Digital access to the law

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Abstract:
Access to the law evokes the transparency of the rule of law and of the interpretation of the law by judges. The website Légifrance provides access to French laws and decrees; but open data on court decisions is still piecemeal and incomplete. Enshrined in the 2016 Lemaire Act for a Digital Republic, the principle of open public data is unsettling traditions and raising questions about the supremacy of higher courts to control case law, including decisions by lower-court judges. By requiring anonymity and preventing the identification of the parties to a case, this principle risks eventually making court decisions more abstract, removed from the facts of the case. Above all, it challenges our vision of justice by letting us glimpse a "predictive justice", whereby computers pronounce decisions by using models built from precedents. What characterizes predictive justice — besides its violation of the principle of an individual examination of cases and its incapacity for factoring into its decisions the finer points that serve as grounds for decisions — is its conservatism. Fully turned toward the past, it risks petrifying jurisprudence, thus making the law static and rigid.

Access to the law is a comprehensive notion referring to diverse procedures linked to the exercise of fundamental freedoms. It obviously refers to the right of recourse to the law, to a judge, if need be with the assistance of a lawyer. But the primary referents are the transparency of legal rules, their accessibility independent of the recourse to any jurisdiction. Everyone has the right to know the legal rules that are likely to be applied to his/her case, and the state's duty is to see to the availability of this information. For legislative and regulatory texts, this preoccupation reaches back in time. The ancestry of France's official journal is usually dated back to Théophraste Renaudot's *La Gazette*, founded in 1631. Since a decree of 5 November 1870, the *Journal officiel* (nowadays dematerialized) has the monopoly for the official publication of legislative and regulatory acts.[1]

A similar trend has arisen for access to court decisions but with a significant difference, since this diffusion has been under the control of supreme jurisdictions. When creating a court of appeals, the act of 27 November / 1 December 1790 required printing all its rulings; this took the form of "*posters and notices*" with a press run of a few hundred copies. These rulings were incorporated in an official bulletin that became, in 1798, the *Bulletin officiel de la Cour de cassation*. Much more recently, an act of 23 July 1947 created, as part of this supreme appellate court in civil and penal justice, a documentation service with the assignment of making a central file on case law. Meanwhile, lawyers assembled, for the first time, the rulings of the Conseil d'État, the supreme administrative court of appeals, in a collection that would become the *recueil Lebon*. After WW II, this Council of State set up its own documentation service. These parallel trends have fostered a culture and history about access to the law.

[1] This article, including quotations from French sources, has been translated from French by Noal Mellott (Omaha Beach, France).

Technological changes stemming from the digitization of files and access to them via the Internet did not modify this traditional approach right away. A decree of 24 October 1984 set up a public service of legal databases, which has become, under a decree of 7 August 2002, a public service for the diffusion of the law via the internet.[2] The same data were still available, namely: all laws and decrees but a rather small proportion of court decisions, all of this on the website Légifrance.[3] These two supreme appellate courts, Cour de Cassation and Conseil d'État, continued choosing the decisions to be diffused, including those made by lower-court judges. Kept in a database (JuriCa) managed by the Cour de Cassation, these appellate court decisions were accessible only to the personnel of the Ministry of Justice. They were also sold to private publishing houses, which incorporated them in databases accessible to their subscribers. The access to case law was reserved for specialists.

The Lemaire Act of 7 October 2016 for a "digital republic" upset this traditional handling of court decisions.[4] Articles 20 and 21 laid down the principle of diffusing all court decisions that, without any selection, would be limited only by considerations of privacy and of the risks of identifying the persons mentioned. This deprived the two supreme jurisdictions of the privilege of making a selection among their rulings. Furthermore, the decisions made by lower courts are to become part of a corpus of big data on court decisions.

With this diffusion comes the right to reuse the data. This soon led to the development of private companies known as "legaltechs". These organizations do not just diffuse information; they use artificial intelligence (AI) to process legal data. Their efficient AI tools can do profiling, make rankings, and calculate statistics. It thus becomes technically possible to precisely calculate the chance of a given litigation being successful or the exact amount of the damages to be awarded for a tort, or even to identify the judges who are generous in cases of alimony.

Digital access to the law thus has a much higher potential, which cannot yet be gauged, than the mere diffusion of legal texts and court decisions. However we can ask questions about how this digital access will disrupt relations to the law and its contents and alter the making of court decisions.

The relation to the law: Vertical or horizontal?

Opening access to all court decisions has two "horizontal" aspects.

