

Bestowing Legal Personality on AI: A South African Perspective

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Abstract.

Granting legal status to Artificial intelligence (AI) could address much of the uncertainty that currently surrounds accountability and liability of AI systems. As AI lacks sentience and expression of its own will, it cannot be deemed a natural person however juristic or legal personality may possibly be imposed on it. Consideration of the South African common law requirements for juristic personality suggest that AI as a non-human entity meets the prerequisites and consequently should be bestowed with juristic personality in the same way it is bestowed on companies and similar corporations. The research argues that AI meets the South African common law requirements for bestowing juristic personality on non-human entities and postulates that on this basis the South African Companies Act may serve as the primary guiding legislation on which basis a specific AI statute and associated regulations may be drafted and entrenched. By means of a doctrinal desktop study this research considers arguments for and against bestowing juristic personality on AI systems and argues in favour of juristic personality being bestowed on AI discussing the potential benefits that may arise from same. The research by no means attempts to provide a definitive answer to the questions posed but seeks to stimulate academic discussions and contribute to the existing body of knowledge exploring the legal status of AI from a uniquely South African perspective.

Keywords: Artificial Intelligence, Juristic Person, Companies Act 71 of 2008.

1 Introduction

Artificial Intelligence (AI) has infiltrated every aspect of personal and commercial life [1]. It has evolved to become a necessary commodity in business transactions and activities, required to increase productivity, profit and competitive market share [2]. 78% of companies worldwide have confirmed their use of artificial intelligence in at least one business function, up 6% from what was reported during 2024 and up 23% from what was reported in 2023 [3]. In South Africa the most recent study by World Wide Worx has confirmed that 90% of participating respondents currently use or intend to use generative AI in their business operations, confirming that the adoption of generative AI in South Africa is a catalyst for innovation and growth [4]. However, despite the efficiency and productivity that AI provides in a business environment, it remains significantly unregulated in South Africa. To date no legislative provisions regulating

AI has been promulgated in South Africa. Only a policy framework [5] and an AI National Government Summit Discussion Document [6] have been published and a process to obtain inputs for a national AI plan have been launched.[7]

The limited regulation of AI is problematic given the uncertainty that arises in respect of ensuring its proper development and deployment, allocating creative ownership and copyright where it generates novel literary, artistic or musical works and imposing liability and accountability where harm should be caused through or by it. The latter is of primary concern given the tendency of generative AI systems to hallucinate and provide false information, on which reliance could have severe negative consequences resulting in monetary or reputational loss, harm or damage. The far-reaching negative consequences of AI has recently been evidenced in three reported South African court judgments where three attorney firms, on separate and unrelated instances, blindly relied on an AI system to draft court documents without fact checking the AI system output, which contained false law precedents [8]. This resulted in the relevant firms being penalised for misleading the court. This not only holds reputational damage for the relevant attorney firms but also translates into additional monetary damage suffered by the client given wasted and consequent delayed legal proceedings. Similar harmful consequences of AI have been witnessed in the USA where legal briefs with fake citations have also been seen along with the AI system CHATGPT wrongfully accusing a professor of sexual assault [9].

It is clear that as AI is increasingly affecting our lives, our legal systems are late in providing appropriate regulations either through amendment of existing laws and legal systems or in entrenching new laws and systems to appropriately govern and regulate AI [10]. The obstructive uncertainty, specifically in respect of liability and accountability for loss, harm or damage caused by AI, could possibly be addressed by assigning legal status to AI necessitating only a slight amendment of our existing laws.

As AI refers to intelligence demonstrated by machines, distinct from the intelligence demonstrated by humans and animals which involves consciousness, self-awareness and emotionality [11], AI cannot be deemed a natural person as only humans can be assigned such title. However, the question then arises as to whether we may assign juristic personality to AI and what effect or consequence this may have.

Consideration of the South African common law requirements for juristic personality suggest that AI as a non-human entity meets the prerequisites and consequently should be bestowed with juristic personality in the same manner in which it is bestowed on companies and similar corporations. This in turn begs the question that if AI is deemed a juristic person, whether the existing Companies Act 71 of 2008 may serve as a guiding legal framework for the drafting of an appropriate statute regulating AI in South Africa.

A definition of AI will firstly be introduced to demonstrate what is meant by AI in today's terms differentiating realistic AI from science fiction. This will be followed by

a differentiation between natural and juristic personality, with confirmation of what the consequences and effects of juristic personality is and on what non-human entities it can and has been bestowed on. Hereafter the South African common law requirements for bestowing juristic personality will be discussed, with arguments in favour of bestowing AI with juristic personality being set out. This will be followed by considering the extent to which the South African Companies Act 71 of 2008 may serve as a guiding legal framework for the drafting of a uniquely South African AI statute.

2 Research Methodology

The research paper adopts a qualitative, doctrinal desktop study. Through in-depth review of various scholarly articles, research papers, conference papers and existing guidelines, common patterns in arguments presented for and against granting juristic (legal) personality to AI have been identified and are set out herein. Whereafter through a process of deductive reasoning based on the review of the sources as described and consideration of common law precedents and theories on juristic personality, the research question is sought to be addressed and future research possibilities confirmed.

Limitations of the research must be acknowledged. Given the significant pace at which AI is continuously being developed and deployed, the research undertaken now and arguments presented herein may be obsolete within a couple of years or even months after conclusion hereof. Furthermore, the lack of a universal definition of AI and of what 'personhood' entails given different foreign jurisdictions and legal systems also limit the extent to which the arguments may be deemed applicable or acceptable to specific jurisdictions and legal systems. It is additionally noted that the challenges, risks and liabilities that may arise from AI use and development are extensive and far reaching. However, discussion and consideration of all nuances associated and arising from AI use and development is beyond the scope of this research and consequently only specific aspects related to the accountability and liabilities arising from AI are discussed herein.

