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Review: Paweł Księżak, Sylwia Wojtczak, *Toward a Conceptual Network for the Private Law of Artificial Intelligence* (Springer 2023)

Abstract

This article is a review of the publication Paweł Księżak, Sylwia Wojtczak, *Toward a Conceptual Network for the Private Law of Artificial Intelligence* (Springer 2023). The book, which includes 12 chapters, describes a coherent and comprehensive concept of regulating the legal phenomenon of artificial intelligence (AI). The book identifies the nature of AI and the need for its legal regulation, proposing to award AI limited legal personality as a participant of global trade. The publication outlines the premises for its award and presents proposals as to how to register AI in the situation when it is assigned legal personality (advanced AI). It indicates the consequences of such an approach when AI has the competency to enter into contracts, assume rights and obligations as well as ownership titles, personal copyrights or liability for injury under tort law. According to this concept, AI itself or entities that use it will be assigned liability for its functioning. This novel concept is the focus of the reflections presented below, which explore its recognition as a subject by law, as well as its existence and technological development in the era of the 4th industrial revolution.

KEY WORDS: artificial intelligence, legal personality of AI, competency of AI to enter into contracts, liability for AI, liability for damage to AI

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Artificial intelligence (AI) is the ability of machines and computer programs to exhibit human capabilities, such as thinking, learning, planning, or being creative.

The European Parliament has proposed common definitions of cyber physical systems, autonomous systems, smart autonomous robots, and their subcategories. These definitions take into consideration the following characteristics of a smart robot: — the acquisition of autonomy through sensors and/or by exchanging data with its environment (inter-connectivity) and the trading and analyzing of those data;— self-learning from experience and by interaction (optional criterion);— at least a minor physical support;— the adaptation of its behavior and actions to the environment;— the absence of life in the biological sense; (European Parliament resolution of February 16, 2017, with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), 2018/C 252/25).

The consequence of AI is intellect devoid of any biological functions of a living organism. AI may engage in the processes of association, independent learning and conclusion drawing as well as decision making. Such extensive possibilities of AI are what makes it develop into a separate entity. This phenomenon requires comprehensive legal regulation, which involves the determination of liability for the consequences of its engagement in decision-making processes, contract conclusion, creation of work products or, finally, its exposure to the risk of injury.

The monograph under review here makes an attempt to describe and define the phenomenon of artificial intelligence. It puts forward a novel proposal for comprehensive regulation of AI as an entity, encompassing its ownership rights or personal copyrights, its capacity for free will and trade, its ability to sign contracts, and its liability for injuries caused by its operation.

The monograph is divided into 12 chapters. In the first, introductory, chapter and in the second chapter, the authors consider the possibility of assigning AI legal personality (as an electronic person, e-person or electronic personality). Having regard to ethical concerns, authors propose to award personality to AI and make it a participant of social life. It should be noted that at present certain intentionally separated asset pools may have legal personality. Legal personality (special legal competency) would apply only to these spheres of AI activity where it would be justified (i.e. torts, undertaking legal actions with a legal effect or ability to be a subject of personal copyrights). Theoretically, this idea should be approved. So far,

such competencies have been found admissible and referred to as „special legal personality”.

These reflections are continued in chapter 2. A further consequence of assigning such a distinctive type of legal personality is the ability to undertake legal actions (competency to engage in legal actions in trade). The question of who should be assigned the act of will (declaration of will) is also addressed. This is determined by whether it should be AI with legal personality, the legal/natural person who uses AI or in whose interests AI is acting, or maybe AI itself. This applies in particular to defects in declarations of will that may be evaluated in the same way as in the case of actions undertaken by an agent or representative. The authors pose the question of whether AI possesses „free will” and the capacity for autonomous decision-making. It is essential to establish a standard to determine the extent of „awareness” that defines AI’s free will as a form of cognizance and the ability to autonomously and freely direct its behavior, provided it has sufficient understanding or soundness of mind. The question of verifying the existence of AI „awareness” and „free will” arises, as well as the necessity of such verification in the context of legal persons, including entities, being directed by „human will”, which is fictitiously assigned to them by law. Undoubtedly, in circumstances where AI’s will dominates the decision-making process (i.e., the selection between options), the associated decisions should be legally binding for the entity that owns or uses AI. The authors do not condition the award of personality to AI on the existence of any awareness on its part. However, they are exploring how institutions that refer to „awareness” might be applied in such contexts. The award of personality to AI would create legal consequences for AI itself. Thus, if AI makes a declaration of will, it needs to be determined whether this will have legal consequences and if so, to whom (as a subject) these consequences may be assigned. Recognizing AI as a person makes it possible to assign the consequences of declarations of will to it.

