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Intelligence without a Conscience? A Plea for Regulation of the Digital World

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ALMOST HUMAN:
LAW AND HUMAN AGENCY
IN THE TIME OF ARTIFICIAL
INTELLIGENCE

by

ANDREW MURRAY



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The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. The Annual Lecture builds on his vision and mission, it invites distinguished international scholars to take inspiration from Asser's idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today. It is the T.M.C. Asser Instituut's flagship lecture and its date commemorates the foundation of the Institute in December 1965.

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FOREWORD

Intelligence without a Conscience? A Plea for Regulation of the Digital World

The Sixth Annual Asser Lecture was unlike any other. Part of the tradition of the Asser lecture is to meet for a late afternoon of critical reflection on the state of international or European law, at the premises of the Peace Palace, built in the days of Tobias Asser himself.

In the midst of the Covid-19 pandemic, on November 26th, 2020, our speaker was in London, our guests were at home or in their offices, and we, the Asser team, were in a studio in The Hague. No drinks and buzzing in-person conversations about the lecture afterwards. On the other hand, we were delighted so many people could join. Thanks to technology, hundreds of people from around the world attended the lecture virtually.

While the 2020 Asser Lecture was different, some things were the same. This year we again organised the lecture in the context of our research programme, ‘International and European law as a source of trust in a hyperconnected world’ (2016-2020). It seemed only natural to examine the implications of hyperconnectivity, datafication and algorithms for law and governance at the end of 2020 – a year severely marked by the Covid-19 pandemic increased human dependency on digital connectivity and on new technologies such as Artificial Intelligence (AI). These technologies do however not merely enable us to forge human connections around the world, they have also come to feed distrust among citizens.

Only a week prior to the lecture, we saw a lawyer of the then US President Donald Trump create suspicion about voting machines being hacked by ‘a secret algorithm’ and stealing millions of votes. This adds up to social media in which citizens roam around algorithm-

governed echo chambers, with rising levels of distrust towards each other and towards public institutions. Increasingly, algorithms are shaping or even taking over human decision-making. Trained with human data, artificial intelligence exacerbates human biases often with harmful consequences. Urgent questions emerge: when are algorithms trustworthy? And, when is trust in artificial intelligence misplaced? To put it in the words of Cambridge philosopher Onora O’Neill, who delivered the second Asser Lecture.¹

In short, we chose the topic for the 2020 Asser lecture before the Covid-19 crisis had really started. Over the past few years, questions of law and tech have become increasingly important in our research. In September 2020, for example, we were able to launch a new interdisciplinary research project: Designing International Law and Ethics into Military Artificial Intelligence (DILEMA). Led by Asser Senior Researcher Dr Berenice Boutin, and supported by the NWO [Nederlandse Organisatie voor Wetenschappelijk Onderzoek - Dutch Research Council], the project explores how to safeguard human agency in military applications of artificial intelligence and it seeks to ensure compliance with international law and accountability by design. If we allow for these military applications to be used – I deliberately use *if* since I am personally much persuaded by arguments made for example by leading international lawyer Mary Ellen O’Connell that autonomous decision-making, when non-human agency decides over human life, is inherently in violation of the humanity principle² – then

¹ Onora O’Neill, *Accountable Institutions, Trustworthy Cultures*, the Second Annual T.M.C. Asser Lecture (The Hague: Asser Press, 2017).

² Cf Mary Ellen O’Connell, *Banning Autonomous Killing*, in *The American Way of Bombing. Changing Ethical and Legal Norms from Flying Fortresses to Drones* 224 (M. Evangelista and H. Shue eds. Cornell University Press, 2014) 236 ‘Resort to weapons has always been accompanied with some legal and moral restraint, including the complete ban on certain types of weapons. In the near future, robotic weapons are expected to be available with programs able to select and destroy targets without a human operator in the loop. Such a development would conflict with the historical, legal, and moral understanding that killing should be based on a good-faith understanding of real necessity and carried out by someone who may be held accountable for a wrong decision. Even if a computer could be so programmed, it is imperative that human beings not give up sovereignty over these vital aspects of what it is to be human: to have a conscience and to be subject to accountability. Too much of our current system of community and personhood are based on these two factors

these applications should at a minimum be in full conformity with international humanitarian law and international human rights law. The concept of “meaningful human control” has caught on in discussions on autonomous weapons systems to uphold human agency in warfare, and therewith responsibility, answerability, and enforceability – in brief it demands accountability that is meaningful and goes beyond mere transparency of unsorted information and data.³

Artificial intelligence challenges law in a fundamental way. Law is a social construct, it presumes and is a product of human thought, human experience, and human interaction; in short: law is a product of human agency. Humans interpret the law, they apply the law. Humans are able and free to respect the law when acting or making a decision. What gets lost when human agency (human autonomy) disappears and is supported or even replaced by autonomous decision-making? What are the implications of algorithmic decision-making for the rule of law, for democracy and human rights? In short, how to approach the governance of AI technologies?

