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Sunday, 15 June 2014

Legal education in a digital context



Technology of the past? Or for the future?*

In my last post, I reflected on the [future of legal education](#). I focussed on the importance of learning law in broader contexts and one of those contexts I called digital literacy. It was this idea that attracted the most attention on Twitter, and one that I am starting to work with in our own curriculum.

While I am not an expert in digital technologies, I am interested in thinking progressively about the law and justice, and consequently about legal education. Others are expert in [digital pedagogies](#), [e-publishing](#), [legal informatics](#), information visualisation, [altmetrics](#), [coding](#),

[e-discovery](#), [intellectual property](#), [e-commerce](#), [e-research](#) and the [future of legal practice](#). I seek to draw together these spheres of thought to develop a coherent discipline-specific and overarching rationale for digital literacies to inform the law curriculum.

In this post I will develop the idea of digital literacy in the law curriculum. I will explain what I think it might mean as a broader context for the study of law: as a lens through which to develop knowledge, skills and attributes central to the discipline.

Digital literacy in higher education

There are a number of arguments for [incorporating digital technologies](#) in higher education generally. Literature in teaching and learning for example focuses on improving student learning and the student experience through digital tools. Certainly this is an important reason for incorporating digital media in law teaching.

Additionally, as with other 'broader contexts' such as Indigenous perspectives and sustainability, [digital literacy](#) is recognised as an essential graduate attribute of higher education. See for example [Deakin University's principles](#) of educating for digital literacy. In general terms, digital literacy focuses on skills in manipulating information digitally and ethical considerations in using digital tools. These ideas have been translated into a the context of legal education in a number of ways.

Thomson, in his [book and blog Law 2.0](#), provides examples and a compelling rationale for the integration of digital technologies in the *law* curriculum to 'better prepare law students now for the practice of law tomorrow.' Similarly, it is typical for thinking about digital literacy in a legal education context through an emphasis on ensuring law graduates are literate in [online research techniques](#) as a typical way of thinking about digital literacy in a legal education context. These ideas are the starting point for a curriculum wide

About Me



Kate Galloway

I lecture in land law at James Cook University and I write and think about the nature of

property and its representations in the law; about issues affecting women; about justice generally; and about legal education

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conceptual integration of digital practice in a law-specific context.

Susskind has a different - more comprehensive - approach, arguing that the nature of legal practice is fundamentally changing and consequently legal education needs to be understood quite differently. For curriculum development, I think this rests on a need to be clear about the nature of the law.

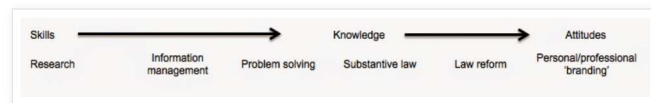
Law as information management

Rather than an adversarial process arguing substantive rules, the law is perhaps better conceived of as a form of information management. The courts and their processes are concerned with the discovery, evaluation, sharing and withholding of information. Legal practice (which is in fact largely transactional and not litigious) involves processing client information and repackaging it in the genres of the law. Central to the lawyer's role is maintaining the secrecy of client information.

These processes and the ideas they reflect were born in a paper-based era, a time when the text of the law was itself available only to the lawyer. These ideas reflect, as the IT Country Justice so convincingly points out, an [analogue or paper-based understanding of information](#) and relationships. However this no longer represents social and economic life and we need to develop a new understanding of the law and its information processes.

Digital domains

To expand on this idea, the task becomes one of explaining what might be called digital domains within the knowledge, skills and attitudes at the core of the discipline of law. My preliminary thoughts are that for the purposes of curriculum design, this can be represented in six domains.



Each of these domains involves the understanding of the nature of information and how to manipulate it within the context of the law.

Research

There is an extensive literature on the [nature of digital research in law](#). The question remains, how much of this is effectively integrated into the law curriculum? Part of the answer to this lies in how we as legal academics integrate digital research into our own practice. However even where we do integrate and consciously scaffold these skills into the law curriculum, how familiar are we with [new ways of representing legal information](#)? These evolving tools are relevant not only for [finding the law](#), but also for [information management](#) in practice, such as [gathering evidence](#).

At the heart of legal research is the question: if the text of the law is now widely and freely available to the average citizen, what do lawyers do with legal information that is special?

Information management

Closely related to the skill of research is the management of information. This includes skills in storing, disseminating and protecting information. Skills might include knowing how and why to back up digital objects, but in the legal context includes knowledge about the appropriateness of dissemination of information and the process by which this should be done - including various forms of communication.

Legal processes involve either the transparency or the secrecy of information. Knowing where information is situated on this spectrum is a type of legal knowledge (for example, invoking a duty of confidentiality or privilege). This knowledge informs the practical aspects of information storage, retrieval and dissemination. Understanding cloud computing for example raises questions about security of information in a legal context. A conceptualisation of law as a paper-based endeavour is no longer a sufficient foundation from which to develop skills in information management.

