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Can Historical Jurisprudence Inform the Artificial Intelligence and Law Debate?

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Abstract

The publication of a monograph by Dr Luca Siliquini-Cinelli on the history of *scientia iuris* in which he argues that law is a constructed form of knowledge that differs from experience is not just an important and very learned contribution to historical jurisprudence. The book's thesis is also making an important contribution to the debate about the impact, and probable future impact, of artificial intelligence (AI) on law, legal thought and legal reasoning. In critically reviewing the book, this essay will briefly indicate how and why Dr Siliquini-Cinelli's book is establishing a fundamental relationship between historical jurisprudence (understood as the history of legal thought) and AI.

Keywords: artificial intelligence (AI); epistemology; legal singularity; map; model; philosophy; rule-theorist; territory.

Would it be idle to think that, in a few decades time, law and legal decision-making will not be dispensed by a robot judge? And, if, or when, this phenomenon arrives, what will be the impact, in particular, on legal education and on law as a body of knowledge? Given the recent advances in artificial intelligence (AI), no doubt such robotic judgments will be elegantly written and supported by convincing legal reasoning. Is such a future development to be feared or welcomed? One pressing question is whether law teachers might disappear (Chaumet & Puigelier 2024). Another pressing question is the ontological and epistemological basis upon which such AI is founded. What will inform this ontology and epistemology? A new book by an Italian-trained comparative lawyer, legal philosopher and legal historian impliedly, if not directly, addresses these AI questions through an extremely learned contribution to historical jurisprudence and comparative legal history (Siliquini-Cinelli 2024).

Dr Luca Siliquini-Cinelli's *Scientia Iuris: Knowledge and Experience in Legal Education and Practice from the Late Roman Republic to Artificial Intelligence* (2024) proposes the following thesis. Legal education and legal practice are in crisis and the reason for this crisis is to be found in the distinction between experience and knowledge. The distinction is not recent, says the author; it goes right back to the Roman jurists of the Republican era who began to establish law (*ius*) as a body of constructed knowledge (*scientia iuris*) that could be seen as existing independently from the human experience. The result is "that law is and will increasingly be capable of performing its regulatory function without recurring to the *experiential* medium of legal experts" (2024: 1). And this is because legal education and practice pursue knowledge by employing analytical techniques of reasoning and argumentation that void experience and render it obsolete. The author links all of this to "Prometheus [who] is the god that knows everything in advance ('*pro-mētheús*', '*pro-mathḗs*') and whose thinking moves on a rectilinear plane on which all that exists is effectually commeasured ('*pánt' epistathmṓmenos*', '*pro-ex-epístasthai*') for epistemic purposes" (2024: 124). The book claims "that rather than just being a prerogative of scientific treatments of law, *scientia iuris* lies at the core of, and still defines and directs, the whole of legal education and practice in Civil and Common law jurisdictions" (2024: 126). The author, in the chapters that follow, goes on to trace and to justify the thesis through an extensive and very detailed examination both of the philosophy of knowledge and of the history of legal thought and reasoning.

The author insists that his "take on knowledge and experience is *philosophical*", that is to say "the book argues on philosophical grounds that while experience defines who we are as individuals because it is bound to our own facticity (i.e. experience is and cannot but be factical and finite), knowledge is impersonal and ethereal." And so "while one's experiences are immanent, subjective, and unique, knowledge is *information*—i.e. a metaphysical and sharable end-result of intellectual processes of ontological abstraction that transcend experience's facticity and finiteness" (2024: 2, original emphasis). Dr Siliquini-Cinelli justifies his arguments in the chapters that follow the introduction through a detailed examination of the work of philosophers such as Plato, Aristotle, Husserl, Heidegger, Popper, Siegal, Russell, Agamben and others. There is equally a detailed diachronic analysis and discussion of *scientia iuris* that in terms of the *Prometheus Bound* myth "reveals that law's nature is artifactual because it is a specific social *technique* whose purpose is the *creation* of regulatory (i.e. meaning-assigning and chaos-avoiding)

frameworks *knowable in advance* through which life can be decoded and systematised legally" (2024: 123, original emphasis).

One might say (with some trepidation) that in summary what this work on epistemology is arguing is this. Legal knowledge (*scientia iuris*) is a constructed model of the kind discussed recently by Erica Thompson in *Escape from Model Land* (2022) (although Dr Siliquini-Cinelli refers neither to models nor to Thompson) and that this legal model is highly problematic and will eventually be able to function without the intervention of jurists and lawyers. As the author says: "the teaching, learning, and practice of law have always been dependent upon a form of thinking and language that is both *structured* and *structuring* along rational and cognitivist lines, of which logical and analogical forms of validation as well as conceptual representationalism are the protagonists" (2024: 149-150, original emphasis). This suggests an epistemic "model", although the author would no doubt prefer the term "philosophy". It is a model that nevertheless raises an epistemic problem: what is it modelling? Is it modelling something independent of the model—something "out there" (*res*)—or is it modelling a psychological model that is inherent in the mind (*intellectus*)? Or is it modelling another model: is it a model of a model?

This question can be put another way. Is a civil code (for example the *Code civil* or the *Bürgerliches Gesetzbuch*) a model that is attempting to model social reality (the code is the scientific model while social reality is the object) or is the reality completely absorbed by the model? This is the old map and territory argument (on which see Mathieu 2014). Is a code a "map" that is actually mapping an objective "territory" or is the map actually the territory itself? If a jurist goes on to assert that ontologically law consists of a set of rules (see, for example, Eisenberg 2022), then even in a non-codified legal system the set of rules is nothing but a model. That is to say, social reality is being fashioned by the text of the rule rather than by some other model—one thinks of the recent legislation declaring Rwanda as a safe country irrespective of the reality on the ground so to speak (Safety of Rwanda (Asylum and Immigration) Act 2024, section 2(1)).

