
Is Emerging Technology Submerging the Bar?

by Chan Chang Yang

Introduction

With the advent of broadband, cloud services and other new technological features, traditional law practice has changed which inadvertently affects bar associations (“Bar”). This essay begins with a brief discussion of the three main functions of the Bar and thereafter to identify four emerging technologies that could potentially cover or obscure those functions. It then seeks to argue that emerging technology is not submerging the Bar in view of the overarching if not irreplaceable responsibilities of which the Bar assumes in protecting the legal profession, upholding public advocacy and preserving competent representation.

The Bar and Emerging Technology

Regardless of type, the Bar exists to benefit three groups: lawyers, the legal profession, and the public.¹ Their main objectives often focus on improving individual lawyers by providing training and other skill-enhancing opportunities; elevating the legal profession by maintaining quality and ethics while protecting the profession from unqualified practitioners; and empowering the public by protecting and strengthening the administration of justice, by enhancing public understanding of and respect for law and legal institutions, and by identifying and advocating needed changes in the law and opposing those that are deemed undesirable.²

For emerging technology to submerge the Bar, it will have to either fundamentally replace or substantively undercut all three main objectives of the Bar. Important technologies nowadays can debut in any field or emerge from any scientific discipline but they share four common characteristics: high rate of technology change, broad potential scope of impact, large economic value that could be affected and substantial potential for disruptive economic impact.³ Many technologies have the potential



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to meet these criteria eventually but to submerge the Bar, a technology must have broad reach — extending to law firms and industries and affecting or giving rise to a wide range of machines, products or services. The mobile Internet, for instance, could affect how billions of people go about their lives besides equipping them to become potential innovators or entrepreneurs, rendering it one of the most impactful technologies in this era. Another prime example of emerging technology is the Internet of Things which could connect and embed intelligence in multiple objects and devices all around the world, affecting the health, safety and productivity of humanity. Out of the numerous emerging technologies, this essay zooms in on four candidates which cite the most potential of submerging the Bar. First is the mobile Internet represented by increasingly inexpensive and capable mobile computing devices and Internet connectivity.⁴ Second is the automation of knowledge work characterised by intelligent software systems that can perform knowledge work tasks involving unstructured

¹ Q Johnstone, ‘Bar Associations: Policies and Performance’ (1996) 15 *Yale Law & Policy Review* 193, 193.

² *Ibid* 195–196.

³ J Manyika et al, *Disruptive Technologies: Advances that will Transform Life, Business, and the Global Economy* (McKinsey Global Institute, 2013) 2.

⁴ *Ibid* 4.

commands and subtle judgments.⁵ Third is the Internet of Things consisting of networks of low-cost sensors and actuators for data collection, monitoring, decision making and process optimisation.⁶ Fourth is the cloud technology comprising the use of computer hardware and software resources delivered over a network or the Internet, often as a service.⁷

Yardstick One: Protection of Legal Profession

The protection of legal profession requires a self-regulated and independent bar association with mandatory membership because it ensures the independence of lawyers, the quality of legal services and the rule of law. The Bar monopolises such position and its functions can never be easily usurped by emerging technology. Article 24 of the United Nations Basic Principles on the Role of Lawyers provides that “lawyers shall be entitled to form and join self-governing professional associations to represent their interests. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference”.⁸

Nevertheless, a few developments lately in the Malaysian legal industry may have led to concerns about Bar Council Malaysia failing to move ahead with times and adopt new technological advancements to be competitive and on par with any international lawyer.. One of such developments is the ban of the use of virtual office rental by lawyers in August 2015 which raised a few eyebrows among Malaysian lawyers who complain that Bar Council Malaysia has been slow in keeping pace with rapid changes in the legal practice, rendering Malaysian lawyers less competitive than their international peers.⁹ Their complaints are not unwarranted as automation of knowledge work has introduced new, formidable competitors into the legal services marketplace. Most notably, non-lawyer online legal services companies such as Onecl, LegalZoom and RocketLawyer have devoured a considerable share of legal services that were previously performed exclusively by lawyers.¹⁰ Lawyers need to stay ahead of this new threat by emphasising more on specialised work and expanding into new geographic markets.¹¹ In this case, virtual office rentals are supposed to be the silver bullet to their woes by making geographical expansion accomplishable with minimal staff plus at a very low cost. As such, the ban by

