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van State



**Colloquium organized by the Council of State  
of the Netherlands and ACA-Europe**

***“An exploration of Technology and the Law”***

The Hague 14 May 2018

**Answers to questionnaire: United Kingdom**



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## **An exploration of Technology and the Law – *Response from UKSC***

Technological advances are changing society more profoundly (and more rapidly) than ever before. This could have far-reaching implications for legislation and case law in the near future or even today.

A debate is now under way in various European countries about recent and future technological advances, including the development of self-driving cars, the increasing use of big data and the emergence of self-learning supercomputers, such as IBM's Watson. The fundamental question being asked is what social impacts these developments will have.

A debate is also going on among Europe's administrative courts and legislative advisory bodies about the relationship between these accelerating technological advances and the law, which is not evolving at the same pace. Precisely where and to what extent these developments intersect with the work of administrative courts and legislative advisory bodies is a theme we aim to address at the ACA Colloquium on 15 May 2018. This is unlikely to be the last time that the ACA will need to consider the relationship between technology and the law. Therefore another aim of the meeting will be to think about an agenda for the future and how we can keep up with developments as they unfold.

Given the breadth of the subject area and the limited time available at the Colloquium, the theme of technology and the law needs to be clearly delineated and specified. To this end, we would like to know which specific topics within this broad theme each country considers relevant.

Below you will find a number of exploratory questions relating to five potential themes that I have identified: digital decision-making, digital proceedings, digital dispute settlement, technology-neutral legislation and digital enforcement. These are followed by two open questions to encourage you to share your ideas on other relevant topics that we might discuss at our Colloquium on 15 May next year.

I would be grateful if you would send me your response by 15 September 2017 at the latest. After analysing the responses and selecting the definitive topics, we will send you a second, more comprehensive questionnaire in October.

## Digital decision-making

*The use of 'Big Data' and algorithms enables decisions to be taken more rapidly and more frequently, for example on whether to issue permits, award grants or pay benefits. Critics warn of 'government by robots' that is hard to keep in check, while proponents argue that such technology will improve the justification and efficiency of decision-making.*

1. Do administrative bodies in your country make use of automated decision-making? By 'automated decision-making' we mean decisions based on automated files or computer models.

- *I assume so, but the Supreme Court has no direct access to this information*

Please provide an example.

N/A

Please also indicate what consequences automated decision-making has for you when assessing decisions in a judicial capacity and/or what particular aspects you have to consider when drafting advisory opinions on legislative proposals relating to this topic.

- *None (The UK Supreme Court has no advisory role on legislative proposals.)*

Is there a public debate in your country on this issue? Is the introduction of such a system under consideration? What advantages and disadvantages have been identified?

- *Yes, but not one involving as yet the role of the courts. Decision making by algorithm is said by some to be cheaper and more reliable than decision making by humans. It is heavily dependent upon the construction of a sufficient database.*

Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

- *Not as far as the UK Supreme Court is concerned, since we have no direct experience of relevant cases.*

## Digital proceedings

*An increasing number of countries now permit (or require) proceedings to be conducted digitally. The benefits of such a system are usually emphasised (e.g. efficiency gains), but how do digital proceedings relate in practice to principles such as access to the courts?*

2. Are digital (paperless) forms of legal proceedings used in your country? Is it possible in your country to conduct proceedings digitally, for example online? If so, is this optional or mandatory?

o Yes, but practices vary between divisions. My colleague Lord Briggs (who conducted a review of practice in the Civil Courts) gives the following information:

*The only fully digital platform currently in use is the Traffic Penalty Tribunal, which deals mainly with cases about parking fines and non-payment of road tolls. It appears to work very well, albeit within a limited subject matter.*

*There are a number of partially paperless types of procedure:*

1. *E Filing in the Business and Property Courts. This streamlines issue, filing and the storage of court files, and has recently become compulsory for professionally represented court users. It permits limited case management without paper, but not paperless trials.*

2. *Money Claims Online ("MCOL") and Possession Claims Online ("PCOL") in the County Court. These are rudimentary first generation systems for online issue, but the Case reverts to paper after issue, if the defendant responds.*

3. *Bulk Claims: this is a system enabling large utilities to issue numerous small money claims by direct data transfer to the court. The system is quite new, liked by large utilities, but requires them to install very expensive IT for communication with the court. Like MCOL the process reverts to paper soon after issue.*

4. *Now being developed: the Online Solutions Court. This will enable a fully digital system of communication with the court, for issue, filing, uploading of evidence, response and ADR, initially for money claims under £25,000, using a new procedure and a system designed for operation by lay court users, with minimal intervention by lawyers. The first building bricks are being tested (within the County Court) on limited real life cases, with encouraging results.*

5. *Full digitisation of all civil money claims (above £25,000), along existing procedural lines, using common IT components usable or adaptable by other courts (Family and Tribunals). This is designed to facilitate paperless trials, but the common components are at an early stage of development.*

6. *Divorce online (further details can be provided by the Family Division)*

7. *Non-contentious Probate online (not really litigation).*

8. *Crime: well along the route to paperless trials.*

Please describe your experiences, positive and/or negative.

