

The digital transition, an opportunity for legal professionals to seize

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Abstract:

The digital revolution is deeply changing law and the legal professions. Instead of being apprehensive, legal professionals should control this trend within ethical guidelines still to be drawn up. They will thus be able to devote themselves to more valuable tasks. Higher education and ongoing training are essential. To seize this opportunity, corporate attorneys and attorneys at law should unite their efforts...

The digital transformation now under way is sparing no branch of the economy, nor any occupational group.¹ Legal professionals are aware of this, even as millenarian prophecies sometimes announce that robots will replace them. Big data, machine learning and, of course, artificial intelligence (AI) now form the horizon for corporate attorneys who, like trial lawyers, are learning to work with legaltechs. Legal professionals have come to understand the importance of fully appropriating these digital tools if they want to avoid passive submission to this trend. What characterizes this digital transformation is the combination, for the first time ever, of awesome computational power with an infinite quantity of available data.² The move toward open data is enlarging the access to information, while cloud computing is boosting the pooling of computational power — not to imagine how the introduction of quantum computing will accelerate this trend!

Three years ago, the French Association of Corporate Attorneys (AFJE) set this trend among the priorities for its work.³ Though it seemed evident, this choice initially raised a fundamental question. Is it really possible to control this trend, which is often described as the outcome of a new industrial revolution? Or has the paradigm shifted so deeply that legal professionals, regardless of their current efforts, will be turned into a cog among other cogs in the Big Machine?

In 1977, Jacques Ellul pointed out the risk of technology dominating our societies: *“Politics is ever more induced by techniques and is now incapable of orienting technological growth in one direction or another”* (p. 136). This pessimistic vision, contemporaneous with the growth of digital power, necessarily makes legal professionals wonder... Will they manage to steer algorithms? Or are they going to be driven by them and forced to witness an automation of the rule of law? Will they, with their rationality grounded on expertise and their understanding oriented toward the world, be replaced with a network of computers that will, of course, integrate them but by making them one item among others in the logic of computations and communications? Will the production and interpretation of legal rules come to depend on decisions controlled by AI? Will digital sovereignty not take the place of the sovereignty founded on democratic principles? The

¹ This article, including quotations from French sources, has been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor's approval, completed bibliographical references.

² And not just personal data in the sense of the EU's GDPR (General Data Protection Regulation).

³ More than 6000 of the 20,000 corporate attorneys in France belong to the Association Française des Juristes d'Entreprise (AFJE), this legal profession's principal professional association, which will celebrate its 50th anniversary in 2019.

scope of these questions makes us dizzy. Let us not hold back in fear but, instead, step forward to address them. There might be reason to worry, but there are good reasons to remain optimistic.

If legal professionals choose a bold strategy to address these new questions and find the keys for understanding and using digital technology for their own benefit and on behalf of their clients, they can become not just an essential but an inevitable player in this new environment — even more so since, parallel to this technological trend, the need of the law is growing in our societies marked by complexity and globalization. The current disruption can help us find answers by adopting these new digital tools and tapping this technology's unprecedented capacity for analysis and action. Legal professionals could orchestrate all this by placing themselves at the center of a new landscape of power. Nicolas Negroponte (1995, p. 229) has predicted, with little empathy, *“Like a force of nature, the digital age cannot be denied or stopped. It has four very powerful qualities that will ultimately make it triumphant: decentralizing, globalizing, harmonizing, and empowering.”* He has described a world where legal professionals will have to create the conditions for controlling the vast *“neural network”* that is being formed. Lawrence Lessig's (2000) well-known formula, *“Code is law... Architecture is politics”*, leaves full room for legal professionals to be producers of meaning.

It thus seems reasonable to grab the digital transformation like an opportunity for legal professionals and, thereby, for the place of the law in our societies under condition that the means be adopted for controlling the *“Machine”*.

An opportunity for corporate attorneys and for the place of the law in society

The previous wave of digital innovations mainly brought us the automation, rationalization and even simplification of processes that were inefficient if done manually. Clayton Christensen (1997) has distinguished between *“sustaining”* and *“disruptive”* forms of technology, the difference between a technology that supports or even improves existing processes and one that deeply alters them. The wave of innovations now unfurling is disruptive, likewise on the law market. The changes under way are not simply going to make the work of legal professionals easier. They are going to substantially modify this profession's function. The value chain is going to be modified and, eventually, the demand for law.

At the junction of big data and AI

The techniques combining big data and machine learning (AI, in particular) are going to keep us from realizing the quantity and complexity of the data used to respond to searches in the legal field. They will eventually democratize the access to legal knowledge. This information's mass, plasticity and fluidity will no longer cause problems as such, since pertinent information will be more readily accessible.

