



**The Legal Profession in the Age of Digitalization**  
**An outline of Three Potential Transformations in Legal Education**

Schäfke-Zell, Werner; Asmussen, Ida Helene

*Published in:*  
Utrecht Law Review

*DOI:*  
[10.36633/ulr.454](https://doi.org/10.36633/ulr.454)

*Publication date:*  
2019

*Document version*  
Publisher's PDF, also known as Version of record

*Citation for published version (APA):*  
Schäfke-Zell, W., & Asmussen, I. H. (2019). The Legal Profession in the Age of Digitalization: An outline of Three Potential Transformations in Legal Education. *Utrecht Law Review*, 15(1), 65–79.  
<https://doi.org/10.36633/ulr.454>

## ARTICLE

# The Legal Profession in the Age of Digitalisation

An Outline of Three Potential Transformations in Legal Education

Werner Schäfer-Zell\* and Ida Helene Asmussen†

There is consensus within the legal profession that it needs to adapt to the on-going digitalisation of the legal market and the changing means of production of the legal commodity. This adaptation will also necessitate a transformation of legal education to assimilate the changes that the legal profession will undergo. The question is, however, how might the legal profession adapt to its digitalisation? In this article, we will describe three possible pathways that the legal profession might follow. These are based on synchronous sociological models of the dynamics of the legal profession and the legal market as well as diachronous sociological descriptions of the history of the legal profession over the past century. In order to concretise these hypotheses, we will focus on the legal profession in three similar countries between which there is some level of comparability: Denmark, Germany and the Netherlands. The three hypothetical pathways are understood to be non-mutually exclusive. We will then answer our core question: how must legal education be transformed to take into consideration the digitalisation of the legal profession? To answer this question, we will describe three possible transformations in legal education that would consider the pathways that the legal profession might pursue to adapt to the digitalisation of its market and the production of its commodity.

**Keywords:** Digitization; legal profession; legal education; deprofessionalization; legal technology; automatization

## 1 Introduction: automatisisation may lead to deprofessionalisation of the legal commodity

The automatisisation of the core tasks performed by legal practitioners, such as legal decision-making (e.g. an assessment of facts and their subsumption) or mapping of applicable law (e.g. arguing a legal opinion on a certain matter or conducting policy analysis), is an ongoing and open-ended process. This is considered an urgent challenge for the legal profession, because it changes the demands the legal market poses to lawyers as well as future law school graduates. It is thus a challenge to which law schools must respond as well. Therefore, our core question is: how must legal education be transformed so that it qualifies law students to be able to work in a digitised legal profession? This question presupposes another question: what will be the core tasks of tomorrow's legal practitioners, for which law schools will have to prepare their students?

In the present article, we will outline three non-mutually-exclusive hypotheses about the direction in which the legal profession may be heading and the core competencies that will be needed by tomorrow's legal practitioners. These pathways are based on contemporarily observable trends within the legal profession, which may be intensified and accelerated by the digitalisation of the legal profession. These trends and their corresponding pathways have been selected because they fit possible processes digitalisation may prompt within the legal market and the legal profession, based on sociological models of the dynamics of the legal profession. In accordance to the three pathways, we will argue for three according transformations

\* Assistant Professor, Centre for Legal Studies in Welfare and Market, Faculty Law, University of Copenhagen, DK. email: [werner.schaefer-zell@jur.ku.dk](mailto:werner.schaefer-zell@jur.ku.dk).

† Associate Professor, Centre for Interdisciplinary Studies of Law, Faculty of Law, University of Copenhagen, DK. email: [ida.helene.asmussen@jur.ku.dk](mailto:ida.helene.asmussen@jur.ku.dk).

of legal education that would ensure that tomorrow's law students are successfully prepared for entrance into an increasingly digitised legal profession.

The first pathway builds on the contemporary emergence of a new type of job cluster, legal information technology, that will, no doubt, increase in some unpredictable shape and number. The second and third pathways relate to existing branches of the legal profession, i.e. alternative dispute resolution (ADR) and public administration, which would increase in their relevance, when the legal profession would strengthen its image of furthering social cohesion. The last two pathways also entail the extent to which the legal profession controls these branches of the legal market, in which lawyers compete horizontally with other professions and occupations.

Moreover, the three pathways are linked by one overall dominating concept: trust.<sup>1</sup> This includes trust in (fully) automated legal services in general (the first pathway), trust in the rule of law and public authorities (the third pathway) as well as trust at a micro-, meso- and macro-level of society as well as in a global perspective (the second pathway) to compensate for the reduced human element that is an unavoidable consequence of the increased use of (fully) automated legal services. While it seems logical that digitalisation requires trust, it may also contribute to understanding why basic social 'tools' for ensuring trust have been developed in the forms described in the second and third pathways: delegating guardianship of the rule of law to professionals and the development of a more human-focused method of conflict resolution in the form of ADR.

## 2 Two probable dynamics of the legal market

Notable research has been done on the external horizontal competition<sup>2</sup> between the legal profession and non-legal professions, especially with regard to the competition between legal professionals and economists.<sup>3</sup> Moreover, while automatising of legal work may fundamentally affect the types of tasks conducted by legal professionals in their work, it in itself does not necessarily mean that non-lawyers will be able to perform legal tasks without some type of supervision by a legal professional. We will therefore not focus on the external horizontal competition between legal professionals and members of non-legal professions, such as economists or political scientists. Instead, our focus lies on the ways in which legal tasks will presumably be transformed by automatising and how legal education can adapt to cater to this transformed legal market. Our focus is therefore on how the automatising of legal labour intensifies internal vertical competition, and how this leads to higher demands on lawyers' competencies.

The reasoning below takes its point in departure in the hypothesis that the automatising of legal labour will emancipate clients from the legal profession. The legal profession can therefore only maintain its status by reacting in two ways: by owning and controlling the means of production of automated legal services, and by maintaining client desire in an irreducible human element of legal services. The latter reaction points at a relevant factor in the hypothetical development of the legal profession in the age of digitalisation: regardless of the degree to which automatising of legal labour is possible, the acceptance of automated legal services and eventually its economic success, will among other things, depend on client trust in these (partially or fully) automated legal services. The role of trust in a digitised legal profession will be discussed in the

<sup>1</sup> Trust is understood here in the 'encapsulated interest' view of trust (K.S. Cook, 'Trust', in G. Ritzer & J.M. Ryan (eds.), *The Concise Encyclopedia of Sociology* (2010), p. 659): 'one party A trusts party B with respect to x (a specific domain of activity) when A believes that her interests are included in B's "utility function" such that B values what A desires because B wants to maintain good relations with A or wants to maintain a reputation for being trustworthy in the network of relations in which the A-B relation is embedded'.

<sup>2</sup> External horizontal competition means that the legal profession as a whole or part of it stands in competition with another group of actors outside of the legal profession (external) as opposed to the competition of two groups of actors that are both members of the legal profession, e.g. small law firms vs. big law firms (internal), and that the competition pertains to access to the legal market through (horizontal) rather than the social hierarchy within the market, e.g. through ownership over the means of production or higher social status (vertical); R.L. Abel, *American Lawyers* (1991), pp. 15, 20.

<sup>3</sup> E. Mak, *The T-Shaped Lawyer and Beyond: Rethinking legal professionalism and legal education for contemporary societies* (2017), pp. 14–15; O. Hammerslev, 'Where have all the jurists gone? Law, power and professions', in A. Blok & P. Gundelach (eds.), *The Elementary Forms of Sociological Knowledge: Essays in honor of Margareta Bertilsson* (2014); O. Hammerslev, 'Empiriske undersøgelser af den juridiske profession i nationale og transnationale kontekster', in A. Storgaard & B. Lemann Kristiansen (eds.), *Nordisk retssociologi: Status – aktuelle udfordringer – visioner* (2010); O. Hammerslev, 'The Development of the Danish Legal Profession', (2008) 53 *Scandinavian Studies in Law*, pp. 283–302; M.R. Madsen, 'Return to the Copenhagen Magic Circle: First Elements of Longitudinal Study of Large Law Firms in Denmark', (2008) 53 *Scandinavian Studies in Law*, pp. 303–319; Y. Dezalay & B.G. Garth, 'The Confrontation between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility', (2004) 29 *Law & Social Inquiry*, no. 3, pp. 615–638; M. Bertilsson, 'Inledning', in M. Bertilsson (ed.), *Rätten i förvandling: Jurister mellan stat och marknad* (1995); V. Aubert, 'The Changing Role of Law and Lawyers in Nineteenth- and Twentieth-Century Norwegian Society', in J.G. Wilson et al. (eds.), *Lawyers in their Social Setting* (1976); B.-M. Blegvad, 'De juridiske eksperter: Tre professioner', in H. Gullestrup et al. (eds.), *Eksperterne og magten: Professionelles rolle i organisationer og samfund* (1975).

context of the concrete pathways and transformations. The next two subsections examine how automatisa- tion of legal labour may change the perception of legal labour by non-professionals, and what the general characteristics of non-automatable legal labour may be.

