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Rethinking Jurisdictional Barriers to Practising Law Abroad: A Soft Technological Deterministic Approach

Temitope Lawal[1]
Bond University, Australia

Abstract*

The regulation of legal practice has been based predominantly on geographical boundaries. To varying degrees, foreign lawyers are prohibited from engaging in the practice of law in host jurisdictions without local admission, and in some cases with the added complexity of nationality or residency requirements. This is notwithstanding that increasing international trade and other transnational activities, enabled by advancements in technology that facilitate efficient transportation and communication, are creating a growing demand for legal services across borders. While much has been written about how technology is changing the nature of legal practice, the approach taken by this article is to assess whether technology is playing this change-role in a solely deterministic manner. In examining this question, this article applies soft technological determinism to argue that, while technology is an important factor, it does not have a mono-causal effect in shaping changes to cross-border legal practice. Rather, these changes are being influenced by an interplay of technological progress and non-technological factors such as similarities in legal systems, harmonisation of laws and trade affiliations.

***Keywords**:* Technological determinism; legal profession; regulatory barriers; cross-border practice; foreign lawyers.

1. Introduction

In January 2023, the Organisation for Economic Co-operation and Development (OECD) published a report on trade restrictiveness in the legal services sector of 50 countries.[2] Of the five categories of restrictions studied, restriction on foreign entry was the most common, followed by restrictions on the movement of people.[3] A total of 46 countries required foreign lawyers to obtain some form of licence or authorisation to practise domestic law. Specifically, 41 countries required foreign lawyers to take a local examination, while 29 jurisdictions had permanent residency requirements. More restrictively, 23 countries imposed nationality or citizenship requirements for licensing. This report highlights the restrictive nature of the legal profession in terms of foreign lawyer mobility.[4] This is notwithstanding the growing demand for legal services across borders due to the growth of international trade and other transnational activities, facilitated by technological advancements that allow

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[1] Temitope Lawal is a PhD Candidate at Bond University, Queensland, Australia. This article is based primarily on research undertaken as part of Temitope's PhD thesis and is supported by a Bond University Postgraduate Research Scholarship.

[2] "OECD Services Trade Restrictiveness Index: Legal Services 2022," 3.

[3] These two categories combined account for the most common restrictions in 87 per cent of OECD countries, while the number is 89 per cent in non-OECD countries.

[4] In this article, the following terms have the same meaning and are used interchangeably: "foreign lawyer mobility," "cross border practice of law" and cross-border legal practice.

for more efficient means of transportation and communication.[5] Some argue that allowing clients to utilise the services of one lawyer or law firm for cross-border transactions would enhance economic efficiency and reduce costs.[6] For Papa and Wilkins, even more than businesses, professionals or multinational companies, the demand for liberalising the legal services sector in different jurisdictions is mostly attributable to foreign lawyers.[7] However, foreign lawyer mobility is still very restrictive in most jurisdictions.

In many cases, foreign lawyers are prohibited from practising host country law[8] unless they requalify as local lawyers.[9] In others, foreign lawyers are limited to practising international law.[10] Whereas some countries prohibit the practice of any form of law without local admission and in extreme cases, only nationals are permitted to practise law, essentially locking out foreign lawyers. Often, requalification requires foreign lawyers to go through the same admission process as local lawyers,[11] notwithstanding that they have already been admitted to practise law in their home country. However, from the emergence of online legal platforms to the increasing reliance by law firms and corporations on artificial intelligence (AI) systems,[12] technology has been instrumental in the changes that have occurred in modern law practice.[13] Much has been written about how technology brings about change in legal practice.[14] This is notwithstanding that, historically and even in modern times, legal practice has been engrained in traditional ways and has often resisted change in the way it is regulated.[15]

While there is ample literature on how technology is changing the practice of law, the approach taken by this article is to assess whether technology is playing this change role in a solely deterministic manner. This requires taking a step back to reflect on factors that are impacting changes occurring in the realm of legal practice generally, and particularly how these changes will impact lawyer regulation in the context of cross-border practice of law. This analysis is underpinned by soft technological determinism, a theoretical perspective that recognises the influence of technology on societal changes, while also acknowledging the role of non-technological factors in shaping these changes. By applying soft technological determinism, this article argues that changes in the regulation of cross-border legal practice will not be driven solely by technology, but will involve a complex interaction of non-technological factors such as legal system similarity, legal harmonisation and trade affiliation. This perspective reflects how changes brought about by these factors do not occur in isolation but instead are intertwined with technological progress. It is especially important for understanding the extent to which technology disrupts the traditional notion of geographical borders, which restrict foreign lawyers' ability to practise law outside their home jurisdiction.

Understandably, more emphasis is placed on the discussion of the technological factors, flowing from the postulation that technology plays an important role in shaping societal changes. Notwithstanding this, the significance of other factors – such as legal system similarity, legal harmonisation and trade affiliation[16] – is also considered to gain a more holistic understanding of the evolving nature of cross-border practice of law. Taken together, these considerations are likely to shape any future