The authors propose defining AI’s free will as the „unhindered competence of deciding” and indicate a set of 10 premises (conditions) that must be collectively fulfilled to achieve it (p.48). They think that AI may possess „free will”. If AI is to be granted legal personality, it must be registered in a relevant register, such as the register of legal persons (companies). This would distinguish AI with legal personality from unregistered AI and determine its legal capacity and competency to undertake legal and civil actions in trade.

In the following chapters the authors indicate that although such individual manifestations of AI's personality should be allowed, AI should be denied full legal personality. This includes identity (the entity's identification), reputation (goodwill), and personal copyrights to intellectual work products. The debate extends to the question of whether AI should be granted ownership rights. The chapter on copyrights includes a detailed discussion of the relationship between AI and these rights. If AI is capable of creation, it seems reasonable to grant it personal copyrights. However, the question of ownership arises, as the authors argue that property copyrights should belong to the „owner” of AI. This chapter also provides a comprehensive list of all possible instruments for the public redistribution of profits derived from AI's creative activities.

The chapter on ownership (of movables and property) focuses on AI as both a subject and an object of property law. While it is clear that AI can be owned by its creator or the entity that uses it, the question of whether it should be subject to property law in full or in part is still up for debate. The authors present three theoretical approaches to the issue of ownership. The first approach suggests that AI should be regarded as a potential owner without any restrictions. Secondly, AI should not be considered a potential owner. Thirdly, AI should have a limited right to acquire ownership or individual rights which are a consequence of ownership. As the authors point out, when AI is the subject of someone's ownership title, there may arise a conflict between the will and power of artificial intelligence and the will of its owner. An interesting question here is whether AI may be a subject of co-ownership? Will the ownership title of AI become the second category right? It is also relevant to consider whether AI should be regarded as a family member or a „slave”, as outlined in Roman law.

In the chapter on contracts, the authors suggest that AI could have the capacity to enter into contracts. However, due to its „special legal capacity”, AI would not have the same level of freedom to enter into contracts as a human. Its competence to enter into agreements, particular types of contracts, and their content would be restricted. Any transgression beyond a defined area would render such contracts ineffective. The question of enforcement in cases where identifying the contractor and their special competency (personality) is difficult arises. If the rule of risk is applied in such a situation, it may be preferable for the entity using or benefiting from AI to be held liable for damages rather than for AI itself to be held responsible, given the potential anonymity of the latter.

The chapter on the abuse of law defines this phenomenon and indicates how it applies to AI in situations where the interests of a human being are protected or where AI is used in such a way that awarding it limited rights is unjustified (e.g. the collusive situations indicated which limit competition between AI).

Finally, the authors discuss liability in the context of Asimov's Laws as a starting point for reflections on AI's liability as defined in the European Parliament resolution of February 16, 2017 on Civil Law Rules on Robotics. It was decided that the EU model proposed was not effective. The most frequently recommended liability model for an AI producer, a person responsible for AI or AI itself is tort liability. Along with the injury caused by AI, which is important from the legal perspective, the chapter analyses the cause-and-effect relationship between AI's operation and the injury caused as well as AI's negligence and standards of behaviour.

The European Parliament resolution of February 16, 2017, serves as the foundation for our reflections on this matter. This resolution includes recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). The development of science has given rise to new entities, such as intelligent robots and artificial intelligence.

