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I, Robot have rights! Haven't I? Conceptual and normative constraints on holding legal positions

Eu, Robô, tenho direitos! Não tenho? Restrições conceptuais e normativas à titularidade de posições jurídicas

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I, ROBOT HAVE RIGHTS! HAVEN'T I? CONCEPTUAL AND NORMATIVE CONSTRAINTS ON HOLDING LEGAL POSITIONS[i]

EU, ROBÔ, TENHO DIREITOS! NÃO TENHO? RESTRIÇÕES CONCEPTUAIS E NORMATIVAS À TITULARIDADE DE POSIÇÕES JURÍDICAS

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Abstract: This paper investigates whether AI robots can hold legal rights, exploring both conceptual and justificatory aspects of the issue. It distinguishes between two types of inquiries: conceptual (whether robots *can* have rights) and normative (whether they *should*). It argues that interest theories are more suitable for addressing the latter, while will theories may seem more suitable to the former but are limited in reaching necessary truths about rights. Grounded in the idea that legal positions are constituted by legal norms, the paper examines the relationship between will as intentional action, investigating its implications for determining who can hold legal positions, and concludes that intentional action is necessary for legal positions involving action (e.g., duties, powers and liberties), while claim-rights or immunities can be conferred upon entities lacking this capacity. At the normative level, it explores reasons justifying the ascription of rights, focusing on the concept of interest. A suggested approach for the normative analysis required involves comparing robots' interests with those of humans to justify their attribution of rights.

Keywords: Legal rights, legal norms, interest and will theories, robots, conceptual and normative constraints

Resumo: No presente artigo analisa-se, do ponto de vista conceptual e normativo, a questão de saber se robôs dotados de IA podem ser titulares de direitos. Nesse contexto, distingue-se dois tipos de questões: conceptuais (*podem* os robôs ter direitos?) e normativas (*devem* os robôs ter direitos?). Defende-se que as teorias do interesse são mais adequadas para abordar estas últimas questões, enquanto as teorias da vontade podem parecer mais adequadas para as primeiras, mas não são capazes de proporcionar verdades necessárias sobre os direitos. Baseado na ideia de que as posições jurídicas são constituídas por normas jurídicas, examina-se a relação entre vontade e ação intencional, investigando as suas implicações

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para determinar quem pode ser titular de posições jurídicas e conclui-se que a ação intencional é necessária para posições jurídicas que envolvam ação (e.g., deveres, poderes e liberdades), enquanto os direitos-pretensão ou imunidades podem ser conferidos a entidades que não disponham dessa capacidade. No plano normativo, explora-se as razões capazes de justificar a atribuição de direitos a robôs, sobretudo com recurso ao conceito de interesse. Em particular, sugere-se que tal processo justificativo seja realizado com base na comparação dos (potenciais) interesses dos robôs com os dos humanos.

Palavras-chave: Direitos, posições jurídicas, normas jurídicas, teorias do interesse e da vontade, robôs, restrições conceptuais e normativas

> "The Three Laws of Robotics:
>
> 1: A robot may not injure a human being or, through inaction, allow a human being to come to harm;
>
> 2: A robot must obey the 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;
>
> The Zeroth Law: A robot may not harm humanity, or, by inaction, allow humanity to come to harm."
>
> – ISAAC ASIMOV, *I, Robot*

0. Introduction

1. Imagine that a hostile artificial intelligence system called *Skynet* comes into existence and aims at driving humankind to extinction, which it essentially does by creating destructive and assassin cyborgs known as *terminators*..[3] Skynet and its terminators would be, therefore, violating the duties encompassed by ASIMOV's Laws of Robotics. But can artificial intelligence (AI) robots owe duties towards other entities such as humans? And can this sort of robots hold rights against other entities such as humans? These questions may seem odd to some, but the issue of robots holding rights isn't confined to the realm of fiction or future conjecture. It's a topic already being discussed in academic literature and mainstream discourse, and even being incorporated into recent legislative initiatives and proceedings..[4]

In simple and broad terms, AI can be understood "as any kind of artificial computational system that shows intelligent behaviour, i.e., complex behaviour that is conducive to reaching goals.".[5] This notion incorporates all types of machines, such as the ones capable of automation of particular tasks, as well as the ones that show amazing abilities in learning or reasoning. As is known, AI typically exists as software, whereas robots are physical machines capable of movement. Hence, autonomous cars or planes qualify as robots, with only a tiny fraction of robots being "humanoid" or having human-like form, like the aforementioned terminators. Even if not all robots

3. This is obviously a reference to the sci-fi action masterpiece *The Terminator*. Explaining why *The Terminator* is a masterpiece, see WALLACE (2013: 177 ff.).

4. See GUNKEL (2022: 66). In addition, the matter of robot rights is relevant for pragmatic reasons, because public debates refer to the language or rights, and for normative reasons, because if they hold or deserve to hold rights, several normative consequences arise. See BASL, BOWEN (2020: 291-292).

5. See MÜLLER (2023). In a different and even more encompassing way, BRINGSJORD and SUNDAR GOVINDARAJULU (2022) argue that "AI is the field that aims at building": (a) human based (a1) systems that think like humans (reasoning based) or (a2) systems that act like humans, or (b) ideal rationality based (b1) systems that think rationally or (b2) systems that act rationally. The taxonomy was drafted by RUSSELL and NORVIG (2009), according to which AI should be equated with "acting rationally."

use AI (e.g., industrial robots that simply and blindly follow defined scripts with minimal sensory input),[6] due to their agential similarity to human beings,[7] AI robots are a great example for assessing which entities can and should hold legal positions such as rights or duties.[8]

It is commonplace to argue that a necessary condition for the existence of legal rights is their ascription by a legal norm. But, still, to what extent is the determination of the existence conditions of a right purely conceptual and not also normative? To what extent is it possible to ascertain the existence of a right without the need to make evaluative assumptions, and, more generally, to what extent are—or should be—such evaluative assumptions relevant to a theory of rights?[9] Indeed, a very common source of confusion in rights' discourse lies in the mixing of the *conceptual* domain—related with the questions of knowing what are the necessary and sufficient conditions for having a right and what it means to say that someone has a right—with the *normative* domain—which is mainly related to the *justification* of the ascription of rights.[10]

Given the emotive appeal inherent in discussions about rights, these domains often become conflated, a phenomenon frequently observed in political rhetoric. This phenomenon is evident in discussions surrounding contentious issues such as abortion.[11] or animal rights. And the point I want to make relies precisely in the importance of distinguishing these two levels of analysis with reference to AI robots:

(1) Can AI robots be holders of rights?

(2) Should AI robots be holders of rights?

(1) is a conceptual question regarding the "nature" of rights, which is important to determine which classes of entities (such as animals, corporations or robots) are conceptually *capable* of having rights, as well as if there are any restrictions on the content of rights. For example, according to conceptual and linguistic practices it is only possible to have rights to something beneficial—it seems to make sense to say "I have a right to that you pay me five dollars", but not to say "I have a right to be imprisoned for

6. See MÜLLER (2023).

7. In preliminary discussion of this paper in the Lisbon Legal Theory's VI Lisbon Meeting on Legal Theory, MATHIEU CARPENTIER noted that the choice of robots with AI as the object of analysis of the paper was not clear. The reason, however, is simple. As mentioned, in addition to the fact that the meeting had AI as its theme, I focus on AI robots simply because they represent entities that lie close to the extensional boundaries of those capable of and deserving legal positions. This makes them perfect examples for testing my argument.

8. While I hope the claims I will do about rights are extensionally applicable to any type of right, this paper focuses primarily on legal rights.

9. Enunciating these and other questions, see KRAMER, (2000a: 1).

10. Underlining the distinction, see BIX (2023: 122-123); PREDA (2015).

11. Referring precisely to the example of the discussion on abortion, see BIX (2023: 122-123).

five years as a punishment for my crime.".[12] (2) is a normative or substantive question, which is concerned with knowing to what extent a certain legal system (or all) should confer certain rights to certain entities (e.g., what categories of people, places, or things should be normatively protected?)..[13]

Question (1) is more broadly related with the question of *what* can be a "legal person" or to *whom* can be conferred "legal personhood". In a word: What are the constraints on the concept of legal personhood..[14] According to some authors—call them *Legalists*—"anything or anyone can be endowed with rights and so become a legal person, as long as it is compatible with the purpose of any particular law." Differently, for *Realists* "the legal person is an expression of some important defining attribute of human nature and therefore it is important to go beyond law to work out what that nature is.".[15] Legalists seem to be a kind of positivist *formalists*, positing that if legal personality is the legal capacity to bear rights and duties, then it is essentially an artificial construct of law, allowing for the assertion that anything or anyone can be considered a legal person..[16] As a positivist, I generally think law and legal entities are contingently constituted by social facts, what could suggest—at least for some—that not only humans but also non-persons such as AI robots could *be* (*qua* be recognized or be treated as) *legal* persons..[17] However, I claim that not anything can be a holder of (at least of some) legal positions..[18]

12. See HART (1982: 174 ff.); MACCORMICK (1977: 202 ff.). The example can be found in BIX (2023: 122). Recently rejecting this conceptual limitation, see DUARTE (2023).

