

Digital technology, a lever for the efficiency and quality of justice in Europe

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Abstract:

Without any doubt, digital technology, since it shapes both processes and information about them, provides leverage for changing organizations by improving efficiency. For several years now but at different rates and with disparate results, European court systems have taken the introduction of this technology to be an opportunity. Although most tribunals are now equipped, the impact on the quality of services delivered to citizens varies widely. In 2016, the European Commission for the Efficiency of Justice (CEPEJ) not only updated its biennial assessment but also tried using a set of guidelines on cyberjustice to identify the factors of success in the 47 countries belonging to the Council of Europe. The CEPEJ is now examining the latest developments, such as open public data and artificial intelligence, in order to identify the advantages and limits with regard to the European Convention.

The digital transformation of our societies has not affected all European court systems alike. While information technology (IT) is being widely used, the ability to tap its full potential still varies widely. Whereas several European countries have already adopted very sophisticated, legal and technological approaches, others still seem to see IT as a theoretical topic and matter of conjecture. For them, the immediate preoccupation would be to begin using IT for managerial activities.¹

Assessing IT's impact on the efficiency and quality of justice figures among the initial assignments of the European Commission for the Efficiency of Justice (CEPEJ), which was founded on 18 September 2002 under Resolution n° Res(2202)12 of the Council of Europe. Other Council of Europe institutions have also worked out clear positions about using IT in the justice system so as to make efficiency and quality compatible with the rights to a fair trial under the European Convention on Human Rights. This provides a grid for analyzing the prospects in jurisdictions that are arising out of the development of open public data and artificial intelligence (AI).

The discussion herein will concentrate on the Council of Europe (which addresses a wide variety of situations in its 47 member states) from a twofold perspective: upholding fundamental rights (in particular articles 6 and 13 of the European Convention on Human Rights) and improving the efficiency of tribunals and the quality of their activities (the CEPEJ's assignment).

¹ This article has, along with quotations in French, been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor's approval, completed a few bibliographical references.

The Council of Europe's tools for monitoring the digital transformation of judicial systems

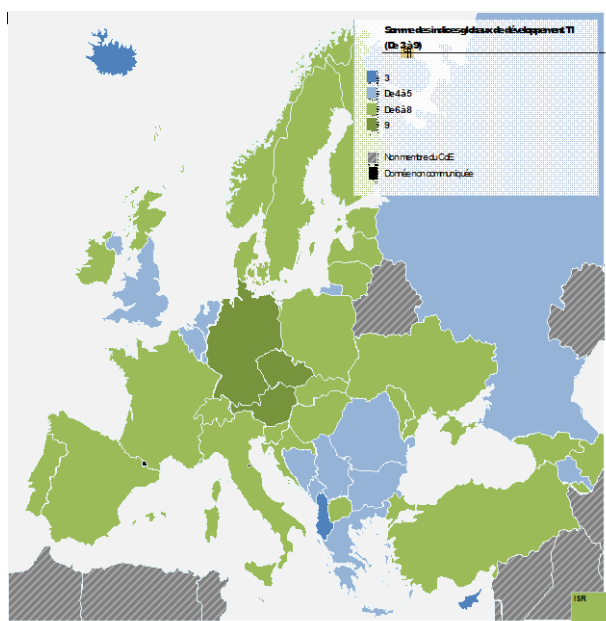
Two series of documents from the Council of Europe are presented herein. The first is supportive of technological developments for upholding fundamental rights, while the second has to do with assessments of IT's deployment and with the guidelines for the move toward "cyberjustice".

An opinion on justice and information technology by the Consultative Council of European Judges (CCJE) in 2011 has provided a general framework for using IT.² It does not concentrate on technical aspects (necessarily variable and dependent on the economic situation) but on fundamental, always current questions. While recognizing this technology's strong potential for change, this opinion has recalled the "*human and symbolic faces of justice*" (§6). In 2015, the Parliamentary Assembly of the Council of Europe (PACE) adopted the resolution "Access to justice and the Internet"³ and listed a set of principles more succinct but fully identical to the CCJE's. It called on member states to uphold articles 6 and 13 of the European Convention on Human Rights and develop applications that abide by the principles for a fair trial and recourse to a court of law.

Sum of information technology indicators in European judicial systems, 2014

For each of three fields — equipment, legal framework and methods of governance — a value was calculated by using the responses provided by member states, to indicate the level of development: from 1 (weak) to 3 (strong). The map depicts, for each country, the sum of these three indicators: from 3 (weak, dark blue) to 9 (strong, dark green).

SOURCE: CEPEJ (2016b, p. 14).



