Law and Legal Practice in The Post-Pandemic Era - Opportunities, Solutions and Innovations

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1. Introduction

Good afternoon. Professor Michael Driscoll, the Vice Chancellor and President of Taylor's University, Mr Kalidas Krishnan, President of the Bar Council of Malaysia, Professor Khong Kok Wei, Executive Dean, Faculty of Business and Law of Taylor's University, Associate Professor Dr Harmahinder Singh, Head of Taylor's Law School and Chairperson of the Conference, senior members of the legal profession and academia, and in particular the students of Taylor's University who are our future.

It gives me considerable pleasure to address you this afternoon[*].

When speaking of the future of the law and legal practice in the 21st century, it is a well-known truth that we are in the midst of a digital revolution, whether we like it or not. The effects of this revolution on technology, the economy and society as a whole has naturally affected the law. Its effects span not only private law but also public law and criminal law. Traditionally, the law has always followed significant changes in mind and culture. Our entry into the digital age is no different. The law too must adapt to the digital age, as must the actors who operate in the field.

How the rule of law is adhered to must accordingly be adapted to meet the needs of this era. The theory and teaching of law must also adapt to these altered conditions. Such change should be made at a philosophical level, not merely by a superficial compliance with the technological aspects of the digital era. What this requires of us is a paradigm shift in the way we define, construe and disseminate the law. What we need to achieve is a paradigm shift in the way we think about how legal meanings are made, disseminated, and construed.[1] For students, that will be like a duck taking to water as you are all children of the digital age. You were born into it and it is second nature to you. So, the important message is this - those of us who are older struggle, but you won't and you are in a position to fashion and create the future of the law and the path it takes.

[*] Based on the Keynote Address for Taylor's International Conference on the Future of Law and Legal Practice 2021, 26-27 October 2021, Malaysia.

[1] Richard K. Sherwin, Neal Feigenson and Christina Spiesel, 'Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law' (2006) 12(2) B.U.J Sci & Tech L., 227-228.

With this in mind, I propose in this address to cover three somewhat distinct areas:

(i) firstly, globalisation, the law and lawyers in this digital and pandemic-driven time,

(ii) secondly, virtual courts, and

(iii) thirdly, how the digital revolution will bring changes to substantive law, the profession and the practice of law as a whole.

2. Globalization and Neoliberalism - Lawyers in the New World Order

To start off, I would like all of you to ask of yourselves this fundamental question: Why have you chosen to read Law? Just think about this for half a minute.

One of the fundamental reasons is likely to be the need to earn a good living. And one other might be an overwhelming need to ensure the prevalence of fairness in society. Contrary to popular belief, these two reasons are not mutually exclusive. And I shall not be so presumptuous as to assume that any of you prefer one exclusively over the other.

Bearing this in mind, what does the law in the 21st century demand of you in order for you to effectively marry these two goals?

I propose to discuss this topic by examining the traditionally held concept of a lawyer in the early to the mid-20th century, compared with the evolution of that role through the rest of the 20th and into the 21st century.

We inherited our current system of law from the British during colonial times, and to that extent we adopted the classical Western view of law as a fundamental bulwark/discourse through which "… rational authority, social solidarity and the moral foundations of society are articulated."[2] That left us with a divergence between our pre-colonial plural systems of law, and our present essentially secular system.

Our development of modernity in the law, including our adaptation of the Parliamentary Westminster system of governance as provided for in our Federal Constitution, was shaped largely by the colonial experience.

[2] Richard L. Abel, Ole Hammerslev and Hilary Sommerlad, '*Lawyers in 21st Century Societies Volume 1: National Reports*' Hart Publishing, Bloomsbury Publishing PLC 2020.

Given that our system of governance is premised on a constitutional framework, there was and continues to be an inextricable relationship between the profession and the development of modernity and governance in our country and society.

In this context the legal profession was assigned a central role in the construction of modern society.[3] In view of this central role, the training of lawyers comprised and still does, the teaching of systematic and rational knowledge and analysis, political neutrality, social detachment as well as the distinctive ethical code essential to a profession. Added to this was the ethos of service, all of which require a lengthy period of training. It is supposed to inculcate a value system along with the requirements of an intellectual education.

As a consequence of this mode of training during the earlier parts of the last century, the moral, cultural and intellectual authority of lawyers became a distinctive and important feature, granting them considerable autonomy in their thinking and ability to pursue social justice. Those were the key tenets/features of the legal profession from independence until the mid-80's and 90's. However, it must be said that there was, and even now, no real appreciation or consideration given to our pre-colonial plural systems of law which co-existed harmoniously prior to British rule.