Bar Council Malaysia is quite extraordinary especially in light of the approval granted by its counterparts from other jurisdictions. Indeed the ban poses an increased burden on ethically compliant lawyers who could benefit from the use of virtual office rentals.¹² From a reverse point of view, however, the fact that the complainants voice their dissatisfaction to Bar Council Malaysia essentially goes on to prove that Bar Council Malaysia, like other contemporary bar associations, still retains both prerogative and initiative in calibrating the rules governing practitioners to ensure quality especially when its opinion has far-reaching consequences to the legal fraternity. Rather than ranting dishearteningly on social media, Malaysian lawyers are still trusting in and relying on the Bar to rectify its diverted course, as the saying goes, “Let him who tied the bell on the tiger take if off”

Another controversial development in the Malaysian legal industry involves a group of practitioners who are introducing the Collective of Applied Law and Legal Realism, a project which aims to educate the public on ways they can procure legal solutions with minimal fuss.¹³ These ambitious lawyers are working towards launching templates and apps for standard form legal documents such as sale and purchase agreements, wills and probate, accident claims, and divorce petitions, while providing guidance on their use. The latent danger that lies in these free legal templates is such that it threatens the livelihood of lawyers as well as compromising the quality of legal service in a country. Under such circumstances, the Bar has a duty to intervene and call for both lawyers and the public to exercise prudence in the event that such “boilerplate” legal documents become openly available. The convenience and ease of access to legal documents made plausible by the advent of technology entails a risk of exploitation by irresponsible parties which, in turn, could result in the loss of reputation and integrity of the legal profession as a whole.

At the end of the day, Bar Council Malaysia is a corporate body established under the Legal Profession Act 1976 with the power to regulate who will continue to have a licence to practise. To the extent it is not already, prompt reply to Bar Council’s inquiries could easily be a condition of maintaining that licence. The Bar can fully utilise such prerogative to ensure that the legal profession is neither hampered by overzealous nor ultra-conservative developments in the face of emerging technology.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁹ S Furnari, *Malaysian Bar Bans Virtual Office Rentals, Solos Frustrated* (12 November 2015) Law Firm Suites <<http://lawfirmsuites.com/2015/11/malaysia-ban-of-virtual-office-rental/>>. (29 March 2016)

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ B Su-Lyn, *Who Needs Lawyers? For Some Legal Work, You May Soon Be Able to Do It Yourself* (24 September 2014) Malay Mail Online <<http://www.themalaymailonline.com/malaysia/article/who-needs-lawyers-for-some-legal-work-you-may-soon-be-able-to-do-it-yourself>>. (29 March 2016)

Yardstick Two: Upholding Public Advocacy

Public advocacy nowadays has become a level playing field with a plenitude of activities whereby an individual or organisation can undertake including media campaigns, public speaking, commissioning and publishing research or conducting exit poll or the filing of an amicus brief. The Bar has a long tradition of public advocacy on issues that range from the obscure and highly technical to the fundamental moral issues that define an era. For instance, one of the objects of the Malaysian Bar is to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour.¹⁴ Unlike the sporadic and scattered voices on mobile Internet, law reform activities by the Bar are generally carried out by committees and sections comprising practitioners in specific areas of law. Working in trenches, these groups examine proposed legislation and formulate recommendations for consultation by the public and politicians – recommendations that may be articulated as a committee resolution or as a report, and that are then publicised in press releases and letters to public officials.¹⁵ A laudable example in Malaysia is the Joint Open Letter to the Prime Minister by presidents of the Malaysian Bar, Advocates' Association of Sarawak and Sabah Law Association commenting about the National Security Council Bill 2015 being a serious threat to the Malaysian system of constitutional government.¹⁶

Undeniably, emerging technology does occupy a role in the area of public advocacy as marginalised communities are now capable of proactive exposure about encroachment onto their rights and mobilising rallies through the utilisation of technology. Marked with an eminent trait of openness, social media has proven itself to be the patronage of free speech with governments generally refraining from interfering with this domain.¹⁷ Online users are posting parodic status updates, uploading satirical photos and commentary videos and criticising about the reckless utterances of irresponsible politicians without considering how it vilifies other groups or people.¹⁸ The combination of digital technologies with social media has even introduced the concept of “digital democracy” in parts of Africa affected by the Arab Spring by allowing citizens a means for collective activism to

circumvent state-operated media channels.¹⁹ More specifically, the Egyptian revolution of 2011 has been interpreted by some as an illustration of a broader trend of transforming from a system based on group control to one of “networked individualism”.²⁰ These networked societies are constructed upon a triple revolution of technology which involves a three-step process.²¹ Marking the first step of such revolution is the inclination of public preference toward social networks.²² The second step involves the proliferation of the far-flung, instantaneous Internet²³ whereas the third step features the even wider proliferation of readily available mobile phones.²⁴ Such technologies provide an alternative platform which is minimally or hardly regulated by the government and where construction of ideas and protests can foster freely.