13. As BIX (2023: 122) stresses, there is a third question related with the weight the rights conferred have, which is especially relevant in cases of conflict of rights. This question, however, will not be addressed here.

14. For the purposes of the present paper, I am not interested in analysing a possible distinction between the concepts of LEGAL PERSON and LEGAL PERSONHOOD. Stressing this difference, see KURKI (2019: passim).

15. See NAFFINE, (2009: 21-22). BROZEK and JAKUBIEC (2017: 294) identify a spectrum of possible positions regarding the legal responsibility of AI entities. On the extremes of the spectrum are the Restrictivists (who deny "the possibility of holding autonomous machines legally responsible on purely metaphysical grounds") and the Permissivists (who impose "no restrictions on the possible legal constructions").

16. See TUR (1987: 121). KELSEN (2005: 96 ff.) also seemed to reduce "legal persons" to bundles of rights and duties.

17. WALTERMANN (2021: 37), for example, emphasizes that law is a "social construct," suggesting the possibility of attributing *any* content to legal norms. David Duarte in private correspondence also suggested me the same. However, I have significant doubts about whether this last statement logically follows from the statement that law is a social construction. In fact, considering law as a human artifact designed to regulate human behaviour, its existence not only relies on social facts but also on facts about human abilities.

18. This would be what KURKI (2019: 31 ff.) calls the orthodox view, because he argues that to be a legal person cannot be equated with being a holder of rights (e.g., slaves were not legal persons even they were holders of duties and even some claim-rights). Critically, see for example BANAŚ (2021). Another hypothesis, impossible to expand upon in this paper, is the one that an entity could qualify as a legal person despite being unable to hold certain legal positions.

In a nutshell, my argument is: first, we need to distinguish (1) conceptual and (2) normative questions..[19] Regarding (1), the existence of legal positions depends on ascriptive legal norms, which serve the function of guiding action. If all legal norms conceptually presuppose the capacity to act, respond to reasons, and master a language, then only subjects capable of intentional action can hold legal positions that require such actions, such as duties, liberties, or powers. In contrast, legal positions like rights or immunities, which do not presuppose the need for intentional action, can be conferred by law on entities incapable of such actions. Here, the distinction between active and passive rights becomes crucial in addressing the conceptual question. Regarding (2), even if conceptually robots may be ascribed (some) rights, assessing whether they deserve to hold rights requires normative analysis, namely of a moral nature. A good approach to carrying out this task is by determining which properties are relevant in justifying the ascription of rights. For example, this can be achieved by assessing if entities such as robots have interests deserving of protection, which can be done by identifying similarities and differences with human adults..[20]

2. In what follows, to put forward my argument regarding the questions of whether robots *can* and *should* have rights, I will begin by sketching, in Section 1., a brief account of the internal structure and of the nature of rights. Then, in Section 2., to assess if robots can be holders of rights, I will analyze what conceptual constraints may impend over possible holders of the different legal positions, which is necessarily related to the respective ascriptive norms; for this purpose, assuming that some of these legal positions presuppose the capacity to *obey* or *exercise* the ascriptive legal norms, I will briefly analyse the concepts of agency and obeying norms. Finally, in Section 3. I will also analyze what normative reasons, if any, can justify the ascription of rights to robots.

1. What are legal rights?

3. The questions of whether robots can and should be granted rights require, firstly, an explanation of the internal structure of rights (the *form* of rights), and secondly, an account of what is a right (the *nature* of rights), which is related with the *function* of rights..[21]

19. In private correspondence, Andrew Halpin noted that it may not be entirely clear throughout the paper whether I maintain a strict distinction between conceptual and normative questions. He suggested that the possibility of choosing a conceptual position may have been influenced by normative commitments. While I made an effort to avoid adopting conceptual positions based on normative commitments, as stressed by Julie Dickson (2001: 33), it is important to acknowledge that "descriptive" legal theories are not entirely value-free. Rather, they are "relatively value-free;" they involve meta-theoretical evaluation but do not necessarily involve (e.g.) moral evaluations of the law to provide an accurate and adequate account of it.

20. From now on, for the sake of simplicity, I will only refer to robots.

21. See Wenar (2020).

An excellent account of the structure of rights is the Hohfeldian analytical system..[22] Seeking to dispel the enormous ambiguity within the legal community in using statements such as "*A has the right to do φ*" or "*B has the duty to do φ*", HOHFELD (1966: 23 ff.) organized these "fundamental legal concepts" into two sets of modalities, in a sum of eight different legal positions. He distinguished between the "right's" family modality (claim-right, privilege, power, and immunity)—which would be the basic elements of any "jural relation"—and the "duty's" family modality (duty, no-right, liability, and incapacity)..[23] For the present purposes, it is enough to briefly define each legal position of the right's family.

Claim-rights exist in situations where a certain subject B has a duty directed at the holder of the legal position A, that is, A has the right against B to the realization or non-realization of φ..[24] Thus: *A has a claim-right for B to φ iff B has the duty towards A to φ.*

Liberty means the disjunctive possibility for its holder to either perform or not perform φ, from which it can be deduced that A has no duty towards B to refrain from or perform φ..[25] Thus: *A has the freedom to φ or* ***¬φ*** *iff A has no duty not to φ or the duty to φ.*

Power refers to the ability of its holder to create, modify, or extinguish legal positions of other subjects or himself. Therefore, it is a second-order legal position or metaright, as it projects onto (i.e., has as its object) other legal positions..[26] Thus: *A has the power to φ iff A has the ability to create, modify, or eliminate x.*

Immunity, in turn, is the absence of power for creating, modifying, or eliminating legal positions of its holder. In other words, immunity results from the no-power (or powerlessness) of B to affect A's legal relations. Thus: *A has immunity iff B does not have the power to create, modify, or eliminate legal positions to which A is entitled.*

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22 Analysing HOHFELD's model, among many others, see (DUARTE D'ALMEIDA L, 2016: 554 ff). Note that I am not carrying out an exhaustive analysis of each component of HOHFELD's model, but just using it, with certain conceptual modifications, as a framework for systematically analyzing the concept of RIGHT.

23 Also noticing the ambiguity, see HART (1982: 162 ff.); and KELSEN (2005: 78).

24 In accordance, all claim rights are correlated to a duty held by (at least) one subject. The distinctive property of claim rights seems to be the fact that the duty on a certain subject is "directed" or "owed" to the right holder. However, the concept of "direction" is a matter of significant controversy. See WENAR (2020).

25 Differently from HOHFELD, which referred to "privilege," I use term "liberty" (more coherent with current linguistic practices) to refer the legal position resulting from a *bilateral strong permission*. On these concepts, see, for example, DUARTE D'ALMEIDA (2016: 556 ff.); GUASTINI (2016: 92). Regarding the question of knowing if liberties (necessarily) imply duties of non-interference or if their existence depend on the existence of other legal norms, see HALPIN (1997: 37 ff.).

26 See PINO (2014: 159). Distinguishing first and second order positions, see KRAMER (2000b: 20). Unlike claim-rights and liberties, which are ascribed by *regulative* norms, powers are ascribed by secondary norms of a *constitutive* nature—precisely those norms that empower their holders with the ability to create, modify, or eliminate other legal norms (i.e., competence norms). In the same sense, see WENAR (2020); PINO (2014: 187 ff.).