### **2.1 Automatisa- tion leads to intensified internal job competition**

The starting point for the examination of the ways in which automatisa- tion of legal services will lead to new forms of internal competition within the legal profession is a phenomenon that, according to the sociology of the professions, is termed 'demystification'.<sup>4</sup> Demystification can denote various processes that under- mine the unreflecting belief of (parts of) society in the exclusivity of a profession's competence and status.<sup>5</sup> While one such process can be the unmasking of expertise as political domination,<sup>6</sup> another process that leads to demystification can be the 'rationalisation'<sup>7</sup> and 'automatisa- tion' of professional labour, 'amplified by developments in information technology'.<sup>8</sup> Max Weber defines rationalisation as the development of a common belief that 'in principle' everything can be 'mastered through calculation'.<sup>9</sup> If the professional tasks performed by lawyers are understood in this way, this means that the rationalisation of the legal commodity can lead to it being perceived by society as being able to be eventually completely automatable. This percep- tion alone would devalue the legal commodity as a mere technical task that does not need to be performed by a professional. Furthermore, the actual automation of the legal commodity can reduce the number of legal professionals needed to satisfy the legal market's need for legal services, as the automatisa- tion of legal labour would mean more efficiency for delivering legal services. In order to evaluate how rationalisation and automatisa- tion might affect the legal profession, a closer look at what automatisa- tion means is necessary.

Automatisa- tion means outsourcing *routinisable*<sup>10</sup> tasks to machines – in this case, legal technology. Such tasks would otherwise be performed by lower-level lawyers or paralegals.<sup>11</sup> Sometimes, these tasks may even be performed in overseas back offices.<sup>12</sup> Such automatisa- tion would not necessarily lead to demystification and might only render legal services more effective. However, automatisa- tion can lead to demystification, if a task that had previously been argued to be the requisite monopoly of members of that profession is automated.

According to the sociology of the professions, professionals usually argue that they alone should be entrusted with performing certain tasks and that these tasks require expert, science-based knowledge and lengthy training.<sup>13</sup> This professional strategy aims at ensuring 'consumer dependence' on the 'professional commodity'.<sup>14</sup> For example, entrepreneurs may (consider themselves to) be dependent on tax advisors in order to comply to tax regulation, or (consider themselves to) be dependent on data protection advisors in order to ensure compliance to data protection regulation, not only in order to delegate the work load, but because ensuring compliance requires sufficient expert knowledge. The legal commodities in this example are legal advice on tax law and on data protection law, respectively.

If such a previously monopolised task can be automated, the arguments that ensure consumer depend- ence lose their power and the demystification of the professional commodity associated with the task threatens that community with the deprofessionalisation of their commodity.<sup>15</sup> To stay with the examples, automated income tax declarations may reduce the demand of private households for tax advice. Regarding businesses' demand for data protection advice, automated data processing agreement generators, for exam- ple, may reduce the amount of advice sought from data protection law experts. However, such automatisa- tion

<sup>4</sup> Abel, supra note 2, p. 19; N. Toren, 'Deprofessionalization and its Sources', (1975) *Sociology of Work and Occupations* 2, no. 4, pp. 323–337; R. Susskind & D. Susskind, *The Future of the Professions: How technology will transform the work of human experts* (2015), pp. 140–141.

<sup>5</sup> Abel, *ibid.*

<sup>6</sup> Abel, *ibid.*; P. Boreham & A. Pemberton, 'Towards a Reorientation of Sociological Studies of the Professions', in P. Boreham et al. (eds.), *The Professions in Australia: A critical appraisal* (1976), pp. 28–33.

<sup>7</sup> M. Weber, *Wissenschaft als Beruf* (1919), p. 15.

<sup>8</sup> Abel, supra note 2, p. 19.

<sup>9</sup> '(...) daß man vielmehr alle Dinge – im Prinzip – durch *Berechnen beherrschen* könne', Weber, supra note 7, p. 16 (emphasis in the original).

<sup>10</sup> Toren, supra note 4.

<sup>11</sup> Susskind & Susskind, supra note 4, p. 68.

<sup>12</sup> Madsen, supra note 3, p. 310.

<sup>13</sup> Abel, supra note 2, pp. 18–19; T. Parsons, 'A sociologist looks at the legal profession', in T. Parsons (ed.), *Essays in Sociological Theory* (1952), p. 372.

<sup>14</sup> Abel, *ibid.*, p. 19.

<sup>15</sup> Abel, *ibid.*, footnote 19; Toren, supra note 4, p. 329.

may affect various branches of the legal profession differently, as tasks differ, and part of a workload of a legal task that still might need to be performed by legal professionals might differ in size. But how can we determine general characteristics of the part of the workload that may not be automatable?

While an optimistic view of the abilities of artificial intelligence would consider any human-performed task to be routinisable and thus automatable, one particular specificity of professional services – as opposed to services provided by non-professionals – must not be overlooked, namely, as Abel puts it, that:

professional services contain an irreducible element of uncertainty or discretion, a delicate balance between indetermination and technicality, art and science. If there is too much art, consumers lose confidence (as in quack medicine or investment advice); if there is too much science, consumers can provide the service themselves or resort to nonprofessional advisers (do-it-yourself home repairs or divorces).<sup>16</sup>

If we apply this reasoning to the challenges that digitalisation poses to the legal profession, it is the latter part of the argument that is especially relevant: too much reliance on science may emancipate clients from professional services.

Within this line of reasoning, there are two possible reactions to the technological demystification of the legal commodity. One possible reaction could be to embrace legal labour as a technicality and attain control over the production of automated legal services and monopolise this control for the legal profession. In the studies of the professions, this tendency to close off portions of the market to non-members of a profession is referred to as 'social closure', and it can be achieved, e.g. by establishing control over the specific education required, as well as through credentialisation and peer-evaluation.<sup>17</sup> For legal technology, this would mean that the legal profession would establish control over the relevant education, credentialisation and peer-evaluation of the manufacturers of legal technology (cf. pathway one, the regulation and coding of legal technology).

Another possible reaction could be to focus on the first part of the argument: art, as an irreducible element of the professional commodity. With this reasoning, excessive reliance on art would seem to be a futile solution to the threat of demystification, as it might reduce trust in legal services. Nevertheless, one option for cutting through the Gordian knot would, in turn, be to root the artistic aspect of the professional services in science. This may be done in two ways. One draws on the role of lawyers as the protectors of the rule of law, a professional role that was especially salient in the legal professions of many European countries until after the post-war period (cf. pathway three, the revitalisation of legal professionals as guardians of the rule of law).<sup>18</sup> This function as guardians of the rule of law is mirrored in a nascent, contemporary image of the legal profession that departs from the dogma of law as subsumed under the paradigmatic rule of New Public Management: the 'contemporary demands come together in a new image, which focuses on the qualities of technological awareness, non-legal competences, and social responsiveness of legal professionals'.<sup>19</sup>

The second way to root the artistic element of the legal commodity in science pertains to elements of the legal commodity that include irreducible human interaction. Ideally, the legal commodity is rooted in the natural philosophical assumption that law is a tool used by humans to form a functioning society. While certain routinisable elements of the legal commodity may be able to be outsourced to machines, there are other tasks that can only be entrusted to other humans, not to machines.<sup>20</sup>

Looking at the role of legal professionals from a functionalist perspective, lawyers manage conflicts between individuals and groups.<sup>21</sup> While this perspective considers lawyers to manage conflicts through rationalisation and redefining conflicts as legal problems,<sup>22</sup> a society may not consider it possible to out-

<sup>17</sup> Abel, *ibid.*, p. 21; Parsons, *supra* note 13, p. 372. Parsons notes that only members of a profession have the right to interpret the 'tradition' of the profession, i.e. evaluate their professional knowledge and skills and the quality with which individual practitioners apply this knowledge and these skills.