However, the norms in Malaysia and most parts of the world witness numerous social networking sites being overwhelmed by unacquainted users criticising and ranting about random issues on a whim. This horde of virtual strangers mostly made up of keyboard warriors usually lacks both systematic organisation and firm determination to sustain the momentum of any public advocacy in order to effect conspicuous changes. For instance, an issue concerning indigenous land rights can be vociferously asserted by one party on a Facebook fanpage but at the same time many other netizens may be callously indifferent. Further, a majority of civil movements organised via social media are not dissimilar from impromptu congregations expressing angst and more often than not their initial objectives fade with time. This is evident from the trend of modern rallies organised via social media including the recent few in Malaysia which have cultivated a standard operating procedure of gathering at dawn, shouting slogans in the afternoon and dispersing at dusk. The process of these online rallies is short and sweet, which ironically resembles their after-effect.

When it comes to public advocacy, another important factor which renders emerging technology lacklustre in comparison to the Bar is value consensus and insulation from competing views.²⁵ Owing to its exclusive membership of practising lawyers, the Bar has been a

¹⁴ *Legal Profession Act 1976* (Malaysia) section 42(1).

¹⁵ Q Johnstone, 'Bar Associations: Policies and Performance' (1996) 15 *Yale Law & Policy Review* 193, 228.

¹⁶ S Thiru et al, *Joint Open Letter to the Prime Minister – National Security Council Bill 2015* (5 January 2016) The Malaysian Bar <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/joint_open_letter_to_the_prime_minister_%7C_national_security_council_bill_2015.html>.

¹⁷ K Madan, *Keyboard Warriors' Two-edged Sword* (23 January 2015) Gulf News India <<http://gulfnews.com/news/asia/india/keyboard-warriors-two-edged-sword-1.1445574>>.

¹⁸ Ibid.

¹⁹ L Rainie and B Wellman, *Networked: The New Social Operating System* (MIT Press, 2013) 207.

²⁰ Ibid.

²¹ Xiaolin Zhuo, Barry Wellman and Justine Yu, *Egypt: The First Internet Revolt?* (Peace Magazine, 2011) 6.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ M Powell, *From Patrician to Professional Elite: The Transformation of New York City Bar Association* (Russell Sage Foundatin, 1988) 180.

relatively homogenous organisation throughout its incorporation and enjoys a high degree of value consensus. As a result, the Bar is able to take on strong, uncompromising policy positions agreeably in contrast to the more heterogeneous and inclusive social networks. The importance of value consensus for the success of bar reform efforts is consistent with experimental research on the dynamics of group deliberation.²⁶ Such research finds that group deliberation is of limited value in bridging political divides, especially where individuals' initial views and values are strongly held.²⁷ Instead, group deliberation tends to amplify individuals' pre-existing views and shift the group a whole toward a more unbending position.²⁸ Moreover, lawyers are no strangers to civic and political debate. This is not to suggest that lawyers are exclusively gifted with political wisdom and insight into every person's long term best interests. However, lawyers have been specifically imparted with the art of detachment²⁹ and constant exposure to the argument pool about the distinction between law and politics throughout their academic training. As they carve their career paths, lawyers are also motivated to invest in civic debate.³⁰ Thus, from a societal perspective, the Bar is an important deliberative enclave where like-minded citizens, by virtue of shared professional training, can develop and amplify arguments that might be "squashed in general debate."³¹