[5] Khachaturian and Oliver, "Intangible Trade," 1195–96.
[6] Persky, "Despite Globalization"; Barsade, "The Effect of EC Regulations Upon the Ability of US Lawyers to Establish a Pan-European Practice," 315.
[7] Papa and Wilkins, "Globalization, Lawyers and India," 179-188.
[8] This extends to advising and representing clients before a court or judiciary body in the law of the host country. See "OECD Services Trade Restrictiveness Index: Policy Trends up to 2023," 37.
[9] Liu, "Globalization as Boundary-Blurring," 772.
[10] This encompasses advisory services in home country law, third-country law and international law, as well as a right to appear in international commercial arbitration. See "OECD Services Trade Restrictiveness Index: Policy Trends up to 2023," 37.
[11] Usually consists of meeting some or all of the following requirements: educational qualification, professional examination and practical legal training. See generally "The Regulation of International Trade in Legal Services;" "Practical Law."
[12] Caserta, "The Sociology of the Legal Profession in the Digital Age", 319. According to a 2023 survey carried out across the United Kingdom, United States, France and Canada, 47 per cent of respondents think generative AI will have a significant or transformative effect on the practice of law. Additionally, 45 per cent believe it will have some impact, while only about 7 per cent believe it will have no impact. *See* "LexisNexis International Legal Generative AI Survey Shows Nearly Half of the Legal Profession Believe Generative AI will Transform the Practice of Law;" Linwood, "Moving Towards a Future-Ready Enterprise."
[13] O'Leary, " 'Smart' Lawyering."
[14] See generally Jones, Digital Lawyering; Weinberg and Hyams, "The Law Tech Clinic," 70; Callegari and Rai, "Digitalization and Law"; Caserta, "Digitalization of the Legal Field"; Smith, "The Future of Law"; Kalendzhian, "How Technology is Changing the Nature of Work and Altering the Practice of Law."
[15] Kalendzhian, "How Technology Is Changing the Nature of Work and Altering the Practice of Law"; Lanctot, "Attorney–Client Relationships in Cyberspace," 149. Although not all lawyers are averse to the utilisation and integration of technology, a prevailing perception suggests that lawyers, compared with other professionals, exhibit a tendency to be cautious and slow in adopting technological innovations. See Flanagan and Dewey, "Where Do We Go from Here?" 1248; Guest, "Why are Lawyers Such Luddites?"
[16] It is acknowledged that beyond the three non-technological factors discussed in this article, other factors also exist, such as clients' changing needs and expectations. See "The Future of Law and Innovation in the Profession," 14.

regulatory changes affecting foreign lawyers' ability to practise law across different jurisdictions. Although technological determinism has been applied to various disciplines,[17] this article contributes to the existing body of literature by extending the application of its soft variant to discussions on cross-border legal practice regulation.[18]

The remainder of the article is organised as follows. Section 2 discusses how geographical construct, expressed through the principle of sovereignty and statehood, has been an overreaching consideration in drawing up legal rules that restrict foreign lawyer mobility. This lays a foundation that enables a subsequent examination of the dynamism of law, society and technology. Section 3 then describes the theoretical framework of soft technological determinism and then subsequently applies it in evaluating the role played by technology, legal system similarity, legal harmonisation and trade affiliation to understand the changes that may drive any liberalisation of the ways in which cross-border legal practice is regulated. Section 4 concludes the article.

2. Cross-border Practice of Law and Protectionism

In every country, rules exist that govern admission to practise law.[19] Historically, local law practice was not subject to strict regulation, let alone cross-border legal practice.[20] As the legal profession became more established, rules evolved restricting the practice of law only to those who met the set eligibility requirements.[21] Lawyer regulation was set with physical geographical constructs in mind, hinging on the principle of sovereignty and statehood.[22] In most jurisdictions, only persons who have gone through the local admission process are qualified to engage in the practice of law within their national boundaries. One reason stems from the fact that regulation of legal practice commenced during an era when legal matters were determined jurisdiction by jurisdiction, and a lawyer's knowledge of the laws of their home jurisdiction was considered extremely important and sufficient.[23]

Because legal systems are seen as inherently national, each jurisdiction has its own regulatory system that governs the activities of lawyers within its borders, including rules on the scope of permissible activities, qualification requirements and professional ethical standards.[24] As Barsade notes, 'a legal system is a national phenomenon … states have an inherent interest and responsibility to closely regulate and supervise attorneys to ensure the protection and stability of their internal statutory scheme'.[25] Consequently, legal regulators have tended to adopt protectionism by seeking to shield local lawyers from foreign competition through licensing restrictions.[26] While these restrictions are based on the idea that states have the authority to regulate activities within their national legal systems, the notion of states as the core is not without contest.[27] Historically and in contemporary times, cross-border lawyering has pushed the boundaries of legal practice.[28] Grisel suggests that while influential literature on the globalisation of legal practice has emphasised the key role of national legal systems and professions, recent studies have shifted the focus towards the margins of national legal systems and professions.[29] At these margins, lawyers

[17] Makukhim et al., "Education Virtualization Prospects in Pessimistic Light of Technological Determinism by Jacques Ellul"; Héder, "AI and the Resurrection of Technological Determinism"; Walton, "Technological Determinism (s) and the Study of War"; Hauer, "Technological Determinism and New Media."

[18] This article is limited to extending soft technological determinism as an applicable theoretical lens through which an examination of the extent of the change-role played by technology in relation to foreign lawyer mobility rules is carried out. However, there is scope for further research, especially as it relates to rethinking regulatory approaches to foreign lawyer mobility.

[19] "Law is the bond of society; that which makes it; that which preserves it and keeps it together." See Bradley, "Law, Its Nature and Office as the Bond and Basis of Civil Society," 229.

[20] Baker, "The Legal Profession," 165; Pound, The Lawyer from Antiquity to Modern Times, 226.

[21] Sarvarian, "The Historical Development of National Ethical Traditions," 31.

[22] While other justifications such as protection of the public from incompetent service providers are acknowledged, this article limits its discussion to the issue of protectionism. For further readings on the public interest justification for imposing strict regulation on practice of law, see Bugatti, "Towards a New Era for the Legal Profession," 89; Semple, Legal Services Regulation at the Crossroads, 18; Adams, "What is the Public Interest in Professional Regulation?" 3.

[23] Zwart, "The Reflection of Cross-Border Law Practice in the Organisation and Regulation of the Profession."

[24] Worth, "The Transnational Practice of Law," 11–14.

[25] Barsade, "The Effect of EC Regulations upon the Ability of US Lawyers to Establish a Pan-European Practice."

[26] Gromek-Broc, "The Legal Profession in the European Union," 130.

[27] Grisel, "The Centres and Margins of Transnational Law."

[28] For instance, the US law firm Baker McKenzie began its international expansion in 1955 by opening an office in Venezuela. Two years later it established a presence in Brussels, and in 1961 it expanded to the United Kingdom. See "Baker McKenzie – What the Lawyer Says." Even in recent times, the firm has continued to form joint ventures with local law firms globally. See Yap, "Baker McKenzie Establishes Korea Joint Venture 10 Years After Office Launch."

