Reflections on Legal Ethics in an Age of Evolving Technology

1. Introduction

1.1. Technology has permeated every area of life. Dispute resolution is no exception. Lawyers and decision-makers (i.e. judges and arbitrators) have very different approaches to technological developments in the field. Attitudes vary from extreme reluctance to wild enthusiasm, with everything in between. But one certainty in an uncertain world is that technology is here to stay and is only going to become more pervasive. The question for this panel is what ethical issues arise (and whether or how ethics can keep up). Can justice still be done, and be seen to be done?

1.2. One issue common to a number of the developments considered below is whether it is fair for one party to a dispute to use a particular technology when the other party, for reasons of cost, connectivity or location may not be able to do the same. Is this no different to a party with deep pockets being able to hire a bigger/better legal team and more experienced (and therefore perhaps more expensive) experts?

1.3. To take a simple example: One party is able to use impressive and memorable graphics to present its version of events. The other party has only a marker pen and a whiteboard, and no way to test the inputs into the graphics or reconfigure them to present its own story. How can the decision-maker ensure that both sides get a fair hearing? Advocates in US jury trials know that visuals make a huge difference.[1] Do decision-makers know that they are being manipulated, or is it just part of the game?[2]

1.4. Lawyers advising clients will have a different perspective to judges hearing the case: If they fail to recommend technologies that might tilt the balance in their client's favour, is this negligent?

1.5. Ironically, technology itself offers an extreme solution to some of these issues – take the human element out of the picture and have disputes decided entirely by machine.

2. Predictive justice

2.1. Artificial intelligence is now being used to identify how a particular judge might decide a particular case by analysing his/her past decisions. This allows a party to prepare arguments that are specifically aimed at appealing to that judge. Where parties have a choice in deciding who will hear their dispute (as in arbitration) this data will also be influential in making that choice. [3]

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[1] There has been a huge amount of research on how to appeal to juries in jury trials, and there is no reason to believe arbitrators are completely immune from such tactics.

[2] Opening remarks of H.E. Judge Abdulqawia A. Yusuf, President of the International Court of Justice at the second world meeting of Societies for International Law (2 September 2019): "*A third challenge is the ability of international law to grapple with the impact of rapid technological advances on human rights and freedoms. Today, individual freedoms, individuality and independent thinking are at risk of being affected or even manipulated by technological tools in the hands of a few major corporations in the most stealthy and Orwellian manner. Legal defenses need to be built against abusive behavior arising from the use of such technologies*."

[3] The confidentiality of arbitration makes it more difficult to obtain raw data in this field, although many arbitrators were judges at one time, meaning that their previous decisions can be analysed, and some arbitral awards are now published.

2.1.1. Should a party be able to second guess a judge's decision? Already when parties select arbitrators they and their lawyers will give a lot of thought to how an individual might approach a case, depending on their background and experience. Using AI takes this to another level.

2.1.2. Judges have no control over how (or how accurately) their decisions are being used by the programme. One option is to protect judges by stripping judgments of the judge's names. But what does this say about open justice and accountability?

2.2. Predictive technology is also being used in other ways, for example to calculate an individual's chance of reoffending if released on parole. This is less relevant to commercial disputes, but the technology may well develop in this direction.

2.2.1. Is it right for judges to make decisions on the basis of data generated by a technology that they have not devised, did not programme and may not understand? Or is it acceptable as long as it is just another factor to weigh in the balance?

2.2.2. What happens if, over time, judges find that they are being advised, recommended or even required to rely on such data?

2.2.3. What kind of data might be used for these purposes?[4]

3. Hacking

3.1. Hacking is becoming more common in dispute scenarios. One party to a dispute might actively hack the other party's system in order to obtain damaging material.

3.2. Should evidence that has been obtained by hacking be allowed into litigation/arbitration proceedings? Different jurisdictions have different rules, but this is a developing and somewhat untested area.

3.2.1. What if the material that has been hacked by one party should in fact have been disclosed by the other as part of the discovery process? In that case, both parties are in the wrong. How does an arbitrator or judge strike a balance? What should lawyers be saying to their clients about hacking?

3.2.2. What if the material has been hacked by a third party? The Panama papers and materials from wikileaks are available on line so on one view have lost any confidentiality they ever had.

3.3. A party might try to hack the arbitrators' emails (arbitrators commonly sit in panels of three), in order to access their internal discussions. They can then try to direct the decision-making by amending their arguments accordingly.

3.3.1. Arbitrators need to think about protecting themselves from cyber attack.

[4] In China, it is reported that technology is being used to track the economic and social reputation of its citizens. Credits are awarded for good citizenship, negative credits are awarded for negative behaviours. People with low credit scores can be excluded e.g. from high speed trains or domestic flights. Is there a future where it is a requirement of the court to review someone's rating in reaching a decision on their case? See *The Potential and Perils of Financial Technology: Can the Law Adapt to Cope?* Lord Hodge, Justice of the Supreme Court, speaking at the First Edinburgh FinTech Law Lecture, University of Edinburgh, 14 March 2019.

3.3.2. What is the sanction? Arbitrators have fewer powers than judges in this regard.

4. E-discovery

4.1. The application of some form of technology to discovery (or disclosure) is now normal in all disputes of any size. It is a necessary response to the explosion in document creation and has become the only way of reducing document sets of millions of documents to a number which can then be reviewed manually for relevance.