<sup>18</sup> Mak, *supra* note 3, p. 13; Hammerslev, *supra* note 3; O. Hammerslev, 'Studies of the Legal Profession', in R. Banakar & M. Travers (eds.), *Law and Social Theory* (2013); O. Hammerslev, 'At studere juridiske eliter', in H.V. Godsk Pedersen (ed.), *Juridiske emner ved Syddansk Universitet* (2011); Madsen, *supra* note 3; Dezalay & Garth, *supra* note 3; H. Schliedermann, 'Juristerne: En profession under pres', (1985) 28 *Retfærd*, pp. 26–44; Blegvad, *supra* note 3; B.-M. Blegvad, *Juristens rolle i samfundet* (1973).

<sup>19</sup> Mak, *ibid.*, pp. 14–16.

<sup>20</sup> Cf. Susskind & Susskind, *supra* note 4, p. 117.

<sup>21</sup> Parsons, *supra* note 13, pp. 378–379.

<sup>22</sup> N. Christie, 'Conflicts as Property', (1977) 17 *The British Journal of Criminology*, no. 1, pp. 1–15.

source this task to a machine. There is, in fact, a desire for taking the emotional aspect of conflicts into account, too, in the legal system, as can be witnessed by rise of ADR.<sup>23</sup> ADR can thus be an example for an irreducible human element in certain legal tasks. But what does this mean for the future development of the legal profession? As increasingly demanding legal tasks are outsourced to machines, ADR could be further professionalised, in the sense that it could also be conducted by legal professionals and could be integrated as a subject into law degree curricula (cf. pathway two, expanding the potential of ADR). Such an integration of professionalised ADR training for lawyers would root the 'artistic element' of the professional service in science, which may ensure 'consumer confidence' in the professional service.

## **2.2 Internal competition leads to higher demands on lawyers' competencies**

Automating production of the professional commodity, i.e. legal services, requires the availability of the financial resources needed to develop, build or purchase the means of (partially or fully) automation of the production of said commodity. In the private sector, this prerequisite generally leads to increased pressure on individual practitioners as well as on small and, potentially, medium-sized law firms; it is generally easier for larger companies, as opposed to smaller ones, to possess sufficient financial resources to be able to afford automation of the professional commodity, which permits larger companies to be the vanguard of automation. Such technology, e.g. legal tools based on artificial intelligence, ideally enhances the quality and speed with which certain legal services can be delivered. This means that medium-sized and, in particular, large law firms can more effectively offer services to smaller clients. This is problematic for small law firms and individual practitioners who have otherwise catered to this group of clients.

Where legal professionals are employed to a significant degree in the public sector – as is the case, e.g. in Denmark and Germany,<sup>24</sup> but not as prevalent in the Netherlands<sup>25</sup> – automation will have similar consequences: namely, a reduction in the number of legal workers needed. These workers, however, are often not considered to be members of the legal profession. In the Netherlands and Germany, and, to a certain extent, in Denmark, it is clerks, not lawyers (in the sense of jurists, not attorneys),<sup>26</sup> who provide the bulk of legal services in the public sector. Lawyers occupy only the higher-ranking positions.<sup>27</sup> As lawyers tend to be found at the higher levels of public administration, this means that reductions to the number of lawyers employed in the public sector may be far smaller than reductions to the number of paralegals in this sector. Paralegals in the public sector will thus suffer from 'technical proletarianisation', i.e. either being replaced by technology or being employed to operate the machines that are replacing them.<sup>28</sup> If this development is viewed as a dialectic dynamic, it will mean that lawyers in the public sector will need to be able to credibly claim that, apart from their more 'technical' legal competencies, they possess more of the competencies needed to qualify them for their leadership positions. This dynamic may also prove to be observable in the private sector, albeit in a more stratified fashion.

For example, individually practicing lawyers whose clients are private persons and small and medium-sized companies may underline the benefit of a direct relation to their customers that offers a more empathic service aware of the minutiae of the client's issues compared to an automated service that only takes those facts into account the client was asked via a questionnaire or a chat box. In law firms, the principles of the 'tournament of lawyers'<sup>29</sup> may increase in relevance, e.g. the ability to manage paralegals and ensure the quality of their work, and to develop new legal services to increase the firm's revenue.

Although during the process of digitalisation, the tasks performed by paralegals in the private sector will be automated early on, the tasks delegated to lower-level lawyers will also eventually be automated. This means that, in general, higher-order competencies will become more relevant for lawyers in the private sector. However, what is meant by 'higher-order competencies', especially regarding legal professionals? In the field of pedagogy, there are two well-established hierarchies of competencies, often familiar to university

<sup>23</sup> E.g. A. Duursma, 'A current literature review of international mediation', (2014) 25 *International Journal of Conflict Management*, no. 1, pp. 81–98; Y. Dezalay & B.G. Garth, *Dealing in Virtue: International commercial arbitration and the construction of a transnational legal order* (1996); L.R. Singer, *Settling Disputes: Conflict resolution in business, families and the legal system* (1994).

<sup>24</sup> Hammerslev, supra note 3; T. Lundmark, *Charting the Divide Between Common and Civil Law* (2012).

<sup>25</sup> J. Ballendowitsch, *Strukturwandel im öffentlichen Dienst der Niederlande* (2004).

<sup>26</sup> I.e. Dutch *juristen*, Danish *jurister*, German *Volljuristen*.

<sup>27</sup> E.g. Lundmark, supra note 24; Hammerslev, supra note 3.

<sup>28</sup> Abel, supra note 2, p. 33.

<sup>29</sup> M. Galanter & T.M. Palay, 'Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms', (1992) 76 *Virginia Law Review*, no. 4, pp. 747–811.

faculty because of the regulations that followed the Bologna reforms.<sup>30</sup> Even though competency-oriented learning is associated with the Bologna reforms, which in turn are regarded as a part of the adaptation of modern universities to the principles of New Public Management, the hierarchies of the types of competencies themselves give a hint as to which general types of competencies will be required of lawyers in a fully-automated legal sector.

The *Revised Bloom's Taxonomy* differentiates the following hierarchised types of competencies, listed from lowest to highest type of competency: Remembering, Understanding, Applying, Analysing, Evaluating and Creating.<sup>31</sup> It is an oft-heard lament that traditional law school education at European universities focuses too much on rote learning rather than more problem-based approaches that make learning more realistic and go beyond the use of fictitious textbook cases.<sup>32</sup> Rote learning is obviously most strongly associated with the lowest-ranked type of competency: Remembering. Remembering laws, principles and relevant court decisions is necessary for the efficient provision of correct legal advice. In this area, however, it is merely instrumental. For higher-order legal tasks, such as charting applicable law, which, in turn, is instrumental for litigation in private practice or for rendering correct decisions in administrative practice, it is a prerequisite. Here, we move from Understanding to Applying the legal method, to eventually Creating a legal service product, such as litigation or the rendering of legal decisions. This is also reflected in the second-most wide-spread learning taxonomy, the *SOLO Taxonomy*.<sup>33</sup> Here, merely Identifying relevant law is a basic competence, which, in legal work, is instrumental to Performing Serial Skills, and Explaining the interaction of rules, which eventually leads to Creating an original idea for solving a problem or answering a research question, or the development of some form of 'product', e.g. a thesis.

In the context of learning taxonomies, digitalisation means that the performance of lower-ranking tasks will increasingly be aided or even entirely replaced by technical tools, requiring lawyers to focus on the higher-ranking tasks involved in creating a legal product. This, in turn, requires that legal education focus more on these higher-ranking competencies and less on the lower-ranking competencies that, in a less digitised legal sector, were of comparatively higher importance.