The evolution of the legal profession was and continues to be heavily influenced by, amongst other things, globalization. I highlight globalization because it has influenced the evolution of the profession far more than any other factor. Why do I say this? This is because the law has been essential for the purposes of sustaining globalization.[4]

Globalization, which I shall attempt to define in a minute, brought with it changes to the world order and consequently the manner in which lawyers function. This in turn altered the prior role of lawyers as being professionals in a national domestic setting to being lawyers in a pseudo-international,[5] economically borderless setting.

Quoting from Chief Justice Sundaresh Menon in his paper on 'Justice in a Globalised Age' delivered last month:[6]

[3] Ibid.

[4] Sundaresh Menon, Honourable Chief Justice of Singapore, 'Justice in a Globalised Age' (Speech at the Judicial Roundtable Conference on International Commercial Dispute Resolution, 26 September 2021).

[5] Pseudo-international because while it appears to be like an international setting, in actuality these lawyers function within a national framework amongst numerous other national frameworks.

[6] Sundaresh Menon (n 4) 3.

> " … the term (i.e. globalization) has been used to mean many different things to different people, but most definitions converge on the central idea that it refers to a growing interconnectedness and interdependence across the world in various spheres - whether economic, social or cultural - and at an inter-nation level as well as between individuals, businesses and communities."

This has never been proved more true than with the pandemic which has illustrated amply the effect and consequences our actions can have for distant nations.

The function of the law in globalization has been to afford a structure and order to the evolving scope of relationships between international entities, persons, communities and nations. This has been particularly prevalent in the context of transnational trade and commerce.

3. The Positives of Globalisation in Relation to the Law and Legal Professionals

Undeniably, global economic prosperity has been greatly advanced by globalization as greater trade opportunities and economic liberalization has allowed for greater capital and resource mobility. The law has played an important role in that it facilitated and structured a transnational marketplace enabling commercial relationships on a cross-border basis with relative ease. Inter-se nations, the international law of obligations and Conventions like the United Nations ('UN') Convention on Contracts for the International Sale of Goods and the World Trade Organisation ('WTO')'s General Agreement on Tariffs and Trade are two well-known examples.

Equally the law expanded to allow for the resolution of international commercial disputes in fora which were neutral, with procedural flexibility, accommodating a need that domestic and national courts could not. The success of such features is evident from The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the 'New York Convention'), the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration as well as International Institute for the Unification of Private Law ('UNIDROIT') and the less popular but efficacious Convention of 30 June 2005 on Choice of Court Agreements (commonly known as the 'Hague Convention on Choice of Courts Agreements 2005'), etc., all of which have gained considerable ground. To that extent transnational commerce which is the bedrock of globalization has been eased by the law and legal professionals.

We have seen the evolution of attempts to harmonize and converge laws even in a judicial context to allow national courts to take a more common approach to commercial issues. This in

turn is geared towards enabling a greater degree of stability and finality for any person from any jurisdiction to embark on international commerce.

On the substantive law front too, the law has sought to support and play the role of handmaid of commerce.[7] This includes a more universalist approach in relation to cross-border insolvency, the development of competition law to guard against monopolies and the age-old concept of the separate legal personality.

In short, these triumphs of the law in relation to globalization adhere to the Rule of Law and enhanced the function and purpose of the legal profession. This is to be lauded.

4. The Adverse Effects of Globalization on the Legal Profession

But alas, the story is not all rainbows and unicorns.

The obverse is that in as much as the law has facilitated globalization, globalization has also altered the structure of the law and its manner of practice by its professionals. Essentially, the law and its institutions have altered substantively to meet the changing needs of the people whom they serve, while being shaped by the influence of the rest of the globalised world.[8]

How has this come about? Essentially business has become a colossal power. It is both internationalized in countries throughout the world, while power is concentrated in specific regions. Coupled with this was the deregulation of financial markets, a cornerstone of free market capitalism, which led to an exponential growth in the equity, and thus the bargaining power of transnational corporations. Ancillary to these transnational powerhouses are the clusters of producers, technological infrastructures and institutional networks.[9] Taken as a whole, they comprise virtually private sector states - making their own transnational regulations, modes of operation, and new fora for litigation, arbitration etc. Along with this, these transnational corporate superstructures took along with them their large corporate law firms, largely Anglo-American, which accordingly also metamorphosed to accommodate their clients' needs.