Consequently, this research by no means attempts to provide an all-encompassing discussion on AI or provide a definitive answer to the questions posed but simply seeks to stimulate academic discussions and contribute to the existing body of knowledge exploring the legal status of AI from a uniquely South African perspective.

3 Defining AI

Despite reasonable and practical explanations advocating for a universally accepted definition of AI, there is no uniform, globally accepted definition of AI [12][13]. AI is generally accepted to refer to machines or computers that display cognitive abilities required to perform tasks and activities that generally require human intelligence including but not limited to learning, problem solving, perception, language understanding, decision making, logic, thought and reason [14].

AI systems can be divided into three broad categories dependent on their capacities and level of autonomy. The AI we encounter today is generally known as weak AI, which are AI systems designed to perform specific tasks within a specified domain. These systems do not possess general intelligence or the ability to perform tasks or activities beyond what they are programmed to do [14]. General AI, also known as strong AI, is currently only hypothetical and refers to systems that possess human level intelligence and the ability to learn and perform various tasks across a range of different domains [14]. Similarly, Autonomous AI, currently only a future notion, are AI systems capable of operating completely independently without human oversight or intervention, making decisions and taking actions without human control or interference [14]. Currently strong and autonomous AI remain hypotheticals while weak AI is the reality of AI we see today. AI is not capable of independent thought or consciousness and is limited to performing specific tasks within specified domains as per its programming.

It should be noted that the term AI is often used incorrectly. Contrary to the manner in which reference is made to AI, AI is not itself a computer, machine or agent but is the term assigned to various ‘intelligent’ systems, that is processes embodied within technology. AI is an umbrella term the same way in which ‘fruit’ is the umbrella term for various fruits such as apple, banana, orange, pear, pineapple [15][16]. Consequently, AI encompasses a diverse set of approaches and techniques made up of algorithms that enable machines, computers and similar technology to perform tasks that traditionally require human cognitive ability and intelligence [17]. AI, a branch of computer science, is in simple terms various algorithms, which are instructions and rules formulated by programmers, that enable a computer (or robot controlled by a computer) to mimic human intelligence.

Reference to AI today generally refers to machine learning [17]. Simply, machine learning refers to layers of algorithmic instructions according to which vast quantities of data and inputs are processed, identified and sorted, extracting structured data from unstructured data. Based on data that is incorporated, algorithmic formulations of the AI are effectively trained on identifying patterns and commonalities in the data provided and from which, based on statistics, it is then able to make predictions and identify the next pattern or word. This allows it to predict an output that is statistically correct, mimicking the thinking of a natural human being and creating the impression that it possesses cognitive abilities [18].

Machine learning is often used interchangeably with deep learning. However, deep learning is a sub-category of machine learning, with the “deep” of deep learning referring ultimately to the extensive layers of interconnected neural networks which make up machine learning and through which algorithms are trained. The deeper the deep learning the less human involvement is required and better the ability of the AI to itself acquire its own input data and sort same.

However, a computer or machine cannot understand natural human language. Computers and machines communicate using artificially created, specialised formal languages, that are highly constrained, mathematically structured algorithms, such as Python or Javascript [19]. The languages are created specifically for unambiguous mechanical interpretation and thus are very limited in what they can express or convey in terms of the complexity and nuance of real word ideas or phenomena in comparison to natural human languages [19].

Natural language processing, an interdisciplinary field of study combining linguistics with computer science, and a subfield of AI, has provided computers and machines with the ability to ‘understand’ spoken and written human language by treating language as data and identifying statistical matches to specific patterns, [19] translating a limited range of formal programming instructions into known and determinate computational actions and executes them [19]. Nevertheless, a significant limitation of natural language processing is its inability to grasp the underlying, ambiguous meaning of words [19].

This is where large language models, a subfield of natural language processing, becomes important. Large language models are AI systems designed to understand and generate human language [19]. Large language models, a subset of natural language processing, consists of neural networks that are trained to understand and predict human language by learning language patterns and structures [20][21]. Given the layers of neural networks, it is also deemed to be a subset of machine learning and consequently also a subset of deep learning [22][23]. The large language model uses copious amounts of text data as its input and on which basis it statistically determines the most likely word to follow another word enabling it to accurately predict what word would follow [22][23]. In its most basic form, it is a glorified word predictor. With large language models, AI systems are able to grasp the syntactical variation, semantic ambiguity and abstract complexity that is typically part of natural human language [19]. Additionally through machine learning it is able to improve its accuracy and eventually predict not only the next word that would follow but what sentence, paragraph or full content would follow, thereby generating new output similar but different to the input data, in natural language writing, thereby generating content that looks like human generated content [22][23][24][25].

Large language models form the operational basis of generative AI’s. Generative AI, also known as Gen AI [20], is an umbrella term of AI systems that are associated with human creativity with the term ‘generative’ serving to demarcate the purpose of the system as being focused on human creativity [19]. Generative AI makes use of a combination of machine learning, deep learning and its neural networks together with natural language processing and its large language models to generate novel content from the vast quantity of unlabeled data, and some labelled data, on which it has been trained based on a prompt or request provided by a user [26]. The output serves as the answer to the user prompt or request and may be anything from legal document to lyrics to a song to a recipe based on the contents of a fridge [27].

Large language models can effectively create and understand complex written language texts such as research papers, fictional stories, reasoning puzzles and newspapers [19]. Apart from its text analysis abilities it is also capable of synthesizing and reasoning about facts and the physical world, problem solve with abstract ideas and notions and work with modalities beyond text including images, sound and video [19]. This is then combined with natural language processing, which allows a computer to understand text and spoken words as a natural person would [28][29].

Consequently, reference to AI within this research should be understood as reference to large language models, as narrow AI that through deep learning, natural language processing and layers of neural networks generate and understand novel content, mimicking human intelligence, appearing to think critically, problem solve, make decisions, rationalize, learn, and plan.

