Quo Vadis Law and Government in the Digital Age?

Seminar report

Artificial intelligence and big data are rapidly transforming the institutional relationship between the individual, the state, the market, the nature of work and the law across the board in fundamental, unpredictable ways. What impact the digital transformation will have on the role and function of "law" and "government" as basic social institutions is unforeseeable.

On the 15th of February 2019 the Applied Constitutional Studies Laboratory of the Dullah Omar Institute and the Law Faculty at the University of the Western Cape held a seminar to discuss the challenges and opportunities for *Law and Government in the Digital Age.* This seminar was a first, modest step towards building an intra-faculty, inter-generational, interdisciplinary dialogue on the impact of AI on the institutions of law and government in the digital age. It brought together scholars and students from Constitutional Law, Commercial and Mercantile Law, Labour Law and Digital Social Innovation, as well as the Dean of the Law Faculty and the Director of the Dullah Omar Institute to discuss some pressing questions that digital technologies are presenting to their fields.

The participants, who are encountering the effects of that transformation in their own teaching, learning and research, shared their current concerns and challenges about what rapid digital transformation means for law and legal practice in that area, and more broadly for the profession.

The participants were:

- Moderator: Prof Derek Powell (Head, ACSL, UWC)
- The digital revolution, its drivers and its effects on society. *Wouter Grove (ACSL, Western Cape CoLab, UWC)*

- The impact of digital technology in the area of trade and financial transactions. *Prof Riekie Wandrag, Department of Mercantile and Labour Law, UWC*
- Labour, labour law and labour relations in the digital economy. *Prof Darcy du Toit, Department of Mercantile and Labour Law, UWC*
- Social security in an age of structural work insecurity. *Prof Kitty Malherbe, Department of Mercantile and Labour Law, UWC*
- Law and government in the digital society? *Prof Derek Powell (Head, ACSL, UWC)*

The **four main questions** discussed at this seminar were:

- How are AI and big data impacting on legal research, teaching, practice, and doctrine in different fields?
- How have courts, legal doctrine and government policy responded and adapted to the social changes resulting from the transition to a digital economy?
- How is the digital transformation transforming the role, organization and functions of law and government as social institutions?
- From what vantage point do scholars begin to theorize/conceptualize the radical changes?

Confronting massive opportunity as well as concentration of power over people

Wouter Grove, a researcher from the CoLab for Digital Inclusion and Social Innovation (UWC) highlighted the data-driven nature of digital transformation and emphasised that, according to IBM 90% of the data in the world today has been created in the last two years alone. The fact that human subjects are being re-cast as data subjects and that human authority is being replaced by machine authority has given rise to governments (and large private actors like digital platforms) obtaining unprecedented, concentrated power to map, manage and control population behavior.

The fact that regulators and mediators are simultaneously transforming and being transformed leads to incoherent responses from policymakers and law. He also highlighted that we underestimate the hard, structural realities of planetary-scale computation. This necessitates approaches that are multi-disciplinary in nature and often outside of current (artificial) academic silos.

Gaps in the law

Prof Riekie Wandrag from the Mercantile and Labour Law Department at the University of the Western Cape, where she specialises in Corporate Law and International Trade, high-lighted some of the challenges posed to legal and regulatory systems by distributed ledger technologies such as Blockchain and Cryptocurrency and developments in AI. These technologies have exposed some pertinent inabilities of current law to deal with, for example issues around vesting of copyright of intellectual property created by Artificial Intelligence (AI) machines (rather than natural or juristic persons recognised as authors in IP law). Blockchain and cryptocurrency have been posing various challenges to the law related to banking and currency regulation, consumer protection and money laundering. This is mainly due to the fact that cryptocurrency does not constitute fiat currency and does not resort under current regulatory regimes, leaving consumers unprotected against loss of currency, etc.

Crowd-sourcing, non-standard work and the changing workforce

Prof Darcy du Toit, an Emeritus Professor at the University of the Western Cape, former Dean of Law, and coordinator of of the Niche Area in the Department of Mercantile and Labour Law on 'Labour Law in the Fourth Industrial Revolution', highlighted the manner in which digital technologies are creating "non-standard work", such as crowdsourced and platform labour.