Dissenters may argue that emerging technology provides a more liberal avenue than the Bar for lawyers to voice their opinions as it opens up a robust online space in which opposition voices and outlets are given free rein by mobile Internet. Moreover, mobile Internet allows immediate access to critical opinion – the true test of media freedom in a democracy. Here, the Bar's occasional deliberate avoidance from critical issues of public policy in order to steer clear of political repercussions may fall short of reaffirming its position as a public advocate. The inevitable reservation in public advocacy by the Bar is fuelled by the fact that fundamental issues such as the independence of judges or legal services to the poor can be entangled in the vortex of politics. A recent example of such political factor that could have pushed the Malaysian Bar's decision to shy away from certain public advocacy is the sedition investigation by the Royal Malaysian Police on a motion at the 70th Annual General Meeting of the Malaysian Bar that called on the incumbent Attorney-General to quit amid high-profile controversies. Nevertheless, the seemingly more liberal avenue for freedom of speech granted by emerging technology is facing similar fate to the Bar after gradually being undermined by a series of clampdowns by the authorities.

For example, *The Malaysian Insider* has shut down after the Malaysian Communications and Multimedia Commission blocked access to the news portals that have published reports critical of the government while Facebook users who posted statuses deemed rude to the authorities were slapped with police charges.

On the other hand, members of the Bar by and large possess four resources that have been found necessary for the successful exercise of professional influence over policy issues: technical expertise, money, prestige and social connections.³² The legal profession's entry into policy debates boils down to technical expertise in the first place, and, historically, the profession's influence has been strongest on matters with a significant technical component.³³ Thus, lawyers can wield considerable influence individually and even more as a cohesive bloc. Issues such as mandatory sentencing, standards for capital cases, racial and gender diversity in the justice system, human rights and tort reform are clearly substantive or procedural matters affecting the administration of justice and the legal profession. The Bar may not carry a transmitter of public advocacy as wide as the one posed by digital technology but it certainly generates a stronger and more protracted signal to embed its intended message across a country.

Yardstick Three: Preservation of Competent Representation

The Bar shoulders a vital responsibility in preserving the quality of legal services and the competence of law practitioners. Competence in this digital age requires the quality of innovative, especially a comprehension on the lawyers' part about developments in technology that affect both their cases and the manner in which they practise. E-mail, the Internet and a growing set of portable digital devices have become commonplace elements of the practice of law. A lawyer's duties of competence and diligence could be redefined as the practice of law becomes gradually paperless. Competent representation requires more than legal knowledge. It also requires the skill, thoroughness and preparation reasonably necessary for the representation. This incorporates the use of methods and procedures meeting the standards of competent practitioners as well as keeping abreast of changes in the law and its practices.

In 6 August 2012, the American Bar Association's policy-making House of Delegates voted to modify its Model Rules of Professional Conduct regarding lawyer

²⁶ E Chambliss and B Green, 'Some Realism About Bar Associations' (2008) 57 *DePaul Law Review* 425, 437.

²⁷ R Brown, *Social Psychology* (Free Press, 2nd ed, 2003) 226.

²⁸ C Sunstein, 'Deliberative Trouble? Why Groups Go to Extremes' (2000) 110 *Yale Law Journal* 71, 85-90.

²⁹ R Gordon, 'The Independence of Lawyers' (1988) 68 *Boston University Law Review* 1, 74.

³⁰ Chambliss and Green, above n 26, 443.

³¹ Sunstein, above n 28, 111.

³² Chambliss and Green, above n 26, 434-435.

³³ M Powell, 'Anatomy of a Counter-Bar Association: The Chicago Council of Lawyers' (1979) 4 *American Bar Foundation Research Journal* 501, 502-503.

competence. In the new version, Rule 1.1 Comment 8 reads “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...”³⁴. The amendment to Model Rule 1.1 may not immediately change the legal landscape for lawyers but it reinforces what most already know, yet some ignore. Indeed, there is effectively nothing new about Rule 1.1 – only its manifestation in the face of emerging technology and an acknowledgement that the changes are primarily a matter of degree rather than overhauls of the actual substance of the rules.³⁵ The manifestation may include inextricable issues associated with the practice of law, awareness of social media sites, the rising use of the cloud, the risks associated with using mobile devices and the basic issues of data security,³⁶ the use of technology to help enforce document retention policies³⁷ and basic use of modern legal research services.³⁸ Lawyers may not recognise those instances – in which mere deliberation or discussion with other lawyers may not be sufficient³⁹ because simply making another seemingly more tech-savvy lawyer or staff member the point of reference for all things technological presents its own set of ethical and practical challenges.⁴⁰