4 Personality Types – Natural v Juristic Personality

Most western legal systems differentiate between natural personality and juristic personality which is said to be encompassed within legal personality. Legal personality is explained by Smith (1928 Yale Law Journal) as follows: “to be a legal person is to be subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality” [30][31]. Natural personality is bestowed on natural persons, that is all human beings, automatically from birth until death and is focused on the protection of fundamental human rights [30][31]. Juristic personality is bestowed in terms of statute on non-human entities such as companies and similar association of persons; from the moment their incorporation is registered in terms of law until they are deregistered. Juristic personality is imposed for practicality and legal security onto entities such as businesses, organisations or corporations which have been granted title of “legal person” artificially by humans to allow those entities to exist and exercise their own rights and obligations [30][31].

The question on whether juristic personality should be bestowed on AI in a highly contested debate that has a clear divide between those in favour and those against it [32]. One school of thought argues that AI will eventually reach a point where it surpasses human intelligence and consequently should be granted rights and obligations like what is granted to companies as juristic persons [10]. On the opposing side it is argued that as AI is the outcome of human programming, AI lacks autonomy and free will and consequently it should not be recognised as a juristic person [10].

Reasons for granting juristic personality to non-human entities such as companies and similar corporations include providing them with separate legal existence to enable them to hold rights and duties in their own names. Additionally, by affording juristic personality to companies and corporations it permits people to engage directly or contract with the company as an establishment as opposed to the various individuals

associated with it. This establishes a direct line of contact, making it easier for liability to be imposed where fault should arise. Furthermore, bestowing juristic personality on companies ensures better and more efficient facilitation of transactions, managing assets and debts, bookkeeping, tax duties and administration of bank accounts. Also, by bestowing juristic personality on companies a separate individual and independent entity is introduced that will be directly liable where loss or damage should be caused. Moreover, bestowing juristic personality on companies ensure there is no suspension or disruption in economic activities due to a change in the individuals associated with it such as may arise by reason of death or resignation, which in turn provides for greater trust and legal security in the market and in society [31].

The arguments set out above may serve as valid arguments raised in favour of bestowing juristic personality on AI systems. Reasons for granting juristic personality to AI, a non-human entity, includes providing them with separate legal existence to enable them to hold rights and duties in their own names. Additionally, by affording juristic personality to AI, it permits people to engage directly or contract with the AI itself as a person as opposed to the various individuals associated with it. This establishes a direct line of contact, making it easier for liability to be imposed where fault should arise. Furthermore, bestowing juristic personality on AI may further ensure better and more efficient facilitation of AI transactions, management of AI's assets and debts, bookkeeping, tax duties and administration of its bank accounts. Also, by bestowing juristic personality on AI a separate individual and independent entity is introduced that will be directly liable where loss or damage should be caused. Moreover, bestowing juristic personality on AI may serve to ensure there is no suspension or disruption in economic activities due to a change in the individuals associated with it, which in turn provides for greater trust and legal security in the market and in society [31].

It should be noted that bestowing legal personality on non-human entities is not unheard of and has in recent years increasingly been recognised in different legal systems. Apart from natural and juristic personality, the concept of environmental personality has also recently been recognised in some Western legal systems. Environmental personality is like juristic personality, in the sense that it entails bestowing legal personality on non-human entities, that is elements of nature. This is done so that certain rights may be attributed to the natural entities so as to enable persons and advocacy groups to act on their behalf in their preservation and safe keeping without incurring problems regarding legal standing, bestowing legal rights and executing legal duties and obligations [31]. This has been seen in New Zealand where legal personality has been bestowed on a national park, Te Urewera, and a river, Whanganui, through legislation. Similarly in USA, Lake Erie has been bestowed with legal personality to enable residents to institute legal action against polluters on the lake's behalf [31]. While legal personality has been conferred on temples and the Ganges and Yamuna rivers [33] in India and an entire ecosystem in Ecuador [34].

The so called "environmental personality" serves to counter the power balance between governments and nature, permitting principles and provisions of private law to

apply to nature as opposed to only administrative environmental law alone being applicable or relied on to preserve these natural entities. This means, as has been seen with Lake Erie in USA, that through applicable private laws, residents, non-governmental agencies and advocacy groups are permitted to institute legal action in the name of the specific natural entity to protect it against dangerous or pollutive activities. The natural entities, bestowed with legal personality, are recognised as separate independent entities that are afforded rights such as protection and preservation. However, liability, obligations and duties cannot be bequeathed to these entities alone and effectively require human agents to discharge duties imposed on such natural entities [13][31]. The same is required with juristic personality of companies where company rights are enforced and duties are executed on the company's behalf by a board of natural human directors.

Consequently, the personality granted to the natural entities serves as a pretence to address problems over legal standing and ability to institute legal action. By affording personality to certain natural entities, it enables human individuals to act on behalf of the non-human rights holder rather than requiring it to establish standing in its own capacity [34]. Granting juristic personality to AI would have the same effect but in reverse. It would allow individuals to hold AI liable and accountable for harm caused by or through its use by holding AI to certain specific legal duties deemed executable by the individuals associated with it, without having to prove legal standing and capacity.

5 Arguments for imposing juristic personality on AI

There are several reasons why it would be beneficial to extend juristic personality to AI.

Firstly, by bestowing juristic personality on AI it creates the opportunity for establishing a legal framework in terms of which AI can be held liable for harm or damage caused by it [14]. Currently there is a lack of accountability attributable to a person in so far as AI is concerned as, determining who had control over the outcome of AI becomes increasingly difficult the more autonomous the AI system becomes. In terms of the Law of Delict liability is imposed for harm or damage arising from fault or negligence, however the more autonomous AI systems become the harder it is to foresee what the outcomes of their actions may be, making it more difficult to determine what would constitute fault in such circumstances. Where a person cannot predict harm or had no control over conduct causing harm, liability cannot be imposed unless strict liability applies. Whether strict liability may apply to the developers and manufacturers of AI is currently debated in academia but unfortunately discussions on same is beyond the scope of this research. Bestowing juristic personality on AI will ensure that end users who may suffer harm, loss or damage from the AI use would have a specific entity from which damages could be claimed in the same manner as is done with Companies as a juristic person today [35].