In order to better integrate these competencies into legal education, a better coupling between the often too doctrinal teaching at law schools on the one hand, and professional training on the other hand, must be achieved. As an empirical study at the University of Copenhagen has shown,<sup>34</sup> this is not necessarily achieved through simply having practitioners teach courses that have been designed by academic members of staff. A thorough approach to this problem would entail mapping the relevant skills and drawing upon other relevant academic disciplines to enrich doctrinal law courses, e.g. using oral or written exercises that require students to consider state-of-the-art research on legal rhetoric and legal communication. The underlying basic principle, formulated back in the 1990s, is that, in order to fully engage learners intellectually and to avoid short-term learning, a learning environment should approximate the complexity of the real-world tasks that will later be performed by the learners. To aid learners in developing the competencies needed for

<sup>30</sup> The Bologna reforms aimed at the '[a]doption of a system of easily readable and comparable degrees,' Ministerial Conference Bologna 1999, 'Joint Declaration of the European Ministers of Education: The Bologna Declaration of 19 June 1999', <<http://www.ehea.info/cid100210/ministerial-conference-bologna-1999.html>> (last visited 29 October 2019). The point of departure for enabling comparability of degrees within European Higher Education is the following report on competence frameworks that help ensure degree comparability: Working Group on Qualifications Frameworks, *A Framework for Qualifications of the European Higher Education area* (2005) <<https://ufm.dk/en/publications/2005/files-2005/a-framework-european-higher-education-area.pdf>> (last visited 29 October 2019), see D. Vervecken et al., *Kompetenzorientierte Lehrveranstaltungsevaluation als Instrument der Reformgestaltung*, in S. Nickel (ed.), *Der Bologna-Prozess aus Sicht der Hochschulforschung: Analysen und Impulse für die Praxis* (2011), pp. 257–270; E. Weyer et al., *Kompetenzorientierung: Wie ist das gemeint?*, in E. Cendon (ed.), *Die kompetenzorientierte Hochschule: Kompetenzorientierung als Mainstreaming-Ansatz in der Hochschule* (2017), pp. 6–12.

<sup>31</sup> D.R. Krathwohl, 'A Revision of Bloom's Taxonomy: An Overview', (2002) 41 *Theory Into Practice*, no. 4, pp. 212–218; L.W. Anderson & D.R. Krathwohl, *A Taxonomy for Learning, Teaching, and Assessing: A revision of Bloom's taxonomy of educational objectives* (2001).

<sup>32</sup> E.g. A. Dyevre, 'Fixing European Law Schools', (2017) 25 *European Review of Private Law*, no. 1, pp. 151–168; Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland* (2012); S. Jorgensen, 'Konsstereotyper i universitetsuddannelser', (2011) 11 *Kvinder, Kon & Forskning*, no. 2, pp. 34–38; P. Rattleff, 'Den pædagogiske reform af Københavns Universitets juridiske bacheloruddannelse', in L. Rienecker (ed.), *Universitetspædagogiske praksisser* (2015); E.M. Frenzel, *Öffentliches Recht in der wissenschaftlichen Lehre* (2015), p. 10.

<sup>33</sup> J.B. Biggs & C.S.-k. Tang, *Teaching for Quality Learning at University: What the student does* (2011); J.B. Biggs & K.F. Collis, *Evaluating the Quality of Learning: The SOLO taxonomy (structure of the observed learning outcome)* (1977).

<sup>34</sup> W. Schäfer et al., 'Socialisation to interdisciplinary legal education: An empirical assessment', (2018) 52 *The Law Teacher*, no. 3, pp. 273–294.

applying their knowledge and skills in new contexts, variation and complexity are required in teaching and learning activities.<sup>35</sup>

The wish to implement learning activities in law school curricula that aid learners in developing higher-order competencies that are relevant for the higher strata of the legal profession departs from a certain ethic, however, which is meritocracy. It assumes that students may enter law schools because of their abilities, and that graduates who enter the higher strata of the profession do this because of their abilities, too. There is another perspective, however, within elite studies, that focuses on the legal profession as a means of the social reproduction of a country's elite.<sup>36</sup> A law school's function of social reproduction runs counter to the principles of meritocracy not only through gatekeeping who is able to attend such a school (e.g. through tuition fees, which are not very widespread in continental Europe), but also through upholding the traditional curricula that are more of a test of the students' will to endure a long, strenuous education,<sup>37</sup> in order to justify well-paid services.<sup>38</sup> If within a law school, the political will to favour the law school's (perceived)<sup>39</sup> role as one of the gatekeepers for social reproduction is stronger than the will to follow the ideal of meritocracy, it might be difficult to implement the learning principles mentioned above.

One main hurdle for reforming law curricula is this adherence to the function of law schools as part of the process of social reproduction. This role of law schools has been diminished during the past century, however. In Scandinavia and Germany, the advent of the mass university as well as the broad expansion of bureaucracy in the 1970s and 1980s reduced the role of legal education as a tool for social reproduction of the elite.<sup>40</sup> Reverting legal education to its former more exclusive and elite status, however, seems neither possible nor desirable, if more diversity is sought in the legal profession.<sup>41</sup> In the Danish context, the massification of educational programmes is furthered by the Danish Ministry for Higher Education and Science, which has direct control over the universities' budgets. The number of students that may enrol in any university-level study programme is adjusted according to the rate of employment among the respective programme's graduates. In the Dutch and German systems, in which lawyers are also almost exclusively educated at public universities, similar mechanisms apply.<sup>42</sup> In such systems, it is impossible to implement high entry barriers to legal education so that only a chosen few will be selected. If it seems important to law schools, however, to be part of generating a society's future elite, new ways of gaining symbolic capital must be established.

How can this be achieved? As has been found in the sociology of the professions, the desire of a profession to increase its social standing and to form part of society's elite class is subsumed under the agenda of 'collective social mobility'.<sup>43</sup> This means that no elite legal education is required. In order to increase lawyers' social standing and thereby increase trust in the legal commodity and its value, legal education merely needs to contribute positively to the possibility that some of its graduates will enter elite positions and that, if they do, they will then contribute to the image of lawyers in a way that increases public trust in the legal commodity. This means that it is both desirable and possible to develop law students' skills in analysing, from a social sciences and ethics perspective, how the legal profession functions and ideally should function in society. The key audience for reformed legal education, then, is not professional associations or the bar association; it is the

<sup>35</sup> J.A. Bowden & F. Marton, *The University of Learning* (1998), pp. 114–129.

<sup>36</sup> E.g. Hammerslev, supra note 18.

<sup>37</sup> Abel, supra note 2, p. 213.

<sup>38</sup> M. Bertilsson, 'Den juridiske profession i et sociologisk perspektiv', in O. Hammerslev & M. Rask Madsen (eds.), *Retssociologi: Klassiske og moderne perspektiver* (2013), p. 670.

<sup>39</sup> Abel, supra note 2, p. 213.

<sup>40</sup> On the development of the mass university see W.J. Mommsen, 'The Academic Profession in the Federal Republic of Germany', in B.R. Clark (ed.), *The Academic Profession: National, disciplinary and institutional settings* (1987). The role of law faculties of German universities in forming part of the 'abstract elite' of Germany, prior to the advent of the mass university, is presented in R. Dahrendorf, 'The Education of an Elite: Law Faculties and the German Upper Class', in International Sociological Association (ed.), *Transactions of the Fifth World Congress of Sociology* (1964). On the reduced representation of lawyers among the elite in Denmark see, e.g., Hammerslev, supra note 3; Hammerslev, supra note 3; Blegvad, supra note 3; Blegvad, supra note 18. On a similar development in Norway see, e.g., Aubert, supra note 3. On Sweden see, e.g., Bertilsson, supra note 3. For an overview of the whole of Scandinavia see O. Hammerslev, 'Professioner, eliter og strategier: Nordiske og internationale studier af juridiske eliter', (2012) *Praktiske Grunde*, 2–3, pp. 67–76; O. Hammerslev, 'Skandinaviske studier af den juridiske profession', (2008) 31 *Retfærd*, no. 2, pp. 81–100.

<sup>41</sup> Bertilsson, supra note 37, pp. 671–673.

<sup>42</sup> H. Hirte & S. Mock, 'Die Juristenausbildung in Europa vor dem Hintergrund des Bologna-Prozesses', (2005) 45 *Juristische Schulung*, no. 12, Beilage.

<sup>43</sup> Abel, supra note 2, pp. 25–27.



general public. Legal academia must do more outreach to convince the public that lawyers function as secular guardians of society's values and as a vanguard in the struggle of social groups for achievement of social equity.

Any transformation that takes a law schools' possible elitist conservatism into account would thus need to include more of the social sciences in the curriculum: not only political science, but sociology and cultural and religious studies as well. This would provide students with the opportunity to develop an understanding of how various social groups interact in society and how to manage their conflicts on not only a micro-level, but also on a meso- and macro-level. It would not only include reading the paradigmatic authors of social theory, as, for instance, is the practice in legal education in Denmark, but would also include courses offered in cooperation with NGOs and various administrative institutions in which students will be able to employ their skills to engage with social causes in a research-based manner.