Firms across the globe accordingly expanded along similar lines, to ensure survival and to boost their earnings and status. Together with this alteration in structure, geography and culture, and the interdependence of these corporate law firms, both domestic and transnational, on their

[7] Lord Bingham of Cornhill, 'The Law as the Handmaid of Commerce', The Sixteenth Sultan Azlan Shah Lecture, 5 September 2001.
[8] Richard L Abel and others (n 2) 2.
[9] Richard K. Sherwin, Neal Feigenson and Christina Spiesel (n 1) 232.

clients, there was a gradual dismantling of the more traditional structure and practice of the law. This diluted the law firms' characteristic, national identity and embeddedness domestically. This was done subtly and very often not recognized because all players were focused on improving their respective economic interests and maximising profits, exponentially if necessary. In that way the DNA of the professional lawyers and law firms were effectively altered.

In order to grow profits and enhance performance economically, there was a tendency to adopt an international corporate culture which resulted to some extent in denationalization. But what is important to appreciate is that such alterations in the value systems and modes of functioning were initiated, orchestrated and monitored by these transnational corporations and their legal advisors, rather than by any domestic or national considerations. The net effect, viewed from a bird's-eye perspective, is that of distinct national and geographical entities, economies and institutions being reconfigured to meet the needs of global corporates or global capital.

To this end, as stated at the outset, what was initially in the 19th and early 20th centuries, a profession which was connected closely to state theory, political values and a specific ideology which focused largely on comprising the cement between the state, society and citizen, changed to assume the needs of the modern globalized society. The extent of the shift of focus from professionalism to making the law a business, is evident from numerous papers written between 2012 onwards where leading law schools particularly in the more developed nations have extolled the virtues of adopting a more business-like model in relation to the practice of law. The lines between legal professionalism and commerce were encouraged to be blurred. This approach diminished and detracted from the more traditional concepts of avoiding conflict of interest positions, requirements of disclosure, anti-collusion etc. This was a clear move away from the expected ethicality of the profession. It compromised to some extent the autonomy that the profession initially professed in preserving their professional independence.

The profession today, apart from having increased exponentially in terms of size, has become a more fragmented, multiform and decentred profession, to enable the maximization of profit. In the course of doing so, it has necessarily lost some of the ideals that were central to its function as an important agent, instrumental in the formation of the constituent powers of the state. The function of the profession as the role of the agent between the state and civil society was eroded. The provision of domestic legal services became infused with the commercial and entrepreneurial philosophy characteristic of international corporate firms, thereby enhancing and legitimizing the concepts of commercialised and corporate professionalism. And that is where we are today. As a consequence, there is far less recognition of the intellectual, moral and cultural authority of lawyers, and the profession as a whole, which they once enjoyed. To put it another way, lawyers should uphold the fabric of the law in the course of their practice on an

everyday basis, rather than seeing the law as a means to achieve small scale victories for one's client motivated by the need to win at all costs. That is not what the practice of law prescribes and not what society needs from lawyers.

One of my eternal regrets is that I neither saw nor recognized this change and accepted unquestioningly the ethos of globalization and its effects at the time. This was when I was still in legal practice prior to joining the Judiciary. I failed to appreciate or understand the effects it had on the fundamental principles of the profession.

I am not saying that earning very comfortably from the profession is wrong. Rather, what I am saying is that it cannot be at the expense of the complete erosion of the fundamental building blocks of the profession. And those foundational aspects lie in the importance of comprehending the composite nature of the law, which has room for concepts like equal access to justice and the profession's responsibilities to society as a whole. Rather than to any one segment of society or client with complete disregard to the needs of the remaining segments of society or the nation as a whole.

The solution, I suggest, lies in continuing with globalisation but being cognizant of its limits. What are those limits? Those limits lie in comprehending that trade and legal infrastructure cannot be utilized to create unsustainable levels of consumption and affluence.

This comes from the recognition that there can be no maximal exploitation of global resources without restraint. We can continue to pursue economic prosperity but ensure that it is sustainable development which ensures that we remain responsive to threats to collective humanity. This means being mindful of the need for the preservation of the environment, protect against threats posed by climate change and importantly, comprehending the importance of addressing economic inequality.

The last is of particular significance to the profession and the law. It is borne out by the World Inequality Report 2018 which stipulated that between 1980 and 2016, income inequality had increased sharply in nearly all world regions. Although economic growth increased across all income groups, the global top 1% of earners procured twice as much of the growth in global income as the poorest 50%.[10] It is evident that there was no equity in the distribution of the wealth generated by globalization. Drawing a corollary with the profession and the law, it should be recognized that a philosophy that seeks profit without limit is untenable in this day and age. We need to be cognizant of this reality. Perhaps the answer lies in greater distribution of wealth

[10] Sundaresh Menon (n 4) 3.

and a genuine attempt to facilitate access to justice for the 80% or more of the general population in this country who have no such access.