There are also increases in automation and robotics. This results in weakening of traditional collective labour relationships and creation of individualised work relationships. This often leads to workers being in precarious power positions that current labour law regimes are ill-equipped to deal with.

The direction that the labour law discourse is moving currently includes more emphasis on "responsive regulation", decentralisation and new forms of worker organisation. According to Prof du Toit there needs to be a cross-disciplinary engagement between law, commerce (understanding new business models) and science (understanding technological change).

Outdated social assistance models

Prof Kitty Malherbe from the Faculty of Law at the University of the Western Cape discussed social security in an age of structural work insecurity. Prof Malherbe is a member of the Research Niche Area in the Department of Mercantile and Labour Law on 'Labour Law in the Fourth Industrial Revolution'. She highlighted the fact that current social insurance models are not suitable in an age of structural work insecurity as they are based on and cater mostly for employees in standard employment relationships. Most of the assumptions that the social

assistance model is based on are also not valid any more, such as a solid tax base and the ability of the means tests to determine who qualifies for social grants.

The direction of discourse in social security law is looking at extending current social security to new forms of work, but these responses have been rather limited so far. In South Africa (and internationally) there has been particular interest in reforming of fragmented social security systems into a comprehensive system including elements of universal income. Increased attention is being paid globally to the potential role of universal income as an integral part of social security in an age of structural work insecurity. These suggested solutions, however, will be significantly influenced by how fast Artificial Intelligence technologies develop and deepen its influence in society.

Prof Derek Powell, moderator of the seminar and head of the Applied Constitutional Studies Laboratory at the Dullah Omar Institute at the University of the Western Cape, discussed two far-reaching systemic impacts of AI on law. These are system-wide transformations impacting on the social context which law must govern and on the organisation, practice and research of law. These transformations are clearly visible, though their outcome is uncertain.

From human processing power to machine processing

The first impact "on the inside of law" is the shift from human processing power to machine processing power. Law is an information system structured into specialized fields of law, rules, precedents, practices, organizing logic, decision-making hierarchies (courts, legislatures), and so on. In the past, legal meaning and decision were solely products of human processing power. Today, the entire expanse of law is increasingly susceptible to AI. This fact will see a loosening of the traditional hard boundaries between different fields of law, the legal profession and its national territory, and law and other professions. AI tools will complement lawyers, generate new products and services, and put much greater emphasis on measurement and quantitative tools as more and more aspects of law become datafied at lower cost.

The human subject as a field of data in time

The second, social transformation — on the external context or "outside of law" is that the human subject and the data subject become coterminous. In the past the human being was a more or less integrated whole subject existing in present time, and capacity to explain past behaviour and predict future behaviour was limited (using tools like the census and surveys). Today, the human subject is increasingly encountered (by market and state) as a massive field of data points streaming across past, present and future points in time, that data can be aggregated

or disaggregated to any scale, commodified, and used to predict human behaviour in ways approaching certainty. The organized power of market and state can now access huge populations in real time on a scale that is unprecedented in human history, with massive consequences for the traditional public categories of subject, selfhood, citizenship, voter, consumer and worker.

The digital revolution will transform law and government

It is certain that AI and big data will have a far-reaching impact on the practice, research, and teaching of law and government across the board. It is by no means clear, however, where we even start from in thinking about the implications of the digital revolution given the speed and scale of change. Conventional concepts and doctrines no longer account for and explain the changing reality. The conventional disciplinary boundaries are crumbling, disciplinary fields are being rewritten, and some will disappear. "Law" and "government", two of our basic institutions in society, are themselves being fundamentally transformed by AI in historically unprecedented ways, with unprecedented concentrations of wealth and power in the technology sector.

In conclusion, it was agreed that there is an urgent need to have a more systematic dialogue, across disciplines, to understand the seismic shifts that law and government are confronting as a result of AI.