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When AI Makes Decisions: Who Should Be Legally Responsible?

-Atulya Srivastava

AI is no longer limited to chatbots and recommendation systems. AI now impacts many decisions including who is hired, medical diagnoses, loan approvals, autonomous vehicles, criminal sentencing tools, and even military technologies.¹ With AI systems being more and more autonomous and independent in decision making, one significant legal question becomes difficult to avoid: when AI inflicts harm, who is responsible?

The issue is not a theory anymore. Self driving cars have had accidents, AI-based HR processes have shown bias to applicants, predictive policing has been accused of racism, and medical AI systems produce inaccurate diagnoses.² In these situations, AI itself cannot be punished or sued because it is not considered a 'person' under the law. Therefore, it is up to an individual(s) or organisation(s) connected to the AI to be held accountable.

1 .STUART RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH (4th ed. 2021).

2 .CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016).

Another argument is that developers must have legal accountability. It is the developers who create an AI, developing the AI's algorithm, datasource and how the AI operates. If there are serious issues with the AI due to improper code or inadequate testing, that developer has caused harm. This argument is comparable to product liability law; manufacturers must be accountable for their defective goods. Thus, any organization that produces AI without reasonable precautions to ensure it is safe must, at a minimum, be legally liable for harm done to customers because of defective products resulting from their negligence.³

But simply attributing blame to developers is an oversimplification of the situation. Many Artificial Intelligence systems learn through large volumes of information, and, as such, may behave unexpectedly once deployed. Developers cannot totally control the evolution of an AI system after initial development. If developers were held completely responsible for all errors produced by an AI, new innovations would be discouraged and businesses would be hesitant to fund research in AI.

Another potential model is that organizations or companies that utilize AI should bear responsibility. Hospitals that use an unreliable AI diagnostic tool should be responsible for harm to patients from using that tool because they made the decision to depend on that tool as an aid to their diagnosis. If a bank uses an AI program that results in discrimination for its loan approvals, the bank should have some type of legal responsibility for any unfairness caused by using that program. The reason this model makes sense from a practical perspective is that organizations can profit from the AI they utilize and have the ability to manage how it is used.

3. AaSee generally John Villasenor, Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation, 4 HARV. J.L. & TECH. 125 (2014).

There are many disadvantages to this approach too. Many companies are using third party AI systems, which they haven't created themselves and often don't understand. Some AI models are considered opaque "black boxes", in that nobody (not even experts) can indicate why some AIs choose to do what they do. The user is ultimately responsible for any actions taken by the AI; the developers who created these AIs are not responsible or accountable for them at all.⁴

Many people believe that multiple parties must share the liability. Developers, companies, operators and sometimes even regulators will have shared liability on a case by case basis, depending on the circumstances. The most realistic current legal approach to liability for AI will be to have multiple parties involved in the liability equation. Since AI systems are very complex, there is most likely to be a series of failures that lead to an incident rather than a single act of negligence causing an incident.

Let's suppose an autonomous car causes a crash. Possible causes for the crash include defective algorithms created by the software developer, lack of testing on the part of the manufacturer, failure to accept safety upgrades by the owner and that the regulators approved inadequate standards. If we place the blame on only one party we are ignoring the truth concerning how AI systems actually work.

Another factor to consider is whether AI should be granted legal personhood at all. Some academics have suggested creating a separate category for highly advanced AI systems to receive legal personhood as an 'electronic person'. While this may be true in the future, it is still impractical and there are a number of reasons why this should not happen. Typically when there is a question of legal responsibility there must be an intention, understanding and the capacity to deliver penal or punitive results.

4. Org. for Econ. Co-operation & Dev. [OECD], OECD Principles on Artificial Intelligence (2019), <https://oecd.ai/en/ai-principles>.

AI does not have consciousness, morality or independent legal existence. Granting legal personhood to AI may allow corporations to avoid responsibility for their actions by using an AI to replace humans in that regard.

The fast rate at which advancements in technology continues to expand presents an ongoing challenge for legal systems around the world. Countries are now increasingly adopting specific legislation for Artificial Intelligence including regulations concerning transparency, liability and the need for human oversight.

Regulations such as the European Union's AI Act are helping countries to categorize their AI activities into different levels of risk, with high risk regulations imposing the greatest requirements on organisations. Governments worldwide are seeing the need to introduce legislation to ensure that AI activities are not conducted without any regulations.⁵

AI can increase productivity and provide solutions for difficult challenges; however, there are some significant legal and ethical risks involved with these technologies. To suggest that AI alone is responsible for an incident involving an AI system is absurd since machines have no legal or moral right to exist outside of humans who designed, deployed, profited from or supervised the machine. Therefore, humans and companies will always be considered legally responsible for the consequences of the AI systems that they create, deploy, benefit from, and supervise, even if the AI system was at fault for the incident.

5. Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act), COM (2021) 206 final (Apr. 21, 2021).