5. The Pandemic and the Need to Re-Assess the Needs and Functions of the Profession

But now let me turn to the unicorn bit. You as legal professionals, from a younger and different generation, offer great hope. You are, after all, the Greta Thunberg generation. Studies and analyses bear out the fact that younger generations are generally more attuned and sensitive to the need for equality, labour rights, the environment and gender parity.

Without placing too heavy a burden on you, the hope to restore the DNA of the profession lies with you. If you can incorporate the factors I just made reference to, in the course of your practice, and if you can persuade your superiors and peers to factor in these realities, there is every hope for a resurgence in social justice and affording access to justice on a more equitable basis. And that surely must reflect the true meaning of the Rule of Law.

6. Virtual Courts - Delivering Justice During the Pandemic and the Future Use of Technology

Now let me move on to a more practical aspect of the recent pandemic and its practical and real-life effect on the Courts. That takes the form of virtual courts which is very contemporary and significant for those entering practice. I have spoken about this in various fora, and I am reinforcing the same message here.

Essentially, “We went from being the Flintstones to the Jetsons in 9 months.” (Dan Schulman, PayPal)

I think that quote accurately describes how the courts adapted to technology simply by reason of the pandemic.

And that is because the pandemic brought along with it the need to ensure access to justice. Courts throughout the world were catapulted from a state of relative complacency in terms of their existing operational systems, to transforming overnight to meet the new pandemic driven environment. That new environment precluded functioning in person, in the seemingly safe sanctity of our courtrooms. This demanded a change in our mindset and the way in which we have dispensed justice, namely in person, for at least the last 150 years or so in Malaysia, and considerably longer, for example, in the United Kingdom.

The pandemic has taught us what would, in probability, have taken us at least a decade to accept without the pandemic, that effective access to justice can be achieved digitally, in some instances arguably more so.

Why do I say so? As we go in and out of phases of being in lockdown and then released, we have shuttled between digital and physical hearings at the behest of the virus. Surely it is now time, to reflect on and perhaps accept that this medium of court hearings, namely remote or virtual hearings, are here to stay, even if and when the pandemic is under control.

As Albert Einstein famously said, 'The measure of intelligence is the ability to change'.

We should recognize that we are on the cusp of an evolution in terms of how justice is administered, and how access to justice is maintained and enhanced. The first hurdle (which has been amply pointed out by renowned writers such as Susskind) is the need for the actors in the field of law, i.e. lawyers and judges, to be open to changes in the concepts, as well as the manner of providing a system of justice that affords true access to the litigants. In short, a change in mindset.

The way in which the legal system works formally, has over the centuries, been literally engraved into our legal and judicial ethos and culture to the point that if litigation is not conducted in the manner we are used to, we feel that it amounts to a derogation of substantive justice. But is that true? Or are we deceived by our own need to adhere to a familiar and comfortable system of adjudication that has survived over centuries?

We look to phrases like the majesty of the law, we look to our courtrooms, our robes, where we sit, to rue and disparage the new paradigm shift to the virtual courtroom. The question however is whether the traditional mode of conduct of dispute resolution the only acceptable means of achieving justice?

Do these factors comprise the essential elements of justice, the administration of justice or access to justice?

7. The Rule of Law and Virtual Courts

I suggest not. To my mind, **the test to be adopted in ascertaining whether justice is jeopardized, is analysing whether such changes would endanger the core elements of justice and its administration as envisaged under the Rule of Law.**

The **Rule of Law** necessarily means different things to different people globally. But for the purposes of the digitalization of the courts, virtual courts and remote hearings, the issue of whether the 'thin' version of the rule of law is jeopardized, suffices. (The 'thick' version encompasses complex principles such as democracy and human rights which deviate from country to country.)

The thin version focuses on procedural fairness and ensuring that court processes adhere to a minimum standard. For example, that the rules of natural justice are complied with, and the essentials of a fair trial are ensured. This is guaranteed under our Federal Constitution and is sufficient to instil public confidence in the legal system.