Additionally, HOHFELD claimed legal positions to be logically connected by relations of *correlation* and *opposition*. The correlativity relation aims to represent the logical equivalence between positions that can be described either from the perspective of each modality..[27] Illustratively, the position of "claim-right" corresponds to the position of "duty" (e.g., S1 has the right for S2 to perform φ iff S2 has the duty towards S1 to perform φ). According to the relation of opposition, each modality has a corresponding modality as its negation. For example, the position of "liberty" is opposed to the position of "duty" (e.g., if S1 has the liberty, in relation to S2, to perform or not perform φ, then S1 cannot have a duty towards S2 to perform or not perform φ)..[28]

Based on the content of rights (i.e., the actions or omissions to which rights refer) and the subjects obligated to perform or refrain from these conducts,..[29] four modalities of rights can be discerned..[30] First, it is possible to distinguish between (a) *active rights*, whose object is a conduct to be performed by the holder (e.g. liberty and power), and (b) *passive rights*, whose object is a conduct to be performed (or omitted) by a subject other than the holder (e.g. claim-right and immunity). Second, passive rights can be subdivided into (b1) *negative rights* and (b2) *positive rights*. The holder of a negative right is entitled to an omission from a certain conduct (e.g., the right against B to refrain from actions that interfere with life), while the holder of a positive right is entitled to an action by another subject, such as the provision of a good or a service (e.g., the right against B to the protection of life)..[31]

Finally, apart from these mentioned relations, each of the *atomic legal positions*—claim-right, liberty, power, and immunity—is logically independent of the others..[32] However, they can connect and form *molecular aggregates of legal positions*..[33] This shows an additional level of ambiguity, as the concept of right may refer to either an atomic legal position or a cluster of legal positions..[34]

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27. Criticizing the Hohfeldian axiom of correlativity (based on the examples of duties not to harm animals or duties to respect the deceased or individuals in a coma), see for example SREENIVASAN (2010: 465 ff.); DUARTE D'ALMEIDA (2016: 559).

28. Demonstrating the ambiguity of the concept of opposition used by HOHFELD, which can be translated into *(i)* "opposites of extremes", *(ii)* "opposites of negation", and *(iii)* "opposites of alternatives", see HALPIN (1997: 35 ff.).

29. The terms "action" and "conduct" are sometimes used interchangeably. When I use the term "conduct," I'm indicating that we're not only referring to actions *stricto sensu* but also to omissions.

30. On these modalities, among others, see FEINBERG (1980: 130 ff.); MACCORMICK (2007:123 ff.); (LYONS, 1970: 45 ff.); PINO G (2014: 173 ff.); WENAR (2020).

31. This classification can also be viewed from the perspective of the holder of the passive legal position, i.e., the correlative duty-holder. Thus, negative rights correspond to negative duties, while positive rights correspond to positive duties.

32. See PINO (2014: 168).

33. With this or similar distinctions, see GUASTINI (2016: 95-96); PINO (2014: 168 ff.); WENAR (2020); THOMSON (1990: 55 ff.).

34. Qualifying concepts such as PROPERTY as "presentation devices", see ROSS (1957: 812 ff.).

4. A different question is to know what unites the category of "claim-right".[35] To put in different words, what is the nature of rights? First, in a very broad way, the concept of right seems to refer to a "normative property" ascribed by some normative entity, such as a legal norm,[36] to subjects that satisfy some conditions.[37] That is, usually one refers to these normative properties, *qua* positions or situations in which their holders are, through the language of rights.[38] Being metaphisically *constituted* by legal norms,[39] rights are not legal norms, but legal positions whose existence ontologically depends on norms. Therefore, they seem to be "theoretical constructions"[40] used to represent the content of legal norms from a subjective point of view,[41] that is, from the point of view of their subjects.[42] However, it is not always clear who is the holder of the rights correlative to the duties created by legal norms.

To address this question (or so it seems), certain theorists, operating under the assumption that rights entitle their holders to something and to fulfil a function vis-à-vis the right-holder, have started exploring the *function* of rights. There are several competing theories identifying a set of necessary and sufficient conditions for having a right, the main ones being the will theories and the interest theories.[43]

In a simplified manner, according to will theories the function of rights is to give its holders control over another's duty to protect choices, therefore making their holders "small-scale sovereigns."[44] For example, promisees have rights because they have the power to waive or demand the promisors' duty to keep the promise. Differently, for interest theorists the function of rights is to protect or promote the interests of right-holders. For example, from this perspective, an owner would have a right because ownership

35. See HERSTEIN (2023).

36. Usually, it is argued that moral rights exist independently of legal systems (and more generally of social facts), but are simply shown by moral argument, for example justified on the basis of the moral relevance of certain interests. See KAMM (2002: 476-477). However, regarding the nature of norms and/or moral properties, as well as one's epistemological access to them, are contingent upon the individual's chosen metaethical standpoint.

37. See CELANO (2018: 19). As JEAN THOMAS (2020: 2) argues, no doubts exist that RIGHT is a "normative concept."

38. See FERNÁNDEZ NÚÑEZ (2023: 16).

39. In a different place I argued legal rights are *ontologically dependent* on legal norms—see SAMPAIO (2023 I; 495 ff.). Generally stressing legal rights' normative dependence, see RAZ (1970: 175 ff.); MACCORMICK (1977: 189); DUARTE (2023).

40. See ORUNESU, RODRÍGUEZ (2023: 69-70).

41. See GUASTINI (2016: 84).

42. See DUARTE (2023).

43. Defending will theories, see, paradigmatically, HART (1982); as well as SIMMONDS (2000: 113 ff.); STEINER (2000: 233 ff.). Defending interest theories, see, paradigmatically, RAZ (1986: 165 ff.; 1994: 254 ff.); MACCORMICK (1977: 189 ff.); KRAMER (2000b: 7 ff.).

44. See HART (1982: 183).

makes him better off..[45] Consequently, the reasons for ascribing rights differ under each of these theories: While will theorists highlight individual sovereignty, interest theorists emphasize individual well-being. These theories aim to encompass all statements of rights in accordance with their usage in legal discourse, but they find difficulties in explaining the counterexamples that have been presented..[46]

Despite their theoretical relevance, I'm not sure these theories are truly capable of identifying the *nature of rights*..[47] Anyway, there is no point in discussing these theories (or possible theoretical alternatives)..[48] in detail here, but to merely ask what their relevance is. Well, if rights *qua* rights fulfil any necessary function towards rights-holders, that will set a *conceptual condition* for rights-holding. For example, under the interest theory, as seen, rights broadly speaking *necessarily* benefit rights-holders. Therefore, if a right does not benefit X, X does not hold that right. In addition, the function of rights is also connected with determining what types of entities can or cannot hold rights,..[49] which is precisely the main question under analysis in the present paper. For example, again under the interest theory, if X is an entity incapable of having interests, then conceptually X cannot hold any rights..[50]

5. As I stressed in the introduction, it is important to distinguish between conceptual questions, related with the definition of a right, and justificatory questions, related with the reasons in favour of granting a right and with

45. See WENAR (2020).

46. Among others, see WENAR (2013: 202-203). The will theories, for example, struggle in explaining the ascription of rights to children or individuals in a coma who are not legally capable of making decisions. The interest theories, for example, struggle in explaining third party beneficiaries (e.g., parental benefits). See WENAR (2005: 205).

47. This is not the place to put forward a theory of rights. Anyway, my intuition is that the only necessary and sufficient condition for holding a right is to be the *beneficiary* of the correlative duty. And if there are doubts as to who the beneficiaries of the right are, this is an interpretative problem that cannot and should not be resolved authoritatively by theorists, but left to official interpreters of the law. This means that rights are *legal positions of formal advantage* ascribed by legal norms to certain subjects. They are *formal* legal situations because no conceptual restrictions of a substantive nature regarding the rights' content are imposed, with the exception of those that I will mention later. This means that holding a legal right may or may not constitute a substantive benefit to the right holder from his individual and concrete point of view. For example, the holder of a claim-right or an immunity is in a situation of legal *prevalence* towards the holder of the correlative position, who is *normatively constrained* to the (non) performance of φ. With similaries, see RAINBOLT (2006: 25 ff.; 48); SUMNER (1987**:** 32); STEINER (1994: 54 and 59); MARTIN (1993: 32, 42, 51); WELLMAN (1995: 8); THOMAS (2020: 13 ff.). And acknowledging the potential existence of disadvantageous rights presents a theoretical advantage over interest theories, see DUFFEL (2017: 199).

48. For *demand theories*, see FEINBERG (1980: 141 ff.); DARWALL (2006); for *mixed theories* that combine will and interest, see SREENIVASAN (2005: 257 ff.); for *several functions theory* and the *kind-desire theory of claim-rights*, see WENAR (2005: 223 ff.); WENAR (2013a: 202 ff.). For criticism on these theories, see, e.g., WENAR (2013b: 375 ff.); KRAMER, STEINER (2007: 281 ff.); KRAMER M (2017: 49 ff.).

49. See KRAMER (2001: 29 ff.); KURKI (2019: 62 ff.).

50. See RAZ (1986: 166).

their content. In accordance, remember the two questions initially presented:

(1) *Can* robots be holders of rights?

(2) *Should* robots be holders of rights?