² Consultative Opinion n° (2011)14 of the Consultative Council of European Judges (CCJE) on "Justice and information technologies (IT)", 9 November 2011, CCJE(2011)2 Final. Available at <http://rm.coe.int/090000168074816b>.

³ Resolution of the Parliamentary Assembly of the Council of Europe, "Access to justice and the Internet: Potential and challenges", Res 2081 of 27 November 2015. Available via <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=22283&lang=en>.

In 2016, a CEPEJ work group presided by Jean-Paul Jean, a French judge, released, in addition to its two-year report, an in-depth study about how European courts were using IT in 2014 (CEPEJ 2016a). This study made, for the first time, an exhaustive inventory of the deployment of IT and assessed legislative frameworks and methods of governance. It divided IT into three categories: assistance to professionals in judicial systems, the administration of justice, and communications with professionals and users.

Among the noticeable achievements with positive effects on the efficiency of European judicial systems is the use of the managerial tools called “case management systems” (CMS), which apparently underlie major changes. Given their ability to manage workflows, these systems are a channel for connecting services (central offices, dematerialization, online monitoring of cases, production of statistics). Estonia’s e-File and Norway’s LOVISA are two noteworthy examples of efficient, operational solutions accepted by all users. On the contrary and despite considerable investments, the CMS Phénix in Belgium has never been realized. In 2014, Portugal had to quickly vote laws for extending deadlines because of the problems with making Citius, its CMS work. In Albania, and despite much support from other countries in Europe, courts seldom use ICMIS, which users deem unadapted. Although France has a comparatively average level of IT development, judges and civil servants have constantly criticized the software available to them.⁴ Among the other CMS software programs with promises for simplifying tasks in judicial systems, it is worth mentioning those that allow for making recordings (audio or video) of hearings that will serve as records (systems installed in Latvia and Spain, for instance) or as archives of decisions (in Poland, where statements recorded by the IT software are, by default, deemed reliable and used for transcriptions at the request of parties to the case).

The CEPEJ report tries to find relations between the indicators of efficiency,⁵ the amount of investments in IT and the level of development of IT applications in the aforementioned fields. Crossing this information lets us see that the member states that have apparently made the biggest financial investments have not systematically benefitted from a significantly improved capacity for settling cases. Other factors, along with investments, apparently have an impact on improving the speed and quality of court decisions. Among them are: public policy-making (for organizing workflows), the organization of programs with multidisciplinary teams close to users, and plans for studies on feedback, in particular about the return on investments (which can help make existing systems evolve).

The work group on quality, presided in 2016 by François Paychère, a Swiss judge, drafted guidelines on conducting the change toward cyberjustice (CEPEJ 2016b). It urges member states to switch from an equipment-based approach to a strategy for steering innovation. This shift seems evident in several countries, including France, but policies for designing and deploying digital tools are still often left to IT departments in many countries, which have not opted for a multidisciplinary approach.

⁴ For example: “Réforme de la justice: des magistrats critiquent la méthode Belloubet”, *Le Monde*, 14 February 2018, at http://www.lemonde.fr/police-justice/article/2018/02/14/des-magistrats-critiquent-la-methode-belloubet_5256697_1653578.html.

⁵ The CEPEJ report uses as indicators the clearance rate (the ratio of the number of resolved cases to the number of incoming cases) and the disposition time (the time theoretically needed to resolve pending cases in relation to the number of resolved cases during the year multiplied by 365).

The CEPEJ's viewpoint on two new digital trends

Following the foregoing remarks, we must take account of new phenomena. The CEPEJ, adopting an objective, forward-looking approach, has chosen to study two distinct topics with a potential for improving justice that is proportional to the risks conveyed: the publication of court decisions as open public data and the use of artificial intelligence in court systems.

Open data and court decisions

Borne by the principle of the transparency of actions by public authorities, the trend toward open public data is thought to be a factor that will improve the quality of justice. The CEPEJ's next biennial report (in October 2018) will take stock of current practices in the Council of Europe's 47 member states. However it is difficult to assess the impact of making judicial data open. Questions arise about how the data will be put to use, in particular by the private sector (for targeting groups such as lawyers, insurance companies or legal departments).

