

UNDERSTANDING DIFFERENCES TO MAKE A DIFFERENCE – IN THE DIGITAL LEGAL WORLD

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We are at the dawn of what some have called the Fourth Industrial Revolution. It is a new era of technology and industry, fostered by an increasing digitization and driven by three disruptive technologies: artificial intelligence (AI), blockchain and the Internet of Things (IoT).

Digitizing means converting or encoding continuous data or information, such as a photographic image, a document or a book into digits. Through digitization, something real (physical, tangible) is converted into numerical data so that it can be processed by a computer for different purposes. In other words, digitization involves moving from a continuous reality to a discontinuous reality made up of bits (zeros and ones).

Digitization is giving rise to profound changes in society, culture, politics, economics, business and the law. In the legal field, these developments pose numerous challenges, for example, wedging new phenomena into traditional frameworks or how to deal with new powers of control over others. And all it is happening at an unprecedented devilish pace. A rather overwhelming situation for most lawyers, used to working with traditional institutions and values. How can we contribute to a digital development that respects basic postulates of justice, equality, and equity? Is it possible to transform legal provisions and principles into mere digits, without losing a shred of meaning and content? How can we lawyers approach these challenges to become doers instead of just hearers?

We are also witnessing the emergence of new actors and ways of practicing law and conflict resolution, which may distort existing legal institutions and the traditional monopoly of the State on legislation and legal enforcement. Among the numerous existing initiatives, we can mention projects such as Legalese (legalese.com), a software startup that sets up mechanisms for business management without the intervention of lawyers or Kleros (Kleros.io), an online dispute resolution platform, that leverages blockchain and crowdsourcing to provide an efficient resolution system for a number of frequent consumer disputes in areas such as e-commerce, collaborative economy and others. It is a revolutionary development, where typical legal tasks are taken over by artificial agents – issuing awards or administrative decisions, doing legal research, or drafting contracts etc. A twist that implies much more than replacing humans with typewriters and photocopy machines; it means taking away from human beings tasks where law is understood and formed.

There is a risk that technological powers will impose digital models based on legal cultures, different from the context in which they are to be applied. Digitization must not entirely remain unaffected from the human world. Just as non-human things technically connect with each other, the boundaries between culture, technology and digital policies intermingle. According to Pierre Lévy, today's knowledge-based society results from the ICT revolution and its profound influence on language and social structures. Certainly, language, technique and complex social structures have always been interrelated. In fact, their mutual influence has been the real driver of humanity's development since the very onset of language. It is now impossible to understand culture without society or

technologies; they have become indivisible. An iPhone, for example, is culture because it is a key element of the social environment and its language.

Law does not exist in a vacuum, either. It is not isolated from culture, language, or the socioeconomic context in which it develops. However, most digital developments in the legal field are embedded within the Anglo-Saxon language and culture. The English-speaking dominance of the digital world is ever increasing with the emergence of so-called Legal Tech, a term that is generally referred to innovative technology and software that streamlines and improves legal services. Legal Tech companies are generally startups created with the aim of transforming the functioning of the legal profession – characterized by a high level of regulation and institutionalization and which is traditionally conservative.

Legal Tech typically includes: (i) technologies that facilitate knowledge management and data processing; (ii) management tools; and (iii) substantive law solutions i.e. tools to autogenerate contracts, e-discovery, online dispute resolution etc.

According to the Technology Index of the CodeX Stanford Center for Legal Informatics (<https://law.stanford.edu/codex-the-stanford-center-for-legal-informatics>), which contains more than 1736 companies, there are currently 27 Legal Tech projects in Spain. This is a considerable number; however, we are a long way from the figures of Anglo-Saxon countries such as the US, Canada or the UK, which are at the top of the rankings. The two large niches of Spanish Legal Tech are legal marketplaces and the self-generation of legal documents. But even in these fields, the Anglo-Saxon influence is clear. For example, most Spanish software applications for the self-generation of legal documents are inspired by Rocket Lawyer, a well-known American online legal technology platform.

