



## Expectations and Limits of the Use of New Technologies in the Activity of the Legal Profession: Professional Ethics as a Guiding Element

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↳ Avec les nouvelles technologies susceptibles d'améliorer notre capacité à exercer le droit de manière compétente et efficace, de nouvelles questions se posent quant aux problèmes éthiques qui en découlent. Cet article examine si les règles existantes sont suffisantes et si les attentes de ce que peuvent offrir les nouvelles technologies comportent un risque de détérioration infondée de la perception par le public de la prestation actuelle de services juridiques (humains).

↳ Dado que es probable que las nuevas tecnologías mejoren nuestra capacidad para ejercer la abogacía de manera competente y eficaz, surgen nuevas preguntas en cuanto a las cuestiones éticas que surgen de ellas. Este artículo examina si las reglas existentes son suficientes y si las expectativas de lo que pueden ofrecer las nuevas tecnologías conllevan el riesgo de un deterioro infundado en la percepción pública de la prestación actual de servicios legales (humanos).

### Expectations and Risks of New Technologies

There is no doubt that human progress in the development of new technologies derived from computer science, including the development of artificial intelligence, robotics, and nanotechnology, has broadened our horizons in an extraordinary manner in terms of our way of conceiving work. This technological progress can and should also be incorporated into the legal profession.

In the face of the exciting expectations of what can be achieved technologically, strong voices have expressed some concern and In the field of autonomous Artificial Intelligence (A.I.) systems, some have been particularly cautious. Stanford University professor Richard Omohundro reminded us already in 2014 that autonomous A.I. systems are programmed to operate in a strictly rational way and can end up acting in an anti-social and harmful manner unless designed with great care. For example, if a computer is programmed as an autonomous system based on self-learning to beat any human opponent in chess, it could transcend the mere game and protect itself even from a possible unplugging, choosing to neutralize the human being who tried it. Other authors such as Eliezer Yudkowsky are of the same opinion as Prof. Omohundro, and insist that the machines of the future must be conceived and created to be "friendly" (i.e. kind) and avoid any risk of them becoming "unfriendly" (i.e. hostile).

Indeed, in the academic community there is a growing call for realism and scientific reasoning about the possibilities of new technologies, since until now it has not been possible to demonstrate how far one can go, with considerations of conscious machines, feeling machines, and moral machines, and there is a very fine line between science and mere belief (Vincent Müller)<sup>1</sup>.

Some authors are beginning to raise a concern over the prospects of what a deregulated AI can achieve, and the risk even of degrading democracy and the rule of law. For instance, Mark Cockelbergh calls for a deep reflection on the future of technology and its impact

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1. Evgeni Morozov: La locura del solucionismo tecnológico. Madrid: Pub. Katz, 2015; Steve Omohundro: "Autonomous technology and the greater human good", *Journal of Experimental & Theoretical Artificial Intelligence*, 26:3, 2014, pages 303-314; Eliezer Yudkowsky: "Artificial intelligence as a positive and negative factor in global risk", Bostrom, Nick and Circović, Milan (Eds.): *Global catastrophic risks*. Oxford, UK: Oxford University Press, 2008; Vicent C. Müller: "Risks of general artificial intelligence", *Journal of Experimental & Theoretical Artificial Intelligence*, 26:3, pages. 297-301.



on individuals, or our societies, and on humanity as a whole, and the fact that we need to strike a balance between technocracy and democracy<sup>2</sup>. In this sense, José M<sup>a</sup> Lassalle<sup>3</sup> (a Spanish philosopher) insists that the relationship between humankind and technology has to be a priority that needs to be humanized and ruled, given the processes of concentration and monopolization of digital power. In the same line of thought, the 2021 Update of the ITECH Report on Responsible AI concludes its general reflections in its first chapter by stating that "... it remains critically important that organizations ensure that they thoroughly assess the ethical implications and societal benefit of a proposed AI system as part of a structured responsible AI Impact Assessment prior to its development, deployment or use".

Having stated the risks, the prospects are nonetheless bright, and it seems obvious to state that diligence in business management requires a constant analysis of how innovation and available technology can improve processes and results. This is equally applicable in the delivery of legal services.

## The Specificity of Legal Services

In fact, in the last years, there has been an increasingly insistent claim that the legal profession should adapt and embrace significantly more what the new technologies are offering, and in particular what AI will be able to achieve. There are different views on the degree of what machines will achieve in the legal sector. In particular, the questions are if they will do some, most or even virtually all of the work of lawyers, depending on the degree of faith that

each author grants as to what technology will be able to accomplish<sup>4</sup>.

The specificity of our profession is a key element to assess the degree of incorporation of new technologies to our daily work and, in particular, if we should follow the trends that mark the new achievements or maintain a cautious position, a careful look at the consequences that a particular application may involve in the social context in which we are immersed (for example, if it can generate negative externalities).

This specificity of our profession is predicated on the existence of three factors that differentiate us from other professional services. Firstly, the lawyer is in a position of asymmetry of information with respect to his/her client, who cannot verify the efficacy of the legal service rendered. (a fact highlighted by the Harvard Business Professor Ashish Nanda<sup>5</sup> in the first decade of this century): For example, the lawyer cannot know, for example, whether the recommendation to initiate a lawsuit or to reach an agreement is in his/her best interest (or in the interest of the law firm advising him/her). This leads clients to place their trust in the professional (even if they ask for a second or third opinion, the situation will be similar). Consequently, the quality of the lawyer's recommendation cannot be checked *ex ante* (like that of the advertising creative), nor *ex post* (as it can be done with the private banker, or the architect).