To confuse these questions will most likely lead to the violation of the is/ought distinction..[51] Being autonomous questions, they also allow for different combinations of possible answers: *(i)* robots cannot have rights, even if they should; *(ii)* robots cannot and should not have rights; *(iii)* robots can, but they should not have rights; and *(iv)* robots can and should have rights..[52]

That said, the problem with the described interest and will theories is that they generally seem more normative than conceptual in nature..[53] Put it differently, contrary to what is claimed by its advocates, they seem "justificatory" and therefore "value-laden" theories, rather than descriptive..[54] Anyway, perhaps less exaggeratedly, my intuition is that while interest theories aim to fulfil a conceptual role and appear to be effective in explaining moral rights, they are better suited for the domain of justification when it comes to legal rights..[55] Conversely, although will theories seem more suited to play a role at the conceptual domain, their restrictive nature prevents us from reaching necessary truths about rights.

Starting with the premise that legal positions are constituted by legal norms, my next step involves two main aspects. Firstly, at the conceptual level, I will explore the concept of will as intentional action to ascertain who is capable of obeying or exercising a legal norm, and whether this imposes conceptual constraints on the holding of legal positions..[56] Secondly, at the normative

51. See GUNKEL (2018: 87 ff.).

52. See GUNKEL (2018: 89 ff.).

53. Precisely noting that "theorists who argue about rights often make moral and political arguments rather than conceptual ones", see THOMAS (2020: 2).

54. See HERSTEI (2023). For example, interest theories appear to be framed within *consequentialism* and support normative theories of well-being (which emphasize individual welfare), while will theories seem to be linked to *Kantian normative theories* (which emphasize autonomy). This leads to the fact that both will and interest theories are monistic theories, but one should not rule out the need for a pluralistic theory because rights can serve different functions. In fact, monistic theories may be a vehicle for imposing a particular philosophical theory about rights. STEINER, for instance, seems to use his will theory to defend his left-libertarian political view, while RAZ, in turn, appears to use his monistic thesis as an argument for his perfectionist theory of social justice (see WENAR, 2008: 271). However, PREDA (2015: 410) claims that the will theory has anything to say about the content of rights.

55. As an example, look at how MACCORMICK's (1977: 192) words suggest the interest theory to better fit the justificatory realm: "The 'interest theory', by contrast, contends that what is essential to the constitution of a right is the legal (or moral) protection or promotion of one person's interests as against some other person or the world at large, by the imposition on the latter of duties, disabilities liabilities, or liabilities in respect of the party favoured." (emphasis **mine**)

56. I am not claiming the concept of WILL *is* the same as intentional action, but there is a clear connection, as will be evident.

level, I will examine whether there are reasons justifying ascriptions of rights and if the concept of INTEREST may be relevant for that matter.

2. Can robots be holders of rights?

6. It is possible to distinguish between theorists who think that rights are singled out by their great weight as practical reasons—for whom rights, *qua* trumps, enjoy a categorial priority in weight over any other consideration which are not themselves right-based.[57]—and theorists like myself who think that rights are not special in this regard, but instead are to be analysed into more basic notions, mainly those of duty, liberty and power, with perhaps the addition of other criteria. This means that not all rights will be of great importance..[58]

Furthermore, as I have stressed, I doubt that the nature of rights can be found in having choice or control over the corresponding duty (or in interests being protected by the corresponding duty). However, I believe that the capacity to exert will or make choices can guide us in demonstrating the existence of conceptual constraints on holding legal positions. Legal positions, in fact, depend on being ascribed by legal norms, and the function of legal norms—guiding conduct—is inherently related to agency and action. Therefore, it is interesting to investigate whether this relationship, in addition to the specific characteristics of each right, can reveal conceptual constraints on the ascription of legal positions.

2.1. Conditions for holding rights from the perspective of ascriptive norms: the capacity to act

7. As already emphasized, rights are normative entities, and legal rights are necessarily dependent on legal norms..[59] Norms, in general, aim to guide human behaviour,..[60] providing individuals with reasons to act in a certain way. This demonstrates that norms play a central role in the context of practical reasoning within various normative domains, such as the legal one..[61] Structurally, legal norms consist of an antecedent, a deontic or alethic operator—according to whether they are regulative or constitutive norms—and a consequent..[62] Regarding the normative antecedent, not only do all

57. See, for example, DWORKIN (1985: 153 ff.). Noting that "[r]ights might be nonabsolute and still be so-called trumps over utility, if they are overridden by factors other than utility," and that it is probable that most rights—except, perhaps, the most crucial human rights—are sometimes overridden by utility considerations," see KAMM (2002: 479).

58. See CAMPBELL (2022).

59. Differently from what some argue [see, for example, HERSTEIN (2023); THOMAS (2020: 15)], legal norms *are not* legal rights. They are *constituted* by legal norms.

60. Among many others, see HART (2012: 85 ff.); KELSEN (1991: 94 ff.); SHAPIRO (2000: 127 ff.); HIMMA (2020: 82 ff.).

61. See HAGE (2018: 103).

62. In a more complete way, see VON WRIGHT (1963: 70 ff.).

norms involve a set of subjects (subjective element)—which allows for the identification of holders of legal positions—but they also refer to (regulating or constituting) a conduct (objective element)—which enables the identification of the content of legal positions.[63]

If legal norms are directly (regulative norms) or indirectly (constitutive norms, such as competences) connected to (brute or institutional) action, and their ultimate function is precisely to *guide human conduct*, then they seem to presuppose the *capacity to act*. Acts require "agents",[64] which are beings with the capacity to act, and "agency" constitutes the exercise or manifestation of that capacity.[65] Conceptually, it appears that the (direct) subjects of legal norms must be agents.

In the context of philosophy of action, the "standard conception of action" constructs the concept of ACTION around the concept of INTENTIONALITY, while the "standard theory of action" elucidates the intentionality of actions by attributing them to the causal influence of the agent's mental states and events. From this, first, we get a "standard conception of agency" according to which an entity possesses the capacity to exert agency if it can act intentionally, and the manifestation of agency involves carrying out intentional actions and, often, unintentional actions that stem from intentional actions. Second, we also get a "standard theory of agency," according to which an entity is deemed capable of intentional action if it possesses the appropriate functional organization, meaning that the occurrence of specific mental states and events, such as desires, beliefs, and intentions, would lead to the desired events, such as particular movements, in the right manner.[66] It is, however, important to note that there are different senses of agency, with varying degrees of demand. A robust sense of agency entails autonomy, involving the capacity for reflection, reasoning, and deliberation. An intermediate sense of agency requires the capacity to act intentionally and make choices. Lastly, a more limited sense of agency only necessitates the capacity to act intentionally.[67]

With that said, I am assuming what could be termed the *realist theory of agency*.[68] According to this view, an entity qualifies as an agent iff it can

63. Similarly, and in a more developed way, see DUARTE (2023).

64. See VON WRIGHT (1963: 36).

65. See SCHLOSSER (2019).

66. See SCHLOSSER (2019). Defending this thesis, see (e.g.) DAVIDSON (1980: 3 ff. and 43 ff.); GOLDMAN (1970); BRATMAN (1987); DRETSKE (1988); MELE (2003).

67. See PREDA (2012: 232-233).

68. WALTERMANN and HAGE, in different papers, reject this standard picture of agency, mainly based on evidence gathered from cognitive sciences according to which the majority of human action is not based in conscious decisions, but operates intuitively at System 1, and that our actions are largely driven by biases. In conclusion, consciousness and intentionality would play little to no causal role when it comes to our behaviour. See WALTERMANN, HAGE (forthcoming); WALTERMANN (2021); HAGE J (2017). This is not the space for a comprehensive analysis of their arguments, but I still wish to make the following points. I generally agree with the premises they state, but it seems to me that the conclusion does not follow. The problem lies in their (apparent) undue generalization from the proposition that action is not always conscious and not fully determined by human attitudes to the proposition that actions are never

instantiate mental states capable of directly causing actions, a capacity that presupposes consciousness.[69]

Despite criticism directed towards these conceptions and theories,[70] such as their perceived demanding nature, particularly in light of the necessity for legal norms to presuppose communication—when explaining agency in terms of the agent's desires, beliefs, and intentions, it is assumed the explanation presupposes mental representations, namely intentional mental states and events that have representational contents—they prove suitable for the intended purposes. Communication inherently relies on language, a domain of significant complexity, as demonstrated by modern linguistic theories. Indeed, human languages are "vastly complex objects",[71] as evidenced by the multitude of syntactic and semantic rules governing sentence formation and the assignment of meanings to words and sentences, without which it would not be possible to effectively use a language.[72] Therefore, what is of interest for the present purposes is *rational* agency in (at least) an intermediate sense, viz. "practical reasoning, acting

conscious and not determined by human attitudes to any extent. Actually, if this were the case, it would be a mystery how they have managed to write such complex and technical papers on agency. Additionally, I think they overemphasize these true aspects of human action in rejecting "real agency." In a way, their argument is similar to deterministic arguments used to reject free will. However, for example, there are neuroscience evidence suggesting that the prefrontal cortex plays a crucial role in the regulation of behaviour, our power to exercise of self-control. In sum, I remain unconvinced that the concept of agency lacks representation in the natural world and is solely a matter of social practice. And HAGE (2017) also stresses that the common perspective is to include *free will* alongside *intentionality* as a criterion for legal responsibility, which he identifies as a "realist mistake." However, as SETIYA (2023) claims in a recent review of a book by SAPOLSKY challenging the concept of free will, what is needed for affirming free will is simply *hypothetical liberty*: "If I choose to undertake action A, I will execute it; if I choose otherwise, I won't." According to HUME's interpretation of free will, when we discuss our abilities or freedoms in everyday language, we are not addressing determinism failures or breaches of causal laws. For example, it may be physically possible for me to disappear due to a quantum mechanics anomaly. However, this does not imply that I possess the ability to vanish. Therefore, freedom simply entails the capacity to carry out an action if and when I decide to attempt it.