As digital tools gain weight in the legal world, the methodological, conceptual and cultural schemes of common law countries gradually infiltrate the legal systems of other countries and legal traditions. This is not the first time that it happens. In the field of business law, Anglo-Saxon influence, especially, American influence, has been remarkable for decades. However, Legal Tech is introducing institutions and legal concepts that are alien to us at an unprecedented rate, very difficult to assimilate.

In the opinion of Tuori, the law consists of three distinct layers: the surface level of law, which consists of legal provisions, case law and comparable material; the legal culture, which is comprised of legal concepts, general principles and juridical method; and, finally, a deep structure of law, which is more static and reflects each historical period.

All three levels are normally interrelated, so that legal culture and its deep structure influence the surface level of the law, and vice-a-versa. In this regard, there is a risk that digital tools will adopt solutions anchored only at the surface level of law, without addressing the legal culture or the deep legal structure of the countries where they are to be implemented. This responds to market logic. Creating and adapting software applications is expensive and time consuming. Digital developers, therefore, seek to get users to adapt to a limited supply of products, to increase profit reducing production costs. Being so, the user is restricted to a few options and is not able to modify them, in general.

Although there is a trend towards diversification as the digital market matures, many tools depart from a common base and most users opt for standard solutions, given the significant financial outlay, resources and attention that tailor-made solutions require. If these standard solutions only consider the superficial layer of law when introducing them into the different markets, without addressing the legal culture layer underneath, the solutions envisaged by developers may not be entirely optimal to respond to the specific

problems that may arise. This can be a problem, especially, in the case of technological tools that provide substantive law solutions.

Possible dysfunctions may be of a varied nature. For example, since legal culture plays a crucial role in understanding and applying the law, the absence of a legal culture common to the developer and the user, may require an excessively thorough and detailed contractual drafting. Terminology and concepts may be problematic points, as well. Each national legal system uses terminology that does not necessarily correspond with the legal languages of other countries. Hence, a literal translation of a given legal term into another language may not exactly express the same concept. For instance, the English expressions contract or obligation comprise different concepts than Vertrag, aftale, contrato or obbligazione. Similarly, the French term cause (removed from the French Civil Code after the 2016 reform) is slightly different from the Spanish or Italian causa, and there is no corresponding term in other legal systems. Likewise, there are common law terms which have no equivalent in other legal systems i.e. consideration.

Law and language are closely connected in that they usually are products of the same social, economic and cultural influences. In the same sense, cultural heritage is embedded in law, including the linguistic dimension. Hence, legal thinking cannot be easily separated from the language in which it is formed. Being English the language used in the development of most Legal Tech applications, we must keep a close eye on the impact of common law institutions, legal thinking and methodology in a continental legal system like ours.

It is true that there are points of convergence between common law and civil law and that the gap between the two legal traditions is not as significant as it might seem to the naked eye. As mentioned, the common law has been infiltrating the world of business for many decades now., the differences between legal families reflect the idiosyncrasies of the countries to which they belong and their distinctive mentalities. For instance, civil law tradition privileges the legal rule, whereas common law grants priority to practical experience. According to Legrand, each approach reflects a world vision deeply anchored in the society in which it arises, possibly drawing a parallel between legal culture and culture in any other form. This circumstance must be considered when using standard Legal Tech solutions in legal systems based on different rationality and morality.

As digitization expands around the world, the need to make efforts to adapt the digital world to other languages and legal cultures becomes more apparent. Within this context, comparative law, as a discipline that seeks to extract the principles and concepts common to various legal systems through comparison, may play a key role to give a critical and adequate response to some of the referred challenges. Comparative law may be, indeed, crucial as we enter a world where digital does not mean revolution, but everyday life, digital familiarity. A new era, where we must focus on who designs the algorithm and if this inadvertently reflects prejudices and unethical biases by cultural and societal patterns hidden in the data.

Comparative law can guide us in the search for factors and agents through which law is interpreted and constituted. It can also lead us to a better understanding of the mechanisms and reasoning behind the law. I believe this will not only help us lawyers cope with a digital revolution, which is aimed at simplifying the complexity of the legal world. It will also enable us to claim a more active role in this revolution. We can show digital developers and programmers the nuances and differences between legal concepts and traditions. This will anticipate possible problems and solutions when it comes to “translating” law into computer language.