Here is a short list of the major fields of relevant technological developments with an impact on the work of legal professionals:⁴

- e-discovery, which refers to the tools for assisting the deep, real-time analysis of documents (and not just the pre-trial procedure of discovery in American law), namely: a mixture of classical and disruptive technology ranging from the detailed analysis of a large number of complex documents to the predictive analysis of lawsuits and a control over their costs.

⁴ See, too, the list of thirteen disruptive technologies in SUSSKIND (2010, p. 40).

- automated document sorting, assembly and review: a field ranging from the production of documents and of models for contracts (available and easily adaptable) to sophisticated content analytics based on machine learning.
- real-time searches based on AI: a field covering chatbots (smart conversational entities), visual cartography and correlations based on lawsuits and complex legal questions.
- blockchain technology, in particular its use for smart contracts (*i.e.*, autonomous programs that automatically execute the conditions and terms of a contract without the need for human intervention). Incorporating software in a blockchain guarantees that the terms of the contract will not be altered and that, upon the occurrence of a stated event, the contract's clauses will apply automatically. For instance, the startup InsurETH has created smart contracts for insurance against flight delays. The passenger does not need to fill in a form, and the airline company has no claims to process. The insurance policy is purely and simply executed automatically.
- Smart searches, for example in the database of a firm's contracts in order to assign risk scores to clauses with a wording that might lead to, or is already in, litigation.

It is worth pointing out that many disruptive technologies soon become mainstream (ELLUL 1977), when they are adopted much faster than expected.

Corporate legal services mainly use this technology for: smart contracts, social networks, the sharing of documents, the security of the information on blockchains, chatbots and electronic signatures. In France, 11% of legaltechs have staked out a position in the market for AI-assisted statistical analyses of court decisions, (DAY ONE 2017). The observatory of the Village de la Justice has counted at least 164 legaltechs with operations in France.⁵ According to it, 13% of the persons in legaltechs are law professionals or law school students. As these figures show, it is too late to pick a fight but it is still time to collaborate and work out a strategy for reckoning with digital technology instead of ignoring it.

The need for legal services will increasingly be related to these new models of production and distribution, and this will lead professionals to adapt.

The value chain and the demand for legal services

The use of digital technology will make the roles of legal professionals, whether in corporations or private practices, evolve. The approaches adopted to using this technology are, we notice, based on specialties and disciplines. The next step is to take account of the whole of legal services, like a department that is modifying its model for providing services, honing its approach to clients and, ultimately, adapting its organization so as to carry more weight within the firm. What is at stake is to redefine the place and function of legal professionals in society.

⁵ <https://www.village-justice.com/articles/Les-start-up-droit,18224.html>

Two complementary trends are under way. On the one hand, legal professionals must expand into new fields, such as the protection of personal data, social and environmental responsibility, cybersecurity or regulatory questions. On the other hand, the legal professions can benefit from the awesome potential of digital technology in order to redefine value and the conditions for generating it: protect and create. The digital transformation can, in some respects, be seen as an opportunity for engaging with these two trends in firms and society.

By adopting solutions based on machine learning for instance, new trends, questions, and difficulties, both in- and outside the firm, can be identified; teams of legal professionals can be oriented toward the most useful activities; and efforts within the department can be focused on the most efficient and relevant procedures. Corporate legal services are going to gain efficiency and be freed from repetitive tasks (intellectually the least interesting and the easiest to automate) so as to concentrate on assignments that generate more value. By relying on algorithms to perform such tasks as well as, or even better (and in any case faster) than, people used to do, corporate attorneys will be able to devote their efforts to strategic questions requiring advice and on tactical issues for following up on affairs. They can be more present in the field, in contact with in-house clients and, too, the firm's environment. By relying on the algorithms at their service, they will more than ever be the law's irreplaceable human face.

Corporate attorneys are also going to work differently with contacts outside their firm. New tools for working together will make it easier to organize work in projects. Once certain tasks are easy to automate, billing practices and the methods used to calculate the cost of services will have to be overhauled. Lawyers have no reason to dread this trend. They should boldly embrace the digital transformation, as Kami Haeri (2017) has advocated. Information technology expands the law market to the benefit of all professions if they advance together.

Given the mass market that will emerge out of the open data, digital technology is going to democratize the access to legal information. This raises questions for jurists, regardless of their practice (corporate or freelance), who might initially feel that what is at stake is the "story" that society tells itself about lawyers, whom it admires and fears but to whom it entrusts its secrets. Let us see digital technology as a particle accelerator that makes more people aware of the importance of the law and of their legal needs.

Access to the law is essential to the rule of the law. Legal professionals have a part to play here. The diffusion of a "culture of the law" in all strata of society and within firms can create the conditions for the law market to stretch beyond its current bounds. On this new frontier is the question of control over the technology....

Control by legal professionals over their technological environment

This success of the digital transformation cannot be measured only by the quantitative penetration rate of digital tools in corporate legal services and in society. In addition, these tools must enter into a process of responsible innovation, and legal professionals must be trained to handle these new issues.