69. Similarly, see HIMMA (2009: 20-21).

70. Analyzing the problems of the standard theory of agency and also some alternatives, see SCHLOSSER (2019).

71. As linguists, psychologists, and philosophers today agree, knowing a language is much more than associating words with concepts: "It also crucially involves knowledge of how to put words together, for it's typically sentences that we use to express our thoughts, not words in isolation." See COWIE (2017).

72. Knowing a language depends on knowing and mastering a huge number of linguistic rules, which as many argue today is related with the brains of human beings that enables them to master a natural language. Arguing that human brains contain a specialized "language organ," an innate mental "faculty," that is dedicated to the task of mastering a language, see, for example, CHOMSKY (1965).

In addition, it is also important to distinguish between *competence*—which is "what knowing a language confers: a tacit grasp of the structural properties of all the sentences of a language"—and *performance*, which "involves actual real-time use", and may diverge from the underlying competence, due to external non-linguistic factors (e.g. being drunk); or to the agent capacity limits. See SCHOLZ *et al.* (2022).

on the basis of considerations, reflecting about what one ought to do and acting on one's subsequent normative judgements."[73]

In light of the above, it seems that rule-following conceptually presupposes or requires not only the capacity to act intentionally but also the ability and a minimal capacity to master a language.[74] Just as dispositions, "abilities" are properties of beings that can exist even when not manifested (e.g. a person has the ability to raise her arm even when she is not raising her arm). In addition, ability is different from *capacity*, which is a kind of a "second order ability"—one may have the capacity to do φ if one *can* acquire the ability to do it.[75] To intentionally act and to communicate are precisely *abilities* of some beings (e.g. human beings), which for some philosophers may be reduced to dispositions.[76] Abilities can be defined as a kind of *power*, which is predicated to agents (and not to things) and they relate agents to *actions*.[77] It's also crucial to distinguish between having the ability to do something, meaning knowing how to do it, and possessing varying degrees of capacity or skill in performing it.[78] Lastly, it's noteworthy that the resemblance between the category of ability and the traditional concept of *active powers* is not coincidental—some even consider them to be equivalent—which are those that essentially involve the will.[79]

8. If legal norms aim to guide behaviour, then they presuppose not only the capacity to act but also, more specifically, the ability to *obey* them. What sort of thing must happen for an agent to obey a regulative norm?

According to what SEVEL (2018: 6) calls "the Standard View" of obeying law,[80] which is related to a broader philosophical view about practical authority,[81]

> "we are creatures who have rationality or reason—the capacity to recognize certain features of the world as significant, worthy of our notice, and relevant to deciding what to do and believe. Those features are themselves said to be reasons, considerations that count in favor or against doing or adopting some token action or attitude. This capacity to recognize and respond to reasons is said

73. See PAAKKUNAINEN (2018: 403).

74. The claim here is simply that if legal norms are necessarily communicated through language, then if some entity is *unable* to comprehend language, it is *unable* to respond to normative reasons and to obey legal norms.

75. See VON WRIGHT (1963: 50).

76. See MAIER (2022).

77. Note that while some powers, such as the ability to understand language, are properties of agents but do not inherently involve action, others, like speaking a sentence, clearly do. Conversely, the power to speak Portuguese seems inherently tied to action and would thus be considered an ability. See MAIER (2022).

78. With similarities, see VON WRIGHT (1963: 50).

79. From this point forward, and without prejudice to any potential ambiguity, whenever I mention "capacity," it should be understood that I am referring to the ability and minimal capacity required for something.

80. See SEVEL (2018: 1 ff.).

81. Among others, see SCANLON (2014); PARFIT (2011); RAZ (1999); DANCY (2004).

> to be essential to us as persons, as agents who can respond and affect the world in distinctive ways. Practical authorities such as the law are said to enter the picture by making demands on us, say, to pay our taxes or refrain from committing murder. These demands are made on the presumption that we are persons in this sense, and so are intended to engage our capacities by serving as reasons for action, alongside, and on some accounts, in place of, all the other reasons that we had before the authority came on the scene."

Moreover, according to the Standard View, law provides reasons for action to its subjects. Obedience, under this view, necessitates *compliance* with a reason—to act for that reason—rather than simply *conforming* to it by performing the action for which the reason is provided..[82] In other words, a person obeys a norm only when they align their behaviour with the norm itself as the primary motivating reason. This is distinct from merely conforming one's behaviour to the norm with other reasons (or none) as the primary motivators..[83]

More formally, the Standard View can be called the "Reason Compliance" (RC) view and can be stated as follows:

(RC): If it is a fact, F, that a norm, N, requires A to φ, then A obeys N by φwing for the reason that F..[84]

Those who accept RC assume that obeying the law requires knowledge of the content of the law, which seems a plausible assumption because in order for a person to act for a reason, that person must have knowledge of, or at least be aware of, that reason. For example, I can't pay my taxes because the law says so, unless I know that the law says so, and what exactly it says..[85] This account has been accused of being too demanding, because in many cases from the standpoint of law it doesn't matter the precise reason you acted upon, but simply doing what the law requires, that is, to conform to legal norms..[86] Although it seems to me that these are two different questions—a conceptual one regarding what is to obey law and a practical one regarding what is sufficient for obeying law from the legal perspective..[87]—for the purposes of this paper, it is essential to emphasize

82. See RAZ (1990: 178-180); distinguishing between "deliberately" and "accidentally" doing what reasons recommend, see GARDNER, MACKLEM (2002: 462-463). From the perspective of efficacy, calling compliance "normative efficacy" and conformity "factual efficacy," see NAVARRO (1987: 257 ff.).

83. Talking about "directives", see EHRENBERG (2016: 167). Noting that people may obey norms for a variety of reasons, see HART (2012: 114).

84. See SEVEL (2018: 7).

85. See RAZ 2009: 214).

86. See, for example, HERSHOVITZ (2012: 67). See also PERRY (2013: 10-11). Following the conformity thesis because legal rules *qua* exclusionary reasons only exclude contrary reasons, but not reasons for action of similar direction, see RAZ (1990: 180 ff.).

87. For a critical analysis of the compliance and conformity views, and with a different thesis he calls "Intention Conformity with Knowledge" (IFK), see SEVEL (2018: 13 ff.). According to SEVEL's (2018: 18-19) IFK, "in order for their conduct to count as obeying,

that the *ability to obey the law* is a necessary condition for the very existence of the law."[88]

In connection with this, it is important to recall that the prevailing view among most philosophers is that "ought" implies "can", meaning that a subject can only be obligated to perform an action if she is capable of doing so. Many of them also see an intimate relationship between what we ought to do and the reasons guiding our actions, indicating that "reason" may similarly entail "can." This implies that "[t]here can only be a reason for a person to perform an action if this person can perform this action."[89] For example, since inanimate objects cannot perform actions, one has to conclude there are no reasons for toasts or vacuum cleaners to perform any action whatsoever, the same applying to persons or other animate entities who cannot perform an action."[90]

Everything that has just been said about the capacity to act and respond to reasons applies to obligations and prohibitions. But does it also apply to permissions and constitutive norms like competences? In the context of practical reasoning, it is true that permissions and competences do not seem to be capable of being obeyed or non-obeyed as obligations. Instead, they can be exercised, which can be seen as a *mental action*."[91] Furthermore, only conscious beings with a mind can perform such actions. It's also crucial to remember that duties presuppose, at the very least, half liberties, which must be exercised to conform to one's obligations. Therefore, it's reasonable to assert that these types of legal norms also presuppose the capacity to act and respond to reasons—in other words, the capacity to act or refrain from acting according to the determinations of the will. All that has been previously stated applies *mutatis mutandis* to these norms.