4.2. At its simplest, material will be uploaded onto a system and then searched for key words, date ranges, specific individuals etc. The work of uploading the documents, hosting them and sometimes even running the search terms is usually outsourced to a third party provider. Some programmes apply 'cluster technology' where, once one document has been identified as key, all related documents will be identified.

4.2.1. The programmes are created and run by IT professionals who are not subject to the same ethical obligations and training as lawyers. Do they understand the implications of what they are doing?

4.2.2. Do lawyers understand the implications of the searches that are being applied, and what material might not be captured? Documents returned from the search depend on how good the search terms are. Mistakes can arise which would not happen with a paper review. Different skills are needed.

4.2.3. Is there a risk that the process effectively outsources the thinking and the responsibility too? The role of a junior lawyer running a document production process now is completely changed from the days when the same lawyer would simply have read boxes of documents. Do lawyers get the same chance they once did to understand the case on the basis of the countless documents they had read?

4.2.4. What is the risk of inadvertent disclosure e.g. of privileged material? In large cases, there may be no manual review at all of material that is disclosed to the other side. Decisions have to be made about the potential risk.

4.3. One middle ground is to balance the use of artificial intelligence with lawyer intelligence to take the best of both worlds. But this can be a difficult balance to strike - some lawyers (rarely also IT experts) jump at the chance to outsource as much of the disclosure exercise as they can.

4.4. The technology is improving all the time. There may come a point where we have to accept that, when it comes to discovery, the computers do a better job.

5. Social Media

5.1. Lawyers may use social media to investigate counter-parties and prospective witnesses. What if a lawyer tries to 'friend' someone who s/he intends to be a witness in order to obtain information that the witness otherwise restricts?

5.1.1. The IBA Guidelines on Party Representation provide that, before seeking information from a potential witness or expert, the lawyer should identify himself and the party s/he

represents, and the reason why the information is sought, as well as making the witness aware that they have a right to inform or instruct their own counsel about the contact and to discontinue communications with the lawyer.[5] But these guidelines are not automatic, and impose higher standards than the courts might.

5.2. Should a lawyer advise a client to restrict access to or remove social media content? Arbitration rules are silent, and again different jurisdictions take a different view. To an English lawyer, removing content from the internet doesn't sound much different to shredding a box of papers – it shouldn't be permitted.

5.3. Arbitrators use social media too. Should they make a conflict of interest declaration if they are Facebook/LinkedIn friends with the lawyer in the case before them?

5.3.1. The IBA Guidelines on Conflicts of Interest in International Arbitration say that a social media relationship does not have to be disclosed.[6] Such a relationship does not necessarily give rise to justifiable doubts about impartiality and independence. But it may not be as simple as this:

5.3.1.1. Is there a difference between the professional LinkedIn and the more social Facebook?

5.3.1.2. What if the lawyer has liked the arbitrator's posts? Or endorsed their skills? Once, or many times?

5.3.2. Posts on social media (in particular Facebook and Twitter) may also reveal an arbitrator's biases.

6. Augmented reality

6.1. Using visuals to demonstrate how something happened can be very effective.[7] How easy is it to challenge them? Visuals shouldn't be allowed to jeopardise due process and the rights of parties to receive equal treatment.

7. On-line dispute resolution

7.1. This is another rapidly developing area, pioneered by businesses like Amazon but now being developed as a means of deciding legal disputes, sometimes with no human involvement at all.

7.2. Humans should in theory be better at factoring in the impact of their decisions than computers. Does that make human judges, who may feel they can test the limits of the law, better or worse than computers, which cannot move the boundaries?

7.3. Humans can also demonstrate equity, empathy and emotional intelligence. This is generally regarded as a good thing, but:

7.3.1. a party may not always want these qualities in its arbitrator - it will depend on the case.

[5] IBA Guidelines on Party Representation, Guidelines 18 and 19.
[6] Article 4.4.4
[7] If people see something connected with what they are hearing as they hear it, research suggest they will remember 50% more. K. Evans, *The Golden Art of Advocacy.*

7.3.2. humans demonstrate other emotions too – impatience, anger, short attention span etc. – that are less helpful to the legal process;[8]

7.3.3. humans usually have unconscious bias, whereas in theory a computer should have none (although in reality this will depend on how it is programmed); and

7.3.4. humans may be swayed by style over substance – good advocacy and powerful rhetoric.

7.4. An arbitrator's role is to make a decision on what happened (the facts) and apply the law. Technology to identify whether someone is lying, and technology that can evaluate more legal decisions at one time than any human could possibly hold in their head, is developing all the time.

7.5. There is generally accepted to be a cost and time saving with online dispute resolution compared to more traditional methods. Might the cost saving actually improve access to justice?

8. Conclusion

These issues are complex. The technology is fast-moving. Regulation, guidance and ethics all struggle to keep up. There is perhaps only one common thread – that lawyers and decision-makers should try to understand developments as best they can, not least so they are aware of the tools they can use, and the tools which may be being used against them.

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[8] S. Nappert and P. Cohen in 'The Practitioner's Perspective' (*Arbitration in the Digital Age: The Brave New World of Arbitration* ed. M. Piers and C. Aschauer) refer to a study of Israeli parole judges that revealed that, regardless of merit of the applicants, judges were more likely to grant parole after breakfast and lunch. S. Danziger, J. Levav and L. Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions', (2011) 108(17) *Proceedings of the National Academy of the Sciences in the United States of America*, 6889-6892.