[29] Grisel, "The Centres and Margins of Transnational Law," 54.

operate at the interface between different national legal systems.[30] Global law firms in particular have emerged as key actors in this process of boundary blurring.[31] They are skilled at establishing connections with local law firms and engaging in activities such as international arbitration that extend beyond the confines of individual states.[32] These activities often operate in the shadows of legal systems, exploiting technicalities to push the margins of practice from the core. Notwithstanding this, the practice of law remains one of the most heavily regulated activities in the world,[33] which stems from its historical roots as a tightly knit profession that has remained unchanged for a long time. Often perceived as esoteric,[34] for the most part the practice of law is still restricted on a jurisdictional basis. This is seen in the various regulatory models adopted globally in relation to cross-border legal practice.

One model is the imposition of nationality and citizenship requirements.[35] In more than 40 countries, only nationals or citizens can be admitted to practise law.[36] This completely excludes foreign lawyers from engaging in any form of legal practice, making it the most restrictive regulatory barrier. Another model is the prohibition of foreign lawyers from engaging in any activity that constitutes legal practice, whether it pertains to their home country law, international law or host country law, unless they obtain local admission.[37] While this is still a significant barrier, there is some room for foreign lawyers to practise law, provided they go through a requalification process to become locally admitted. A third, more common model globally allows foreign lawyers to practise their home country law and international law without local admission.[38] However, the practice of host country law is restricted to individuals who have undergone the requalification process, similar to local lawyers. England and Wales have adopted a more liberal approach by permitting foreign lawyers to practise host country law that does not fall under the six reserved activities recognised under the *Legal Services Act 2007*, in addition to practising their home country law and international law.[39]

Arguably, the most liberal model for cross-border legal practice permits foreign lawyers to engage in any form of legal practice without needing to undergo the requalification process. This approach is seen within the European Union (EU), where lawyers qualified in one member state can practise their home country law, international law and the local law of another member state without any requalification, so long as they practise under their home-country professional title.[40] This is made possible through EU directives promoting the single market regime.[41] Another way in which this full liberalisation model occurs is through mutual recognition arrangements, where foreign lawyers are granted the privilege of practising law in other jurisdictions based on the assessment that their academic and professional qualifications are equivalent to those of the host country.[42] For instance, the Trans-Tasman Mutual Recognition Agreement (TTMRA) allows lawyers qualified in Australia or New Zealand to practise law in either country without additional tests or examinations.[43]

One argument often adduced in support of restrictive regulatory models for cross-border legal practice is that only individuals who are licensed in a particular jurisdiction possess the requisite knowledge to practise law within that jurisdiction's legal system.[44] However, in markets such as England and Wales, where lawyers and non-lawyers compete, there is little evidence to

[30] Grisel, 54.
[31] Liu, "Globalization as Boundary-Blurring," 801.
[32] Grisel, "Marginals and Elites in International Arbitration," 260.
[33] Rhodes and Axberg, "The Law Firm as an Industry Model for Entity Choice and Management," 280–81; Khachaturian and Oliver, "Intangible Trade," 1196.
[34] Garoupa and Markovic, "Deregulation and the Lawyers' Cartel," 939; Pearce, "The Professionalism Paradigm Shift," 1231; Brundage, "The Medieval Advocate's Profession," 441.
[35] Fronk, "Making Mistakes Abroad," 507; Worth, "The Transnational Practice of Law."
[36] These countries include Egypt, Moldova and Thailand. A list of other countries is accessible through the databases of the International Bar Association and Thomson Reuters Practical Law. See "The Regulation of International Trade in Legal Services;" "Practical Law."
[37] For example, in Nigeria, only locally admitted lawyers can engage in the practice of law. See Adangor, "Globalization of Legal Practice in Nigeria," 8.
[38] Muller, "Trade Agreements and Legal Services", 242. These lawyers are referred to as foreign legal consultants in some countries, such as the United States. See Pardieck, "Foreign Legal Consultants."
[39] "Working with Foreign Lawyers: The Registered Foreign Lawyer (RFL) Regime."
[40] Katsirea and Ruff, "Free Movement of Law Students and Lawyers in the EU", 385–86.
[41] Directive (77/249/EEC) of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services; Directive (98/5/EC) of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a member state other than that in which the qualification was obtained; Directive (2005/36/EC) of 7 September 2005 on the recognition of professional qualifications. See also, Lonbay, "Assessing the European Market for Legal Services."
[42] Correia de Brito, Kauffmann and Pelkmans, "The Contribution of Mutual Recognition to International Regulatory Co-Operation," 10.
[43] "The Trans-Tasman Mutual Recognition Agreement Between New Zealand and Australia."
[44] Kosugi, "Regulation of Practice by Foreign Lawyers;" Stewart and Feinstein, "Private International Law," 285–86.

support claims of a professional monopoly regarding superior standards, knowledge or ethics among lawyers.[45] Instead, the imposition of restrictions on cross-border legal practice often serves the interests of members of the legal profession within a particular jurisdiction, thereby curbing competition from foreign lawyers and increasing the income of local lawyers, who benefit from these protective rules.[46] In this context, Olsen, Lueck and Ransom note that 'self-interested professionals capture regulators, and then shape regulations to limit the entry of potential competitors and increase their own incomes'.[47] These regulations typically impose strict requirements, such as education, residency and bar examination prerequisites, as well as practical training.[48] They serve the purpose of disincentivising foreign lawyers from going through the rigorous process of seeking admission to practise law in other jurisdictions, despite having already met similar requirements in their home jurisdiction. As Lee aptly puts it, 'every barrier to admitting foreign lawyers has some aspect of protectionism. Such prohibitions purport to ensure that domestic lawyers will not lose business.'[49] While protectionism is often cited as the main reason for jurisdictions' reluctance to liberalise, Godwin argues that this reluctance is not solely about protecting local lawyers from foreign or international influence and control;[50] other factors, such as traditional attitudes towards lawyers and their role in upholding the rule of law, also come into play.[51]

There is also the belief that these restrictive rules originate primarily from within the profession itself, through bar associations and law societies, rather than from the general public.[52] These professional bodies, composed of members of the profession, hold significant sway in shaping rules that are eventually enacted into law. Here, lawyers are seen as anticompetitive and inaccessible because they are shielded by their own profession.[53] In other words, the regulation of lawyers is inherently influenced by the profession itself.[54] As Friedman observes, 'the pressure on the legislature to license an occupation rarely comes from the members of the public who have been mulcted or in other ways abused by the members of the occupation. On the contrary, the pressure invariably comes from members of the occupation itself.'[55] Since local lawyers constitute the regulators of the legal profession in their respective countries, they are able to impose stringent rules to determine or restrict the entry of foreign lawyers in the local legal market.[56]

Notwithstanding the historical and sustained reliance on jurisdictional considerations in framing rules for cross-border legal practice, society is a dynamic and constantly evolving construct that continuously undergoes transformations and adapts to new circumstances.[57] In this regard, societies are not static entities, but complex systems that interact with internal and external forces, leading to shifts in norms, values and practices.[58] As an integral part of society, legal practice is not immune to these changes.[59] Just as societal structures and institutions evolve, so does the practice of law. As a powerful force in contemporary society, technology has played a significant role in driving changes across various domains, including the practice of law.[60] As

[45] Rather, non-lawyer organisations or other forms of alternative business structure are increasing their market share of legal work. See Webley, "Legal Professional De(Re)Regulation, Equality, and Inclusion," 2359; Webley et al., "The Profession(s)" Engagements with Lawtech," 18.
[46] Olsen, Lueck and Ransom, "Why Do States Regulate Admission to the Bar-Economic Theories and Empirical Evidence?" 254.
[47] Olsen, Lueck and Ransom, 267. According to the authors, "the main intent of professional licensure is to enhance professionals" income by limiting the entry of new professionals who, if allowed to practice, would compete with existing professionals and reduce the price of legal advice."
[48] The International Bar Association and Thomson Reuters have comprehensive databases of eligibility requirements for admission to practice law in various jurisdictions. See generally "The Regulation of International Trade in Legal Services;" "Practical Law."
[49] Lee, "Toward Institutionalization of Reciprocity in Transnational Legal Services."
[50] Godwin, "Barriers to Practice by Foreign Lawyers in Asia: Exploring the Role of Lawyers in Society," 315.
[51] Godwin, 315.
[52] Friedman, "Occupational Licensure."
[53] Webley et al., "The Profession(s)" Engagements with Lawtech," 18. However, self-regulation by members of the legal profession is greatly diminished in jurisdictions such as England and Wales. Currently, about 10 independent bodies are responsible for regulating various aspects of legal services. Some of them include non-lawyers, which has led to increased liberalisation and opened up opportunities for non-lawyers to engage in some form of legal work. See Webb, "Regulating Lawyers in a Liberalized Legal Services Market," 549.
[54] Newman Knake, "The Legal Monopoly," 1305.
[55] Friedman, "Occupational Licensure," 140.
[56] Medley, "Replacing Geographic Lines with Conceptual Lines", 1427. "Legal services tend to be self-regulated, by lawyers or courts, in the interest of lawyers." See Ford and Ashkenazy, "The Legal Innovation Sandbox," 6. Others have counter-argued that narratives about unauthorised interlopers may overshadow the strong argument for additional liberalisation of lawyers" monopoly on legal services to enable new methods of improving access to justice. See generally Rhode and Ricca, "Protecting the Profession or the Public."
[57] Ataçay, "Understanding and Explaining Social Change by Examples"; Feinberg, "Modernization, Socio-Cultural Change," 18; Bawden, "Burial: The Deus Ex Machina of Social Transformation?"; Tabassum, Theories of Social Change, 7.
[58] Lenz, "The Key Role of Education for Sustainable Democratic Societies."
[59] Jones, Digital Lawyering, 370.
[60] O'Leary, " 'Smart' Lawyering," 199.

technology continues to evolve, it becomes more probable that the predominantly knowledge-based nature of legal practice calls into question its ability to remain unchanged in terms of how lawyer regulation impacts cross-border practice.[61]

Activities that fall under the practice of law can generally be categorised as legal representation, legal advice and legal drafting.[62] However, in many countries there is resistance to treating and regulating lawyers as 'service providers' and reducing their monopoly over legal practice.[63] This resistance stems from the broad scope of work attributed to lawyers and the reluctance to limit the work that should be reserved exclusively for them.[64] The scope of work has implications for the regulation of foreign lawyers as well as the level of integration permitted with local lawyers. Terry discusses the concept of lawyers as 'service providers', where the legal profession is not seen as a distinct and independent profession with its own regulations, but is instead grouped together with other service providers for regulation purposes.[65] This trend is becoming more prominent in jurisdictions such as the United Kingdom, which has moved away from self-regulation and now treats lawyers as service providers regulated by independent authorities.[66]

To varying degrees, the scope of work over which lawyers have traditionally held a monopoly is adaptable to being carried out with the aid of technological tools. According to a 2022 research study, the global legal technology market size was US$29.8 billion in 2021 and is projected to rise[67] to US$69.7 billion in 2032.[68] As will be discussed, not only is it possible to employ technology in the communication process, but even in the workflow process, technology is easily adaptable to create more efficiency, irrespective of the location of the lawyer or the client. The next section will examine soft technological determinism as the relevant theoretical lens through which to discuss the extent to which technology impacts changes in the context of cross-border practice of law.

3. Soft Technological Determinism

Soft technological determinism is a subset of technological determinism, which is a reductionist theory that amplifies the effect of one phenomenon – technology – as the determinant of changes that occur in society.[69] Being a less-deterministic variant, soft technological determinism does not view societal changes as resulting from the mono-causal power of technological progression;[70] rather, it situates technology as part of a more complex matrix that includes social, economic, political and cultural factors.[71] Because it is a subset of technological determinism, the soft approach still maintains that technology has certain deterministic attributes – that is, technology is the main variable that propels societal changes.[72] However, its area of divergence with hard technological determinism lies in its acknowledgement that technological force is not wielded autonomously but involves the interplay of other factors. Technology's acceleration of societal development is contingent on the presence of other 'soft' causal elements, be they social, political, cultural or economic.[73] The role played by these other factors cannot be jettisoned, notwithstanding the significant influence and effect that technological developments have in fostering progress and bringing about social change.[74] Soft technological determinism does not invalidate the notion that technology has a significant influence on societal changes; Instead, by not assigning a sole causality of societal changes to technology, it qualifies technology's effect to the extent that other factors, even if invisible, are present in the dynamics.[75] Thus, technology does not play a self-sufficient role in society. Succinctly put, technology acts as a springboard and necessary condition for societal change but requires other factors to have an effect.[76]

[61] Kimbro, "Regulatory Barriers to the Growth of Multijurisdictional Virtual Law Firms," 166.
[62] "Study to Provide an Inventory of Reserves of Activities Linked to Professional Qualifications Requirements in 13 EU Member States & Assessing Their Economic Impact," 20.
[63] Godwin, "Barriers to Practice by Foreign Lawyers in Asia," 315.
[64] Godwin, 303.
[65] Terry, "The Future Regulation of the Legal Profession."
[66] Godwin, "Barriers to Practice by Foreign Lawyers in Asia," 304.
[67] One of the main drivers of this growth is attributable to the rise of generative AI. See Coyer, "How Rising Legal Tech Prices Impacted the Market in 2023", based on a 2023 study conducted by LexisNexis across the United States, United Kingdom, France and Canada,
[68] Saha, "LegalTech Market Outlook (2022 to 2032)". See also Ali, "The Success of Legaltech Depends on Training."
[69] Janssen, "Revisiting the Problem of Technological and Social Determinism."
[70] Smith and Marx, Does Technology Drive History?; Cockfield and Pridmore, "A Synthetic Theory of Law and Technology," 492.
[71] Smith and Marx.
[72] Feng, "Analysis of Technological Determinism and Social Constructionism."
[73] Heilbroner, "Technological Determinism Revisited," 77–78.
[74] Feng, "Analysis of Technological Determinism and Social Constructionism," 1394.
[75] Heilbroner, "Do Machines Make History?" 61.
[76] Walton, "Technological Determinism (s) and the Study of War."

In the context of the evolving changes that are impacting foreign lawyers' ability to practise law outside their home jurisdiction, which is the focus of the subsequent discussion, a soft technological deterministic approach provides a more nuanced assessment of the extent to which technology influences the regulation of cross-border practice of law. To apply soft technological determinism in the context of cross-border practice of law regulation, it is important to first consider how technology is disrupting the traditional notion of physical geographical borders as the basis for regulating lawyers.

3.1 Technology and Cross-border Legal Practice Regulation

Prior to the emergence of technological tools that enabled seamless communications to occur irrespective of the geographical locations of lawyers or clients, rules restricting the practice of law based on physical geographical considerations were easier to enforce because lawyers typically practised law within their localities.[77] The conventional view was that lawyers were tied to specific geographic areas and were expected to have strong local connections.[78] Strict regulations on practising in different jurisdictions further reinforced this local perspective.[79] What made this even more possible was the idea of sovereignty and statehood, through which governments were able to exert physical control and impose penalties on those who violated their national laws.[80] As such, geography was the guiding consideration for regulating who could practise law.[81]

Since legal systems are inherently nationalistic, local lawyers typically adduce the need to protect the sanctity of their internal schemes as a justification for maintaining restrictive rules, rather than encouraging liberalisation, in relation to who is eligible to practise law within their respective jurisdictions.[82] This justification, while sufficient to regulate activities conducted within physical borders, faces considerable challenges when applied in a virtual environment.[83] Technology enables seamless communication and makes it difficult to rely solely on national borders when considering the legal ramifications of certain activities.[84] Technology makes it possible to carry out activities that the legal system of a particular country might be unable to enforce or deter, but nonetheless are an encroachment.[85] Traditional methods of regulation are often inadequate in the virtual environment, where interactions frequently cross traditional boundaries and expose ambiguities in traditional law.[86]

Accordingly, Lessig classified the challenges faced by governments and national regulatory bodies when attempting to regulate cyberspace using traditional models into four themes: (1) regulability; (2) regulation by code; (3) competing sovereigns; and (4) latent ambiguity.[87] The first challenge is whether governments are able to effectively regulate online activities. The second issue pertains to the idea that the architecture and design of computer code can act as a form of regulation, influencing and constraining the behaviour of users within cyberspace. The third challenge raises questions about jurisdictional authority over online activities. The fourth challenge lies in the difficulty of applying traditional principles to online actions and entities that do not have direct equivalents in the physical world.[88] Themes 1, 2 and 4 are relevant to the ensuing discourse on the challenges of regulatory systems that are mostly localised and based on physical jurisdiction, as discussed previously.[89]

In terms of regulability, technology makes service delivery less reliant on national borders.[90] This is because in an era devoid of technological advancements such as the internet, countries could impose and enforce rules that applied to subjects within their jurisdiction.[91] However, with the move towards online service provision, it is increasingly difficult for different jurisdictions to prevent activities from occurring across borders. Reliance on rules tethered to physical location to determine

[77] Gillers, "A Profession, if You Can Keep It."
[78] Dinovitzer and Hagan, "Lawyers on the Move," 119.
[79] Dinovitzer and Hagan, "Lawyers on the Move."
[80] Raj Singh, "International Jurisdiction."
[81] Gillers, "A Profession, if You Can Keep It."
[82] Kosugi, "Regulation of Practice by Foreign Lawyers."
[83] van Klink, Prins, and Prins, Law and Regulation.
[84] Gordon, Shackel and Mark, "Regulation of Legal Services in the E-World" 57; Reisman, "Introduction to Jurisdiction in International Law," xiv. For a discussion of three analytic narratives of technology's role in augmenting, disrupting or ending the current legal services environment, see generally, Webley, "The Profession (s)"engagements with Lawtech."
[85] It has been argued that "the state no longer has the democratic legitimacy to exercise jurisdiction in a digital environment … Nation states are not entitled to impose rules on the virtual community of citizens who are located outside their territory and who are unable to exercise any influence on the content of these rules." *See* van Klink, Prins, and Prins, Law and Regulation, 7:50.
[86] Albakajai and Adams, "Cyberspace," 13.
[87] Lessig, Code: And Other Laws of Cyberspace, 19–23.
[88] Lessig argues that cyberspace is not immune from control and regulation; it all depends on the values that are embodied in the code. "…the Net cannot be regulated now, but if the government regulates the architecture of the Net, it could be regulated in the future." See Lessig, 44.
[89] See Section 2.
[90] "When you "go" to cyberspace, you don't leave anywhere." See Lessig, Code: And Other Laws of Cyberspace, 21.
[91] Svantesson et al., "Cyberspace and Outer Space are New Frontiers for National Security."

whether a foreign lawyer, utilising existing technological tools such as emails, telephones and video conferencing, is engaged in cross-border legal practice becomes challenging.[92]

Regarding competing sovereigns, determining jurisdictional authority becomes challenging when trying to enforce local regulations related to the practice of law and to determine whether lawyers are using the internet as a platform to offer legal services in multiple jurisdictions.[93] Identifying the location of these events is often misguided and sometimes entirely futile.[94] Even if it were possible to identify such events, determining which national laws should apply when internet-based communications simultaneously traverse different jurisdictions presents another challenge. The internet operates on the basis of logical rather than geographical locations.[95] Consequently, communications conducted over the internet seem to exist everywhere and nowhere in particular.[96]

Furthermore, the application of traditional laws to online activities becomes challenging due to latent ambiguity.[97] Nowadays, almost every information-based activity, including the practice of law, can be conducted online.[98] Typically, the rules governing these activities are designed with locality and territorial boundaries in mind.[99] Legal regulators grant lawyers authorisation to practise under their local laws, so conventional regulations require professionals such as lawyers to obtain licences for each territorial jurisdiction where they offer their services.[100] At their core, these regulations assume that individuals in regulated fields, such as lawyers, must be tied to a specific geographical location that falls under the governance of a sovereign authority with jurisdiction over that area.[101] However, enforcing these regulations can be challenging when these activities are carried out by individuals who are globally dispersed but connected through the internet.[102] In essence, these requirements become impractical when professionals provide services via the internet and potentially serve clients in multiple jurisdictions.[103]

As a result, technology is fundamentally altering the applicability of geocentric rules for regulating cross-border legal practice. However, on its own, technology – although an important factor, as already mentioned – cannot have the mono-causal effect of shaping the future of cross-border legal practice regulation. Technology is able to achieve the effect of enabling cross-border practice of law with the interplay of other factors that facilitate its actualisation. Next, this article will explore the relevance of other factors, such as legal system similarity, legal harmonisation, and trade affiliation, to demonstrate their importance in enabling cross-border practice of law and ultimately shaping the evolution of foreign lawyer regulation.

3.2 Legal System Similarity

The majority of countries in the world are divided along two main legal systems: common law and civil law.[104] Civil law is the most dominant legal system worldwide, with approximately 150 countries practising it in various forms.[105] Although there are different branches within the civil law tradition, such as Romanic and Germanic, these systems share significant similarities.[106] They all rely on comprehensive legal codes, use deductive reasoning and employ an inquisitorial process. As a result, lawyers qualified to practise law in a civil law jurisdiction should generally be able to understand the legal system of other civil law countries. While local laws may differ, the functioning of the legal system should feel familiar to these lawyers, making it easier to navigate its intricacies.[107] Arguably, this is one of the reasons why the European Union's liberalised market for cross-border

[92] An ABA Report indicates that lawyers and clients are increasing interacting in cyberspace, and forming relationships that are entirely based on electronic communication. See "2023 ABA Legal Technology Survey Report: Vol. 4: Marketing & Communication Technology."
[93] "The architecture of cyberspace makes regulating behavior difficult …" See Lessig, Code: And Other Laws of Cyberspace, 19.
[94] Johnson and Post, "Law and Borders," 1378.
[95] "IP Address as Logical Address and MAC Address as Physical Address."
[96] Johnson and Post, "Law and Borders," 1376.
[97] "We have tools from real space … [b]ut in the end the tools will guide us even less than they do in real space and time." See Lessig, Code: And Other Laws of Cyberspace, 22.
[98] Johnson and Post, "Law and Borders," 1377.
[99] Flood, "Megalawyering in the Global Order," 176.
[100] Johnson and Post, "Law and Borders: The Rise of Law in Cyberspace," 1382.
[101] Everett-Nollkamper, Fundamentals of Law Office Management, 342.
[102] "The rules that attempt to regulate the giving of legal advice are a mess. They are ineffective, archaic, and in the coming years, they are going to be largely nullified by the Internet and what lies beyond." See Gordon et al., "Mexican Lawyers Going North and US Lawyers Going South."
[103] Johnson and Post, "Law and Borders: The Rise of Law in Cyberspace," 1382.
[104] Bailey, "The Civil Law and the Common Law."
[105] Lukings and Habibi Lashkari, "Legal Foundations," 14.
[106] Pejovic, "Civil Law and Common Law," 9.
[107] This brings to mind the case of *Montriou v. Jefferys* (1825) 172 ER 51, where C. J. Abbott, afterwards Lord Tenterden, was quoted as saying, "No attorney is bound to know all the law. God forbid that it should be imagined, that an attorney, or a counsel, or even a judge, is bound to know all the law." See also Stout, "Legal Ethics," 3; McKean, "The Presumption of Legal Knowledge," 101.

legal services has largely been successful.[108] The majority of EU member states have legal systems based on civil law, with the exception of Ireland.[109] Thus, the single market regime encounters less friction, as lawyers can fluidly navigate the legal systems of member states, having been trained in a similar legal system. The same analogy applies within the common law legal system. For example, Australia and New Zealand – both common law countries – signed the TTMRA in 1996, enabling lawyers admitted to practise in either country to practise law in the other without the need for additional tests or examinations.[110] While legal system similarity is not the sole reason for the success of this arrangement, it undoubtedly plays an important role.[111] Empirically, in 2020 the United States exported US$2.9 billion in legal services to the United Kingdom; the two nations predominantly practise the common law legal system, making the United Kingdom the leading United States partner in legal services trade.[112]

Taking this argument a step further, the ability to practise law is not limited to similar legal systems.[113] In other jurisdictions, multiple legal systems coexist, allowing qualified lawyers in those jurisdictions to navigate these mixed legal systems. The practice of bijuralism[114] is particularly relevant in countries with mixed legal systems,[115] where no distinction exists regarding the type of legal system in which a lawyer is proficient. Once qualified, lawyers in these countries practise both common and civil law. This further demonstrates the possibility and practicality of lawyers practising under both civil and common law systems.

3.3 Legal Harmonisation

Legal harmonisation is a method that countries use to enhance cross-border trade.[116] According to Leebron, this involves 'making the regulatory requirements or government policies of different jurisdictions identical or at least more similar'.[117] Through legal harmonisation, cross-border commercial transactions are simplified which also has a knock-on effect on cost reduction.[118] This allows businesses to save time and resources that would otherwise be spent interpreting the domestic laws of each jurisdiction with which they do business. Typically, harmonisation is achieved by either replacing existing domestic laws with internationally agreed ones, or by supplementing domestic laws with internationally agreed rules specifically for international transactions.[119] However, both approaches involve aligning legal standards and regulations across different jurisdictions. This has various effects on the practice of law across borders – harmonised laws make it easier for lawyers to understand and apply the laws in different countries as they dilute the differences between national legal systems.[120]

Additionally, harmonised rules enable parties to more easily predict and determine the applicable rules in a specific area of law, regardless of the jurisdiction.[121] For example, international organisations such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) have played important roles in facilitating the harmonisation of contract law. The United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Principles of International Commercial Contracts (PICC) are two prominent harmonising instruments developed by these organisations, which unify legal provisions relating to international sales contracts

[108] According to some perspectives, a considerable push also came from London-based law firms intending to export English law to EU member states. This push began in 1973 with the establishment of offices in Paris, Brussels and Amsterdam, and later expanded to Frankfurt, Madrid and elsewhere within the European Union. See Taylor, "What the EU did for English Law"; Morgan and Quack, "Institutional Legacies and Firm Dynamics."
[109] See generally, Abel and Lewis, Lawyers in Society. See Hayes et al., "Ireland: The Ideal Alternative to English Law and Courts."
[110] The TTMRA was signed by Australia (Commonwealth, state and territory governments) and New Zealand in furtherance of the liberalisation spirit of the 1983 Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). "The Trans-Tasman Mutual Recognition Agreement between New Zealand and Australia".
[111] Correia de Brito, Kauffmann and Pelkmans, "The Contribution of Mutual Recognition to International Regulatory Co-Operation," 68.
[112] The report defines "services trade" as the provision of services across borders, including remote, virtual or mail-based services, as well as services provided when a consumer or supplier travels overseas. See "Legal Services Report."
[113] "Legal systems influence each other; civil, common and religious laws mix; the public/private distinction blurs; and international law extends its coverage to more subjects." See Papa and Wilkins, "Globalization, Lawyers and India," 188.
[114] This is the ability to practise law in two legal systems – for example, common law and civil law. See Breton and Trebilcock, Bijuralism: An Economic Approach, 189.
[115] Scotland, South Africa, Quebec, Louisiana, Botswana, Cameroon, Sri Lanka, Cyprus, Israel, Jersey, Lesotho, Malta, Mauritius, Namibia, the Philippines, Saint Lucia, Seychelles, Swaziland, Thailand, Vanuatu and Zimbabwe. See James and Thomas, Business Law, 31.
[116] Mwakaje, "Protection of Geographical Indications and Cross-border Trade," 33.
[117] Leebron, "Claims for Harmonization."
[118] Sanchez Lasaballett, "Conceptualizing Harmonization," 74; Gopalan, "Transitional Commercial Law," 805.
[119] Twigg-Flesner, "Making International Commercial Law," 62.
[120] Krebs, "The UNIDROIT Principles of International Commercial Contracts," 142.
[121] Moghaddam Abrishami, "Should Iran Join the United Nations Convention on Contracts for the International Sale of Goods?" 637.

and international commercial contracts respectively.[122] Many countries have incorporated these international rules into their domestic legal frameworks, thereby promoting the harmonisation of contract law and increasing legal certainty and predictability in cross-border transactions.[123] Legal harmonisation is also evident in other areas, such as data protection[124] and intellectual property.[125] The alignment of these laws provides a foundation for lawyers to advise clients on these specialised areas, regardless of jurisdiction.

3.4 Trade Affiliation

The increasing economic integration among countries, often expressed through trade agreements, has also played a role in facilitating cross-border practice of law. Legal services are considered a trade in services according to the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO).[126] International trade and investment in services have grown significantly and have become an important part of world trade. These trade negotiations in services were predominantly featured during the Uruguay Round, which culminated in the creation of the WTO, and they continue to be significant aspect of bilateral, regional and multilateral trade talks. It is not surprising that Europe, with the largest number of trade agreements, has seen the liberalisation of cross-border legal practice within the European Union as evidence of the role of trade agreements.[127] Even in the case of Australia and New Zealand, the TTMRA – which facilitates the cross-border practice of law between the two countries – is an offshoot of a larger trade agreement: the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), which was entered into in 1983.[128]

4. Concluding Discussion

From the preceding section, applying a soft technological deterministic approach reveals that technology does not, in the context of changes to the cross-border practice of law, have a solely deterministic attribute; other factors exist that are instrumental in actualising any changes that would lead to a more liberal approach to regulating cross-border practice of law. For example, the existence of similar legal systems makes it more feasible to use technology to provide legal services across jurisdictions. Lawyers who are knowledgeable in a specific legal system can utilise technology to offer legal services to clients in jurisdictions with similar legal systems. Through technology-driven research and communication tools, lawyers can access relevant legal resources from different jurisdictions and apply them in providing legal services to clients, regardless of their location. In a more concerted way, harmonisation of laws – especially in the areas of international private and public law – are being embarked on and applicable regardless of legal systems. International and supranational legal frameworks, which transcend national peculiarities, seem to create a level playing field,[129] allowing lawyers with expertise in areas such as intellectual property, data protection and contract law to advise clients located in different jurisdictions using technology as a medium of communication and collaboration. Furthermore, the interdependence among countries, as evidenced by the continued easing of trade in goods and services, provides an opportunity for technology to thrive as a medium and tool for providing legal services across jurisdictions with trade affiliations. This is because the provision of legal services cannot be detached from the growth experienced in international trade. As international trade increases, so does the demand for legal services. Trade agreements serve as initial steps in removing barriers to market access, and technology – particularly when used as a mode of service delivery – plays a role in bringing about the liberalisation of trade in goods and services.

Understanding the impact of technological, social, political, economic and cultural factors on the liberalisation of rules regarding the cross-border practice of law requires a more nuanced perspective. This approach not only helps legal regulators to develop more balanced rules, but also leads to a greater appreciation of the inadequacy of traditional rules in a constantly changing legal landscape. As discussed, Lessig outlines four challenges faced by governments and regulatory bodies when attempting to regulate activities conducted in cyberspace using traditional regulatory models: regulability, regulation by code, competing sovereigns and latent ambiguity. By taking a step back and examining the interplay of technological and non-technological factors – particularly with respect to geographical borders – through a soft technological deterministic approach, legal regulators can establish a more informed basis for future regulatory changes. While this article does not delve into specific regulatory reforms, it is important to recognise that the dynamic nature of society makes a more liberal outlook to regulating

[122] Marshall, "The Hague Choice of Law Principles." They have been referred to as providing "the best way forward for modernizing and progressively harmonizing international contract law." See Dennis, "Modernizing and Harmonizing International Contract Law," 151.
[123] See generally, Bridge, The International Sale of Goods; Turner, "Researching the Harmonization of International Commercial Law."
[124] Andresen, "On the Internationalisation and Harmonisation of Archival Law." 79.
[125] Odhiambo, "Towards a Conceptual Case for Harmonisation of Intellectual Property Laws."
[126] Terry, "From GATS to APEC."
[127] "Regional Trade Agreements."
[128] "The Trans-Tasman Mutual Recognition Agreement Between New Zealand and Australia."
[129] Bersier, Bezemek and Schauer, Common Law, 1.

the cross-border practice of law foreseeable. The ease with which technology enables the provision of legal services across borders, regardless of physical limitations, renders the enforcement of geocentric rules half-hearted, and in some cases extremely difficult if not nearly impossible.[130]

One of the main issues is that many rules that restrict the practice of law to persons licensed within a specific jurisdiction fail to consider the ease with which legal services can transcend borders without the visibility of legal regulators. The harmonisation of laws and trade integration between countries, coupled with virtual communication capabilities, ensures the flow of cross-border legal services. Furthermore, when regulations do not keep pace with current realities, this would have the effect of being honoured more in the breach than the observance. For instance, in 2023 the American Bar Association began exploring the possibility of revising certain provisions of the Rules of Professional Conduct to reflect the post-COVID world and changing client needs.[131] One proposed amendment is to Rule 5.5, which addresses multijurisdictional practice, allowing lawyers admitted in any US jurisdiction to practise law and represent clients without geographical limitations.[132] The successes achieved in jurisdictions such as the European Union, where the regulation of cross-border practice of law has largely been liberalised, confirm the feasibility of such changes.[133]

Fundamentally, the lack of political will to liberalise foreign lawyer mobility rules across multiple jurisdictions is driven primarily by a desire to protect the legal profession within each jurisdiction, rather than concerns about foreign lawyers' knowledge of local laws or public's protection from incompetent legal service providers.[134] Regulations governing the practice of law in different countries often include restrictions that aim to shield local lawyers from competition with foreign lawyers for local clients.[135] This legal monopoly allows regulators to limit competition from foreign lawyers by imposing barriers to entry, thereby restricting the practice of law to only those admitted in each country.[136] However, as countries increasingly engage in cross-border trade in goods and services, there is a growing need to encourage uniformity in laws. For instance, areas of law such as intellectual property, contract and data protection have achieved a significant level of legal harmonisation across countries. Many countries adopt similar provisions in these areas, often derived from international instruments that serve as models. Therefore, it can be argued that lawyers' specialised knowledge in these areas should be the primary consideration when assessing competence, rather than relying solely on the geographical borders of their country of licensure.[137]

Furthermore, the proliferation of online resources and information has democratised access to knowledge, enabling lawyers to gain insights that aid them in providing legal assistance related to the laws of other jurisdictions in which they may not be qualified to practise. These legal services can also be provided remotely without lawyers needing to be physically present in the country where they are not licensed to practise. While it is true that localised knowledge is relevant, as each national legal system has its own distinct legal nuances and cultural considerations,[138] it is important to recognise that globalisation of knowledge serves as a balancing act. The globalisation of knowledge involves the global exchange and transformation of knowledge traditions, resulting in the emergence of new consensual knowledge.[139] This process leads to the globalisation of local knowledge traditions and the diffusion of new bodies of knowledge on a global scale.

Consequently, the interplay of the various factors discussed in this article increases the likelihood of changes in the regulation of cross-border legal practice. Technology does not have the mono-causal effect of altering cross-border legal practice regulations; its impact depends on the presence of other variables that support efforts to liberalise lawyer regulation in a cross-border context. Given the globalised environment shaped by these factors, it is necessary to reassess the historical justifications for restrictions on foreign lawyer mobility and determine whether regulatory reforms should be implemented, and if so the nature and extent of those reforms. This does not mean that assertion of sovereignty by nations will diminish;[140] rather, it questions the effectiveness of rules that fail to evolve and adapt to the forces of liberalisation.

[130] Worth, "The Transnational Practice of Law," 16.
[131] "Overhaul of Model Rule on Cross-Border Practice Initiated."
[132] "Overhaul of Model Rule on Cross-Border Practice Initiated."
[133] See generally, Bethlehem, "The End of Geography"; Goebel, "Legal Practice Rights of Domestic and Foreign Lawyers in the United States"; Godfrey, Law without Frontiers.
[134] Kosugi, "Regulation of Practice by Foreign Lawyers." This is not to say that there are no valid risks faced by consumers in using legal services provided by unauthorised (in this case, foreign lawyers) lawyers or non-lawyers. For a discussion of this as well as the regulatory paradox inherent in regulating non-lawyers similarly to lawyers, see generally Bell and Rogers, "Fit and Proper"
[135] Olsen, Lueck and Ransom, "Why Do States Regulate Admission to the Bar-Economic Theories and Empirical Evidence?" 254.
[136] "Legal Services Report"; Khachaturian and Riker, "Imports and Foreign Affiliate Sales of Legal Services in the United States," 1–2.
[137] Gillers, "A Profession, If You Can Keep It," 998.
[138] Liu, "Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market," 775.
[139] Papa and Wilkins, "Globalization, Lawyers and India," 178. "As globalization increases the flow of people and information cross borders, it inevitably leads to the interchange of knowledge traditions." See Papa and Wilkins, 188.
[140] Bloor, Understanding Global Politics, 63.

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