In the following, we will present the three pathways and accordingly outline possible methods for transforming legal education. There are, of course, overlaps between the pathways, especially when it comes to the transformation of legal education. However, isolating the pathways contributes to a clearer and more comprehensible overview of the reasons that make such transformations of legal education necessary.

### 3 Pathway and transformation one: automated jurisprudence

Regardless of the technical possibilities for automating legal services, the possibility to create revenue with these services is among other things dependent on client trust in automated legal services. In order to ensure this trust, automated legal services must guarantee at least the same degree of legal certainty as non-automated services. A prerequisite for high-quality legal technology is that the information used is precise, exhaustive and continually updated. In order to ensure such information, it is necessary to have lawyers who have a detailed knowledge of the law, including the principles of legal interpretation. In this process, it becomes important to distinguish between routine tasks and highly-advanced legal tasks, e.g. when applying law in new contexts, dealing with mutually-contradictory rules or principal decisions, etc. Apart from questions regarding digitalised governance (cf. pathway three), this raises questions about how to ensure quality in fully automated legal services, e.g. through increased professionalisation.

#### 3.1 Pathway one: regulation and coding of legal technology

Taking into consideration the sociological modelling of the dynamics of the legal profession, a current trend indicates the usurpatory movement of a new actor, i.e. legal tech start-ups,<sup>44</sup> by which the existing actors in small law firms and individual practices are being further marginalised within the profession, because legal start-ups could offer the same service more effectively, cheaper or with higher cost transparency. These small law firms and individual practitioners are the last remnants of the legal elite of yore, when the legal profession was a safe space for social reproduction of the legal elite through the social molecule of the bourgeois family, whose family law business was the means of production. This model has been pushed to the fringes of the legal market by the rise of Big Law as a means for the upwardly mobile to move to higher strata of the legal profession.<sup>45</sup> Legal tech start-ups will usurp small law firms and individual practices with ease, albeit not replacing them, but rather by proletarianising their labour through offering platforms for their services, thus devaluating their commodities through increased price transparency and by gatekeeping their access to the legal market.<sup>46</sup>

Establishing legal control over legal technology, their manufacturers and the trainers of these manufacturers may be a viable pathway. Legal control could be achieved through three strategic actions. First, licensing of legal technology; second, credentialisation of manufacturers (and possibly also the users) of legal technology; third, control over the trainers of these manufacturers and users of legal technology through

<sup>44</sup> Typical legal start-ups are tech start-ups that offer legal services, software that makes legal labour more efficient through further automation or offer a platform for legal services. An example for extending the principles of platform economy to the legal market is the Danish start-up Legal Heroes, <<https://legalhero.dk/>> (last visited 24 May 2019). Legal Heroes offers a platform for attorneys and prospective clients, where clients can enter their issue and receive offers from the registered attorneys for legal counsel. Legal start-ups that offer legal services themselves often offer document automation, such as Green Meadow <<https://gmeadow.com/>> (last visited 24 May 2019), or standard templates, such as Contractbook <<https://contractbook.co/>> (last visited 24 May 2019). Standard templates and document automation are not examples of radical, discontinuous innovation, but rather of continuous, incremental innovation. Contractbook, for example, combines standard templates with a cloud-based document management system for their customers. Most start-ups furthermore follow a bottom-of-the-pyramid-innovation strategy and target the most numerous but least well-paying customers, such as private individuals, married couples, and small and medium-sized companies. An overview of the growing number of legal tech start-ups can be found under <https://techindex.law.stanford.edu/> (last visited 29 October 2019).

<sup>45</sup> Madsen, *supra* note 3; Dezalay & Garth, *supra* note 3.

<sup>46</sup> An example of a former legal start-up that now services as many customers as a big law firm may be Rocket Lawyer, who – like Legal Heroes mentioned earlier – offer a platform for legal services, <<https://www.rocketlawyer.com/>> (last visited 24 May 2019).

accreditation, i.e. control over the tertiary education institutions and their study programmes. If such exclusionary measures are not taken by the legal profession, legal tech start-ups may eventually be able to perform with an even smaller number of legal professionals.

### **3.2 Transformation one: jurisprudence as applied study of technology and society**

Legal education can accommodate for this by educating builders and users of legal tech. This can be in the shape of IT specialists with an understanding of law in the fashion of T-shaped lawyers,<sup>47</sup> or in the shape of legal specialists like lawyer-linguists. There are, however, dynamics within the legal profession that might hinder such adaptation of legal education. For example, the Danish legal profession is wary, however, of specialisation, strongly following the dogma of the monolithic unity of the legal profession. What could be done is a new study programme of law and IT. In order to make these machines effective, such an education should not merely be a bi-disciplinary Frankenstein including half an IT degree and half a law degree. Automated, digitalised jurisprudence as an applied science would then be the study of how technology can be used to regulate society. This form of jurisprudence would be an applied study of the interaction between technology and society, becoming the applied mode of science and technology studies, which is an established cross-discipline of technology studies and social sciences.

Regarding this first pathway and its corresponding transformation, it can be said that there needs to be a professionalisation of legal IT competencies, as contemporarily observed at a rather early stage in the domain of legal start-ups. This involves increased control over the legal technology market, as legal tech is an area in which legal professionals face competition from information technologists.

## **4 Pathway and transformation two: the irreducible human element**

It stands to reason that if legal services become more automated, competition will increase regarding the non-automatable part of legal services. As noted above, non-automatable legal labour consists of those tasks that clients do not trust to machines. Considering this pathway, we examine a subgroup of these tasks that are perceived to contain an irreducible human element, an element of art. Such an element can be found in the need of a good lawyer to empathise with their client's situation.<sup>48</sup> One area of the legal market, where lawyer-client interaction especially stands out as an element of legal labour, is ADR. Since lawyer-client (or, more generally speaking, lawyer-layperson) interaction can be considered to be of importance for every branch of the legal profession, the following reasoning could be extrapolated to other branches.

### **4.1 Pathway two: expanding the potential of ADR**

While the sale of routinisable legal services may mean that digitalisation forces some lawyers from the legal market, ADR may prove to be a refuge for the legal profession. For lawyers who develop the required further competencies, mediation and negotiation offer opportunities both for offering new services, thus expanding their market, and for improving their existing legal services.<sup>49</sup>

As higher-order legal tasks in public administration begin to fall to paralegals, the inclusion of mediation in legal education will benefit the legal profession. For example, at the University of Copenhagen's Faculty of Law, a recently-established master's programme for paralegals who possess vocational bachelor's degrees already serves this group's aspiration of usurping lawyers in public administration. The inclusion of mediation in classical legal education, however, may not only help the public branch of the legal profession to maintain and improve its position as paralegals enter their market: it may also help lawyers in small and medium-sized law firms in the private sector, where digitalisation could lead to a concentration of power in a branch that, so far, is still dominated by small law firms. For now, client dependence on these types of

<sup>47</sup> While the term 'T-shaped lawyer' is used as a buzz word, cf. Mak, *supra* note 3, p. 7, characterizes this ideal of the legal professional as a 'response to the challenges of technological developments, changes in the market for legal services, and new ethical dilemmas for lawyers in a complex society' of which 'it is argued, [to be] able to cope with these challenges based on deep legal knowledge and skills – the vertical column of the T – combined with broad knowledge of other disciplines and academic skills, allowing for collaboration – the horizontal column of the T,' *ibid.*, p. 7–8, cf. R.A. Smathers, 'The 21st-Century T-Shaped Lawyer', 2019 *Law Practice Magazine* 40, no. 4.

<sup>48</sup> Hedeem and Salem conducted an online survey of 611 judges, family law attorneys, mediators, custody evaluators, law professors and law students at two law schools in 2005. The survey's participants were asked to name the five most important topics to cover in a comprehensive family law curriculum; T. Hedeem & P. Salem, 'What Should Family Lawyers Know? Results of a survey of practitioners and students', (2006) 44 *Family Court Review*, no. 4, pp. 601–611; See also M.C. Nussbaum, *Not for profit: Why democracy needs the humanities* (2016), pp. 24–26.

