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"COURTS AND THE FUTURE OF THE RULE OF LAW"

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On my appointment to the High Court, three events occurred that caused me to wonder whether someone was having a joke at my expense. First, my completed employment form was returned to me by the Attorney-General's Department with a post-it note attached that read "employee unknown". Second, I discovered that the painting that had been hung in my chambers in Canberra was entitled "Idiot's delight". Third, when I talked about courts and the rule of law at my swearing in, a journalist published a report describing me as being a bit too big for my boots and delivering what sounded too much like a policy speech.

You can imagine my concern, let alone my discomfort, then when Professor Adrienne Stone invited me to speak on "Courts and the Future of the Rule of Law".

So, what did I say that raised eyebrows? I said that it was not possible to serve as a trial judge without recognising that our legal system was facing great challenges in providing appropriate

mechanisms for the resolution of civil disputes; that people in dispute want certainty; and that they are willing to embrace judicial determination of a dispute by mechanisms and processes never before contemplated. I was so bold as to suggest that trial courts and the Australian legal profession not only faced these challenges, but had a responsibility to meet them. Why? Because unless the challenges were faced and met, the courts risked being sidelined. And if that happened, the development of the rule of law risked being stifled.

Was I too big for my boots? That is for others to judge. But I remain of the view that the challenges faced by the courts and the resulting challenges for the maintenance of the rule of law are real and live.

I accept that there is no single agreed definition of the rule of law. I accept that the rule of law has different components, some more accepted than others. I want to focus on one uncontroversial aspect of it – "that the law should be such that people will be able to be guided by it"¹. And for that to occur, the law must be "accessible and so far as possible intelligible, clear and predictable"²

1 Raz, *The Authority of Law: Essays on Law and Morality*, (1979) at 213.

2 Lord Bingham, "The Rule of Law", speech delivered as the Centre for Public Law's Sixth Sir David Williams Lecture, 16 November 2006 at 6.

and there must be means for resolving legal disputes without prohibitive cost or inordinate delay³. And I want to focus on just one source⁴ of challenge to that aspect of the rule of law – disruptive technology.

We cannot brush away the challenges posed by technology as something to deal with at some unspecified time in the future, when technology and its use have become sufficiently ingrained in our legal system and legal practices. That point has already been reached. At a recent public event in the United States, Chief Justice John Roberts was asked: "Can you foresee a day when smart machines, driven with artificial intelligences, will assist with courtroom fact-finding or, more controversially even, judicial decision-making?" His reply was: "It's a day that's here and it's putting a significant strain on how the judiciary goes about doing things"⁵.

For my part, the question, and therefore the answer, were incomplete.

3 See Lord Bingham, "The Rule of Law", delivered as the Centre for Public Law's Sixth Sir David Williams Lecture, 16 November 2006 at 20.

4 See Susskind and Susskind, *The Future of the Professions*, (2015) at 33-37.

5 Liptak, "Sent to Prison by a Software Program's Secret Algorithms", *The New York Times*, 1 May 2017.

Like all issues, the first, and often the most critical, step is to ask the right question. Ask the right question and there is some hope that you will come up with a relevant answer to at least some of the question. Ask the wrong question and you are condemned to debating either irrelevant matters or matters where you cannot draw the necessary connection between the problem and any solution.

So, what might have been the right question? In order to identify it, it is useful to consider some current – and I emphasise current – examples of the ways in which technology is being used in aid of, and simultaneously impacting on, the rule of law.

The first is the increasing prevalence of "online dispute resolution" platforms or "ODR". ODR is what it says it is – dispute resolution, outside the courts, using online platforms⁶. The eBay ODR process is a simple example – each year, it resolves 60 million disagreements concerning such things as non-payment by buyers or complaints by buyers that items delivered did not match the description⁷.

6 Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australasian Dispute Resolution Journal* 227 at 227 citing Hörnle, "Online Dispute Resolution in the EU and Beyond – Keeping Costs Low or Standards High?" in Hodges and Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims*, (2013) 293 at 294.