Secondly if juristic personality is bestowed onto AI, it will allow AI to directly participate in legal transactions such as contract conclusion and property ownership. The AI will itself be a named party to the contract or transaction, giving rise to rights and duties that vest in the AI itself. This will provide for the streamlining of legal transactions as it reduces ambiguity as to who should bear rights and obligations. The parties directly affected by the transaction will be limited to the named entities and not subject to individuals entering transactions or concluding contracts in their own name but for the benefit of another. Additionally, should juristic personality be bestowed on AI the AI itself may enter contracts and transactions reducing the extent of human intervention required. Both aspects will lead to greater efficiency and economic growth [14]. Granting AI juristic personality would streamline legal transactions because it provides a single legal identity for AI, ensuring contracts, liability, and compliance can be attributed directly to the AI itself as a named party in the contract or transaction.

Thirdly it will permit AI to own intellectual property in terms of the content it generates which could include artwork, designs, patents and other financially valuable outputs [31]. The latter may serve as the patrimony from which claims for loss or compensation could be paid, further addressing the liability gap that currently exists with AI.

Fourthly, by affording AI legal status, AI itself will be incorporated into existing legal frameworks, which enables existing legal frameworks to directly address emerging issues and challenges associated with AI use as and when they arise, countering the reactive as opposed to proactive nature of legislation and law making [14]. Additionally it should be kept in mind that as we have an existing legal frameworks (statutes, regulations and case law) across various branches of law that regulate juristic persons and juristic personality, should AI be deemed endowed with juristic personality, flexibility is provided in our existing legal systems in terms of which each field of law will have the freedom to assess the legal issues posed by AI within its own boundaries, subject to its own specific statutes and regulations, requiring only slight amendments as opposed to entrenchment of completely new laws [35].

Lastly, as investors are risk adverse, they are more likely to invest capital if there is certainty as to how AI will be regulated, who will bear liability and how disputes will be resolved. The incorporation of AI into our current legal systems will provide greater certainty, providing predictability boosting investor confidence and ultimately encouraging innovation and economic growth. Consequently, the legal recognition of AI could provide a foundation for increased investment and collaboration which in turn could lead to creation of new industries and markets centred around AI, promoting economic growth and employment opportunities [14].

Consequently, if juristic personality is bestowed on AI, AI would be deemed separate and independent person, possessing the ability to hold its own rights and duties, own its own assets and revenue and be liable for its own debts and liabilities. Being deemed to be an independent 'person' in its own right, means AI would be deemed to have the capacity to enter contracts in its own name and hold rights and duties separate

from its owners, developers, manufacturers or users. This would enable AI to enter contracts in terms of which it would acquire property and associated assets, which in turn would represent the proprietary pool from which damages and compensation for harm or loss caused could be paid by the AI itself.

6 Arguments against imposing juristic personality on AI

However, despite arguments in favour of bestowing juristic personality on AI, AI is deemed perilous to human beings given its role and functionality in surveillance, profiling, manipulation, job losses, automatization of important decisions regarding health and well-being and potential breach of privacy [31]. Consequently, most scholars reject the idea of granting personality to AI as granting personality is deemed to be dangerous and contrary to human interest [31].

Granting juristic personality to AI raises ethical concerns in so far as AI rights may conflict with human rights. For example, property rights and rights to participate and enter legal transactions could lead to situations where AI effectively competes with humans for land, water, power and resources alike, resulting in potential harm to human beings [14].

Additionally, it is said that big technology and AI companies could evade liability by transferring risks and liability to AI systems itself were AI systems to be bestowed with juristic personality [10]. It is argued that bestowing juristic personality onto AI would present a means by which manufacturers, developers and producers of AI may externalize risk and evade liability by holding AI directly accountable for loss and damage [31]. The same way the juristic personality is abused where companies are used to facilitate illegal activities in the company's name and not the names of shareholders or directors. This would ultimately serve to weaken the market incentives to comply with safety standards and regulations [31]. Opponents argue that it would better serve liability claims and claims for damages by imposing liability and accountability directly on the creators, operators and owners of AI as opposed to the AI itself as a juristic person [14][31]. It is said that imposing responsibility on the human agents behind AI would serve to ensure that liability is appropriately placed on those that have the power to control and influence the AI system itself [14][31].

This argument however disregards the so-called black box effect of AI. Certain characteristics of AI such as complexity, opacity, machine learning and autonomous decision making make it difficult to understand how AI systems work and function in all instances. In some instances, even the AI system developer does not know how a certain outcome or output produced by AI has been achieved. This is known as the black box effect [31]. Due to this black box effect limiting the system developer's knowledge and understanding on how a certain outcome or output produced by AI was achieved, liability cannot be imposed as liability cannot be imposed where the owner has limited

foresight, knowledge or control over the AI conduct. This hinders imposing liability for harm or loss caused and raises potential obstacles in establishing causation [13].

Additionally, AI systems are often developed and designed by way of collaboration between researchers, engineers, programmers and designers making it difficult to identifying a specific individual to whom liability may be attributed as it is difficult to determine whose actions caused the resultant harm that may arise through the AI use. Loss or harm arising from AI may be due to any number of reasons, including but not limited to faulty design, error in coding of AI, defective sensors, incompatible software updates, fault or negligent human oversight, improper use of AI or inappropriate or outdated data for training [31]. Who should bear liability remains uncertain. Given the complexity, opacity, connectivity and autonomy of AI systems it would make it very difficult in practice to trace back a specific harmful action of an AI system to a specific human agent input or decision [35].

Ultimately, end users of AI would be better served where juristic personality is bestowed on AI thereby providing a one on one relationship between the AI system and end user, "...whereby the AI [system] effect that affects them visibly is caused by a specific entity..", being the AI system itself which is bestowed with juristic personality and thus is deemed to be a named party to the transactions [35]. This will ensure that the end user has clarity against whom legal action should be imposed should harm, loss or damage arise. This would enhance liability as the confusion that arises where there is a mass of multinational organizations and stakeholders involved in a transaction and who should bear liability would effectively be avoided. The AI system could itself be held directly liable and legal action would be instituted against the AI itself, in the name of the AI as opposed to a victim having to determine against which individual in a mass of multinational organizations and various stakeholders involved in AI manufacturing, development and deployment committed a wrongful or harmful act that caused the harm or loss and in whose name legal action should be instituted.

Apart from the potential conflict of interest and rights between AI and humans and manufacturers, developers and owners evading risk and liability, it is additionally argued that juristic personality should not be imposed on AI as any claims for loss or damage caused by AI would be limited to the value of the AI system itself. It is contended that imposing juristic personality on AI for purposes of establishing a framework by which AI can itself be held liable for loss or damage caused is without merit as damage claims against AI would be limited to the revenue earned by the AI system or to value of the AI system itself. It is argued that this value would be reduced to very little given that the developers, manufacturers and producers would most likely draw profits from the AI as remuneration for their time and effort in developing and making the AI function effectively [31].

Additionally, it is argued that as AI lacks consciousness, emotions and subjective experiences it should not be bestowed with juristic personality as these characteristics are unique to legal personality. It is argued that bestowing legal personality on AI,

which lacks the essential characteristics of persons, would ultimately serve to devalue the concept of legal personality and would be inappropriate [14]. However, it should be kept in mind that human consciousness or will is not a prerequisite for juristic personality as same is not required or deemed a relevant criterion in terms of our laws granting juristic personality to corporations, companies and similar associations of persons [14] who have no 'soul to damn'.

Lastly it is argued that bestowing legal personality onto AI would serve to introduce complexity into existing legal systems and laws as it would require development of new legal concepts and principles not previously encountered or provided for, which would need to be unique to address the characteristics and capabilities of AI systems. This could lead to confusion and uncertainty for enforcement of existing laws and regulations [13][31]. Consequently, it is argued that new laws should be enacted to cater for the unique characteristics and capabilities of AI as existing legal provisions would not be sufficient to appropriately govern AI.

The latter argument is however in direct conflict with the solutions proposed by existing scholars who argue against granting juristic personality to AI systems directly. The opponents argue that existing laws can and should be amended and extended to address liability, loss and harm caused by AI without bestowing it with juristic personality [31], saying that existing laws can be amended to appropriately govern AI. It is argued that legal personality need not be conferred to AI as promulgating stricter safety requirements and standards and amending or extending existing laws to address and cover AI related damage or harm, would be the better option than bestowing AI with legal personality for the sole purpose of addressing the liability and accountability gap [31]. This is however in direct conflict to the above argument arguing that bestowing juristic personality on AI would lead to too much confusion given our existing legal systems and consequently new laws should be enacted.

Although these arguments are raised against bestowing juristic personality on AI, the same arguments could be raised in opposing the granting of juristic personality to companies and corporations. Companies, as juristic persons, directly compete with humans for land, water, power and resources alike. Similarly, a company's juristic personality has and is abused and used by its owners to evade liability, externalizing risk for illegal activities that cause harm and damage through its actions. Furthermore, claims for damages against companies are limited to the net value of the company, which could be a negligible amount given that owners and investors will draw from company profits and assets as remuneration and as return on their investments. Lastly it is conceivable that existing laws could be amended and extended to appropriately regulate companies as opposed to bestowing it with juristic personality itself. Even though the same arguments raised against bestowing juristic personality on AI can be raised against bestowing juristic personality on companies and similar corporations, the latter has been recognised and formed part of our legal system for many centuries despite the counter arguments raised [31][36].

From the above it is clear that the arguments against imposing juristic personality on AI contradict each other. Additionally, given the fact that the same arguments against imposing juristic personality on AI could be raised against imposing juristic personality on companies and corporations, it can be contended that arguments against bestowing AI with juristic personality lacks pragmatism and credibility.

7 Juristic Personality: Common Law in South Africa

A juristic person refers to a social entity or association of persons that is deemed to have an independent right of existence, enabling it to be the bearer of judicial capacities such as holding subjective rights and bearing legal obligations in its own right and name [36]. Before a social entity or association of persons can be deemed to be a juristic person, certain formalities as set out in the South African law must be met.

Having regard to these formalities, juristic persons can be divided into three groups: Firstly, organisations that can only be established by permission of the government where the organisations existence and capacity to act as a legal subject is regulated and governed by statute. This will generally include organisations of national interest such as EKSOM which was established as a juristic person in terms of the Electricity Act 41 of 1987 [36].

The second category of juristic persons is managed by government in the interests of society however the executive need not approve its incorporation as with the first category [36]. These associations need only register in terms of the relevant statute. This would include organisations incorporated for purposes of generating profit which must be registered in terms of the Companies Act 71 of 2008. The nature of the organisation will determine under which statute registration of the incorporation must be affected.

The final group of associations classified as juristic persons exist as such not due to government intervention but since they meet the common law requirements for the establishment of a juristic person [36].

The common law requirements include [36]: the entity must continue to exist despite changes in its members and must thus possess perpetual succession. Additionally, the entity should be the bearer of its own rights and duties, separate and distinct from the rights and duties of the individuals behind it and should possess or have the capacity to possess its own property. Lastly the entity should strive toward a legal, predetermined goal.

Legal conditions for juristic personality are provided for purposes of ensuring public order, providing for regulation of the market, safeguarding commercial efficiency, and appropriate allocation of risk, liability and legal security [31]. The same could be achieved were AI to be bestowed with juristic personality.

Accepting that any entity that meets the common law requirements of juristic personality may be bestowed with same through operation of the common law, it can be argued that any entity that has perpetual succession, is the bearer of rights and duties, can own or has the capacity to own property and which strives toward a pre-determined goal may be deemed to be a juristic person.

