule of law standards, law makes possible (not guarantee) a valuable kind of community, one that can approximate the value of membership.

1. Law provides resources for establishing and sustaining meaningful forms of social interaction and political recognition that bind the community over time.
2. Law offers a public language and public institutions in which members can address disputed regarding the terms of their common life, and, in so doing, take responsibility for their common life over time.
3. Fidelity to the law gives shape to fidelity to fellow members and to the community as it exists over time.

All this would be lost if AI were to replace law as the dominant mode of social ordering.

1. AI regulation has no trans-temporal awareness and provides no resources for constructing personal or communal lives over time. Its mode of control of behavior is opaque to all but the initiated.
2. Political communities would be deprived of a vocabulary in which meaningful relationships among members and the shape and character of their shared community can be conceived, articulated, negotiated and revived.
3. Deprived of law, members of the community would be deprived of a fundamental means of expressing fidelity to each other.