While there is no definitive set of rules, the following aspects are indicia of **compliance with the rule of law**:

(i) **open Justice** may be ensured in the form of livestreaming from the courts, or giving access to persons who wish to observe proceedings, apart from the litigants themselves,

(ii) **equal access by all parties**, equal treatment of and respect for participants – which means all participants enjoy an equal level of accessibility, security without undue inconvenience or cost[11],

(iii) **compliance with the rules of natural justice**, meaning that parties have, for example, access to legal advice and evidence, records and documents utilized throughout the court process,

(iv) **an independent legal profession** that is equipped to cope with the new medium and able to provide advice to ordinary citizens at a level which is sufficient to be useful to a technologically advanced society at a cost that is not unduly prohibitive, and

(v) **an independent judiciary** which is also conversant with functioning in a paperless virtual medium.

The question is whether these indicia are met in a virtual medium. The answer is yes. The use of remote technology **does** afford the opportunity to litigants and their counsel to meet these conditions that comprise the heart of procedural fairness, and thereby the **Rule of Law**.

Early reports and even critics today object to, and criticize the use of remote hearings, and its impact on fairness. Such criticism ranges from matters like the difficulty in engaging in the proceedings, assessing demeanour, feelings of alienation, distorted gestures, and a generally weaker standard of communication, which affects the assessment of evidence etc. Difficulties in taking instructions remotely, difficulty of rapport building between counsel and the Bench or

[11] Michael Legg and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) University of New South Wales Law Journal, 126.

counsel and their clients has resulted in reports that virtual hearings cannot meet the standards achieved in a physical hearing. The reality however is that there is little empirical or scientific data to support these grievances.

However, with the increased use of remote hearings what has become apparent is that:

(i) the use of technology **actually increases access to justice** - the reality is that many citizens do have access to technology and are relatively well versed and comfortable with it and therefore prefer some distance from the courtroom and the judge. The courtroom is often far more daunting than a remote hearing,

(ii) the use of good quality technology eases a great many of the initial complaints –it is arguable that there is, in actuality, a better opportunity to assess a witness's demeanour and credibility as the camera is able to focus more closely on a witness than in a traditional courtroom where the Judge is farther away, as are counsel. For myself at the appellate level, I have found it to be so, as counsel often respond to a facial or physical reaction to a particular argument which has not been expressly articulated, by referring to it. Such is the power of technology which must equally be applicable when a judge is observing a witness,

(iii) 'tricks' such as breakdowns disrupting an important point in cross-examination are recognised as attempts to avoid a question, and

(iv) the use of audiovisual links is a great levelling tool. It enhances confidence and reduces anxiety and tension for counsel and litigants, particularly litigants in person. As for the majesty of the law, that lies in the ability of a litigant to have his grievance heard and effective redress given within a reasonable time. Less so in the formality of procedure and form.

Having said that, it must be accepted that remote hearings may not be ideal for litigants who are vulnerable or have disabilities who may need to be heard physically. Certainly immigration, criminal and family matters come to mind in this context.

But the inevitable conclusion that follows rationally through is that the transition to remote hearings **does not of itself,** presage jeopardy or risk to the **rule of law** which is the fundamental basis on which the provision of justice rests.

8. The Need to Use Technology to Increase Access to Justice for the General Population

Once it is accepted that the use of remote hearings does not jeopardize the **Rule of Law**, the need for innovation and use of the new medium becomes inevitable. Its greatest use perhaps is its potential to resolve that perennial problem of access to justice.[12]

It is a harsh truth that large segments of our population, as is the case in many other countries, do not enjoy ready access to justice. As Jeremy Corbyn said, "Legal Aid is fundamental to giving everybody in this country access to justice."

Although we do have Legal Aid Schemes in principle, the largest being the schemes funded by the Government and the Bar, the bleak reality is that these schemes are often insufficient to meet the needs of the population, as the thresholds for eligibility are at very low levels, such that persons who are just on the poverty line, and those in the lower middle class and middle class, do not qualify. And these latter groups cannot afford private legal representation. This is where technology is pivotal to enable access to justice.

Today, more people have access to a smart phone than ever before - be it in remote or urban areas. This form of access can only increase as we move into a digital era. And such access cuts across the economic divide. In the future with the increased use of digital technology and artificial intelligence, we hope that technology will afford a basis for access to justice for those large segments of the population who have none presently, such that they are afforded an opportunity to be heard and are able to procure a remedy for their particular grievance.

9. Substantive Law - The Future

However, the digital evolution does not stop there. What about the future of substantive law in this digital age? Again, you are all on the cusp of a truly transformative age. Digital transformation in substantive law is a reality. It would be a mistake to think that digitalization comprises a mere shift from a bricks and mortar courtroom to a virtual medium. It is considerably more than that.