8 Application Common Law Requirements to AI

An “entity” is defined as “a thing with distinct and independent existence” [37]. AI is, by its very nature, an entity that exists independently and distinctly as a tangible or intangible component of a systems processes and thus is not regarded as being part of any person. Much like a computer, it is an object, a thing, that possesses its own separate and independent existence. AI furthermore possess perpetual succession as its continued existence is not dependent on one specific user or developer but can continue to exist irrespective of changes in users or developers. AI furthermore has recently been recognized as having the capacity to own intellectual property with DABUS, an AI system, being awarded a patent by the South Africa’s Patent Office (SAPO) who operates under the patronages of the Companies and Intellectual Property Commission (CIPC), the regulatory body regulating enforcement and compliance of the South African Companies Act 71 of 2008 [38]. AI is also programmed toward achieving a pre-determined goal, which is to enhance the thinking, creativity and productivity of its users. Consequently, the only requirement that cannot be directly met at present by AI is its ability to bear rights and duties. However, considering AI’s ability to own intellectual property, as we have seen with DABUS, it implies that it can be the bearer of rights and duties and thus all requirements are met for juristic personality to be bestowed on it.

If juristic personality is bestowed on AI, the AI would itself be deemed to be a juristic person separate and independent of its developers and programmers. It would hold its own rights and duties separate from those of its developers and programmers, and it would own its own property and be liable for its own debts and liabilities. Lastly should any wrong be committed against it, it would be for the AI itself to proceed with legal action and not its developers or programmers.

9 AI under the Companies Act – Legislative Analogy

AI, like a company, can be conceptualised as a juristic person constructed from many individual contributions. A company is often likened to a house built of bricks: each shareholder invests capital and, in return, acquires a portion of the “bricks” that make up the structure. These bricks represent shares, which carry with them both financial interests and governance rights. The greater the number of bricks owned, the stronger the shareholder’s voting power and influence over the company’s affairs.

In a similar way, the creation of an AI system may be viewed as the construction of such a “house.” Developers and programmers, by investing resources, expertise, or intellectual capital, can be understood as acquiring “bricks” within the AI system. Their proportional contributions determine the degree of control or decision-making power they exercise over the governance and functioning of the AI system.

This analogy provides a foundation for considering how sections of the Companies Act 71 of 2008 could with appropriate amendments and adaptations serve as a model to regulate AI within South Africa. However, before consideration is given to how principles of corporate law and provisions of the Companies Act may be amended to apply to regulation of AI systems an important conceptual inconsistency between AI systems and companies as juristic persons should be addressed.

Although an AI system may be deemed a juristic person in the same way a company is, it does not naturally have shareholders (security holders) or directors. This creates a conceptual difficulty. However, the conundrum can be addressed by assigning the traditional corporate roles of shareholders and directors to those most directly involved in the creation and operation of AI systems, that is developers and programmers.

Just as shareholders provide capital and conceptualise the purpose and structure of a company, developers contribute intellectual and financial resources in designing and constructing the AI system. Their role in initiating and shaping the AI system parallels the way shareholders provide the foundational vision and investment for a company.

Similarly, programmers, following the instructions and objectives set by developers, direct the AI system’s functioning. They encode the necessary algorithms and operational parameters, ensuring that the AI system operates as intended and in alignment with the developers’ objectives. Thereby fulfilling the role of directors who in companies act on behalf of shareholders, exercising oversight and directing the day-to-day management of the company in the best interests of shareholders.

Thus, while AI systems lack shareholders and directors in the conventional sense, the functions these roles perform in corporate law can be transferred to developers and programmers. This conceptual adaptation provides a workable governance model for AI juristic persons, preserving accountability and oversight in a manner consistent with established principles of corporate law.

As the AI system would like a company be a fictional, hypothetical person with no soul to damn and no body to kick [34], the AI developers and programmers would like company directors and shareholders be required to act on behalf of the AI in so far as enforcement of rights and execution of duties are concerned. Consequently, should legal action be instituted by or against the AI, the developers and programmers would in the same manner as company shareholders and directors proceed with the legal action in the company’s name proceed with legal action in the AI system’s name and on the AI system’s behalf.

This establishes a relationship suggestive of a holding and subsidiary relationship. It should be noted that the owners, developers, and programmers of an AI system typically operate through a company, which is itself a juristic person, such as Open AI who owns Chat GPT and Microsoft who owns Co-Pilot. As a result, one juristic person, the company comprising the developers, and programmers would effectively own the AI system, which is also considered a separate juristic person.

The AI system, if deemed to be a juristic person, would as provided currently in section 3 of the Companies Act (71 of 2008), be the subsidiary of another juristic person, that is the company to which the programmers and developers belong. This could be called the AI holding company. This latter company, as its own juristic person, would own the AI system as it would be able to directly or indirectly exercise or control the exercise of majority of the voting rights associated with the issued securities of the AI system or would have the right to appoint or elect or control the appointment or election of programmers, assigned the traditional role of directors in corporate law, of that AI system where the programmers come together for a meeting to vote on a matter related to the AI system.

Questions may arise on how liability and accountability could appropriately be imposed if AI systems are deemed to be juristic persons given that the individuals associated with a juristic person, such as shareholders and directors, enjoy limited liability. Consequently, the question arises how accountability and liability could be imposed on an AI system when its owners, developers and programmers enjoy limited liability by virtue of the fact that the AI system is itself deemed to be its own individual, separate and independent person liable for its own debts and liabilities, for which owners cannot be held liable. Argument could be made that where the AI system should cause harm or damage, liability would be imposed on it, and it would need to compensate for the loss or damage caused from its pool of property which it owns given the right of juristic persons to own rights and property. Should the pool of property be insufficient, the AI holding company, being the owning company, such as OpenAI or Microsoft, may itself be held liable. Should same still not yield monetary compensation, piercing of the corporate veil as permitted in the case of holding and subsidiary companies could be resorted to. Piercing of the corporate veil would mean that the juristic personality of the group of companies, and separate existence afforded to the holding and subsidiary company is disregarded. Consequently, the owners, developers and programmers operating through a juristic person themselves would be held personally liable, losing the statutory limited liability protection afforded by juristic personality.