With these poignant questions, we turned to a most eminent scholar in the field who has not shied away from grappling with these fundamental questions ever since he started to work on information technology law and the regulation of cyberspace. Andrew Murray, Professor of Law at the London School of Economics and Political Sciences, has been one of the first global experts who argued for the protection and promotion of human rights within the digital environment. As early as 15 years ago, in *Human Rights in the Digital Age*, a book co-edited with Mathias Klang, he examined how digital technologies impact the enjoyment of human rights. He has written the leading textbook *Information Technology Law: The Law and Society* and has recently co-written the book *Rethinking the Jurisprudence of Cyberspace* with Chris Reed. In *Regulating AI and Machine Learning: Setting the Regulatory Agenda*, co-written with Julia Black and published

to risk their elimination. This point is all the stronger when we realize the risk is being promoted for the sake of creating new means of killing.’

³ Cf Onora O’Neill on transparency, Onora O’Neill, *A Question of Trust* (Cambridge: Cambridge University Press, 2002) 63-79.

in the European Journal of Law and Technology in 2019. Andrew is Director of the LSE Law, Technology and Society group and also leads the AI, Ethics and Governance subgroup. In 2018/19 Professor Murray was the specialist advisor to the House of Lords Communications Committee inquiry “Regulating in a Digital World”. In other words, a true forerunner in this area of law and policy development.

The written version of Andrew Murray’s lecture in front of you, is an in-depth examination of the implications of the structural changes caused by datafication for human agency and for the Rule of Law. It is highly relevant for lawyers and policy makers who are confronted with the technological revolution and the enormous responsibility that the need to regulate evokes.

Murray asks whether we are ‘developing the right approach to the regulation of AI and Machine Learning?’ These technologies ‘have the capacity to undermine our systems of communication, politics, media, and culture, but above all else our system of law and the rule of law [...] because at a fundamental level the use of AI and Machine Learning to supplement, assist, or in time replace, human decision-making is a change to human autonomy, and through that to thought, society and ultimately law as a product of these.’⁴ Mind you, these technologies change human autonomy, which together with human conscience, defines for many what makes us human.⁵ ‘Law presupposes its application by the human conscience, and without the latter the very existence of the former becomes unimaginable.’⁶

First, Murray turns against the current practice to develop field specific and overly ethical frameworks and he argues for *legal* frameworks, which regulate AI at a global level and demand compliance with in-

⁴ Andrew Murray, *Almost Human: Law and Human Agency in the Time of Artificial Intelligence*, the Sixth Annual T.M.C. Asser Lecture (The Hague: Asser Press, 2021) xx

⁵ Nijman, J.E. (2021). *Ius gentium et naturae*: The Human Conscience and Early Modern International Law. In P. Slotte & J. Haskell (Eds.), *Christianity and International Law: An Introduction* (Law and Christianity Series) (Cambridge: Cambridge University Press, 2021) 153-176. doi:10.1017/9781108565646.008

⁶ *Ibidem*.

ternational and human rights law. He is very explicit: we need *new* laws and regulation at a European and global level that is tailored specifically to AI and move quickly beyond the over-reliance on soft governance of AI. Secondly, he warns against taking a risk-based approach to regulation for it does not take the fundamental problem of the input effect on human autonomy seriously – Laws no and Siri yes? The input effect on human autonomy is a very high risk for humans and their societies as it redefines, undermines and destroys what defines humans. The currently popular risk-approach does not capture or avert this danger. And so Murray calls for global leadership and a global institutional response, this is the time to define how corporations and governments will use AI and Machine Learning:

‘The challenge of AI Regulation and Governance is a global one – just as we have the International Telecommunication Union and the International Civil Aviation Organization, we must have an International Office for AI, tasked with the development of a positive, international, legal framework for the development and deployment of AI. This is urgent. For in twenty years the technology will be ambient, and we will have missed our chance at meaningful, modern, positive, regulation of AI.’⁷

Andrew’s wonderful piece of scholarship on how law has to rule AI-driven action and decision-making makes us realise what is at stake today: our democracies, human autonomy, the Rule of Law, human rights, our basic public values and ultimately also law itself, which is not inherently good but may help us order our world and to make it more safe, equal and just. Similarly, AI and Machine Learning can bring both great benefits and great harm to humanity. AI technologies can help us in the face of climate crisis and may lead us to what James Lovelock has called the *Novacene: The Coming Age of Hyper-Intelligence* (2019).⁸

⁷ Andrew Murray, *Almost Human: Law and Human Agency in the Time of Artificial Intelligence*, the Sixth Annual T.M.C. Asser Lecture (The Hague: Asser Press, 2021) xx

⁸ James Lovelock, *Novacene: The Coming Age of Hyperintelligence* (MIT Press 2019).

FOREWORD

Law, as Murray shows, is crucial to the course we take. An international and human rights law approach to the design, development and deployment of AI systems may assist us in assuring these systems fulfil their potential for good.

In the spirit of the Annual T.M.C. Asser Lecture tradition, Andrew Murray has put ‘his finger on the pulse of his time’ and has pointed to the need for the development of international law to guide and constrain the design, development, and deployment of AI and Machine Learning systems. *Au travail!*

PROF DR JANNE E. NIJMAN

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