*See above.*

Would you like to see the introduction of digital proceedings in your country? Is this under consideration? Is there a public debate on this issue? What advantages and disadvantages have been identified?

- *Yes, there is a lively debate on the issue. I attach a paper given by Lord Briggs in October 2016 describing progress and plans (as well as some comparisons with other countries including The Netherlands).*

Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

- *Yes. It would be interesting to compare experiences of different systems in different countries.*

Digital dispute settlement in the public sector without involving the courts

*If a party knows in advance that they have virtually no chance of winning a case, there is little point in instituting proceedings. Computer programs can analyse tens of thousands of judgments and use the results to predict the outcome and the chance of success or failure.*

3. In your country, are you aware of parties using computer systems within the public domain in the settlement of disputes prior to possible court proceedings? Examples may include systems that predict the outcomes of new cases on the basis of case law analysis, allowing parties to decide whether or not to pursue legal proceedings or settle out of court.

- *The UK Supreme Court has no relevant information or experience of this practice*

o Yes

Please provide an example. Is it only parties to proceedings that make use of such systems, or do the courts also use them to assist them in reaching judgments? Is there any debate in your country on the use of such systems, for example in relation to fundamental rights and legal protection?

N/A

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o No

Would you like to see such systems introduced? Is this under consideration? Is there a public debate in your country on this issue? What advantages and disadvantages have been identified?

- *I have no relevant information or experience on this topic. I am not aware of any public debate*

Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

- *Not from the point of view of the UK Supreme Court*

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Technology-neutral legislation

*If a statutory definition contains the words 'written' or 'in writing', does the definition also apply in a paperless context? If a self-driving car causes an accident, who is liable? The software manufacturer?*

4. Does your country have experience of legislation framed in a way that is technology-neutral or that otherwise takes account of future technological developments?

o Yes

Please provide an example in the context of your legislative advisory role and indicate whether or not the legislation in question succeeded in this regard, and why.

- *I find it difficult to answer these questions in a general way. The legislature and the courts have of course had to address issues resulting from paperless transactions, and have done so without particular problems.*
- *The question of liability for an accident caused by a self-driving car (as far as I am aware) has not yet arisen. If and when it does and assuming no legislative intervention, the common law will no doubt find a solution (as it has done for technological developments over the last 1,000 years).*

o No

Does the lack of such legislation cause problems in your society or in other respects? Please provide an example.

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5. How do the courts (administrative or otherwise) in your country deal with legislation that is framed in terms of specific technologies? Do they apply strict interpretations in such cases or is it possible, or even customary, to apply a broader interpretation in order to resolve a problem? Is there any form of debate on this topic, for example with regard to fundamental rights?

- *It is impossible to provide a general answer to the question. The approach of the courts is governed by the particular context, legal and factual.*

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

- No

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- Digital enforcement

*More and more European countries are using digital data to enforce a range of legislation. In the Netherlands, digital data is used for a variety of purposes, such as vehicle speed checks on motorways and in lorries (by means of a tachograph), corporate and private tax returns filed online, and risk profiles developed by law enforcement authorities. In terms of fundamental rights and other such issues, what are the legal boundaries of digital enforcement?*

6. Do you know of cases in your country where automated data analyses are used for enforcement-related purposes, for instance to identify risk profiles? Perhaps the tax authorities use data analysis from various sources, for example, to perform targeted audits?

Yes

Please provide an example. What specific angles of approach do you, as a legislative adviser and/or administrative judge, consider important in this regard?

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No

Is the introduction of digital enforcement under consideration? Is there a public debate in your country on this issue? What advantages and disadvantages have been identified?

- *I am not aware of any significant cases raising these issues, nor of any general public debate. Specific issues may arise in particular cases, but they have not reached the Supreme Court.*

Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

- No

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Open-ended question for administrative jurisdictions

Are there technological developments (other than those already mentioned) that you believe will soon have far-reaching consequences for administrative courts (particularly developments you have already encountered or expect to encounter)?

Please list these developments in order of importance and explain why you consider them significant. Please also indicate whether you would like to discuss one or more of these topics in more detail in The Hague.

- *I am not aware of any other relevant technological developments*

- Open-ended question for legislative advisory bodies

Are there technological developments (other than those already mentioned) that you have already encountered or expect to encounter and believe will soon have far-reaching consequences for the legislative process and legislative advisory bodies in general?

Please list the developments in order of importance and explain why you consider them significant. Please also indicate whether you would like to discuss one or more of these topics in more detail in The Hague.

- *As already noted, the UK Supreme Court has no legislative advisory role*

*Robert Carnwath  
UKSC 7.11.17*