7 See Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims*, (2015) at 11 [4.2].

And the platforms are becoming increasingly sophisticated. The Civil Resolution Tribunal (or CRT) in British Columbia, Canada, is a leading example. It employs a question and answer system – the "Solution Explorer" – at a preliminary stage to assist in resolving strata disputes between owners, tenants, occupants and strata corporations or small claims such as insurance and personal injury claims of amounts up to \$5,000, by consent, before a claim is commenced⁸. Commencing a dispute involves filling in an online application form, which is followed by the "case management phase"⁹. That phase involves an attempt to resolve the dispute with the assistance of a facilitator. If that phase fails to resolve the dispute, the dispute may proceed to the "tribunal hearing phase"¹⁰. The tribunal "hearing", including the reception of evidence, may take place entirely over the telephone, videoconferencing or email¹¹. And to facilitate the whole regime, each phase of the online platform can be accessed at any time of the day or night from a computer or mobile device¹². But Canada is not alone.

8 See <<https://civilresolutionbc.ca/how-the-crt-works/getting-started/>>.

9 s 17(1)(a) of the *Civil Resolution Tribunal Act* 2012 (BC) ("the CRT Act").

10 s 17(1)(b) of the CRT Act.

11 s 39(1) and 42(3) of the CRT Act.

12 See <<https://civilresolutionbc.ca/crt-accepting-small-claims-june-1-2017-830/>>.

In the United Kingdom, Lord Justice Briggs recently recommended the creation of an Online Court for smaller claims, again involving an initial online interactive process¹³, which creates a document that is effectively a simplified pleading. One of the drivers for that recommendation was his Lordship's view that the existing court system is not adequately providing "access to justice for ordinary individuals and small businesses due to the combination of the excessive costs expenditure[,] ... [the] costs risk of civil litigation about moderate sums, and the lawyerish culture and procedure of the civil courts, which makes litigation without lawyers impracticable"¹⁴. The idea appears to be gaining traction. Earlier this month, the UK Government, the judiciary and non-government organisations held a competitive "hackathon" at which teams of lawyers, programmers and designers were invited to come up with tools that would support the work of online courts¹⁵.

Closer to home, the Consumer Action Law Centre in Victoria has a website – "DemandARefund.com" – that helps people to seek refunds for "junk" add-on insurance. It uses a system of checked boxes, reflecting identified criteria developed in accordance with

13 See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 231-232; Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 118-120 [12.15.5]-[12.15.26].

14 Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 115 [12.4].

15 See <<https://www.onlinecourtshackathon.com>>.

existing case law, to assist people to prepare a letter of demand that is sent to the company the subject of the complaint¹⁶ and provides the consumer with the option to electronically notify the appropriate regulator of the complaint¹⁷. In 2016, the website helped consumers demand over \$300,000 in refunds¹⁸. The success rate – about 50%. Moreover, in addition to assisting people, the service enables the Centre to identify trends in the type of complaints and the companies that are the subject of them.

But ODR is not the only form of technological impact on the legal system. There is also the emergence of automated decision-making technology. An aspect of it lies at the heart of the case of *State of Wisconsin v Loomis*¹⁹, decided by the Supreme Court of Wisconsin in 2016. Eric Loomis was sentenced to seven years in prison. At sentencing, the trial court relied on risk assessment results provided by a proprietary risk assessment instrument, the "Correctional Offender Management Profiling for Alternative Sanctions", or "COMPAS". The risk assessment is based "upon information gathered from the defendant's criminal file and an

16 See <<http://demandarefund.consumeraction.org.au/get-your-own-back/how-to-ask-for-a-refund/>> .

17 See <<http://demandarefund.consumeraction.org.au/get-your-own-back/what-to-do-next/>> .

18 See <<http://impact1516.consumeraction.org.au/2016/10/19/a-centre-for-excellence-in-consumer-advocacy-law-and-policy-2/>> .

19 881 NW 2d 749 (Wis 2016).

interview with the defendant"²⁰. The risk assessment provides a prediction about the risk that an individual offender will reoffend based on a comparison of information about the individual to a similar data group²¹. However, because the developer of COMPAS considers the algorithms to be trade secrets, it does not disclose how the risk scores are determined or how the factors are weighed²².

Mr Loomis was identified in the risk assessment as "an individual who is at high risk to the community"²³. But Mr Loomis could not access, analyse or understand, and therefore had no basis to challenge, the accuracy and scientific validity of the risk assessment – the algorithm was and remains secret²⁴. Nor did the sentencing judge have access to the algorithm. And, of course, because it is an algorithm, it is not static. It changes as the underlying data group changes. And, logically, it should change each time a person reoffends.