First of all, it concerns users, since the transparency of court decisions is intended potentially for everyone, legal professionals as well as ordinary citizens, claimants or even the merely curious. Although the principle of open public data eliminates intermediaries in the access to public information, it does not mean democratization. Search engines collect court decisions and put them in order but do not explain them. The role of the lawyer as an intermediary is altered but not threatened. By incorporating statistical analyses, algorithms will enable lawyers to offer their clients more granular analyses of the chances for a successful court action.

The second aspect has to do with case law. The purely quantitative approach to open data makes accessible all decisions not only of the supreme jurisdictions but also of lower-court judges. The traditional superiority of the rulings made by the Conseil d'État and the Cour de Cassation seems threatened. Lawyers and judges might be tempted to draw directly on the decisions made by lower courts, which are closer to the facts of the cases being pressed or are more recent than rulings by the supreme courts.

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[2] Décret n° 2002-1064 du 7 août 2002 relatif au service public de la diffusion du droit par Internet, *Journal Officiel* of 9 August 2002, p. 13655.

[3] https://www.legifrance.gouv.fr/Droit-francais

[4] Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, *Journal Officiel* of 8 October 2016, text n° 1. Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&categorieLien=id.

The two supreme jurisdictions have realized the risk of losing control over the body of case law based on lower-court decisions. In February 2018, Jean-Marc Sauvé, vice-president of the Council of State, declared during a conference organized by lawyers admitted to the Council's Bar, "*Open data tends to level differences between court decisions, to undo any ranking between the different forms of decisions. Everything is alike and equivalent.*" Lurking in this declaration is a warning. Judges on the two supreme courts have the task of making case law coherent and pointing out important decisions, a task not to be left to algorithms. The current policy, mainly promoted by persons in charge of the highest courts, is intended to reestablish verticality by ranking decisions and recognizing the supremacy of the high courts. During the aforementioned conference, Bertrand Louvel, a presiding judge on the Cour de Cassation, declared that open data is "*a wide-ranging trend that the Cour de Cassation has the duty of piloting*". Open public data is, therefore, a key issue of governance. The very first recommendation made by the Cadiet report to the minister of Justice in January 2018 was formulated as follows: "*Assign to the supreme jurisdictions the piloting of arrangements for the automated collection of decisions from their respective jurisdictions […] and the management of the thus formed databases.*"[5]

This choice of verticality is based on the idea of public service and the determination to preserve the unity of case law. Implementing it is still a sensitive matter however. For want of financial and technical means, the supreme jurisdictions are having difficulty assuming the role of pilot. In contrast, private firms (legaltechs) have these means; and the law authorizes them to collect and reuse data. The principle of open data when applied to court decisions risks producing a market commodity before any public service is ready to enter into operation.

The contents of court decisions as open data

Under the Lemaire Act, court decisions are to made available to the public "*while upholding the privacy of the persons concerned*". In a 2001 decision, the National Commission on Informatics and Liberty (CNIL) demanded that the names and addresses of the parties and of witnesses be concealed in any court decision diffused on the Internet, without the concerned having to request this concealment.[6] Simply applying the principle of anonymity no longer suffices however, since anonymization does not keep persons from being re-identified.[7]

The EU's General Data Protection Regulation, which went into effect on 25 May 2018, imposes strong conditions on processing personal data, which can only be stored with the consent of the concerned.[8] Paragraph 26 of the GDPR's preamble allows, however, for exempting certain data (which could be the case of court decisions) from becoming open data: "*The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable*". Files must, therefore, be designed so as to prevent the re-identification of persons.

Anonymizing any element of information capable of being used to re-identify someone would reduce a court decision to a sort of pure abstraction separate from any factual elements. This runs diametrically opposite to all of case law, which can be interpreted as a constant accrual of a control (in particular, before administrative judges) of the facts, their exactitude and

[5] CADIET L. (2017) "L'*open data* des décisions de justice", a report at the request of the Ministry of Justice on court decisions as open public data. Available via http://www.justice.gouv.fr/publication/open_data_rapport.pdf.

[6] Commission Nationale de l'Informatique et des Libertés, Decision n° 01-057 of 29 November 2001, with a recommendation about the diffusion of personal data on the Internet by databases of case law.

[7] Researchers at MIT have worked on transactions of more than a million credit card users without any identifying element. By crossing the data with four "*spatiotemporal points*" (geographical location, date and time of transactions), they managed to re-identify 90% of the users. DE MONTJOYE Y.A., RADAELLI L., KUMAR SINGH V. & PENTLAND A. (2015) "Unique in the shopping mall: On the reidentifiability of credit card metadata", *Science*, 347(6221), pp. 536-539.