Similarly, [crowd-sourcing](#) of information - as foreign as it might be to the traditional lawyer - represents a [contemporary \(and future\) context](#) for the creation of information, including

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for [lawmaking](#). This is just one example of an information context that is relevant to inform legal skills and knowledge.

Problem solving

Legal problem solving traditionally contemplates the identification of an issue of substantive law and its resolution through recognised legal method. In light of the issues raised in the management of information however, it is possible to view a further layer in the skill of problem solving requiring an understanding of the context of the information involved.

For example in the interests of consumer protection, Queensland legislation has required vendors of residential property to attach a warning statement to the front of the contract for sale. In one case before the Supreme Court, the contract had been faxed to the purchaser's solicitor. The pages had been reassembled so that the warning statement did not form the front page. Pondering why fax would be used to deliver such an important document the Court, in solving this legal problem, failed to appreciate how lawyers manage information on a daily basis. The Court, in turn, had been failed by Parliament in legislating such a requirement that could so easily have been derailed by (the then) contemporary practice of information management.

Similarly, fraud in Torrens transactions tends to be understood in terms of the case law that relies almost completely on transactions involving paper title. In these cases a third party (often the solicitor) misuses the paper title and absconds. Digitisation of land titling, including the roll out of e-conveyancing, generates a completely different form of information management and new ways in which to contemplate the key legal concept of fraud.

It is one thing to identify the substantive law to apply to a problem, and quite another to view this in the context of the digital use and manipulation of information.

Substantive law

The substantive law - the content that is central to traditional legal education - is likewise based on a different (mostly non-digital) social, economic and governance foundation. Following the continuum of skills and knowledge in digital context, this too needs change. One way to address this is to offer [specific subjects in the field](#) and many law schools have done this. I suggest however that the ideas need to be embedded throughout the core of the degree as a foundation for all students, as well as to support subsequent specialisation.

Contextualising legal education within digital practice would give new meaning to contract and property law as well as to a spectrum of commercial laws. Intellectual property, civil procedure and evidence take on a new dimension if the nature of information is reconsidered. The substantive content of human rights, effects on responsibilities of executive government regarding information, and even the implied (Australian) constitutional right of freedom of political expression all take on a different complexion when viewed through a digital context.

It may be fair to say that studying the law in the absence of digital context leaves us with only an historical viewpoint, ill-equipped for its contemporary and future application.

Law reform

The foundation of our understanding of substantive law informs our capacity to think critically about the law. As [Susskind](#) points out:

it is almost impossible to conceive of a future - of law, or indeed society - that is not radically changed through technology.

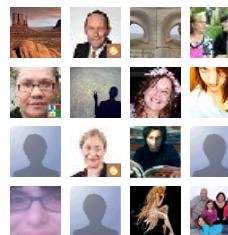
Fundamental concepts of the law, ideas as diverse as property or evidence, will be unsuited for the future (or indeed may already be unsuitable) unless we have the tools to think differently about society, economy, environment and governance and how they are mediated by technology. The idea of privacy, for example, has taken on a radically different meaning in light of now ubiquitous social media. Rather than a personal realm vis-a-vis others, it has become a facet of governmental and corporate information management and control. The very idea of who we are in private has radically changed, requiring the framing of entirely new questions to address new legal issues.

In another example, there is now discussion about the need for an [Internet bill of rights](#).

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This demonstrates that law is implicated in our construction of society on the back of rapidly evolving technologies. Legal education is instrumental in ensuring the law can evolve to comprehend and provide for these contexts.

Personal and professional 'branding'

My final suggested domain lies in the relationship between each student - the future professional - and technology. This has a practical side, in terms of a 'digital footprint' and one's [professional persona](#) developed in the online environment. But it has an intellectual aspect also: one that requires a graduate to be able to articulate their own perspectives on the digital realm and its relationship to the citizen, the lawyer and the law.

I consider this to be an aspect of the attitudes expected of a law graduate not in the sense that it represents an article of faith ('I believe in technology') but rather that it reflects an understanding of the graduate's own role within a digital context. As with the traditional lawyer's ethical responsibilities, this has a personal as well as a professional dimension (though the two are now more closely intertwined).

Legal education should offer the opportunity for students to engage with a variety of digital media - reflecting good pedagogy generally - in a critically reflective way. This should aim to engender an understanding of different tools and their implication for the practitioner and for society. They should support students in developing professional and personally ethical approaches as well as a digital footprint that represents their personal values system.

An immersion curriculum

Putting these ideas together, I believe it possible to develop an 'immersion' law curriculum using digital literacies as an organising context. A scaffolded approach to knowledge, skills and attitudes is an essential part of the contemporary law curriculum. This can be done through embedding appropriate knowledge about digital practice in the substance of the law, and critical approaches to technology, its promise and its limitations. Students should have the opportunity not just to learn through digital tools but to engage in supported reflective practice around their use, developing a professional persona that will equip them to engage in the law of the future, rather than law as an historical artefact.

* Image from <http://www.gadgetlite.com/2011/12/29/steampunk-hard-drive-enclosure/>

Posted by [Kate Galloway](#) at [13:52](#)

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