²⁰ *Loomis* 881 NW 2d 749 at 754 [13].

²¹ *Loomis* 881 NW 2d 749 at 754 [15].

²² *Loomis* 881 NW 2d 749 at 761 [51].

²³ *Loomis* 881 NW 2d 749 at 755 [19].

²⁴ See Butt, "Should Artificial Intelligence play a role in criminal justice?", *The Globe and Mail*, 1 June 2017.

In October last year, Mr Loomis filed a petition for a writ of certiorari in the Supreme Court of the United States. In response, the Attorneys for the State of Wisconsin submitted that Mr Loomis' petition should be denied, in part, because "[t]he use of risk assessments by sentencing courts is a novel issue, which needs time for further percolation"²⁵. They further contended that Mr Loomis was free to question the assessment and explain its possible flaws. How that was to be done was not explained. The United States, as amicus curiae, recognised that the use of actuarial risk assessments by sentencing courts "raises novel constitutional questions" that may merit the Supreme Court's attention in a future case²⁶ – just not this one.

The Supreme Court denied Mr Loomis' petition in June this year²⁷. However, the use of tools such as COMPAS raises difficult issues that are unlikely to go away. In the Supreme Court of Wisconsin, it was recognised that there are certain benefits of "evidence-based sentencing"²⁸. But the Court also recognised that it

²⁵ Attorneys for the State of Wisconsin, *Loomis v Wisconsin*, Brief in Opposition at 1.

²⁶ United States, *Loomis v Wisconsin*, Brief as Amicus Curiae at 12.

²⁷ See Supreme Court of the United States, Order List: 582 US, 26 June 2017 at 5
<https://www.supremecourt.gov/orders/courtorders/062617zor_8759.pdf> .

²⁸ *Loomis* 881 NW 2d 749 at 758 [36].

was important to circumscribe the use of a COMPAS risk assessment²⁹. For example, some studies have concluded that "there is little evidence" that COMPAS does what it is supposed to do³⁰. There are also concerns that COMPAS disproportionately classifies minority offenders as higher risk. One analysis suggested that black defendants were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism³¹.

Should more "evidence-based" sentencing come at the price of secrecy? Should "evidence-based" sentencing come at the price of secrecy when the justification for that secrecy is the protection of a private company's core business and therefore their profits? Is an answer that governments should develop their own algorithms and provide access to them to judges and the prosecution and defence lawyers? And could (or should) tools like COMPAS be used not as a risk assessment tool but as a tool for avoiding unconscious bias on the grounds of race?

These innovations, and others like them, raise important questions concerning the legality of actions by public bodies, minimum standards of fairness (both procedural and substantive), accountability of government decisions and access to merits and

²⁹ *Loomis* 881 NW 2d 749 at 757 [35].

³⁰ See *Loomis* 881 NW 2d 749 at 762-763 [59]-[60].

³¹ *Loomis* 881 NW 2d 749 at 763 [63].

judicial review³². That list is not exhaustive. I doubt that it can be said that any of these technological innovations ensure that all persons and authorities within the state, public or private, are bound by and entitled to the benefit of laws publicly made, taking effect generally in the future and publicly administered by the courts.

And we know that technology is not all bad. Indeed, automated processes and programs are often *able* to be designed in a way that *enhances* aspects of the rule of law. For example, by allowing the public to observe hearings online or on a video display³³; by assisting in the dissemination of information by publishing online information about processes and documents and decisions³⁴; by addressing the economic problem that many people and organisations simply cannot afford legal services, or at least cannot afford them to the full extent they might need; by providing automated online complaint systems; by recognising that people today access and consume information differently and that those

32 Perry and Smith, "iDecide: The Legal Implications of Automated Decision-making", speech delivered at the Public Law Conference, September 2014. See also Perry, "iDecide: Administrative Decision-making in the Digital World", (2017) 91 *Australian Law Journal* 29 at 31. See generally Nettle, "Technology and the Law", speech delivered at the Bar Association of Queensland Annual Conference, 27 February 2016.