[8] The GDPR (General Data Protection Regulation): "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data". Available via: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1478961410763&uri=CELEX:32016R0679.

qualification. Can we imagine not identifying the litigants in the ruling by the Council of State on 25 October 2017, which ordered that the immense cross from the statue of Pope Jean-Paul II in Ploërmel be taken down?[9] To prevent re-identification, it would be necessary to anonymize the names not just of the litigants but also of the city and, probably too, of the pope. It would be hard to understand a court decision fully separated from its factual elements, since the latter are the decision's very grounds.

Court decisions: Predictive justice?

Including court decisions among the public data to be opened lets us glimpse the possibility of predictive justice. Owing to AI and machine learning, *i.e.*, the algorithm's ability to evolve on its own, we can theoretically imagine a computer making a court decision by building a model from precedents. This possibility might seem attractive, since it is often presented as the guarantee of strict equality before the law, and since legal rules will be interpreted in the same way for all claimants. The quality of court decisions could thus be improved, insofar as this transparency leads to clarifying the grounds underlying decisions. Above all, predictive justice would help cope with congestion in court rooms, by rapidly providing fully standardized decisions for the mass of routine cases of the same sort that have the same grounds in the law. This could be imagined for questions related to court deportation orders or to the amount of an award in case of divorce or abusive dismissal by an employer.

However the first experiments with predictive justice have proven disappointing. The appellate courts in Rennes and Douai were asked to test such software (Predictice) in early 2017, but only for calculating the amount of redundancy payments in dismissals without "real and serious cause". Even though the set of cases was narrowly defined, the experiment turned out to be a failure. The Ministry of Justice declared that the software "*needs to be significantly improved […and] does not present, in its current state, a gain for magistrates*".[10] The software only took account of a part (the disposition) of each court decision and was unable to gauge the subtle differences in the headnotes or to reckon with the compensation awarded under out-of-court settlements. In any case, a preliminary step is to devote very deep thought to predictive justice, which should not be subordinated to the software's efficiency.

Given the current state of the law, predictive justice violates the principle of an examination of each individual case. This precludes automatic decision-making. To comply with substantive law, predictive justice would have to be used as a computer-assisted justice, the software offering to judges assistance in making a decision but without making the decision in their place. Above all, algorithms should not be forced upon judges if the latter are incapable of controlling them and making sure that they do not give preference to one line of legal reasoning to the detriment of another or that erroneous data have not been introduced whether by the fault of the system or by criminal intent.

Furthermore, the transparency of algorithms is incompatible with machine learning, a technique that fosters the software's autonomous development as the algorithm acquires the faculty of learning from its own decisions. The myth of the computer slipping out of human control is becoming reality. Judges risk being pushed out of the function of making decisions as they cope with a system that they did not design and that they simply use and, as users, have access only to the result of a series of complicated calculations. We can thus imagine the computer, like Hal in *2001: A Space Odyssey,* replying to the judge, "*I know that you and Frank were planning to disconnect me. And I'm afraid that's something I cannot allow to happen.*" Without going so far as science fiction, we can evidently conclude that predictive justice should

[9] CE, 25 October 2017, Fédération morbihannaise de la Libre Pensée et autres, req. n°369990.

[10] Reply of the minister of Justice to the written question n° 01823 from Jérôme Durain, *Journal Officiel*, Senate, 28 December 2017, p. 4694.

not develop unless its algorithms are known and can be challenged during hearings in the courtroom.

Though apparently modern, predictive justice turns out to be conservative in its very essence. Algorithms are incapable of making a decision to grant an exemption, as a judge might do in a special situation. For example, an administrative tribunal decided, in a single specific case, to override a common law rule that prohibits women from being inseminated with the gametes of a deceased husband.[11] Nor does predictive justice, which is merely quantitative, know how to handle reversals in case law. Turned toward the past, it produces decisions that merely come out of a statistical analysis of precedents. Seen from this angle, predictive justice is the negation of the very idea of justice, which is based on fairness, individuality, being convinced beyond reasonable doubt — and, for sure, not on a quantitative analysis.

Opening public data on court decisions might be the best or worse solution. Thanks to this transparency, citizens can be informed about the decisions made in the name of the French people, and judges will be forced to carefully state the grounds of their decisions. But if not controlled, open data on court decisions risks leading to an automated, conservative justice that will push claimants toward alternative means for settling their disputes (means often expensive and less reliable than the decisions made by courts of law).

[11] CE, ord. réf. 31 May 2016, Mme C. A., req. n°396848.