The monograph's research objective, which aims to address the fact that the law is „one step behind reality”, should be fully approved. The regulation of AI and robots that may acquire awareness and make independent decisions is essential. This necessitates the allocation of legal effects to these phenomena and the establishment of rules for AI operation and liability. This involves addressing the question of liability for the effects of modern technologies that become autonomous entities (i.e., entities that acquire existence). It seems to be the purpose of the publication. The focus is not just on the effects of liability for injury but also all legal effects of AI's functioning, which is a definite advantage of this work. Maybe AI should be assigned exclusively obligations and if it is granted personality, then only for the purpose of becoming an object of rights and obligations? It is difficult to require from an object in a legal sense to be aware of its existence and be able to have feelings (e.g. emotions). This is not the condition for making AI a subject. However, it may soon occur. The potential for electronic persons (e-persons) – hybrids that combine human and technological capabilities – emerges at the nexus of technology and biology, as exemplified by cyborgs with exoskeletons and instruments that enhance sensory perception and strengthen skills.

The authors' monograph is among the first attempts to comprehensively and systematically determine the legal framework for the functioning of AI, its definition in the legal system and the determination of a model that may be applied to assign partial personality to AI. The authors' primary focus is not on analyzing and collecting existing literature on AI, but rather on proposing a novel and coherent legal concept of AI (p. 6). This publication makes a valuable contribution to the debate on the legal regulation of new technological phenomena (the 4th industrial revolution) in private law based on the European (Roman) law tradition.

It seems there are two approaches to the legal regulation of AI. First, AI regulation may be utilitarian in nature, applying to only certain aspects where it is necessary to define the legal framework for its existence. Alternatively, a uniform and comprehensive model may be adopted, where AI is assigned limited personality. The authors advocate for the latter, asserting that the legal regulation of AI should be coherent and comprehensive. To define the relevant legal framework, it is necessary to take into account some ethical and legal assumptions. If AI is to be regarded as a subject, it may not yet possess the status equivalent to human beings, as its role should be auxiliary. Secondly, one may not forget that in the near future AI may surpass and outstrip human intellectual abilities (artificial existence and feeling, cyborgs, hybrid persons). Thus, there is a potential of emancipation and liberation from the framework, also the legal one, defined for such forms of existence as AI or hybrids of technology and biology (human species) by human beings. The world depicted in the 1982 movie *Blade Runner* (set in 2019) is rapidly approaching reality and may have already entered our world, though many of us are unaware of it. This gives rise to reflections on whether AI will be an independent entity equal to humans or in the long term it will strive for emancipation and domination over the human species in the name of the biological rule of survival and domination (the next link in the chain of evolution, but this time biological and synthetic in one). The self-awareness of AI and the drive for survival could potentially lead to a confrontation between AI and its creator, humanity, who might ultimately lose the upper hand. The student may surpass the master, and the master may be compelled to relinquish their position. Therefore, it is necessary to determine the stringent framework for AI functioning addressed to its creators, users, and AI itself.

The European Parliament's resolution adopted Asimov's Laws as a starting point for legal regulations. These laws provide that (1) a robot (AI) may not injure a human being or through inaction, allow a human being

to come to harm; (2) a robot must obey orders given it by human beings except where such orders would conflict with the First Law; (3) a robot must protect its own existence as long as such protection does not conflict with the First or Second Law (cf. *Runaround* by I. Asimov, 1943); and (4) a robot may not harm humanity, or, by inaction, allow humanity to come to harm. These laws apply both to the creators of AI and robots and to the products of their work.

The European Parliament resolution of May 3, 2022, on artificial intelligence in a digital age (2020/2266(INI)), outlines the fundamental principles of novel AI solutions and their implications for various aspects of life, recognizing the emergence of the fourth industrial revolution.

One may register artificial intelligence and insure oneself against the effects of its activity.

