Preface

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The topics treated in this book prompt important thinking about the foundational structures underpinning international dispute resolution. That current technology is disruptive of international arbitration is a truism. That this disruption demands no less than the complete re-assessment of certain first principles, and of what it now means to be a lawyer and an arbitrator is, I would argue, an imperative call for our field in modern times. Technology is offering the opportunity to re-write the rules and concepts underpinning cross-border dispute resolution, and to make the process more accessible and less convoluted; in other words, fitter for the purposes of 21st century commerce.

Some of the questions that arise include: the role of the rule of law and its respect for the dignity of human agency, and the place of that dignity in a coded environment; the intervention of human intelligence in the application of legal rules, as opposed to their mechanistical utilization; the displacement of human intelligence when algorithmic systems enter the field of law; the place of knowledge, and legal knowledge, as distinguished from the information and data that is processed and repurposed by algorithmic tools; the tension between the promise of more speed, better accuracy in the digestion of voluminous data, on the one hand, with, on the other hand, the time reliance and biases that come with the human factor in decision-making.

It is a privilege to write the preface of this book, and a tall order to address such big questions in a manner that does them justice. In this preface I aim to do no more than share a few observations on the phenomena that are the development of the Web3 economy and the meteoric rise of artificial intelligence. I would like to outline some of the synapses that these phenomena create with governance and the rule of law, more specifically with international arbitration as a tool for governance and as an instrument for upholding the rule of law.

The role of international arbitration as an instrument for the guardianship and application of the rule of law has long been recognised.[1] It is part of the "human element" of governance and the rule of law, which a school of scholarship on legal philosophy terms "thoughtfulness and the rule of law". This school of thought posits that human beings "*want to be ruled thoughtfully. Or, to put it in a democratic idiom, we want our engagement in governance to be thoughtful and reasoned, rather than rigid and mechanical*."[2] The rule of law, a "*value-laden concept*", "*expresses a powerful commitment to dignity and respect for the dignity of human agency in the forms and procedures it requires for law*."[3]

This is an ethos that resonates particularly strongly in the 21st century, an era in which it can be tempting to view human attributes as overtaken by lightning technological advances and, as a result, found wanting.[4]

This sentiment is exacerbated by the feature of anthropomorphism that sits at the core of generative AI and large language models (LLMs). To the human mind, the LLMs' ability to "speak human", and to "understand" conversational prompts, acts as a powerful (albeit false) indicator that there must also be human intelligence, human understanding, and human logic at work behind the algorithmic rhetoric. The UK Bar Council, in its 2024 guidance on generative AI, ranks this feature first in the list of key risks inherent in LLMs: "[*LLMs*] *are designed and marketed in such a way as to give the impression that the user is interacting with something that has human characteristics. One of the mechanisms by which this is sought to be achieved is by the use of anthropomorphic language to describe what is happening. Perhaps the most obvious example of this is the use, by OpenAI, of the word 'Chat' in the name of its LLM products (ChatGPT). As set out above, LLMs (at least at the current stage in their development) do not have human characteristics in any relevant sense*."[5] Specifically, a large language model "*is not a conventional research tool, it does not analyse the content of data and it does not think for itself*."[6]

Relatedly, it has been observed that, in parallel with the LLMs' conversational ability, the AI innovation market is driven by the "displacement of human judgment", that is, the delegation to algorithmic tools of tasks that historically relied on human intelligence and decision-making: "*In the domain of law, autonomous machine decision-making is transforming adju-*

dication. Technologies range from automated compliance and monitoring software that reports breaches of contracts, to chatbots and other natural language interfaces that automatically fill out and in some cases file legal documents, to a range of automated dispute resolution systems (e.g., online "blind bidding" to reconcile competing confidential settlement offers, automated negotiation software using AI to calculate dispute resolution outcomes that maximise the preferences of both sides, and customised automated systems designed to resolve customer to customer and customer to corporation disputes)."[7]

In time, one could foresee the "displacement" of human judgment veering into the "outsourcing" of that judgment to AI tools. Putting aside the important societal implications of dehumanising the exercise of legal judgment (i.e., ridding the exercise of judgment from intrinsic attributes such as empathy, solicitude, forbearance), the potential consequences of outsourcing (even only some) legal decision-making to artificial intelligence as regards the application of the rule of law by international tribunals are worth pondering. One salient question is what would remain of the "thoughtfulness" element of the rule of law in that construct.