The conclusion drawn from the above discussion is as follows: If all legal norms, in one way or another, presuppose the capacity to act intentionally—acting with purpose, knowingly, deliberately, for a reason—distinct from mere goal-directed movements (such as a spider using silk to build a web or an intelligent vacuum cleaner autonomously cleaning a house), as well as the mastery of a language, and if legal positions conceptually depend on legal

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those subjects must at least recognize that their conduct is so describable." According to the IFK, the "knowledge of the fact that one's conduct is describable as an act permitted, forbidden, or required by the law must play some role in the explanation as to why one acts as one does on the relevant occasion of obedience." For SEVEL, "the knowledge of action-description equivalence need not play an explicit role in the practical reasoning of an obedient subject, for example by functioning as a reason for performing the required action, but yet may make a contribution to action by being in the background of that reasoning. Obedience requires that knowledge of the law at least motivate action, whether or not that knowledge explicitly guides action in deliberation."

88. See VON WRIGHT (1963: 107 ff.).

89. See STREUMER (2018: 233 ff.).

90. See STREUMER (2018: 237 ff.).

91. On the concept of mental action, among others, see O'BRIEN, SOTERIOU (eds.) (2009).

norms, then only subjects capable of intentional action, responding to reasons, and mastering a language can hold (at least some) legal positions..[92]

2.2. Can robots be holders of any legal position?

9. First of all, it is worth stressing that the ontological dependence that rights reveal in relation to norms is particularly decisive in the task of *individuating rights*. In fact, considering that legal norms are the constitutive and regulatory elements of legal relations, the existence and structural properties of legal positions are shaped by the structure and function of the norms that ascribe them..[93] Accordingly, from the norms that ascribe rights, it is possible to identify the specific legal position at stake. On the one hand, if an obligatory or prohibitive primary norm is involved, the ascribed legal positions are claim-rights correlated to duties to perform a certain conduct. On the other hand, if the primary norm is a permission, the ascribed legal position is a liberty. Furthermore, if a secondary norm is at stake (such as competence norms and/or norms that define or regulate the conditions of competences exercise), the legal position will, in principle, be a power or an immunity..[94]

Additionally, as *supra* mentioned, from the conducts regulated or constituted by legal norms and the subjects obligated, prohibited, permitted, enabled, or disabled to perform these conducts, one may discern different modalities of rights. One of them is the distinction between *active rights*, which refer to a conduct to be performed by the right-holder (e.g., liberties and powers), and *passive rights*, which refer to a conduct to be performed or omitted by other subject than the right-holder (e.g., claim-rights and immunities).

10. Of particular importance is the previous distinction between active rights and passive rights. Since only active rights involve actions by their holders, it is possible to infer that the conceptual constraints previously identified regarding the capacity to act, respond to reasons, and master a language do not apply to passive rights..[95] In other words, it appears that the conceptual constraints on holding active legal positions are considerably greater than those affecting the possible holders of passive legal positions.

For will theories, for example, animals, infants, or comatose people do not have any legal rights, because they are incapable of being right-holders. In KRAMER's (2001: 29) words:

> "Such creatures are not competent to form or express their wishes with the elementary degree of precision and reliability that would be necessary for the full-fledged exercise of any legal power of

92. Similarly, even if subscribing a more demanding sense of agency, see WELLMAN (1995: 108).

93. Similarly, see DUARTE (2023).

94. See PINO (2014: 187-188).

95. Also drawing a distinction between active and passive incidents of legal personhood, even if following an adapted interest theory of rights, see KURKI (2019: 95 ff.).

> enforcement/waiver. They are not able to grasp what is involved in the enforcing or waiving of various duties, and they are likewise unable to communicate any decisions on such matters in a minimally satisfactory way - even if they could arrive at those decisions adequately."

Things are different with the interest theory, because by focusing on the preservation of well-being rather than on the exercise of choice it opens up, at the conceptual level, the possibility of assigning legal rights to animals, dead people and mentally incapacitated people.[96] Nevertheless, on the one hand, my intuition was that the preservation of well-being *qua* interests seems a normative question.[97] On the other hand, the conceptual constraints are the ones coming from the ascriptive norms. As seen, obligatory and prohibitive norms, which constitute duties, presuppose the capacity to act, respond to reasons, and master a language. Without these capacities, it would be impossible to obey them. By the same token, permissions, which constitute liberties, and constitutive norms such as competences, which constitute powers, also presuppose the capacity to act, respond to reasons, and master a language in order to exercise them. These and the ascription by a legal norm are, therefore, the necessary and sufficient conditions for being the holder of a duty, a liberty or a power.[98]

That being said, the key question to consider is: Can entities like robots act intentionally, respond to reasons, and master languages? At the present, the answer is that even sophisticated AI robots still do not seem to be capable of intentionally acting in response to reasons.[99] It is true that they seem to be already able to master languages[100] and they can act purposefully, but they do not seem to "know" they're acting, or to act deliberately and in response to reasons.[101] In fact, behavior exhibited by artificial intelligences

96. See KRAMER (2001: 30).

97. However, RAZ (1986: 166), for instance, considers as a criterion for "having a right" that one *can* have rights, and someone (or something) is capable of having rights "if and only if his well-being is of ultimate value or he is an 'artificial person'." But as I will say later, this type of criterion seems to be more adequate on the normative level.

98. Similarly, PREDA (2012: 237-238) argues that intentional action is a condition for bearing duties, while the capacity to make choices is also essential for holding liberties and powers. However, I am skeptical that the capacity to make choices isn't also necessary for fulfilling duties, as compliance with legal obligations appears to rely on the capacity to choose between following and non-following.

99. It is important to note that, as WALTERMANN (2021: 36) stresses, AI entities have already different levels of autonomy (or independent action): "from human supervision (level 1), and deterministic autonomy (level 2), to machine-learning (level 3) and multi-agent systems (level 4)." Obviously, levels 3 and 4 are the ones closer to agency as I defined it. However, according to BARANDIARAN *et al.* (2009), artificial systems do not even seem to have minimal agency, which does not require the possession of mental states but simply the adaptive regulation of the agent's coupling with the environment and metabolic self-maintenance.

100. Even this is debatable. Perhaps to be able to massively associate words to linguistic rules is not sufficient to "master a language."

101. Recall that I subscribed the standard theory of agency, which is realist, according to which "it is far from obvious whether or not artificial systems have internal states that ground the ascription of representational mental states." See (SCHLOSSER M, 2019). In an interesting work, CHOPRA and WHITE (2011: 11 ff.), relying on DENNET'S (1987)

through programmed algorithms or even machine learning processes appears to be the outcome of computational processes, rather than genuine manifestations of mental states or desires. Therefore, this phenomenon resembles mere simulated intentionality.."[102] The described ability is a necessary condition for being entitled to active legal positions. Because they are unable to rationally perform actions, they cannot ought to perform actions or having reasons to perform actions.."[103] However, according to KRAMER (2001: 42):

> "even if we grant as much, we shall have no reason to presume that animals cannot *bear* legal duties. To bear a legal obligation is simply to be placed under it. If X bears a legal duty to do Φ, then a legal norm or decision requires him to do Φ; whether he can comprehend the legal norm or decision (and can alter his conduct to conform therewith) is a separate matter."

I'm arguing the exact opposite precisely for conceptual (and not moral) reasons. As seen, actually the capacity to follow obligations stablishes a conceptual constraint on the creation of oughts and, *a fortiori*, on the ascription of duties.."[104] Therefore, as "crazy norms" are conceptually impossible,.."[105] so are duties. In LUCY's (2009: 791) terms, "we might imagine

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"intentional stance," according to which an "artificial agent could, and should, be understood as an intentional agent, as acting for reasons that are the causes of its actions, if such an understanding leads to the best interpretation and prediction of its behaviour," seem to argue that artificial agents can already be "coherently understood" as acting in conformity with obligations, and therefore they can be seen "as having duties". In addition, they even identify some practical reasons to obtain this conclusion. Disregarding now the criticisms that are usually made about this type of instrumentalist stance (such as its reductionism, behaviourism and lack of explanatory power), the problem is that they seem to be confusing the conceptual and the deontic realm. The "duties" of this type of agent are not delineated on the deontic level, but on the factual level, insofar as they are pre-determined by human agents. Therefore, they are not deontic duties but rather alethic 'duties'—essentially human-made necessities. Otherwise, it would be the same as saying that duties derive from the laws of nature.

102. A blind reviewer noted that "simulation need not automatically mean that something is fake or non-existent," because "we can think about simulating mind in some special (digital) environment." I am aware some philosophers would be happy to notice that this simulated mind is still a mind. However, I am specifically talking about what I consider to be appearance or imitation of intentional behaviour by some artificial system, without that system possessing true intentionality or consciousness.