In so far as AI users are concerned, it should be accepted that AI users, referring to students, scholars and business professionals who use AI in their daily life, research or business activities would be clients and customers of an AI system the same as company clients and customers are the users of the company services it renders as its primary business function. AI users such as company clients and customers are not included in the legal system and framework in which juristic persons are regulated and managed.

If AI should be deemed to be a juristic person, the question arises as to whether the South African Companies Act 71 of 2008 could serve as a guiding legal framework for the drafting of a statute specific to AI regulation. Considering the possibility of this by working through the Companies Act and its 225 sections to see which sections could and could not be effectively applied to AI systems by effecting word amendments is a tedious process, which in depth consideration, arguments and counter-arguments are beyond the scope of this research however serves to highlight potential future research that could and should be undertaken. Although comprehensive consideration and argument of this is beyond the scope of this research, for purpose of demonstrating this practicality a few specific sections of the South Africa Companies Act will be referred too.

It should be noted that although not all of the 225 sections of the Companies Act 71 of 2008 can be applied directly as is to AI systems and its future regulation, the Companies Act does provide a very good basis from which certain sections may be taken as is or which may, subject to slight amendment, such as changing the word “company” ; “companies” or “enterprises” to “AI” or “AI systems” or changing “director” or “directors” to “programmers”, it may nevertheless effectively apply to AI systems and its development, deployment and use. Thereby providing a good basis from which to effectively regulate it in South Africa. By way of example a few of these sections are discussed below:

The preamble of the Companies Act confirms that certain aspects and aims of the Companies Act could also be applied to AI. Relevant parts of the Companies Act preamble confirms that the Act is promulgated for the purpose of providing for the incorporation, registration, organisation and management of companies. Additionally, it serves to define the relationships between companies and their respective shareholders or members and directors. Further, the Companies Act preamble confirms that it provides for efficient rescue of financially distressed companies and provides for appropriate legal redress for investors and third parties with respect to companies. The Companies Act preamble moreover confirms that it establishes a Companies and Intellectual Property Commission and a Takeover Regulation Panel to administer the requirements of the Act itself with respect to companies and to establish a Companies Tribunal to facilitate alternative dispute resolution and to review decisions of the Commission. Lastly the preamble of the Companies Act confirms that it establishes a Financial Reporting Standards Council to advise on requirements for financial record-keeping and reporting by companies.

By replacing the word “company” with “AI” it is evident that the Companies Act preamble could serve to provide the basis of a preamble for a similar AI Act that is specifically promulgated for purposes of: firstly, providing for the incorporation, registration, organisation and management of AI systems. Secondly, it may serve to define the relationships between AI systems and their respective programmers and developers. Thirdly, the Act could provide for efficient rescue of financially distressed AI systems

and provide for appropriate legal redress for investors and third parties (users) with respect to AI systems. Fourthly, the Act could establish an AI systems Commission and Regulation Panel to administer the requirements of the Act itself with respect to AI systems and establish a Tribunal to facilitate alternative dispute resolution and to review decisions of the Commission. Lastly, the Act could establish a Financial Reporting Standards Council to advise on requirements for financial record-keeping and reporting by and on AI systems.

Likewise, Section 2 of the Companies Act which provides for related and inter-related persons and control of companies could be used as a means of determining the relationship between the AI system and its owners, developers and programmers. As provided above, should juristic personality be bestowed on AI systems, the AI system as a juristic person would be owned by another juristic person, the AI holding company, being the company through which owners, programmers and developers operate. Consequently, Section 3 of the Companies Act setting out provisions to regulate and govern subsidiary relations could equally be applied with appropriate amendments to the relationship between an AI system and its relevant owners, developers and programmers.

Similarly, Section 7 of the Companies Act that confirms the purpose of the Act itself could with appropriate amendment of the words “company” and “companies” serve as is, as the purpose for which an AI statute may be promulgated. Taking the wording of section 7 of the Companies Act as is and merely replacing the word ‘company’; ‘companies’ or ‘enterprises’ with the word “AI systems”, the following result is achieved: The purposes of the Act, would like the Companies Act, serve to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of law; promote the development of the South African economy by encouraging entrepreneurship and enterprise efficiency; creating flexibility and simplicity in the formation and maintenance of AI systems; and encouraging transparency and high standards of corporate governance as appropriate, given the significant role of AI systems within the social and economic life of the nation; promote innovation and investment in the South African markets; affirm the concept of the AI system as a means of achieving economic and social benefits; continue to provide for the creation and use of AI systems, in a manner that enhances the economic welfare of South Africa as a partner within the global economy; promote the development of AI systems within all sectors of the economy, and encourage active participation in economic organisation, management and productivity; create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in AI systems and the spreading of economic risk; provide for the formation, operation and accountability of AI systems in a manner designed to promote, support and enhance the capacity of such AI systems to perform their functions; balance the rights and obligations of owners, developers and programmers associated with the AI system; encourage the efficient and responsible management of AI systems; provide for the efficient rescue and recovery of financially distressed AI systems, in a manner that balances the rights and interests of all relevant stakeholders; and provide a predictable and effective environment for the efficient regulation of AI systems [39].

By drawing on the established regulatory framework of the Companies Act, legislators could create a coherent structure for recognising and categorising AI systems as juristic persons as provided in section 8 of the Companies Act. With minor amendments substituting the word “company” with “AI system,” one might conceptualise: for-profit AI systems, that is AI created primarily to generate profit for its developers or programmers, but with limitations on who may participate in ownership. Public AI systems, that are for-profit AI open to participation by the broader public or public institutions, without restrictions on ownership. State-owned AI systems which are AI developed, controlled, and owned by the state, for public benefit and lastly non-profit AI systems, which could be AI created not for profit but to advance community or social interests, potentially qualifying for tax benefits and state subsidies.