<sup>49</sup> Dezalay & Garth, *supra* note 3; Dezalay & Garth, *supra* note 23.

law firms is ensured through the direct outlet of the services they provide, with no need for an intermediary. When the legal services this branch provides become automated, small and medium-sized law firms will only be able to maintain client dependence through underscoring the 'artistic', 'idiosyncratic' aspects of their work, claiming that they can do what an app cannot.<sup>50</sup>

As ADR is still growing and expanding, we have still not seen the full potential of its integration into various legal fields. However, the decreasing demand for traditional legal services will force more lawyers into mediation, negotiation, arbitration and conflict prevention. Moreover, as new technology makes it possible to use ADR in conflicts where the parties live far apart (Online Dispute Resolution, ODR), digitalisation is enlarging the field of ADR.

#### **4.2 Transformation two: jurisprudence as applied arts and humanities**

When introducing mediation more broadly into the study of law, we must not think exclusively of courses titled 'mediation', in which mediative techniques are trained. Integrating mediative competencies into all areas of law means considering communication an integral part of legal practice. Following this pathway, in order to be able to claim the superiority of their services over automated services, lawyers need to be capable of seeing the individual complexity of the cases they mediate and of using their mediative competencies to deal with the inherent intricacies. In other words, in this pathway, lawyers primarily need to focus on conflicts at the micro-level. At the same time, the ability to deal with conflicts on a micro-level is the basis of being able to work with ADR at the meso- and macro-level when managing conflicts within and between organisations and institutions, as well as on an international and global level, e.g. as part of such complex challenges as climate change and migration.

This combination of competencies focused both on human interaction as well as on complex challenges requires an integrative perspective. Such a perspective can be achieved through a transformation of the legal practice into a form of applied arts and humanities, in a similar fashion to the 'Human Development model' proposed by Martha C Nussbaum; graduates would, for e.g., need an empathic understanding of the variety of social realities and biographies represented in a society, to assess critically, yet realistically, the intentions of law-makers and understand all the social dynamics in the context of a globalised world.<sup>51</sup>

The primary competencies that would be required for lawyers are mediation, rhetoric and communicative competence within a vast variety of contexts, and a tolerance for multi-perspectivity, open-endedness and the ambiguity inherent in the human condition. This type of education is already helping humanities graduates gain ground in Danish municipal administrations.<sup>52</sup> To different extents, mediation and legal rhetoric are available as electives in law curricular. Courses on legal philosophy and legal sociology are also well-suited for giving room for multi-perspectivity, in how various notions of (scientific) truth as well as social and political power relations shape groups of people's perceptions of what is applicable, appropriate or ideally desirable law. This, however, means to dare not simply to teach legal interpretation and application of the law in the spirit of a technical skill that will have the same outcome if applied with enough quality, but as a project that is meant to serve society.

Since textual interpretation, argument and communication are already the core elements of jurisprudence, it may prove not to be impossible to transform legal education in this direction. These elements would need to be contextualised with no loss of doctrinal depth. As modern didactic approaches hold, learning these skills in the context of the legal areas law students learn about during their studies would be more effective than outsourcing them to specific 'soft skills' courses that are especially dedicated to, e.g., legal rhetoric, or legal sociology.<sup>53</sup>

Summarising this second pathway and the appertaining transformation of legal education, it can be said that the service of mediation will become of increased importance for the legal labour market,<sup>54</sup> accelerating a trend that has been witnessed in recent decades. The recent trend shows an expansion of the ADR market, in which lawyers are competing with mediators.<sup>55</sup> As a less expensive, less time-consuming and even more

<sup>50</sup> Abel, *supra* note 2, p. 18.

<sup>51</sup> Nussbaum, *supra* note 46, pp. 24–26.

<sup>52</sup> This is shown in data collected by Statistics Denmark for the period of 2008–2016. The data are not published, but the authors have received an overview from the Danish Association of Lawyers and Economists (*DJØF*).

<sup>53</sup> Bowden & Marton, *supra* note 34, pp. 114–129.

<sup>54</sup> P.T. Coleman et al., *The Handbook of Conflict Resolution: Theory and practice* (2014).

<sup>55</sup> B. Bogoch & R. Halperin Kaddari, 'Co-optation, competition and resistance: Mediation and divorce professionals in Israel' (2007) 14 *International Journal of the Legal Profession*, no. 2, pp. 115–145.

user-friendly method of handling conflicts, ADR is an increasingly popular option for resolving a variety of legal conflicts in various fields of law.<sup>56</sup> Mediation is practised by lawyers and non-lawyers, as the key qualifications are not legal competencies, but, rather, in-depth knowledge in the areas of dialogue, social interaction and behaviour. An increasing number of lawyers, however, also possess specialised knowledge about the nature of conflicts and conflict management,<sup>57</sup> and – as part of their insight into legal procedures – have a special understanding of how and in which contexts it would make sense to supplement or change existing legal systems and processes. As the potential of ADR is far from exhausted, there is room for legal professionals to expand the market for ADR.<sup>58</sup>

## 5 Pathway and transformation three: digitalised virtue

Automatisation of legal decisions will make the process opaque, as the decision making process of the currently developed machine learning algorithms are not interpretable in human terms: only the viability of their decisions can be evaluated against the ‘gold standard’ of their training sets.<sup>59</sup> This lack of transparency may lead to reduced public trust in the rule of law, as the reasons behind certain legal decisions cannot be explained to affected persons, only the result of the decision itself.<sup>60</sup> If citizens are to trust the legal decisions made by legal technology, it will be necessary to legitimise the decision-making process and its results to those citizens.<sup>61</sup>

This issue is exemplified in a current scandal in Denmark, the ‘tele-data case’ (*teledata-sagen*). In the tele-data case, incorrect automatically processed data was used in over 3,000 criminal cases with an expected penalty of over six years of imprisonment.<sup>62</sup> The Danish Minister of Justice recognised the severity of the scandal, when stating that ‘[t]he tele data-case is about our confidence in the legal system’.<sup>63</sup>

While this example seemingly pertains to faulty automatisation of legal labour, the problematic opacity of automated legal labour is indirectly addressed in the statement by the Minister of Justice: ‘I expect that all errors will now *come to light* and will be dealt with *openly* and properly.’<sup>64</sup> At the same time, more comprehensible efforts of automating state administration are underway in Denmark, in the way that all future laws shall make automated case management possible, including automated administrative decisions.<sup>65</sup> Such efforts to automate public administration, and the issues of trust, both underline necessity to legitimise such decision-making to the affected citizens,<sup>66</sup> and the need for lawyers to understand the interplay of technology and society.

### 5.1 Pathway three: revitalisation of legal professionals as guardians of the rule of law

Individual professions have a limited number of strategies that can be used to increase the value of their professional commodity.<sup>67</sup> One possibility is to create a need for the professional commodity. For legal services, this could be achieved by such measures as the introduction of regulations. However, this can

<sup>56</sup> A. Nylund, et al. (eds.), *Nordic Mediation Research* (2018); T. J. Stipanowich, ‘ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”’, (2004) 1 *Journal of Empirical Legal Studies*, no. 3, pp. 843–912.

<sup>57</sup> J.M. Nolan-Haley, ‘Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective’, (2002) 7 *Harvard Negotiation Law Review*, pp. 235–300; J.M. Nolan-Haley & M.R. Volpe, ‘Teaching Mediation as a Lawyering Role’, (1989) 39 *Journal of Legal Education*, no. 4, pp. 571–586.

<sup>58</sup> It has been discussed whether a legal background might be counterproductive when practicing mediation, e.g. J.M. Nolan-Haley, ‘Lawyers, Clients, and Mediation’, (1998) 73 *Notre Dame Law Review*, no. 5, pp. 1369–1390; J. Haynes, ‘Mediators and the legal profession: An overview’, (1989) 23 *Mediation Quarterly*, no. 1, pp. 5–12.

<sup>59</sup> B. Sheppard, ‘Warming up to inscrutability: How technology could challenge our concept of law’, (2018) 68 *University of Toronto Law Journal*, supplement 1, pp. 36–62, pp. 47–49; R. Brownsword, ‘Technological management and the Rule of Law’, (2016) 8 *Law, Innovation and Technology*, no. 1, pp. 100–140.

<sup>60</sup> Sheppard, *supra* note 57; Brownsword, *supra* note 57.

<sup>61</sup> Cf. V. Abazi & E. Tauschinsky, ‘Reasons of Control and Trust: Grounding the Public Need for Transparency in the European Union’, (2015) 11 *Utrecht Law Review*, no. 2, p. 78–90.