One of the purported challenges here is that the level of technical proficiency required is not always clear, may vary depending on the lawyer’s area of practice and is likely to evolve in today’s rapidly changing technological environment. Such challenge is exacerbated by the potential increase in fractured attention inadvertently suffered by modern-day lawyers due to information overload brought about by media tools and virtual multitasking. Apart from revolutionising modern society, the four emerging technologies abovementioned also herald the age of interruption where younger generations have an over-abundance of information along with a general attitude of inattention.⁴¹ In view such information inundation, the Bar remains the most rational choice of authority in rolling out new standards of technical proficiency for lawyers to comply with. To better serve its purpose of preserving competent representation, many

bar associations establish information technology panels to consider and, where necessary, actively provide input into information technology developments as appropriate and their implications for the legal services market.

Competent representation can be offered only by diligent lawyers who stay in touch with advancements that will benefit their clients and suffice it to say that no other existing association qualifies more than the Bar to facilitate lawyers in achieving their desired high standard of practice. For example, the Malaysian Bar’s recent passing of the mandatory Continuing Professional Development scheme in its 2016 Annual General Meeting is a welcoming move to prepare lawyers in matching the rapid pace of technological advancement if not embracing it.⁴² Another major feat exemplified by the Bar on a global scale is the regulation of cloud computing products for lawyers who intend to store confidential client data on servers owned and operated by third parties. The North Carolina Bar Council in the United States gave the use of cloud computing its stamp of approval and concluded that reasonable care must be taken to protect confidential client information.⁴³ In addition, the Bar has published materials to assist its members on matters of professional conduct including guidance on the development and use of information technology. Therefore, the Bar has a major role to play by regulating the use of emerging technology in legal practice rather than being a sitting duck waiting to be consumed by the raging tide of technology as alleged by its critics.

Conclusion

Technology can be egregiously abused in the absence of law but not the other way round. Although emerging technology has influenced or revolutionised various conventional associations, it is not submerging the Bar in view of the irreplaceable role and imperative duty of the Bar in protecting the legal profession, espousing public advocacy and ensuring competent representation by legal practitioners.

³⁴ American Bar Association, *Model Rules of Professional Conduct* (at 6 August 2012) r 1.1.

³⁵ J Podgers, *You Don’t Need Perfect Tech Knowhow for Ethics’ Sake – But a Reasonable Grasp Is Essential* (9 August 2014) American Bar Association Journal

<http://www.abajournal.com/news/article/you_dont_need_perfect_tech_knowhow_for_ethics_sake--but_a_reasonable_grasp>.

³⁶ J Browning, *Legal Ethics and Social Media: It’s Complicated* (1 December 2013) Dallas Bar Association

<<http://www.dallasbar.org/book-page/legal-ethics-and-social-media-it%E2%80%99s-complicated>>.

³⁷ M Nelson, *New Changes to Model Rules a Wake-up Call for Technologically Challenged Lawyers* (28 March 2013) InsideCounsel Magazine <<http://www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech>>.

³⁸ D Jackson, ‘Lawyers Can’t Be Luddites Anymore: Do Law Librarians Have a Role in Helping Lawyers Adjust to the New Ethics Rules Involving Technology?’ (2013) 105(3) *Law Library Journal* 395, 396-397.

³⁹ Nelson, above n 37.

⁴⁰ A Vogel, *Should California Lawyers Have a Duty of “Compu-tence”?* (October 2013) Los Angeles County Bar – County Bar Update <<http://www.lacba.org/showpage.cfm?pageid=15158>>.

⁴¹ E Rose, ‘Continuous Partial Attention: Reconsidering the Role of Online Learning in the Age of Interruption’ (2010) 50(4) *Educational Technology* 41, 41.

⁴² B Su-Lyn, *Motion On Mandatory Training for Young Lawyers Passes by One Vote, No Recount* (19 March 2016) Malay Mail Online <<http://www.themalaymailonline.com/malaysia/article/motion-on-mandatory-training-for-young-lawyers-passes-by-one-vote-no-recount>>.

⁴³ Nicole Black, *NC Br Council Issues Final Opinion on the Cloud* (14 March 2012) Sui Generis – A New York Law Blog <<http://nylawblog.typepad.com/suigeneris/2012/03/nc-bar-council-issues-final-opinion-on-the-cloud.html>>.

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