Section 13 providing for the right to incorporate company or transfer registration of foreign company can likewise subject to amending the word “companies” to “AI systems” or “Company” to “AI system” be used as the basis on which the right to create an AI system is governed and regulated in a separate AI statute. As required by Section 13 of the Companies Act, a closely worded copy of a similar provision in an AI statute could provide that an AI system may be developed and deployed by any person subject to completion and signature of a prescribed founding documents, such as is served by a company Memorandum of Incorporation. Additionally, such founding document could then be required to be registered with a commission which like the Companies and Intellectual Property Commission are incorporated for purpose of monitoring compliance and enforcement of the AI statute.

Similarly, as section 15 of the Companies Act confirms what provisions may be included in a company memorandum of incorporation, a similar provision could be used to control what provisions may be encoded into the AI system itself confirming what actions by the AI would be permissible and what would be prohibited.

Equally, section 214 of the Companies Act which provides for offence and penalty for false statements, reckless conduct and non-compliance could with appropriate word amendments of “company” to “AI system” serve as the basis on which an AI system deemed a juristic person like a company may be held liable for an offence and breach of the relevant statute. An individual found guilty of an offence in the Companies Act is in terms of section 216 of the Companies Act liable for a fine or imprisonment for 10 years or 12 months depending on the nature of the offence and sections of the Act that has been breached. The same provision may be applied to AI systems and where an individual of the juristic person owning the AI system, that is the juristic person, should be found to have committed an offence the piercing of the corporate veil would be applied to the owning company as juristic person.

Provisions of Companies Act detailing the board of directors and the role and duties of the board of directors cannot find simple application to AI systems as AI systems do not themselves have directors like a company has directors and through which the

company acts. However, this short coming can be rectified as discussed above by assigning the role of shareholders and directors as traditionally understood in terms of corporate law to developers and programmers. By amending the word shareholders as understood in corporate law to developers and amending directors or board of directors in Companies Act to programmers, the relevant provisions of section 66 of the Companies Act that regulates director rights and duties can appropriately govern and regulate the rights and duties of programmers in so far as juristic AI systems are concerned.

Here it is important that a clear distinction is made between developers and programmers. Developers refer to individuals that conceptualise the AI system, referring to individuals that design, architect and oversee the creation of the AI system while programmers are the individuals who write the actual code of algorithms on which the AI system runs. The programmers implement algorithms, structures and functions as per developer instructions to allow AI to process data, learn and produce novel outputs. Consequently, the developers can be seen as the shareholders who invest money, time and effort in conceptualising the juristic person, the company or AI, while programmers can be seen as the directors who control and direct the day to day operations of the AI system as directors do in respect of the company, for and in the shareholders best interests.

Given the above discussions and reference to potentially relevant sections of the Companies Act there is a clear possibility that the remaining sections and provisions of the Companies Act may also with appropriate amendments and adjustments adequately provide for the regulation of AI and AI systems. It is not suggested that the Companies Act can be transplanted wholesale onto AI by merely substituting “company” with “AI.” Rather, the Act is presented as a valuable point of departure for developing a tailored AI statute. The Companies Act demonstrates tested regulatory mechanisms that have proven effective in governing juristic persons, such as accountability structures, disclosure requirements, and liability frameworks. These mechanisms, while not directly transferable, can serve as guiding principles in shaping an AI-specific statute that responds to the unique challenges of AI while drawing on established governance models.

10 Conclusion

As AI is increasingly incorporated into social and corporate life there is an urgent need to consider how it may be appropriately regulated, specifically in how liability may be imposed and compensation claimed where harm, loss or damage should be caused by or through it. A possible solution as proposed in this research essay is to bestow juristic personality on AI in the same manner in which it has been bestowed on companies and similar corporations.

In terms of South African common law requirements, juristic personality can be bestowed on non-human entities that can continue to exist irrespective of changes in its

owners or members, possessing perpetual succession, where it can or is the bearer of rights and duties and when it strives towards a legal, predetermined goal. Given that AI continues to exist as an entity, irrespective of changes in its ownership, programmers and/or developers, has been granted intellectual property rights as has evidenced by the patent awarded to DABUS, confirming the ability of AI to possess property and accompanying rights and duties and strives toward increasing the productivity and efficiency of its users, a legal predetermined goal, it can be concluded that AI may in terms of South African law be bestowed with juristic personality.

By bestowing juristic personality on AI, AI will be deemed to be a hypothetical person separate and independent from its owners, developers, programmers and users. As a juristic person it will have its own rights and duties, own its own assets and be liable for its own debts and liabilities. Liability is enhanced and not reduced by granting juristic personality to AI. Claims for harm, loss or damage can be claimed from the AI itself as a person as opposed to from its owners, developers and programmers, who may evade liability given the collaborative efforts of designing AI and difficulty in tracing back harmful AI actions to one of the many stakeholders involved in designing it. Furthermore, compensation can be paid by the AI directly from the proprietary assets and interests it possesses given its ownership of intellectual property and the royalties associated with same. Additionally existing legal rules, principles and concepts across the various branches of law that already regulate juristic persons can be applied to the regulation of AI. In turn should AI be lawfully regulated it will foster innovation and economic growth, providing for new economic activities and increase employment rates. Given that legal personality has been awarded to non-human entities such as companies, lakes, rivers, temples and eco-systems, there is little room to argue that it cannot be bestowed on AI systems.

Clarity on the legal status of AI is not required but demanded as appropriate regulation of AI will only be possible once there is certainty on AI legal status which will assist in determination of whether existing laws may merely be amended and extended to AI or whether the promulgation of new laws will be required to address the current lack of appropriate AI regulation in South Africa.

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