[12] Defining access to justice in its simplest terms, I understand it to mean that: A person who is suffering hardship in one form or another:

(i) firstly, recognizes that a legal issue is involved, or has access to someone who can identify, for his benefit, that a legal issue is involved,

(ii) secondly, is able to obtain timely and affordable access to the level of legal help required, to put forward his case correctly and adequately,

(iii) thirdly, gets a fair hearing before an impartial and educated adjudicator, so as to obtain a fair result and remedy to his problem, and

(iv) fourthly is able to make the result and remedy a reality, which means the ability to enforce or obtain the benefit of the remedy in a timely manner.

Digitalisation has touched on how we work in terms of strategy, structure, work processes, capabilities, and culture.[13] The greater future challenge for the law and the courts therefore lies in how substantive law is to evolve so as to take its rightful role in digital society.

The economic world outside the courts has and continues to evolve into a digital revolution, where data is becoming central to economic activity. Digital currency is another area which has and is developing rapidly, with central banks investing in research on regulation and utilization of cryptocurrency which will significantly alter the manner in which business transactions are carried out. The law will have to evolve to meet these new means of trade.

The rise of the Platform Economy which involves the digitalization of products, services and business processes in sectors such as transportation, accommodation, retail, and banking sectors is yet another example.

The courts will increasingly have to deal with new forms of evidence and admissibility disputes created by emerging technologies, such as geolocational data, facial recognition evidence, social media evidence, and genetics evidence, to name a few.[14] Consequently, one would expect interlocutory applications and court proceedings which involve such evidence to be become more complex, technical, and commonplace.[15] Our laws will require updating to bring them in line with current technological advancements.

In matters relating to proof, the courts may be asked to determine if documents have been digitally altered. From recent developments, metadata and blockchain data (material that was supposedly unalterable) has been found to be editable like other forms of data.[16]

To compound matters, the digital age pays no heed to borders nor national legal frameworks. To that end, national solutions which work within a particular domestic environment may not satisfy cross-border requirements and the risks of the digital world.

[13] Jungwoo Lee and Spring H Han, *The Future of Service Post-COVID-19 Pandemic Volume 1: Rapid Adoption of Digital Service Technology* (Springer Link, 2021).

[14] n/a, 'Report and Recommendations of The Future Trials Working Group' (*Nycourts.gov*, 2021) <https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf> accessed 6 May 2022.

[15] Ibid.

[16] 'AI in the Classroom: How Artificial Intelligence is Changing Law Students' Day-To-Day Lives - IE Driving Innovation' (*IE University*, 2022) <https://drivinginnovation.ie.edu/ai-in-the-classroom-how-artificial-intelligence-is-changing-law-students-day-to-day-lives/> accessed 6 May 2022.

10. The Lawyer in the Age of Digitalisation

All this necessarily leads to the re-definition of the role of lawyers, given the emergence of more sophisticated, AI-driven technology and applications. Does that mean that in the future, the need for lawyers will abate? Will the profession slowly become extinct?

That to me does not appear to be an accurate prediction. In point of fact, it is inevitable that the legal profession and its dynamics will change to meet the needs of a digitalized world. While AI may reduce the number of lawyers required for a particular task and alter the nature of some of the work done by lawyers, law students of the future can be rest assured that they can still have a legal career ahead of them - but perhaps in partnership with a machine.[17]

There are several possibilities about how the legal profession and legal education will evolve, premised on the need for adaptation to digitalization, as well as the new character of globalization I have sought to visualize. It is therefore pertinent to ask what will be the core tasks of tomorrow's legal practitioners? How must law schools and legal education be transformed so as to qualify law students to work in this dynamically evolving environment?[18]

The first and arguably most obvious point which most lawyers don't see or consider, as Susskind says, is that people want justice, not lawyers.[19] So the question/issue for both legal professionals and law schools should be, 'How can we utilize technology to provide justice?'

This requires a major change in the mindset of the profession as a whole including the educational arm.

Once technology is accepted as a tool or structure that is permanent a few consequences follow.

Automatization is likely to affect the most routine aspects of legal labour if it can be termed as such. In effect this means that routine tasks are likely to be outsourced to machines. Those might be tasks generally performed by paralegals, young lawyers or even in back offices in other jurisdictions. Such automatization affects the legal profession if it is argued that the carrying out of that job function falls within the sole monopoly of a legally trained lawyer. Let us take an example. Automated tax declarations for example may well reduce the need for tax advice from

[17] Ibid.

[18] Werner Schäfke-Zell and Ida Helene Asmussen, 'The Legal Profession in the Age of Digitalisation' (*Utrecht Law Review*, 2022) <https://www.utrechtlawreview.org/articles/10.36633/ulr.454/> accessed 6 May 2022.