France's experience illustrates the questions raised by an ambitious, precursory policy. Breaking with the former practice of selecting the court decisions to be made available to a large public, France adopted, in 2016, a legal framework that requires tribunals to publish their decisions.⁶ Now, nearly all documents produced by jurisdictions will have to be published. The first president of the Court of Cassation has touted the gains expected from this, namely a better understanding of judicial activities and of precedents, and an improved quality for a judicial system now aware that it is under observation.⁷ This possibly ideal form of discipline for judicial authorities gains leverage via digital technology, but it is apparently to be qualified, for reasons both technical and substantial. Besides the difficulty of collecting court decisions (given the absence of a homogeneous information system and of a means for fully automating "pseudonymization"),⁸ the question arises of how all this will alter the rationale underlying the production of court decisions (BUAT-MÉNARD & GIAMBIASI 2017, p. 1483). The derivation of a literal "norm derived from numbers" related to court decisions of a certain type seems possible in some cases; but using it as a source of law still requires clarification: what meaning is produced by indistinctly processing the mass of decisions produced in a judicial system? Even if a graduated listing could be made for quantifiable decisions, it could not be predictive. As the decision of 23 October 2013 by the Court of Cassation has stated, the formation of such a list could not replace the law, nor reduce the room for judges to interpret the law.

Paradoxically, open data would be too lacking in transparency to deliver meaningful information to most people, since it literally means clicking on a hyperlink in order to download from a computerized database raw information, which few citizens know how to use as such. Attaching the virtues of transparency and information to open data is based on the hope that a third party will be able to make sense of all these data (not to mention the cost of doing so).

⁶ Article R433-3 of the Code de l'Organisation Judiciaire stated the principle of publishing "*decisions of special interest made by other jurisdictions in the judicial system*". Now, articles 20 and 21 of the Digital Republic Act have set the principle of total openness, except for certain decisions. 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..>

⁷ At the conferences on jurisprudence in the open data movement (14 October 2016) and on predictive justice (12 February 2018): https://www.courdecassation.fr/institution_1/revolution_numerique_7985/open_data_7821/jurisprudence_mouvement_7886/supplement_semaine_36233.html & <https://www.courdecassation.fr/IMG///Colloque%20-%20la%20justice%20pr%C3%A9dictive%20-%2012.02.2018%20-%20LOUVEL.pdf>.

⁸ The word "pseudonymization" appeared during debates about implementation of the EU's GDPR (General Data Protection Regulation of 27 April 2016), which contains a strict definition of "anonymization" as an operation that prevents any direct or indirect reidentification of a physical person. Given the impossibility of realizing this operation when processing court decisions, "pseudonymization" was coined to describe the replacement, in published court decisions, of a name by a letter.

Artificial intelligence and court decisions

Among the most advanced forms of technology introduced by the current digital transformation, the most spectacular is AI — a handy way of referring to an assortment of sciences and techniques (including automatic machine learning) that produce “intelligence” in the strict sense of the word. It is also the most discussed given that some legaltechs claim to be able to predict the outcome of lawsuits.⁹ In 2017, PACE passed a recommendation “Technological convergence, artificial intelligence and human rights” that calls on competent authorities to establish guidelines.¹⁰

A first look at this phenomenon leads us to distinguish the sales pitch for AI from the reality of designing, using and deploying it. The concrete, everyday use of predictive software by judges is, for now, inexistent in Council of Europe member states. Local experiments¹¹ and academic studies, such as the work on 584 decisions by the European Court of Human Rights (ALETRAS *et al.* 2016), are gauging the potentialities of such applications, but these actions have not spurred developments. Meanwhile, these potentialities increasingly exert attraction on public decision-makers, who imagine that the new technology could cope with longstanding problems related to the predictability of justice or the settlement of petty claims. Such prospects should, however, be qualified by looking at the mechanics of machine learning, which massively produces correlations between items in the lexical groups used to describe court decisions but without claiming to build a model for a legal argumentation (MENECEUR 2018). For some authors, there is a potentially high risk of turning “*freedom into destiny*” (GARAPON 2017) on the basis of the fallacious correlations made by using big data (CALUDE & LONGO 2017). Although we should relativize the debates that, in fact, revive the longstanding question about how to use statistics for normative purposes (BASDEVANT & MIGNARD 2018, p. 36.), the CEPEJ will provide, through a multidisciplinary approach, an objective expert assessment of these new technological advances in the field of the law. By the end of 2018, it will adopt an ethical charter, in line with the principles of the European Convention on Human Rights, about using AI in judicial systems.

⁹ We might cite the example of HART (Harm Assessment Risk Tool) in Great Britain, which is patterned on software (COMPAS) used in the United States. However it has been, for the time being, excluded from discussion in France because of the obvious questions about using it to assess the risk that defendants will become recidivists. The following remarks will, therefore, be restricted to general theoretical questions.

¹⁰ Recommendation 2102(2017) of the Parliamentary Assembly of the Council of Europe (PACE), 28 April 2018, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23726&lang=en>.

¹¹ In France for example, a panel of civil court judges within the jurisdictions of the appellate courts of Douai and Rennes experimented for a year with predictive software.

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