This is an issue that lies at the heart of the AI debate. One assumption in this debate is the notion of "legal singularity" which is described as "a version of a complete legal system, overseen by a superhuman intelligence" whereby such "a system is premised on the possibility of the perfect enforcement of legal rights" (Deakin & Markou 2020: 27). In other words one feeds into the AI machine a "singularity" code of rules which will then act as the programme for deciding legal cases, an idea that

reaches back to the *mos mathematicus* jurists and was the dream of the original European codifiers. But such a code will map not just the rules but equally the social facts; it will model the whole of these social facts via the rules "as if" they are reality, thus giving a renewed life arguably to the fiction theory of law (Jones 1940: 164-186).

It is this kind of problem that motivates Dr Siliquini-Cinelli's project and gives it a relevance that cannot be ignored. It is not just computer scientists that are the problem; historical jurisprudence is just as much to blame in that the ever more rationalising tendencies from republican Roman law to the Pandectists have helped create the myth of a "legal singularity", often under the guise of legal positivism. The challenge, of course, is to offer an alternative model to the one proposed by convinced rule theorists such as Eisenberg (2022) and by the legal singularity school. How is legal reasoning to be modelled? Dr Siliquini-Cinelli proposes "experience". The problem, he says, is that "knowledge phenomenologically equalises the targets of its reach for regulative and structuralising purposes, thus emptying both their factical immanency and unpredictability of their interaction" (2024: 130). Perhaps this is true, but it still leaves open the question of how one models experience for reasoning purposes. One is reminded of Felix Cohen's well-known 1935 article attacking the (in effect) Pandectic notion of *scientia iuris* as nothing but transcendental nonsense (Cohen 1935). This Cohen article is more than convincing in its "deconstruction" (as one would say today) of conceptualism in law but, when it comes to the alternative functional approach, there is a feeling that such an approach is not completely thought through. Functionalism is a much more complex scheme of intelligibility than it might seem.

One might also reflect on how judges are supposed to reason. Are we, for example, supposed to applaud Lawton LJ's approach to interpretation in the case of *Young v Sun Alliance Insurance* (1977) when he declares that an elephant is difficult to define (science?) but easy to recognize (experience?)? The problem here with any subjective experience thesis is that if care is not taken, it gets dangerously close to the judicial "intuition" theory derided (rightfully) by Ronald Dworkin (1986: 10-11). Given the number of rather odd decisions made on occasions by United Kingdom senior judges, some might argue that an approach based on knowledge rather than on (so-called) experience might not be a bad thing. As for law teachers, how might they go about discussing, on the basis of experience, the Roman law situations set out in, say, *Digest* 9.2.52.2, D.19.2.31 and/or D.41.1.55? It may be, then, that the author might wish to give some further guidance on how the experience theory translates into practical

reasoning (although, in fairness, the author's discussion of Twining in chapter 6 is helpful in this respect).

Dr Siliquini-Cinelli's thesis is a challenging one. The author recognizes that his thesis may attract criticism and he attempts to counter several of the objections in the introduction (2024: 58-62). Some, however, may not be entirely comfortable with this critique of legal knowledge in favour of some kind of epistemology founded on "experience" for other reasons. There is a possibility of opening the door to conspiracy-theory ideas about the dangers of European rationalism. Of course, one can be sure that this is far from the mind of the author who is rightly concerned about the state of legal education and the encroachment of AI into the field of legal decision-making. Yet the thesis is open to an interpretation that is suggesting an "irrational" view of the world. (The position is not helped by Heidegger's links to fascism.) "Experiences," says the author, "by contrast, are inherently subjective and unique" and so "cannot be replicated from one subject to another" (2024: 3). Moreover, says Dr Siliquini-Cinelli, "knowledge is independent of truth" (2024: 380). This, of course, begs a question of what amounts to "truth", a notion for some that might best be avoided. Or, failing that, others might say that there is such a thing as "truth"; it is just that we cannot access it directly, only through sophisticated "knowledge" models. The author would no doubt counter that this is a misreading of what he is trying to do. The point, however, is that there are statements—perhaps inevitable given the complexity of what the author is trying to do—that are open to a misreading which has been encouraged by what some might regard as an "anti-science" stance.

One final point must be mentioned: the book has no index. This is obviously an inconvenience, but, arguably, it is more than that. "The ideal index", writes Dennis Duncan, "anticipates how a book will be read, how it will be *used*, and quietly, expertly provides a map for these purposes" (2021: 17). As has been argued elsewhere, an index is an epistemological model in itself that operates quite differently from the kind of rationalized knowledge models that Dr Siliquini-Cinelli attacks in his book (see Samuel 2011). If ever there was a model that brought "knowledge" face to face with empiricism (experience?) it is surely the alphabetically arranged detailed index. It is an "X-ray" of the book's content where "duty" can find itself juxtaposed with "duck" and "right" with "road", not to mention "Thatcher, Margaret" with "theft" (see further Duncan 2021: 203). Indeed, rethinking a number of "contract" and "tort" cases seen from the viewpoint of, say, "family" may actually offer some "experience" insights into the outcome of several cases that are normally analysed only through the positive rules of private law as coherently arranged by the *scientia iuris* mind. An

index is always an antidote to "antifactuality", and so its absence is a real cause for regret. As Dennis Duncan reminds us, *Qui scit ubi sit scientia habendi est proximus*, but of course the search for knowledge (*scientia*) may not be to Dr Siliquini-Cinelli's liking. What about, then, *Qui scit ubi sit experientia habendi est proximus*?

About the author

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