103. The case of animals is a contentious one, because there are some presently arguing they actually meet the intentional agency. See, for example, GLOCK HJ (2019: 645 ff.). Even if this is true, that is, even if they have the *ability* to fulfill obligations, it is far from clear that the concrete *capacity* they could develop does reach the minimum level necessary to comply with legal norms.

104. KRAMER (2001: 43) adds that "If the hypothetical reply is taken to mean that creatures cannot hold legal rights unless they are capable of understanding and heeding legal mandates in the manner of mentally competent human adults, then it has joined the will theory in being committed to the conclusion that infants and senile people and lunatics and comatose people cannot possess any legal rights." But this seems a *non sequitur,* because it is conceptually different to be a holder of a duty or of a passive right, such as a claim-right. I suppose an interest theorist such as FEINBERG would also disagree, because he thinks that the capacity to hold rights is dependent on the capacity to have interests. See FEINBERG (1974: 52).

105. Arguing the same about "crazy reasons", see STREUMER (2018: 234 ff.).

a contemporary Caligula imposing a legal duty on a horse to educate children, but this is pointless as asking for the moon on a plate."[106]

Schematically, my argument runs as follows:

(P1) The existence of legal norms depends on the capacity to perform the actions being prescribed;

(P2) The content of active legal positions, such as duties, requires actions from their bearers;

(C) The existence of active legal positions depends on the capacity of their bearers to perform the actions which are their content.

The conclusion is straightforward: Being conceptually not possible to impose oughts on robots, which cannot have reasons to perform any action whatsoever, from the conceptual point of view they cannot be the bearers of duties. As an example, self-driving cars cannot be civil or criminally responsible for their actions.[107] In addition, as the use of permissions and competences also requires the ability to act rationally in the terms described, then, conceptually, robots are not capable of being holders of liberties or powers either. As an example, AI bots acting in the commercial context do not actually hold powers or liberties. The upshot is that, at least at the present time, on the conceptual level, robots lack the capacity to hold active rights. But what about passive rights?

11. Differently from active rights, passive rights do not require actions from their holders. This means they do not presuppose the capacity to intentionally act, to respond to reasons and to master a language. Without this conceptual restriction on passive rights, such as claim-rights or immunities, the conclusion arising is that it is conceptually possible for non-human entities such as robots to be holders of claim-rights.

106. See HRAFN ASGEIRSSON suggested to me that perhaps it is possible to create legal norms that impose impossible obligations, although they constitute *defective* norms. This interesting objection warrants further reflection, but I believe it can be addressed for two reasons. On the one hand, legal norms, as I see it, are abstract artifacts functionally designed to regulate behaviour; and their function establishes a metaphysical constraint. Therefore, assuming metaphysical constraints are constitutive parts of the natures of their objects, to have possible conducts as their contents is part the nature of legal norms. On the other hand, if such norms were to exist, they would necessarily be disobeyed, rendering them necessarily ineffective and leading to their disappearance through *desuetudo*.

107. Rejecting this conclusion based on the thesis that attribution of agency and responsibility is conventionalist in nature, see WALTERMANN (2021); WALTERMANN, HAGE (forthcoming). However, I still find myself somewhat unconvinced by their argument. While it is true that nonhuman agents, such as corporations, can act, they typically do so indirectly, for example through representation by human agents. As HIMMA (2009: 27) puts it: "[t]hough we attribute these acts to the corporate entity for purposes of legal liability, corporate entities, qua abstract objects, do not act; corporate officers, employees, etc. do. Indeed, the law acknowledges as much, characterizing a corporate person as a 'legal fiction.'" Unfortunately, discussing the connection between the current topic and legal fictions is beyond the scope of this paper. Another possibility is to accept that groups can have collective intentionality and make choices, which is sufficient for entities such as corporations, certain conditions being met, to have the capacity of being holders of (some) legal positions. See PREDA (2012).

Even if this may be weird or counter-intuitive to some, the truth is that this seems to be nothing more than a result of the contingency of law, which is partially consistent with the alluded thesis of the formalists—the law cannot confer legal status upon any entity, yet it appears capable of ascribing rights even to entities that lack the capacity for intentional action and responding to reasons. And this is a chief consequence of the theory being expounded, because differently from what happens with the interest theory**,** which considers the appropriateness of attributing legal rights to natural objects and creatures using a combination of conceptual and moral judgments, my assessment of whether a robot can hold a claim-right relies solely on conceptual judgments..[108]

Of course, entities such as robots, being unable to intentionally act, are also unable to waive their claim-rights whenever the correlative duties are violated, because they are unable of holding powers. But contrary to what follows from the will theory that requires the right's holder to have control over the duty of others, this does not mean they cannot be holders of claim-rights. It just happens that the power to demand the enforcement of the content of the right can only be exercised by a third subject capable of acting intentionally and responding to reasons..[109] As Gunkel (2022: 76) puts it, "robot rights are not just about the robots, AI's, and other technological artifacts; they are also and inextricably about us—we who would be obligated by and responsible for responding to whatever claims, powers, privileges, and/or immunities that are possessed by or have been assigned to the robot."

Does the account presented mean that we ought to assign rights to entities incapable of acting intentionally or responding to reasons, like robots (or animals), or, even more impressively, to rivers or idols?..[110] Of course not, but this is a normative question.

3. Should robots be holders of rights?

12. As stressed along the paper, conceptual questions are to be kept separate from normative (such as moral) questions. As a purely conceptual matter, my account allows the ascription of claim-rights or immunities to entities incapable of acting intentionally and responding to reasons. In a similar fashion, even if with more *a priori* restrictions, KRAMER (2001: 40) also posits that the interest theory permits the attribution of legal rights to inanimate natural entities, regardless of the method of enforcement.

108. Nevertheless, according to KRAMER (2001: 40), "[a]s a pure conceptual matter, the Interest Theory permits the ascription of legal rights to inanimate natural entities – irrespective of how those rights are enforced." However, from the interest theory perspective seems to flow the consequence that entities unable to have interests cannot hold rights. See RAZ (1986: 186). KURKI (2019: 128 ff.), who also adheres to an interest theory, regarding the conceptual restraints on being a "legal person", also agrees that legal persons need to be capable of performing actions.

109. In a similar way, see KRAMER (2001: 60 ff.).

110. Referring impressively to rivers and idols, see KURKI (2019: 127 ff.).

However, there may be moral reasons for abstaining from any such ascription:

> "Because of the morally pregnant dissimilarities between inanimate or insentient phenomena and mentally competent human adults, those phenomena should not be designated as potential right-holders. Beings inherently incapable of undergoing any experiences of gratification or pain are not the beings for whom legal protections are introduced. Those beings may benefit greatly from those protections, but the benefits cannot be perceived and experienced at all except through the intervention of the conscious outlook(s) of some other being(s)."[111]

Therefore, at this junction the main question is whether or not robots *deserve* being ascribed rights.[112] Within the domain of robots, for some people "the very idea of robots, AI, or other socially interactive machines being accorded anything approaching moral or legal status beyond that of a mere instrument or piece of property is not just wrong-headed thinking but a dangerous development that should be curtailed, resisted, or interrupted before it even begins."[113] On the opposite side, there are the ones that recognize "that various technological systems and implementations might need some form of social recognitions and/or legal protections and that entertaining this exigency is an important contribution to ongoing efforts to test, validate, and even revise the limits of our moral and legal systems."[114]

Perhaps a good way of conducing the normative discussion about which rights do robots deserve is to focus specifically on rights in accordance to robots' properties, without forgetting the identified conceptual constraints. Being a contingent matter, however, the ascription of legal rights to robots will naturally depend on their collective acceptance.[115]

Determining whether a robot (or a class of robots) should be a holder of (some) rights may be done by following this piece of reasoning:

(P1) Having property P is a reason in favour of ascribing legal right LR;

(P2) Entity E has property P;

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111. See (KRAMER (2001: 40).

112. As GUNKEL (2022: 72) notes, there is some confusion regarding this question, because many people (scholars included) immediately assume rights to be *human rights*. However, "the set of possible rights belonging to one category of entity, like a non-human animal or an artifact, is not necessarily equivalent to nor the same as that enjoyed by another category of entity, like a human being. Rights does not automatically and exclusively mean human rights." But they may (e.g.) be constitutional rights.

113. In this field, authors such as JOANNA BRYSON (2010) go so far as to argue that robots are and should always be "slaves."

114. See GUNKEL (2022: 66-67).

115. For two interesting papers analyzing people's attitudes towards the ascription of rights to robots, see LIMA et al., (2020: 1 ff.); DE GRAAF et al., (2021).

(C) Entity E should be ascribed LR.