When looking at international arbitration as an instrument of the rule of law, it is important to recall that the rule of law rests on pillars of procedural and institutional values. Thus tenets such as procedural due process, "*the independence of the judiciary, the responsibility of the legal profession, and the care and impartiality with which courts approach questions of evidence, argument, and proof*"[8] are part of the fabric of the rule of law and of its "thoughtful" application: "*In this regard, too, law has a dignitarian aspect: it conceives of the people who live under it as bearers of reason and intelligence.*"[9]

This brings to the fore the question of the time factor inherent to the "thoughtful" application of the rule of law. Procedural due process contributes prominently to the time-consuming aspects of international arbitration. I have argued elsewhere that due process as currently conceived of and applied also sits uneasily with the values of the actors of the Web3 economy: the instantaneousness of transactions, immediacy of outcome,

and trust in dispute management by a community of one's peers rather than by an institutional, centralised decision-making body.[10]

Algorithmic tools, large language models and the automation of legal processes by way of smart contracts are being deployed as a means of streamlining the dispute process, with the laudable view of providing cheaper, more accessible justice. It is a valid question to ask in what manner this affects the application of the rule of law, weighing the place of "thoughtfulness", on the one hand, and expedient effective justice, on the other.

In closing, let me say a word about knowledge. Epistemology tells us that the concept of knowledge requires someone who knows – historically a human being. Knowledge also "*has the function of focusing our attention on what we do not know*".[11]

As regards legal knowledge more specifically, it has perceptively been stated that the law "*is not a body of knowledge that can be reduced to propositions or rules; its primary object is not truth, as if it were a kind of science, but justice. Legal knowledge is an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description*."[12]

This begs the question whether legal knowledge is amenable to coding. Does the code "know" anything? Because algorithms can perform certain tasks beyond human capability, it is tempting for the human to answer that question in the affirmative. However, knowledge and the immutable storage of information are not the same. Knowledge and data sorting are not the same. Crucially (as things currently stand), the code does not know what it does not know, and the code does not factor in a notion of justice.

What constitutes "justice" in the Web3 economy and whether this is an economy that will embrace a new concept of justice that finds it worthwhile to trade in the rule of law for immediate, automated outcomes are important questions for future consideration and development.

For the time being, however, so long as we consider it worthwhile for the rule of law to continue to have a place in modern society, alongside the tremendous advantages offered by technology, then the last kilometre

must remain human. Emerging regulation, such as the EU's AI Act,[13] aims to provide us with the processes that will enable this.

Perhaps the true challenge for dispute resolution in the 21st century is to deliver a carefully balanced process that retains the thoughtful, human-centric application of the rule of law whilst at the same time producing prompt, accurate justice.

Notes

1 Neuberger, Lord David. "History of the Rule of Law and International Arbitration", ICC Dispute Resolution Bulletin 2023-3. *See also* Nappert, Sophie. "International Arbitration as a Tool of Global Governance: The Use (and Abuse) of Discretion" in Brousseau, Glachant, Sgard, eds, *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (2019).

2 Waldron, Jeremy. *Thoughtfulness and the Rule of Law*, Harvard University Press (2023), 11 (hereafter, Waldron).

3 Waldron, 4.

4 Spaulding, Norman W. "Is Human Judgment Necessary?" in Dubber, Pasquale, Das, eds, The Oxford Handbook of Ethics of AI, Oxford University Press (2020), 374, 389-390 (hereafter, Spaulding).

5 Bar Council of England and Wales, "Considerations when using ChatGPT and generative artificial intelligence software based on large language models", issued on 30 January 2024. Available at https://www.barcouncilethics.co.uk/documents/considerations-when-using-chatgpt-and-generative-ai-software-based-on-large-language-models/. See also Spaulding, 376.

6 *Ibid*.

7 Spaulding, 386 (footnotes omitted).

8 Waldron, 4.

9 Waldron, 172.

10 Nappert, Sophie. "Twenty-First Century Arbitration: The Question of Trust" in Bédard, Pearsall, eds, Reflections on International Arbitration: Essays in Honour of Professor George Bermann, Juris Publishing (2022), Chapter 24. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956155

11 White, James Boyd ."Legal Knowledge" (2002) Harvard Law Review 115:1396, 1399 (hereafter White). See also Nagel, Jennifer. Knowledge: A Very Short Introduction, OUP (2014).

12 White, *ibid*.

13 Available at https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf