

Digital technology and administrative law

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Abstract:

The upsurge in digital technology, ranging from the Internet to artificial intelligence, provides the administrative court system with opportunities for making progress on the efficiency, rapidity and quality of the services delivered to litigants. Opposite these opportunities however are risks and worries that should not be underestimated. The dematerialization of proceedings is a first major change in the work methods of courts of administrative law. The advances in artificial intelligence are setting off deep but ambivalent changes, which must be better understood in order to control their effects. Otherwise, the principles of an independent, impartial and human justice will be endangered.

The development of the Internet, social media and digital platforms bears the promise of progress, innovation and positive changes, which are not to be discounted. But these trends also wreak disruption in all fields of economic and social activities: privacy, relations in the world of work, and in health, transportation and national defense, not to forget the administration of justice and, in particular, administrative courts.¹

Following the upsurge of the Internet and dematerialization, the opening of data on court decisions,² coupled with the growth of algorithms and artificial intelligence (AI), represents a novel, exciting challenge, namely “predictive justice”, a topic that must figure at the center of our thoughts about the future and of our plans and vigilance. The digital revolution is apparently disrupting both the recourse to a judge and the office of judge itself as well as the work methods of magistrates, court clerks and officers of the court.

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² Articles 20 and 21 of the Digital Republic Act provides for “open public data”; in particular, all court decisions must be made available to the public for free. Act n°2016-1321 of 7 October 2016 for a “digital republic” available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&categorieLien=id>.

For administrative jurisdictions, digital technology is ambivalent.

Digital technology's contribution to quality and efficiency

Thanks to digital technology, teleprocedures and dematerialization, the administrative justice system will provide public services more rapidly and efficiently at a lower cost. Many administrative formalities can now be done on line. In France's administrative court system, public administrations and the parties represented by a lawyer have to file case statements via an application (Télérecours) used for electronic communications during all phases of proceedings.³ A similar arrangement (Télérecours Citoyens) is being rolled out for parties not represented by a lawyer.⁴ This trend has already led to substantial savings in money (in particular postage) and time (in particular by freeing court clerks from repetitive, time-consuming tasks, such as registering, filing and notifying). By making communications between the parties and the court nearly instantaneous and improving the efficiency of hearings (thanks to the rapid circulation of reports of investigation), this dematerialization has made administrative jurisdictions more accessible.

A second, even deeper, trend is under way: predictive algorithms are coming. Based on the gradual opening of databases on case law to everyone, this revolution can accelerate settlements and increase security by making court decisions more predictable. By providing faster and, above all, more accurate and exhaustive information on case law, algorithms are going to reduce the time judges devote to search activities while keeping them informed about their colleagues' practices. This should, in turn, improve access to the law, equality before a court of law, and a convergence toward a stabilized, harmonized body of case law.

Furthermore, these digital tools will enable the parties to determine more accurately a case's chances of success and the best grounds for arguing it. This might lead a party to abandon an action in justice if a negative outcome is certain; but it could also alleviate the work of judges. By reducing the time spent conducting in-depth searches about the facts of the case and about comparable cases, algorithms will enable judges to offload time-consuming tasks and thus spend more time examining new or complex questions of law (CASSUTO 2017, VILLANI 2018a). Predictive justice will help recenter judges on the briefs where their expertise will add more value.

These trends will ultimately improve the celerity and efficiency of handling queries and build up confidence in justice, as court decisions are purged of contingency and as judges are freed from repetitive or less complicated tasks (GARAPON 2017).

The risks of digital technology for the office of judge and the access to justice

The advances made in digital technology should not cover up the risks that they bring.

First of all, might AI not make people lose their free will and become a substitute for it? AI will shift the tasks now done by people onto automatic systems that machine learning will make ever more autonomous. In the realm of justice, the automation of proceedings would be deeply disruptive, casting doubt on the essential characteristic of justice, namely that each case be examined for what it is, with its irreducible share of originality and complexity. Since algorithms mainly apply programmed rules for accomplishing specific tasks, they are incapable of answering open questions or of defining on their own the legal questions raised by a case. An algorithm does

³ Decree n°2016-1481 of 2 November 2016 on using teleprocedures in the proceedings of the Council of State and administrative tribunals, NOR: JUSC1619677D. Texts of French law are available at: <https://www.legifrance.gouv.fr/Droit-francais>.

⁴ Decree n°2018-251 of 6 April 2018 on using teleservices in the proceedings of the Council of State and administrative tribunals.

not seem capable of handling the distinctions that a judge discerns in the ranking of legal rules and the hierarchy of relations between national and European jurisdictions. For this reason, a judge must remain in control of the legal questions related to a case and of the interpretation of both the results produced by algorithms and the consequences to be drawn from them (ROUVIÈRE 2017).

Secondly, automation might “petrify” case law, whereas case law should help find a concrete solution to a case in litigation and, more broadly, be a means of keeping up with legislative, economic and social trends. The power of algorithms tends to crush spatiotemporal dimensions, since all data are processed together and simultaneously (CNIL 2017, pp. 30-31). As a consequence, it might assign excessive weight to majority decisions, which are not necessarily the most relevant. If lawyers know in advance the precise arguments that are grounded and those that are not, and if judges are dissuaded from standing back from majority trends in court decisions, the results produced by algorithms risk being repeated and amplified; and any “atypical” decision, even justified, risks being unacceptable unless special arguments back it up (BUAT-MENARD & GAMBIASI 2017). Given the function of case law in the formation and adaptation of French administrative law, the idea that algorithms might curb the administrative judge’s freedom is disturbing and worrisome.

Finally, the increasing use of digital technology and dematerialized procedures implies reinforcing procedural safeguards so that everyone has access to justice and so that the risks of corruption, abuse or the violation of data security be eliminated. This means seeing to it that the principles of the right to file a court action and of the right to a fair trial are upheld while guaranteeing the security of dematerialized procedures. The recourse to alternative methods (such as mediation) for settling litigation is to be encouraged, when possible, in order to avoid long, costly proceedings for lawsuits about which there is very little uncertainty. However the “prescience” of predictive algorithms should not create obstacles to instituting proceedings, especially when the results produced by algorithms (mainly in open configurations) are tainted with uncertainty. Data that are not fully reliable or might be biased should not be an impediment to the pursuit of an action in justice.

In conclusion, the flexibility of digital tools should neither impair the quality of proceedings nor lead to uncontrolled, counterproductive uses that reduce to naught the gains in efficiency.

Digital tools must abide by the fundamental principles of justice.

The independence of judges and their freedom to weigh arguments

The development of predictive algorithms should not lead AI to eventually take the place of the judge’s personal analysis and thoughts. Judges must continue exercising their duties in full independence by applying to the cases presented to them the relevant texts of law and pertinent conclusions drawn from case law. They have to weigh the facts and circumstances specific to each case in a setting that allows for a debate that must remain public and open to the parties represented. For security in justice, case law must not be overlooked, and random shifts in interpretations are to be avoided. However an analysis based on statistics and algorithms should not be used as a pretense for thoughtless, mimetic conduct (GARAPON 2017). Artificial and

human intelligence must combine and reinforce each other. The first cannot claim to replace the second (VILLANI 2018b). At present, this “mimetic” risk is limited. In France, Article 10 of an act of 6 January 1978 forbids, in principle, profiling a person or rendering a court decision by relying on automated data-processing.⁵

Algorithms subject to the principles of neutrality and transparency

Let us not presume that algorithms will be neutral. The results produced by predictive software do not provide impersonal information alone. They reflect a given situation and signal a tendency, trend or majority interpretation that feeds back into the machine’s decision-making processes. The algorithms used to calculate the risk of recidivism among offenders reproduce their developers’ social prejudices or biases (CORNILLE 2018). We must be lucid: algorithms risk yielding results that are performative or self-fulfilling, or even disruptive. For this reason, the methodology chosen to process open public data must be clear and transparent (MISSION... 2017, p. 25) so that users can compare and discuss the results, and obtain explanations about the differences or even the errors or biases that they observe. To not be passively dependent of what algorithms produce, the judge and the parties to a case must to be able to debate the contents and results of algorithms (those suggesting formulations and, even more, those proposing solutions). There must, insofar as possible, be guarantees about the traceability and regulation of algorithms; or at least, serious efforts in this sense must be made.

The hierarchy of case law

For judges and lawyers to be able to find their bearings in a situation with proliferating information, exhaustive and interactive, the hierarchy of case law must be respected.

Open public data tends to erase the distinctions between the levels at which court decisions have been made, and to take issue with any hierarchy in judicial decision-making. It is all the same, everything is equivalent. Nonetheless, decisions by upper courts are, in the mass of case law, milestones that the multitude of decisions about specific cases must not hide from view (STAHL 2016). It is, therefore, important to maintain a ranking of court decisions as a function of the courts (first instance, appellate and supreme) that have issued them.

Adapting the legal framework is necessary to cope with the digital revolution and the AI tools now in the pipe line. In the field of public law, administrative judges must be fully involved in establishing this framework. Digital technology undeniably opens the way toward progress, which administrative justice can use to continue providing efficient services to litigants while, at the same time, seeing to the intangibility of its fundamental principles, in particular the principles of a justice that is independent, impartial, transparent, human and balanced, that beware of automatic reflexes. Digital technology and the uses of algorithms must be regulated for service to human beings. For reasons of transparency and fairness, all stakeholders, public and private, must be made responsible.⁶

⁵ Article 10 of act n°78-17 of 6 January 1978: “No decision in justice involving an assessment of the behavior of a person can be grounded on an automated processing of personal data for evaluating certain aspects of his personality. No decision with legal effects on a person can be made only on the grounds of an automated processing of data for defining the person’s profile or evaluating certain aspects of his personality”. Available at: <https://www.legifrance.gouv.fr/affichTexte.do?dateTexte=20181012&cidTexte=JORFTEXT000000886460&fastPos=1&fastReqId=517212989&oldAction=rechExpTexteCode>.

⁶ See proposal n°4 in CONSEIL D’ÉTAT (2017, p. 115).

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