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“An exploration of Technology and the Law”

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Answers to questionnaire: Spain



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An exploration of Technology and the Law

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.

x Yes

Please provide an example.

There are certain public bodies which indeed make use of automated decision-making for certain proceedings, yet in principle with human supervision, i.e. decisions are signed by physical persons. This is the case, for instance, of speed fines and other sanctions imposed on objective standards which can be measured with machines. Tax returns filed online are another example. Developments might be expected at the local level following the example of the so-called smart cities. There is a network of smart cities in Spain, being one the main lines of work precisely the topic discussed here.

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.

The automatism and the possible omission of details have to be taken into account when this kind of automated decisions are judicially examined. For example, administrative judges in Madrid have quashed traffic fines for passing a red traffic light considering that the length of the amber light was too small in relation to the recommended by the State Traffic Office (Dirección General de Tráfico- DGT) – three seconds instead of recommended 35 seconds-.

In these cases, a clear legal framework is necessary, where objective parameters are clearly set. As a member of the judiciary or as a legal advisor, in connection with the former, it is important to bear in mind the level of discretion the administrative authority has in order to check or modulate the "decision" the machine has taken.

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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?

Such a debate in general terms does not exist. Yet in particular cases there are indeed important discussions. This is the case, for instance, of the network of smart cities mentioned above. Since the network is pushing for a more general use of technologies in the cities, in principle only advantages in the practical sense have been underlined. In our opinion, the legal risks and challenges of this use are still to be discussed. Main legal concerns include liability, as no particular subject may be found responsible of a specific decision.

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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?

We consider that we could focus on the following points: 1) what legal framework is necessary for this type of proceedings?; 2) what is the degree of discretion existing in this proceedings?; 3) should there be an administrative body supervising the decision taken mechanically?; 4) if yes, what kind of body?; 5) if yes, what kind of supervision power does this body have?; 6) what kind of liability might arise if a harm happens deriving from that decision?

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?

x Yes

Please describe your experiences, positive and/or negative.

- In Spain, from 1 January 2016, it's mandatory for professionals working in the justice system to use the telematic systems existing for filing submissions and documents and making procedural acts; for people who are not professionals working in the justice system it's mandatory from 1 January 2017. (Disposición final 12.2 de la Ley 42/2015, de 5 de octubre, de reforma de la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil).

Our positive experiences are related to having more free space for working, less queues in the Registry,...

Our negative experiences concentrate on the difficulties of the change of mentality. Sometimes it seems more difficult to find a concrete file in a digital document – in the case of a whole digital proceeding coming from another court, the reason could be that it seems that people who make that digital conversion don't have legal knowledge-. Big files seem also more difficult to read and to select the most relevant parts in them, especially if you have to turn back later to them. The consequence is that the main documents of a digital proceeding are printed on paper for making the work easier.

- In the administrative field, the "Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas" has introduced the electronic administration, although some important aspects of that law– for example, the Electronic General Point of Access to the Administration- will enter into force in 2018.

In general we could say that digital/paperless proceedings are increasingly used by Spanish public bodies. It is compulsory in areas in which it is presumed that citizens are at ease with this type of proceedings. For instance, grant applications for University, or other type of public aids are examples of this. Also taxpayers see how digital proceedings are the main way to pay taxes.

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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?

As explained above, there is a trend towards an increasing number of proceedings turned digital. There is a public debate on this issue, yet mainly concentrated among legal scholars. Benefits of this are clear: less paper, time saving, transparency and objectivity. Nevertheless, risks or disadvantages also exist. We could mainly refer to

what has been called the digital gap existing between those citizens used to technologies and those not only not used to them but also those who don't have easy access both due to lack of means and to lack of education (such as people living in rural areas).

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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?

Yes. Advantages and disadvantages of working just with digital documents in a court of justice. Need for investment in material resources for a smoother transition. Also, the debate on the digital gap should be conducted at the Colloquium.

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.

x 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?

Important law firms use that kind of computer systems on the basis of case law analysis for trying to predict the possibilities of success of their customers before pursuing legal action. Only parties. At the moment, there's no debate in my country on the use of such systems.

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?

This is in principle not under consideration at the moment.

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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?

I don't consider this topic especially suitable for a more detailed exchange of ideas at the Colloquium.

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?

x 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.

The Spanish Supreme Court does not have a legislative advisory role, therefore no experience can be related here.

In classical administrative law for long a "clause of progress" has existed in public procurements, whereby any technological innovation which might appear might have an impact on a specific contract.

Further debate on this has been provoked by the use of computers, software and the Internet at public administrations. For a public body to be technology neutral implies that it might not require the use of a specific private software, which the citizen might be forced to buy and/or use in order to interact with that public body.

Also, the expression of technological neutrality has been used in the framework of freedoms and rights of citizens which might be challenged in the Internet.

Another example of legislation in Spain that takes account of technological developments is "Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal" that transposed into national law the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Spanish Supreme Court (Chamber for Administrative Proceedings) has applied this law many times. In its recent judgement of 15 march 2016, RC 804/2015, considers that Google Spain can't be a party for attending the requests regarding to the right "to be forgotten" on the internet, because that company doesn't determine the purposes and means of the processing of personal data in dispute, but only Google Inc..

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

No further debates can be related here.

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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?

The fact that different methods of interpretation exist makes it possible for judges to decide in each particular case whether to stick to the literal meaning of a specific expression or to give it a broader sense, which allow them to solve the case. No general debate exists on this, with the exception of fundamental rights and its exercise in the Internet (mainly, freedom of expression and freedom of information).

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?

This is indeed an interesting topic according to the questions that have been addressed above. One particular issue which has not been mentioned might be of interest and it is the following. Norms are increasingly more technical and also norms increasingly include definitions of the main concepts that are subject to regulation. One might consider that this is a consequence of EU law, since Directives (mainly) usually include a set of definitions common to all Member States. This has the apparent advantage of providing homogeneity and a uniform application of law, but it can also generate problems, as long as it avoids judges to use broad interpretations in order to solve a particular case. Therefore, the use of definitions in general as a feature of modern law, in connection to the debate on technology that is being discussed here, should be brought to the Colloquium.

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?

x 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?

The tax authorities use data analysis to perform targeted audits. I consider an important angle in this regard to respect the affected part's right to a hearing and defense.

o 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?

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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?

As long as other countries use this type of enforcement, we consider of interest an exchange of ideas, in order to learn from other experiences and see whether those solutions might be applicable also in Spain (or, adversely, if it is something that should be avoided).

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.

- 1- Oral trials recordings replacing written minutes are relevant because sometimes the recording isn't right and it can compel to repeat the trial. This can be especially significant for the criminal justice – thus, the Spanish Supreme Court's decision of 11 July 2017 (Criminal Chamber, RC 1736/2016) declared invalid the oral trial held because its bad recording and the lack of a written minute caused defencelessness for the accused. The same Court, Criminal Chamber, had adopted an agreement of 24 May 2017 expressing that the current documentation system of the oral trials was highly unsatisfying and should be complemented by a shorthand writing system-.

Although this problem has appeared in the criminal jurisdiction of Spain, anyway it could be interesting to discuss about this in The Hague.

- 2- General questions on liability might be of interest. For instance, the question regarding the protection of personal data when disseminating court judgments. In Spain there is a debate on this matter in relation to the existing databases of the General Council of the Judiciary, as well as in relation to the so-called transparency portal of the Supreme Court.

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.