[19] Richard Susskin, Chair of the Advisory Board and a Visiting Professor at the OII, 'Online Courts and the Future of Justice' (Speech to the American Bar Association, September 2020).

legal professionals. In like vein automated data processing agreement generators are also likely to reduce the need for advice on data protection from legal experts. On the dispute resolution front, basic pleadings, basic research may all become automated.

What does that mean for lawyers? It means that they will have to provide higher level competencies to survive. And the question that follows is what are these higher-level competencies? Competency has been measured in The Revised Bloom's Taxonomy starting from the lowest to the highest type of competency: 'Remembering, Understanding, Applying, Analysing, Evaluating and Creating.'

Regrettably, our system of education focuses a great deal on rote learning which means the focus is on the lowest level of competency. That is not to downplay the importance of remembering. It is essential for the efficient provision of correct legal advice. However, it may not be sufficient for higher-levels of legal tasks such as the application of the relevant law which is essential in practice or in public administration. Here both understanding and application become the focus. When put together to provide a solution to a problem you have utilized analysis, evaluation and creation. The solution has been created. A legal decision has been made. That falls within the purview of the trained lawyer and is unlikely to be supplanted by technology in the near future.

In the provision of this form of legal service two other unassailable factors come into play which cannot be performed by technology or AI, at least as yet, and for some time to come: the elements of discretion and trust. These core values cannot be replicated by technology, and to that extent, differentiate a lawyer providing a solution for a client, from a person with a legal problem procuring the answer by the use of technology.

So, when applied to our question, the answer would appear to be that digitalization means that the performance of routine and lower level tasks will increasingly be assisted by, or even eventually replaced by technology, forcing lawyers to hone their skills in the important higher level criteria of understanding, applying, analysing, evaluating and creating solutions for their clients. Legal education will also have to shift its format, content and thrust towards meeting the age of digitalization. It has been suggested, and this is not new, that in order to enhance these skills, particularly intellectual engagement, the ideal learning environment should mimic the complexity of real-world tasks and work that will later be performed by students. The real world does not deal solely with a principle of for example pure contract or tort law in vacuo. A lawyer will be required in a real-life situation to listen to a problem, which will not of itself immediately present itself as a contractual or tortious issue, and then go on to comprehend the problem, identify and then analyse the issues, identify the correct law, apply it, and after that find ways to resolve the client's problem within the law and ethically. This will be followed by writing the

advice, drafting the necessary pleadings or agreement as may be necessary and then dealing with the rules that regulate the particular area, long before arguing the issue in court, or negotiating an agreement or settlement with the opposing side. In short, variation and complexity are required to be an intrinsic part of teaching and learning activities in the curriculum.

It has also been suggested that the digitalization of simpler or more routine legal tasks may comprise a new area of expansion for members of the legal profession in conjunction with information technology experts. Legal tech start-ups by which individual lawyers in small firms and single practices could offer these routinised services at a cheaper rate and more efficiently than their larger counterparts. These legal tech start-ups will, it is predicted, usurp the smaller practices not so much by replacing them, but rather by utilizing these lawyers' services to provide platforms for the carrying out of routine tasks at cheaper rates. Success in this area of marriage between information technology and the law in providing immediate and cheaper basic services commoditizes the law as a service. In order to ensure that quality is maintained, there can be regulation:

(i) by the use of legalised and high quality technology,

(ii) the credentialization of manufacturers or suppliers of such legal technology, and

(iii) thirdly, by controlling the training of such manufacturers and suppliers through accreditation, namely by control over tertiary education institutions and their study programmes. In this manner control over the technological advancement of the supply of legal services can be controlled and maintained within the sphere of the legal profession.

This means that legal education can and should accommodate the advancement of technology by educating and training the persons who create, build and use legal tech. As such, there will be a convergence between IT and the law which can take the shape of IT specialists with knowledge of the law. And such new modules should not take the form of a superficial marriage of IT and the law, but rather a new subject about how automated digitalized jurisprudence can be utilised to regulate society.

In light of what I said earlier about the importance of the human element in the performance of higher level complex legal work, the importance and potential of alternative dispute resolution ('ADR') comes to the fore. The reality is that there is great room for expansion into mediation, conciliation and negotiation, all of which are new services. These forms of dispute resolution, which are not taken sufficiently seriously at present, serve to expand the market for existing practices and enhance their existing services.