33 Lord Justice Briggs, *Civil Courts Structure Review: Interim Report*, (2015) at 45 [4.25].

34 See, eg, Victoria, *Access to Justice Review*, (2016) at 284 [4.3.6].

channels permit, and can encourage, people to solve or engage with their own legal problems.

So, what might have been the right question to ask about technology and the rule of law? I do not consider that we can participate in, or contribute to, the Australian legal system without understanding how the system developed, how it has worked and how it works today. And I do not consider that we can anticipate changes to the legal system, or contribute to the making of those changes, without also understanding what matters in the existing system, and what does not. Fail in our understanding of any of those matters and we will be a passive responder to changes that will be forced upon us – changes that inevitably will have consequences that fundamentally alter, or at least challenge, our present understanding of the rule of law.

If society demands that the law should be such that people can and will be (and, one should add, are willing to be) guided by it, what does that mean for the form and content of these technological innovations? Does it mean that society needs to rethink what until now have been considered important, if not essential, aspects of the rule of law?

Take transparency. It was and remains an important part of how our existing legal system works. The resolution of disputes in open court is said to be an important part of maintaining public

confidence in the administration of justice and, consequently, the rule of law. Why? Because we can see how disputes play out, how the parties manage their cases, and on what basis a court makes a decision. And that learning is not limited to the participants in any particular dispute. The learning extends to, and is used by, the whole of society in a myriad of ways. But none of that is possible, for instance, with eBay's ODR process. Indeed, as Mr Loomis' plight demonstrates, technological tools may not only lack transparency but may also rely on a lack of transparency for purposes unconnected with, and potentially in conflict with, the rule of law.

Does that matter? There are aspects of our existing legal system that are not transparent: private judging and arbitration; mediation; non-publication orders; plea bargaining; "secret courts" for national security matters; independent corruption bodies; litigation involving trade secrets – and the list goes on.

So, are there other aspects of our legal system where we are willing to adopt technological change and at the same time abandon one or more aspects of the rule of law in order to reduce cost, minimise delay, increase access to justice or for some other objective? Where is the line to be drawn – by reference to the nature of the claim, the size of the claim, the identity of the complainant, the identity of the respondent, the jurisdiction, the nature of the tribunal, the relief sought, whether the liberty of an individual is at stake, the amount of the cost or time savings, or the

extent to which access to justice is improved, or which aspect or aspects of the rule of law are subject to change or challenge?

And there are practical questions that must be asked and answered about the development and funding of ODR platforms. A well-publicised ODR enterprise in the Netherlands dealing with divorce and separation was recently shut down. But Professor Roger Smith, who runs a blog called "Law, Technology and Access to Justice", has urged that the demise of that platform should not dissuade us from considering ODR options in the future³⁵. Rather, he urges that we reflect on both the success and failures of the Netherlands model in considering how to proceed. And he suggests that it will be fruitful to do the same with the CRT in British Columbia as that model progresses.

It is only with those questions clearly at the forefront of our minds that we can and should engage critically with technology. And it is only with those questions answered that we can adopt and adapt technology appropriately.

Technology has the potential to bring enormous benefits to our legal system. But we need to embrace those benefits with the

³⁵ Smith, "Classical Lessons from the Rechtwijzer: A Conversation with Professor Barendrecht" (22 June 2017) <<https://law-tech-a2j.org/odr/classical-lessons-from-the-rechtwijzer-a-conversation-with-professor-barendrecht/>>.

knowledge and understanding of the effects, risks and challenges that accompany technological change. Failing to consider and, where appropriate, to address the effects, the risks or the challenges is not an option. Pretending that they do not exist is also not an option. Indeed, the sooner we ask, and answer, these fundamental questions, the better it will be for the development of new tools and ideas that utilise technology, as well as for the rule of law.

The rule of law is not static. It will continue to change. Technology will hasten the rate of that change. The questions for each of us are: what kind of society do we want; and what role does the rule of law have in that society? The answer to those questions – informed in turn by answers to questions like how did our system develop, how has it worked and how does it now work, what matters in the existing system, and what does not – will guide our decisions about what technology we should adopt and what technology we should adapt and why. I do not think that we should, or can, let specific technology or specific circumstances deflect us from asking ourselves these fundamental questions. It is the answers to these questions that will shape the future of our society, the rule of law and the courts.