<sup>62</sup> J. B. Nielsen & P. Thomsen, ‘Justitsminister vil have kulegravet teleskandalen’, (2019-07-02) *Berlingske*; A. Biselli, ‘Vorratsdatenspeicherung in Dänemark: Ein IT-Fehler könnte zu falschen Urteilen geführt haben’, (2019-07-09) *Netzpolitik.org*.

<sup>63</sup> ‘Teledata-sagen handler om vores tillid til retssystemet,’ Justitsministeriet, *Justitsministeren vil have ryddet op i teledata-sagen*, (2019-07-02); own translation.

<sup>64</sup> ‘Jeg forventer, at alle fejl nu kommer frem i lyset og bliver håndteret åbent og ordentligt,’ Justitsministeriet, *ibid.* (own translation and emphasis added).

<sup>65</sup> Finansministeriet, *Bred politisk aftale skal gøre lovgivningen klar til digitalisering* (16 January 2018).

<sup>66</sup> Cf. Abazi & Tauschinsky, *supra* note 84.

<sup>67</sup> Abel, *supra* note 2, pp. 18, 29.

also be done on a broader basis by arguing for the need for regulations and the general desire to follow regulations. As the legal profession seems to be revitalising the post-war ideal of lawyers as guardians of the rule of law,<sup>68</sup> the need for the rule of law becomes a salient discourse position. This discourse position follows the functionalist rhetoric of the legal profession,<sup>69</sup> which aims at promoting the image of lawyers as serving as a cohesive force in society, i.e. through managing conflict through rationalisation and redefinition of a conflict as a legal problem.<sup>70</sup> While actual challenges to the rule of law are salient, e.g. through the rise of populism in Europe,<sup>71</sup> the emphasis on the functionalist image of the legal commodity also serves to increase the value of legal services. Emphasising the role of lawyers as guardians of the *Rechtsstaat*, who work to improve social cohesion and social stability, simultaneously makes an argument for the value of legal services. It is important to note that this form of value creation does not entail a significant portion of the legal profession actually serving the state or the public directly. As the legal profession upholds an image of being monolithic, all members of the legal profession are able to benefit from the increased value of the legal commodity, as this increases consumers' confidence in the legal commodity (since lawyers are considered the best qualified to ensure social cohesion and social stability),<sup>72</sup> and consumers would due to the monolithic perception of legal professionals being more or less equally competent hold their competence in high enough regard to assign their services a high value.

Put into the context of the recent history of the legal profession, the dominant image of the lawyer statesman has been replaced by the image of the interdisciplinary corporate lawyer.<sup>73</sup> The revitalisation of the image of lawyers as guardians of the rule of law thus draws on the image of the purity of law and legal reasoning purported by legal positivism. A challenge for legal education will be to refrain from entering into this discourse, which seems to be restricted to the academic discourse of legal scholars and law teachers.<sup>74</sup> As functionalist theories of the legal profession have already shown, this image is purported by the legal profession solely to legitimise the profession's control of the legal market by framing legal labour as dependent upon exclusive, obscure knowledge, orthodoxy and scientism.<sup>75</sup>

This conservative image of the demands placed upon legal professionals, however, does not live up to the realities of practice.<sup>76</sup> A more open envisioning is needed, combining the older image of lawyers as statesmen with the newer, more interdisciplinary, yet altruistic, image of cause lawyers.<sup>77</sup> Cause lawyering is one of the innovative pathways the legal profession follows to shake off the less altruistic image of corporate lawyers. It does not, however, affect the image of lawyers on either side of state vs. public, and it does not purport to be an image of lawyers as servants to *all* citizens, but only as serving the specific interest groups for whom a cause is perceived to be relevant. As vanguards of secular values, however, what competencies do lawyers need, and how can law schools adjust in order to prepare their graduates to follow this pathway?

<sup>68</sup> Mak, *supra* note 3, p. 13.

<sup>69</sup> Abel, *supra* note 2, pp. 34–39.

<sup>70</sup> Christie, *supra* note 22.

<sup>71</sup> N. Lacey, 'Populism and the rule of law', (2019) 15 *Annual Review of Law and Social Science*. Finding populism only to be a threat to the rule of law in eastern European countries, but not western European countries: B. Bugarcic & A. Kuhelj, 'Varieties of Populism in Europe: Is the Rule of Law in Danger?', (2018) 10 *Hague Journal on the Rule of Law*, no. 1, pp. 21–33.

<sup>72</sup> Abel, *supra* note 2, pp. 18–19.

<sup>73</sup> Mak, *supra* note 3, pp. 14–16.

<sup>74</sup> R. Brouwer, 'The Study of Law as an Academic Discipline', (2017) 13 *Utrecht Law Review*, no. 3, pp. 41–48; J. v. H. Holtermann & M.R. Madsen, 'Toleration, Synthesis or Replacement? The "Empirical Turn" and its Consequences of the Science of International Law', (2016) 29 *Leiden Journal of International Law*, no. 4, pp. 1001–1019; F.L. Leeuw, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training', (2015) 11 *Utrecht Law Review*, no. 2, pp. 19–33; J. Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity', in R.J. Beck (ed.), *Law and Disciplinarity* (2013); D.W. Vick, 'Interdisciplinarity and the Discipline of Law', (2004) 31 *Journal of Law and Society*, no. 2, pp. 163–193; J. Weinstein, 'Coming of age: Recognizing the importance of interdisciplinary education in law practice', (1999) 74 *Washington Law Review*, pp. 319–366; R. Cotterrell, 'Why Must Legal Ideas be Interpreted Sociologically?', 1998 25 *Journal of Law and Society*, no. 2, pp. 171–192.

<sup>75</sup> Abel, *supra* note 2, pp. 34–39; P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field Essay', (1987) 38 *Hastings Law Journal*, pp. 805–813; Parsons, *supra* note 13.

<sup>76</sup> J. Tynell, *Mørkelygten: Embedsmænd fortæller om politisk tilskæring af tal, jura og fakta* (2016); P. Loft, *Hvem har ansvaret? Revner og sprækker i det danske embedsmandssystem* (2016); T. Knudsen & P.B. Koch, *Ansvaret der forsvandt: Om magten, ministrene og embedsværket* (2014).

<sup>77</sup> Mak, *supra* note 3, pp. 16–19.

### 5.2 Transformation three: jurisprudence as a tool for increasing social cohesion

Many of the competencies that lawyers need in their role as a vanguard of secular values reside at the core of what the profession claims to be its expertise, i.e. 1) a clear doctrinal understanding of the rules;<sup>78</sup> 2) clarity of communication on legal matters (including communication with laypeople);<sup>79</sup> and 3) an understanding of people and their conflicts.<sup>80</sup> While the first required competency is the bread and butter of law school teaching, the last two competencies – or rather groups of competencies – may first and foremost be learned on the job, e.g. (depending upon the legal educational system) during summer internships, student jobs, as part of the *Zweites Staatsexamen* or professional training (*advokatfuldmægtig- or dommerfuldmægtiguddannelse*).

It is essential, however, that what is imparted to the students is not merely exclusive, doctrinal knowledge, but also the competence to actually apply this knowledge in daily practice. If legal educators wish to ensure that a broader segment of the legal profession is prepared by means of its education to function as guardians of the rule of law, then the development of these competencies may not be left entirely to chance or to on-the-job-learning. Recent studies on the legal professions in the US and the UK identify such a gap, and propose to better integrate the development of ethics and moral virtues in legal education.<sup>81</sup> A similar discussion is led in Denmark in government issued reports, by lawyers in popular media and by investigative journalists,<sup>82</sup> as well as in the Netherlands,<sup>83</sup> with a more direct look at the implications for legal education.<sup>84</sup> But what can legal education bring to the table regarding the development of these competencies in law students that on-the-job-learning does not?

One possibility are courses formally educating students in codes of ethical conduct. Such courses are considered by legal scholars to be generally useful for law students, though they do not necessarily prepare them for moral dilemmas encountered in practice.<sup>85</sup> In light of this, legal clinics are considered an appropriate measure.<sup>86</sup> Furthermore, courses on ethics – contextualised to the tasks and dilemmas encountered in the legal field – may in a more systematic manner prepare law students to make more of the on-the-job learning they undergo later or alongside of their studies.