The question is therefore to determine which properties are relevant in justifying the ascription of rights to some entities, but not to others. A way of proceeding is to assess if robots have interests deserving to be protected. Interests may be defined as sets "of desires and aims, both of which presuppose something like belief, or cognitive awareness."[116] For RAZ (1984: 195; 1986: 166), more simplistically, interests are "aspects of wellbeing." He also argues that X can only have rights if X is capable of having rights, and that "[a]n individual is capable of having rights if and only if his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation)."[117] From this perspective, we need to know, on the one hand, if the rights contender is of "ultimate value"[118] and if his condition is improved with a possible incident.[119] How do we assess if something is ultimately valuable?

Putting aside the obscurity of the concept,[120] a possible way to go is by identifying similarities and differences between human adults, for whom there is no doubt as to their moral merit as holders of rights, and other candidate entities. For example, usually philosophers distinguish between inanimate/animate and insentient/sentient entities, being the animate and sentient entities more deserving, from a moral point of view, of being ascribed rights.[121] In accordance, one may discriminate positively the conscious creatures that are sufficiently akin to ordinary human adults.[122] In this context, "[a]mong the factors that might be invoked are the sophisticatedness of a creature's sentience, the capacity of the creature for reasoning in primitive ways, its ability to communicate and to receive communications, its understanding of the constraints within which its own needs can be satisfied, and so forth."[123] This seems to make sense from the interest theory point of view, because entities that *(i)* are not sentient and *(ii)* do not have conative life (do not have desires, purposes or beliefs) do not have interests.[124]

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116. See FEINBERG (1974: 52).

117. See RAZ (1984: 195; 1986: 166). I'm fully aware RAZ considers this to be a conceptual condition, but it is far from clear how a value concept such as this one it isn't instead a normative condition.

118. See KURKI (2019: 178 ff.).

119. See KRAMER (2001b: 33).

120. Noting the concept is "rather obscure", see DUFFEL (2017: 191).

121. A difference between animate beings, even if insentient, and inanimate artifacts is that the former have their own ends, while the latter only have the ends we assign to them. For instance, the aims of robots are the ones we program them to have, which means that they do not seem to possess interests but rather serve our own interests. See BASL, BOWEN (2020: 301).

122. Defending, for example, that personal value can be constituted by reasons regarding a person or an entity sufficiently similar to a person (such as certain animals, institutional people, robots, etc.), see MÚRIAS (2024: 406).

123. See KRAMER (2001: 41).

124. See DUFFEL (2017: 192). This is a "subjectivist view of well-being", according to which "bearers of well-being are all, at minimum, conscious," that is, "[t]hey are capable

Therefore, once robots achieve some form of moral self-recognition—assuming they will—as happened with subjugated groups of humans, they may question and ask to be granted some rights..[125] Put another way, may artificial entities, such as robots, achieve a certain degree of consciousness, by sharing a human property like this, they can be morally entitled to rights, that is, it may be morally justified to extending them even human rights..[126]

Nothing in my argument presupposes conclusive reasons for ascribing or not ascribing rights to robots. In fact, not only this is not the purpose of this paper, but the truth is that there is no agreement on the specific question of knowing whether we should grant rights to robots..[127] For example, for some authors—the Deniers—robots are essentially machines or tools created to perform specific functions. Unlike living beings, they lack interests or desires, do not make decisions, nor pursue life goals. They do not interpret, interact with, or learn about the world. Instead, they merely follow preprogrammed instructions..[128] Consequently, being automatons devoid of autonomy, robots do not possess the attributes necessary for moral consideration or status..[129] For the Granters, the current inability of robots to satisfy all the morally significant criteria, such as rationality, autonomy, understanding, and social relations, which are necessary for the attribution of moral personhood and rights, does not conclusively resolve the issue. This is because as their

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of some form of subjective experience or mental states." However, if one accepts an "objectivist view of well-being", according to which (e.g.) an amount of sunlight and water is *good* for houseplants, consciousness would not be a necessary condition for holding (moral) rights. See BASL, BOWEN (2020: 295 and 300).

125. See ASARO (2006: 9).

126. See SANTOSUOSSO (2016: 204).

127. This shows how the present thesis gives space for the possibility of disagreements, which as JEAN THOMAS (2020: 11 ff) argues is an important feature of a theory of rights.

128. Arguing that the recognition of organizational rights undermines substantive objections to robots' rights, see MÚRIAS (2024: 327); HAGE (2017: 261). But I'm not sure whether this holds true both conceptually and normatively (at least for all legal positions). It appears that this argument may only hold at the normative level—corporations and legal persons are entities without intrinsic value, serving merely as instruments. One argument may be that corporations possess collective intentionality—the sense of agency needed for holding active legal positions—which robots lack.

129. See MARX, TIEFENSEE (2015: 83). Stressing the same idea, considering AIs mere "machine-learning algorithms" and therefore not having consciousness, a necessary condition for having well-being, see BASL, BOWEN (2020: 295-296). Differently, BROZEK and JAKUBIEC (2017) claim that while it is possible for law to attribute agency and responsibility to AI, it should not do so because this would take law too far from the life-world and those legal norms would remain "law in book" rather than "law in action." I think it is important to note that the sense of agency required to hold active rights may not correspond to the agency conditions necessary for attributing responsibility. While the former requires only an intermediate sense of agency involving intentional action and the capacity for making choices, the latter entails a more robust sense of agency characterized by autonomous agency. For more on moral responsibility, See PREDA (2012: 236).

capacities advance, there exists the potential for them to eventually meet these criteria..[130]

To finish, it is worth noting that justifying the ascription of moral rights is more difficult than of legal rights. The problem is that concepts such as consciousness or sentience are philosophically and scientifically disputed. In GUNKEL'S (2022: 81) own words:

> "everything depends on metaphysical properties and the ability to be certain (or at least convinced) about the actual presence or absence of these properties, all that is needed to undermine the argument is to pull the rug out from underneath the metaphysical scaffolding, either by pointing out how a property like consciousness not only lacks univocal definition but varies across different contexts of use (...) or capitalizing on the epistemological difficulties of positively detecting the presence or absence of these qualities as they exist (or not) the mind of another"..[131]

Differently, in addition to the identified conceptual constraints, the existence and validity of legal rights merely depend on the ascriptive norms meeting each legal system rule of recognition and constitutional criteria, mainly to be ascribed by competent normative authorities. In a nutshell, they are social constructs or, in a non-cognitivist language, "collective fictions"..[132]

In sum, the fact that my account conceptually allows the ascription of claim-rights to robots is independent from positions on any substantive question about what protection do we owe to robots.

4. Conclusions

13. In conclusion, my argument can be outlined as follows: First, it is important to distinguish between conceptual questions, related to the definition of a right—(1) Can robots have rights?—and justificatory questions, related to the reasons in favour of granting a right and its content—Should robots have rights? Even though interest and choice theories are supposed to answer question (1), my intuition is that, when it comes to legal rights, interest theories are better suited for addressing (2). Conversely, while will theories seem more suited to play a role in answering question (1), their restrictive nature prevents us from reaching necessary truths about rights.

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130. See GORDON (2021: 470). In the same sense, arguing that once AIs exhibit consciousness, desires, and goals, they merit moral consideration, see SPARROW (2004: 203). And as my friend PEDRO MONIZ LOPES reminded me, the same idea is expressed in one of our favourite Silver Jews songs: "A robot walks into a bar/ orders a drink / lays down a bill/ The bartender says, hey we don' t serves robots / and the robot says, oh but / someday you will."

131. See also GUNKEL (2018: 92-93). Also analyzing the problems arising from the argument that AIs do not hold moral rights because they do not have consciousness, insofar as this concept is debatable and is endowed with epistemic difficulties, but arguing there are good reasons for adopting a demanding concept, see BASL, BOWEN (2020: 296 ff.).

132. Using this expression, see TURNER J (2019: 135-136).

Moving forward from the premise that legal positions are constituted by legal norms, I argued the following. Firstly, at the conceptual level, I explored the concept of will as intentional action to determine who is capable of obeying or exercising a legal norm, and whether this imposes conceptual constraints on the holding of legal positions. I concluded that if all legal norms inherently entail the capacity for intentional action, responsiveness to reasons, and mastering a language, then only subjects capable of intentional action can hold legal positions that entail action, such as duties, liberties, or powers. Conversely, legal positions like rights or immunities, not predicated on intentional action, can be bestowed by law upon entities lacking such capacity.

Secondly, at the normative level, I examined whether there are reasons justifying attributions of rights and if the concept of interest may be relevant in this context. I concluded that even though robots may be attributed certain legal rights, determining their entitlement to these rights necessitates normative analysis, namely of a moral nature. A fruitful method for this evaluation involves identifying the pertinent properties that justify the ascription of rights. For instance, one could assess if entities such as robots possess interests warranting protection, which can be accomplished by comparing similarities and disparities with human adults.

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