As lower level legal tasks begin to taken over by paralegals and technology, the importance of developing skills in the art of mediation and conciliation take on a new significance. This is

particularly true in relation to international legal practice and dispute resolution, given the legal pluralities that have to be contended with. The reality is that in the ASEAN region, particularly China, aggressive court-based litigation and even arbitration are not ideal. The Asian philosophy and legal ethic, which has not really been accorded much consideration, given our predilection for the Western based system of law and politics has downplayed if not ignored the ethos of the region. Mediation for example is a highly valued skill and given the population of the region, there is clearly a huge market, particularly given the growth of the Belt and Road initiative. As I comprehend it even newer forms such as conflict prevention are areas that are expanding the field of ADR. So, these different forms of dispute resolution should perhaps comprise a part of the learning and training of young legal professionals from the outset of their education. The single factor that underscores these newer areas is the human factor involved. These modes of dispute resolution require empathy, intelligence, reasoning and reaction which need to be combined in various measures to achieve success.

Neither technology nor AI can easily supplant such a range of complex abilities.

Ancillary or even perhaps central to the study of these modes of dispute resolution which require such a combination of competencies warrants the inclusion of courses on legal philosophy, legal sociology and more esoteric subjects with the focus being on the need and competence to serve society in a globalised world. It requires law schools to take the difficult step of not simply teaching legal interpretation and the application of the law in the spirit of a technical skill but to comprehend and accept the law as a subject which encompasses various social and political areas and relation. While retaining the core elements of textual interpretation, argument and communication, it is possible to widen and transform legal education to incorporate these other elements. In a nutshell with new forms of ADR being the preference of the client field, it makes sense to ensure that law students' training now supplements the already saturated fields of litigation to meet the needs of a fast-evolving digitalising society.

A third aspect of ensuring continuity for the legal profession and the services it provides is to revert back to the philosophical underpinnings of the Rule of Law and the need for lawyers to practice and adhere to its spirit. Lawyers are the guardians of the rule of law and serve as a cohesive force in society through managing conflict. They do so by analysing, rationalizing and breaking down the conflict and redefining it as a legal problem. The propagation of this ethos and image greatly enhances the value of legal services. And this does not necessarily come solely from serving the state or the public directly. It is important that society sees legal professionals as such in order to assign their services a high value.

As I stated at the outset, the decades old vision and respect for a lawyer as a form of noble legal statesman has been replaced by that of the commercial lawyer who charges exorbitant amounts for work that does not necessarily appear to warrant the value placed on it by the profession themselves. The transformation was fuelled to a large extent by the need to control and capture the legal market followed by the projection of the law through excessive legalese suggestive of the fact that the law is inaccessible generally as it is dependent upon exclusive, obscure knowledge and intractable precedents all of which falls within the sole purview and monopoly of the lawyer. That image has to be revisited and transformed by reintroducing the earlier one of the lawyer statesman who is at once knowledgeable yet altruistic, au fait with modern technology and able to provide services in accordance with the needs of the legal world today, both domestically and internationally, at a fee which is not exorbitant.

Legal training and education should note the gap between the bread and butter need for knowledge of the law and its application and the need for lawyers to be trained to comprehend their role in society as comprising guardians of the rule of law and perhaps consider introducing or placing emphasis on ethics and moral virtues. This can take the form of legal clinics, apart from courses on ethics which are contextualized to reflect the common dilemmas faced by our society today. All this will go a long way towards increasing the trust of the public in the legal system and the legal profession.

11. Conclusion

In conclusion, I turn back to the Covid-19 pandemic. Despite the grave debilitation that the pandemic has wrought, it has, ironically enough, induced us to re-examine and accept the potential of, and need for a transformation in the means of administering and enabling access to justice. This is important both domestically and internationally, particularly as borders are becoming increasingly fluid, most notably in the area of trade. It has also dragged the legal world, kicking and screaming, into accepting the reality of the digital economy and the need to evolve to meet its needs.

A second aspect of the digital age is the fact that it affords greater opportunity for equality. Today in the digital world there is exposure to a diversity of goods and services in a way that transcends geographical borders. Equally it allows for the expression of a plurality of views and opinions which promotes understanding and better cohesion, particularly in transnational matters.

The creation and expansion of digital platforms no longer allows for a monopoly on thought, impressions, intellectual discourse and the law. There is no monopoly on the setting of standards. Technology and the e-platform allows for inclusiveness amongst the nations. Technology is a

great equalizer in that there is opportunity for a more level playing field globally. To that end, it promotes a more rational definition to the rule of law, that is not unique to any one cultural perspective, but is relevant and coherent from an international perspective.

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