Ethics and the challenge of modernity

Gunter Anders' (1956) critical philosophy of modernity has pointed to the obsolescence or outdatedness of human beings. For him, what characterizes the third industrial revolution is that anything possible will become compulsory: what can be done has to be done because machines can do it. People will thus lose their humanity, freedom, capacity for acting, sense of responsibility, and relation to being instead of having. Fascination with the power of algorithms should not steep us in devotion to the power of machines. This would be unacceptable from a humanistic viewpoint and, for legal professionals, inadmissible. The question is not what can be done but what ought to be done. This entails a debate about ethics in the development of AI.

Given the urgent need for ethical guidelines, some firms have developed their own, which they apply when developing AI-based solutions or products. These in-house codes of conduct are also used for discussions with stakeholders. Microsoft (2017), for example, has published six principles: fairness; reliability and safety; privacy and security; inclusiveness; transparency; and accountability. Within the firm, legal professionals, along with senior management and developers, participate in an ethics committee that assesses developments in engineering and research and their impact on society.

Let us not be satisfied with ethics as a general substitute for the law. Ethics can be used upstream in the production process in order to identify risks and anticipate trends. It can, for example, help prepare the grounds for the necessary laws on AI and help avoid useless lawmaking.

Beyond the inevitable issues related to the security and privacy of data (given that the data used by AI are not necessarily nominal), a key question concerns the potential risks of biased algorithms. Such biases can distort data analysis or lead to discriminatory proposals. For lawyers, this is a serious topic to be watched.

Open Law, an association, has presented the second version of its charter of ethics for an online law market.⁶ This charter has the objective of making all actors in this market converge toward the fundamental principles necessary for the smooth operation of an online law market and for upholding the interests of litigants. Its rules seek to give all “users of the law” guarantees of competence, confidentiality and responsibility. This falls in line with, for example, the recommendations of the cofounder of a startup that is offering digital software for a predictive justice.⁷ I might also point out that AFJE has released a code of professional standards — evidence that the question of ethics, far from being peripheral to the job of corporate attorney, is a full-fledged part of it.

⁶ “Charte éthique pour un marché du droit en ligne et ses acteurs”, a product of the 2016 program Économie Numérique du Droit. Cf. <https://www.lemondedudroit.fr/professions/337-legaltech/55052-charte-ethique-marche-droit-en-ligne-acteurs-deuxieme-version.html>.

⁷ Jérôme Dupré, cofounder of Case Law Analytics. Cf. *Juriste d'Entreprise Magazine*, 27, 2016.

Adapting the education of legal professionals

Tomorrow's legal professionals will have to understand their environment. This does not imply making all of them programmers or data scientists, even though there will be many more hybrid job profiles. For a successful (*i.e.*, controlled) digital transition, legal professionals must expand their traditional, established identity. Digital technology will have a lasting impact on their jobs, as 88% of those working in firms have declared. This calls for acting, without waiting, on the education dispensed in law schools and afterwards. This was one of the strongest conclusions drawn by the *Grenelle du droit* organized by AFJE and Cercle Montesquieu, which, on 16 November 2017, brought together professionals, academics and students in the field of law.

Although universities have excellent programs, the curriculum must urgently be adapted to the changes under way and to the aspirations of upcoming generations. Young people who enter university and those who will graduate from law school must be prepared to fit into firms where expert know-how does not, by itself, suffice for fully realizing one's potential. These soon-to-be corporate attorneys will have to acquire soft skills, learn how to work in projects, and receive an education in management, communications... ethics and, too, computer programming. More broadly, they must understand AI and the data economy. The objective is not to train engineers but to prepare legal professionals who will understand the "grammar" of digital technology and thus the internal operation of the tools they will be using. This is a categorical imperative to benefit from the new technology and avoid being "snowed under".

Questions also arise about ongoing training to improve the skills and qualifications of the teams already working in the legal field. Basic courses, including in knowledge management, should enable them to preserve, share and enrich knowledge and know-how within the firm. This means acquiring skills and qualifications through e-learning or massive open online courses (MOOCs). To obtain support for this change of culture, reverse mentoring could be introduced, as younger recruits train older employees in the use of the new tools.

For sure, all this will affect recruitments to legal services. Newcomers will have new profiles in terms of skills and a more pronounced interest in digital technology and project management. Departments of legal services will soon foster in-house or third-party partnerships (like the business incubators born in bar associations) for developing specific applications for their jobs.

The "augmented" jurist is, therefore, neither an illusion nor the umpteenth buzzword overused by digital businesses. It is the promise to reinvent a job at the core of our changing societies, where the need for the law is ever more important and necessary. Thanks to their spirit of conquest, legal professionals can use the digital transformation as a lever of stronger leadership. To do this, corporate attorneys and lawyers in general must unite their efforts and create a big profession that will, simply by being united, be capable of seizing the opportunities offered by the revolution under way.

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