In summary of this third and last pathway, and the transforming of legal education derived from it, it appears that there is a need for a revitalisation of the image of lawyers as statesmen, as they have been known in recent European post-war history; this is discernible in the current emphasis in political discourse on the rule of law.<sup>87</sup> This means that two threats to the social status of the legal profession will be coun-

<sup>78</sup> In the Hedeem–Salem survey, law itself was mentioned most often; Hedeem & Salem, *supra* note 46, pp. 607–608. This finding was also confirmed by a survey of external lecturers at the University of Copenhagen conducted during the fall semester 2014–2015 by Werner Schäfke and Martine Stagelund Hvidt. 219 responses were collected in which the external lecturers were among other things asked in open ended questions to state the three most important ‘competencies’ which are ideally most relevant for ‘a good lawyer’, and which are perceived as relevant intended learning outcomes in legal education. In all open ended questions, doctrinal competency (e.g. knowing ‘the legal method’, or knowing ‘the law’) were considered most relevant.

<sup>79</sup> In the Copenhagen survey (*ibid.*), ‘interpersonal competencies’ form the second largest cluster of competencies after ‘doctrinal competencies’. The cluster ‘interpersonal competencies’ mainly contains responses that denote lawyer–client communication skills. Similarly, in the Hedeem–Salem survey, the skills practitioners rate as most relevant for practicing in the area of family law are communication skills. For e.g. the four most often named skills were ‘listening’, ‘setting realistic expectations for clients’, ‘involving clients in decision-making’ and ‘identifying clients’ interests’, *ibid.*, pp. 605–606.

<sup>80</sup> In the Copenhagen survey (*ibid.*), this competency was phrased as ‘empathy’ in the responses and was subsumed under that cluster ‘interpersonal competencies’ along with communication competencies. In the Hedeem–Salem survey, the majority of responses relate to empathy, good ethics and an understanding of the clients’ social, economic and emotional situation, with the minority relating to technical knowledge about the law and the functioning of the social system, *ibid.*, pp. 605–608.

<sup>81</sup> J. Arthur et al., *Virtuous character for the practice of law: Research report* (2014); A. Szerletics, ‘The Role of Virtues in Legal Education’, (2017) 7 *Oñati Socio-Legal Series*, no. 8, pp. 1679–1691; N.W. Hamilton, ‘Connecting Prospective Law Students’ Goals to the Competencies that Clients and Legal Employers Need to Achieve More Competent Graduates and Stronger Applicant Pools and Employment Outcomes’ (2019) 9 *St. Mary’s Legal Mal. and Ethics* (2019 forthcoming), U of St. Thomas (Minnesota) Legal Studies Research Paper No. 19–04, available at <https://ssrn.com/abstract=3351468> (last visited 29 October 2019); A.T. Kronman, *The lost lawyer: Failing ideals of the legal profession* (1993).

<sup>82</sup> Bo-Smith-udvalget, *Embedsmanden i det moderne folkestyre* (2015); E.g. S.T. Kristensen, ‘Fremtidens jurist: Juridisk håndværker eller retsikkerhedens vogter’, (12 April 2016), 95 *Advokaten*, no. 1, pp. 8–15; Tynell, *supra* note 74; Loft, *supra* note 74; Knudsen & Koch, *supra* note 74.

<sup>83</sup> E.g., I. van Domselaar, ‘Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship’, (2015) 44 *Netherlands Journal of Legal Philosophy*, no. 1, pp. 24–46.

<sup>84</sup> Mak, *supra* note 3, pp. 31–32.

<sup>85</sup> Szerletics, *supra* note 79, pp. 1688–1689.

<sup>86</sup> Szerletics, *ibid.*, p. 1689; Arthur et al., *supra* note 79, pp. 23–24; L.M. Graham, ‘Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education’, (1995–1996) 20 *Journal of the Legal Profession*, no. 5, pp. 5–49.

<sup>87</sup> G. Halmi, ‘The Possibility and Desirability of Rule of Law Conditionality’, (2018) 6 *Hague Journal on the Rule of Law*, no. 1, pp. 1–15, pp. 1–3.

teracted: the association with the disorder represented by the profession's clients<sup>88</sup> and the erosion of the functionalist apotheosis of the legal profession as contributing to social cohesion.<sup>89</sup>

In Danish and German public administration, for instance, we have seen a series of incidents in which officials and politicians have been very creative in their interpretation of law or have even acted illegally, and where decisions have been made based on politics rather than the law.<sup>90</sup> The question has been raised as to whether, in these many scandals, the rule of law has lost its power in administrative decisions, and if perhaps one feasible method of making the administrations more democratic would be to strengthen the officials' ethics with regard to the ideal of the rule of law.<sup>91</sup> Even though this apparent crisis of the principle of the rule of law may pertain to lawyers in public service, it challenges the legitimacy of the legal profession in its entirety, when that group of legal actors within the legal profession are abandoning their loyalty to the standards of legal interpretation and decision-making, which most easily of all legal actors can argue to be working for the common good of society and not their personal profit. Furthermore, the legal profession aims at presenting itself as an invisible whole, in which all types of legal actors share the same basic competencies and values.<sup>92</sup>

## 6 Conclusion

The answers to the core question posed in the introduction, 'What will be the core tasks of tomorrow's legal practitioners, for which law schools will have to prepare their students?', followed three different trends that we identified, and thus yields three possible answers. Tomorrow's lawyers will need to increase public trust in the legal system and the human element of legal work by having in-depth knowledge about how technology both is and can be used to regulate society (transformation one). The automatization of technical legal tasks will create the need for increased competencies to deal with the multi-perspectivity, open-endedness and ambiguity of social conflicts, and to contribute to their resolution through classical legal, ADR and transdisciplinary work, especially in the public sector (transformation two). The assessment of these complex social problems, and the legal contribution to remedy them, increasingly require legal professionals to be able to communicate clearly and solution-oriented with non-lawyers (transformations two and three). It will become more relevant for the legal profession to demonstrate professional ethics and virtues (transformation three). We hypothesise that this will be most relevant for that part of the legal profession that are employed as public officials, beyond the relevance of the visibility of cause lawyers<sup>93</sup> in the private sector.

While the role of legal education will be to prepare law students for these new requirements through integrating legal technology and integrative, transdisciplinary studies in their curricula, law schools are not bound to simply wait for changed needs to arise. Law schools can aim to actively steer the possible transformations by educating graduates that are ready to embark in a certain direction. Cross-disciplinary law degrees in legal information technology, or in transdisciplinary legal studies, as well as strong elements on transdisciplinary problem-solving and governance in traditional law curricula can pave the way for the legal profession to more drastically accommodate for the changes happening in the legal market, rather than incrementally kill the pain felt by employers in the legal market that might only lead to too short-sighted reforms of law curricula.

## Competing Interests

The authors have no competing interests to declare.

<sup>88</sup> Abel, *supra* note 2, p. 27.

<sup>89</sup> Functionalism defends the monopoly of the legal profession, their high social status and the high cost of their services by characterising their work as beneficial for society in itself through managing nonviolent conflict resolution and resocialisation of criminal individuals; Abel, *ibid.*, p. 16, p. 34; Parsons, *supra* note 13.

<sup>90</sup> Tynell, *supra* note 74; Loft, *supra* note 74; Knudsen & Koch, *supra* note 74.

<sup>91</sup> Bo-Smith-udvalget, *supra* note 80.

<sup>92</sup> These ethics are especially clearly mirrored in legal education in Germany, in which attorneys, judges and lawyers working in public administration undergo the same professional training (*Zweites Staatsexamen*). The Danish system does not require lawyers in public administration to have completed any further professional training and offers two different professional educations for attorneys and judges, respectively, after the completion of a master-level degree in legal studies (*cand. jur.*). The Dutch system of legal education represents the generalist approach the least, as students already begin during their bachelor-level education to specialise within different areas of the law.

<sup>93</sup> Mak, *supra* note 3, pp. 16–19.

**How to cite this article:** Werner Schäfke-Zell and Ida Helene Asmussen, 'The Legal Profession in the Age of Digitalisation' (2019) 15(1) Utrecht Law Review pp. 65–79. DOI: <https://doi.org/10.36633/ulr.454>

**Published:** 13 December 2019

**Copyright:** © 2019 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.



*Utrecht Law Review* is a peer-reviewed open access journal published by Utrecht University School of Law.

**OPEN ACCESS** The Open Access logo, consisting of a stylized 'a' inside a circle.