It is a matter of some debate as to whether AI should acquire legal personality by registration (register of entities) or whether all cases of the application of AI should be registered (functional register) with a note that it is an entity – with regard to the cases in which AI is to acquire legal personality. The question of whether this should be carried out by a separate entity, such as the European Agency for Robotics and Artificial Intelligence, is also up for discussion. A more effective solution might be to establish a functional register of robots, cyborgs, or AI, irrespective of their complexity and autonomy. This approach would eliminate the assumption that only advanced forms of AI are subject to registration. One needs to bear in mind that there are legal systems where legal personality may be assigned to investment funds (separated pools of assets) that do not have their own bodies as decisions are made for them by associations (groups) of investment funds. Entities using AI may not always want to reveal this fact. Conversely, they may prefer to conceal it, despite the potential for AI to cause harm. In such cases, it would be prudent to identify the AI and assign liability for any harm caused by its operation to the entities that use it.

It should also be noted that a different concept, i.e., the functional regulation of AI's legal framework, has both advantages and disadvantages. The fact that it is regulated also creates legal problems. These drawbacks include numerous legal loopholes that inevitably arise if the law is becoming slower in catching up with reality and AI.

On the other hand, nowadays it is possible to shape the liability of AI's creator or user (owner, producer or user of AI) for the product. However, the producer's liability for the product will be insufficient inasmuch as AI is able to take its own autonomous decisions and be the creator of AI

(further AI). One solution may be to assign liability to AI itself. This does not eliminate separate tort liability, regardless of AI's capacity under tort law, for the harm caused by AI. This parallel liability of the persons who create or use AI will persist as well. If AI itself is to be held liable, it is essential to define the consequences of this liability with regard to assets, as well as the possibility of suspending harmful or potentially dangerous actions by AI. The least that needs to be done is to develop the rules for the protection of fundamental rights (a right to life, dignity and freedom).

In the EU, the attempts to solve the problem of liability for the harm caused while using artificial intelligence systems involve including AI in liability regulations. This issue is the focus of the proposal for a directive of the European Parliament and the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) of 28.09.2022^[1].

The general rules indicate that product liability is not associated with blame. According to the proposed directive, product liability is defined as a breach of the duty to observe due diligence, as defined by EU or national law, in connection with evidence facilitation. This duty is more extensively defined for high-risk AI, as outlined in the proposal. Liability for AI should not be limited because of the injury type, the way of compensation or the fact that the injury was not caused by a human being. It seems more justified to define liability on the basis of risk combined with the system of mandatory or optional insurance from civil liability for AI. In transborder trade, it seems appropriate to adopt the law of the state where the injury was caused as the governing law for non-contractual liability for a tort or delict.

This novel concept proposed by the authors should be recognized as commendable.

Should any doubts be raised, they are not related to the coherent concept presented but rather to the challenges in defining the framework of AI, its scope of operation, and the risks it poses to humans.

This monograph merits recognition as a valuable resource for legal professionals and legislators, as well as individuals eager to broaden their perspectives and envision potential future scenarios or current realities of which they may not be fully aware. It offers insights into domains that have traditionally been explored within the realm of science fiction. To use the example described by Polish author Stanisław Lem, the story of two brothers who died in a space crash had a happy ending because their lives were saved by uniting their organs in one body. The only entity that asked

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496>.

the question „Who is it?” was the insurance company (lawyers). Who should receive it – brother A, brother B, or creature C? The creation of cyborgs, a new race of human beings integrated with technology, may bring this issue to the fore yet again. Who will this be, how to define their existence and identity? Are they a new race or just „upgraded” human beings? To conclude, this creative and engaging monograph presents bold visions of the future, provoking questions that leave us indifferent. It has also inspired the author of this review to ask philosophical questions about the essence of human existence, its components, the awareness of existence (self-awareness), origin, the ability to feel, the ability and freedom to make decisions, or the level of intelligence. It is possible that we will discover creatures whose intellect (of a biological or synthetic origin) may surpass ours. We may not be aware of their existence, and we may be full of false confidence that there are no such creatures or that they are less perfect than us, humans. Should we deny them personality because they do not come from man? Paradoxically, the war in Ukraine might end as a result of negotiations carried out by AI. AI could evaluate the conditions for the termination in an optimal and objective way, achieving the best possible outcome for both parties. AI could be used to analyze the available information and the positions of each party.