Secondly, the profession is part of the defense of the client's interests against other citizens or government, as an essential part of the rule of law, on whose proper functioning depends the right social coexistence. This social service of the legal profession for the rule of law demands prudence in considering the profession in its purely business aspect. Furthermore, the crucial ethical behaviour and predisposition which asymmetry of information entails also leads us to think that there should be limits to considering our profession as a business exclusively, and even more so if we consider that, for most users, going to the lawyer can be an isolated, though transcendental, experience during the course of their lives.

2. Mark Coeckelbergh: *Ética de la inteligencia artificial*. Madrid: Ed. Cátedra, 2021 (originally published as *AI Ethics*. Massachusetts Institute of Technology, 2020).

3. José María Lasalle: *El liberalismo herido*. Barcelona: Arpa & Alfíl Editores, 2021.

4. One of the most representative and celebrated authors on this subject is Richard Susskind, who explores how human work can be substituted by technology. (Richard Susskind: *The end of lawyers?*. Oxford: Oxford University Press, 2008; Richard Susskind, and Daniel Susskind: *The future of the professions. How technology will transform the work of human experts*. Oxford: Oxford University Press, 2015). Other examples: Benjamin Barton: *Glass half full: the decline and rebirth of the legal profession*. New York: Oxford University Press, 2015 ("*Technology is the best bet for solving these [access to Justice] problems. (...) We are only in the early stages of the technological revolution in law (...) As programmers gain confidence and get creative we may see technology fundamentally reshape the market for legal services*", pages 196-7). Also, James E. Moliterno: *The American Legal Profession in Crisis. Resistance and responses to change*. New York: Oxford University Press, 2013 (pages 206-210).

5. Ashish Nanda: "*The essence of Professionalism: Managing Conflicts of Interest*", Harvard Law School, No 9-903-120, rev 29 December 2003.

Finally, a third factor, not always properly assessed, is that our profession is the only one that is essentially an adversary system, which means in most cases faces an opposing party, who will try to question the work we do, or neutralize it, by defending opposing interests.

## New Technologies and the Professional Ethics of the Legal Profession: Raising Issues to be Considered in their Application

Given the characteristics mentioned above, the embrace of technological solutions should be framed in terms of maintaining professional competence, considering the three unique factors of legal practice noted above, while at the same time maintaining compliance with ethical rules at risk of violation of relevant ethical considerations.

Since we can try to guess, but we do not yet know for sure, what technological advancements will be achieved with technology and computer science we reaffirm that new developments and their application to the legal profession should be matched to the essential characteristics of our activity, by formulating the right questions: the nature of our service to the supply structure and the perception of our service by the citizens in three areas.

### a) *New Technologies and the Nature of the Profession*

In relation to the essence of the legal profession services, we must ask ourselves, for example, whether advice rendered by A.I. or other advanced technological solutions would be considered more reliable than purely human advice, whether there would be real transparency in the algorithms used by the software provider, whether we would tend towards autonomous A.I. systems that would replace a significant part of our work, whether we will know how to assess the risks of such autonomous systems (as we pointed out at the beginning of our presentation), whether lawyers will also have to be trained in computer science, and whether this may accentuate the risk of professional irrelevance, or even whether we will tend to incorporate robot judges or robot lawyers before human judges, and what social consequences we can predict from this.

### b) *The Embrace of Technological Solutions and the Effects on the Supply Structure*

We will also have to analyse the effect of the integration of advanced technological solutions in the supply structure of technology providers and of the supply of legal services themselves. In view of this, we should ask ourselves if there is a possibility that our sector will become capital intensive, and if, in order to do so, we will have to design policies that allow easy access to the profession (by facilitating the corresponding financing) for any potential lawyer, or we will rather accept the consolidation of large legal operators (and how we will avoid the risk of oligopolistic prices in this case), and consequently, if an oligopolistic structure will be produced

in the supply of technological solutions and, among other questions, whether we will have free access to analyse their algorithms and corresponding biases, whether such biases will be found as they are applied (trial and error method in the market), or should they be standardised prior to use. Moreover, how will potential conflicts of interest of the computer systems themselves be resolved (can the same A.I. solution be used for both Plaintiff and Defendant?).

It is interesting to highlight that specific reflections are emerging for the legal sector on this issue, such as the recent ITECH LAW report on Responsible A.I. (2019), with the ambition of establishing a global framework, published during 2019, and which reflects on additional issues to those mentioned, such as: responsibility or professional secrecy, the security and reliability of A.I., or industrial and intellectual property derived from the use of A.I. systems, among other topics or principles.

### c) *Risk of Devaluing the Perception of the Added Value of our Services?*

Finally, we should not forget that the very debate on the potential of the applicability of new technologies to our profession may inadvertently generate a risk (an ethical risk, in fact) of an unfounded deterioration in the perception of legal services by the public, in a double sense: on the one side, the technological promises of the future may lead to the idea that we are currently going through a provisional stage of imperfect and, therefore, less reliable, human intervention. On the other side, because there may be a temptation (by some interested parties) to devalue the work of (human) lawyers and consider most of the legal activity as standardisable, that is, as a commodity, in order to try to justify its eventual machine substitution. We must not forget that this ethical risk has its counterpart in its exact opposite, which is that we lawyers continue to consider as value-added activities that have become essentially standardised.

It is possible that, ultimately, the purpose of professional ethics, in this area derived from the integration of new technological applications, is to distinguish at any given time which task of the legal profession has become standard and which part of our activity should not be considered so, in order to preserve and protect it if "human" added value is provided. But this differentiation must be carried out from professional and ethical criteria and not from business criteria exclusively, for the benefit of the rule of law which we must all protect. ■

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