Legal tech, in view of the French judicial “analytics ban”

Session 7.3 - Tech readiness : digitalizing your law firm
FICPI 18th Forum, Vienna, 11 October 2019

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Article 33 of the Justice Reform Act of 23 March 2019

- (...) 

- The identity data of judges and courts’ clerks may not be re-used for the purpose or effect of evaluating, analyzing, comparing or predicting their actual or alleged professional practices.

- The violation of this provision shall be punished by [five years of imprisonment].

- (...)
French Judicial Analytics Ban: an object of scandal?

- “France Kicks Data Scientists Out of Its Courts”
  - Slate, 21 June 2019

- “French Law Banning Analytics About Judges Restricts Legitimate Use of Public Data”
  - Data Innovation.org, 9 July 2019

- “French judicial analytics ban undermines rule of law”
  - IDG Contributor Network, CIO, 3 July 2019

- “France Criminalises Research on Judges”
  - Verfassungsblog.de, 22 June 2019

- “[This illustrates] the indifference to liberal values (…) characteristic of the [French] government”
  - Lawliberty.org, 20 June 2019
1. Background to Art. 33 Reform of Justice Act
The new French Paradox

- France has been accused of shying away from public scrutiny and leading a rearguard fight against innovation

- However, the background of the ban goes back to the Digital Republic Act of 7 October 2016, which sets up an ambitious framework in favor of open data
  - Obliges administration to provide easy access to public data and databases
  - Large scope of public and semi-public data concerned
  - Facilitates re-use of public data, notably for new tech services (electronic format)
Court decisions in the Digital Republic Act (2016)

- Articles 20 & 21:

<table>
<thead>
<tr>
<th>Former system</th>
<th>New system</th>
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<tr>
<td>Database availability depends on:</td>
<td>Database availability of all court decisions (with a few exceptions)</td>
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<tr>
<td>- type of court</td>
<td>- Free of charge</td>
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<tr>
<td>- area of law</td>
<td>- <strong>Condition</strong>: “in respect of the privacy of the persons concerned”</td>
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<td>(e.g. Legifrance.gouv.fr; INPI database; private publishers…)</td>
<td></td>
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<tr>
<td>Copies of judgments available on demand at the court clerks’ offices</td>
<td>Unchanged</td>
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- *The condition was added by the Senate against the wishes of the government
Modalities are to be organized by a later Decree

- Not yet issued because massive open data on court decisions raises specific points of difficulty, notably with regard to privacy

- April 2017: Publication of Senate information Report on the Reform of justice
  - Calls for legislation to set up principles to supplement Art. 20 and 21

  - Commissioned by government

- Art. 33 Reform of Justice Act (2019): aims at clarifying some issues related to art. 20 & 21
2. Analysis of Art. 33 Reform of Justice Act
Issues related to the application of Art. 20 & 21

- Legal tech start-ups and the collection of decisions at the clerk’s office
  - Heavy workload for clerks (personnel, time, money)
  - Who should carry the burden?
  - Art. 33: “Third parties may ask for the delivery of copies, with the exception of claims which are abusive, notably with regard to their quantity, their frequency or their systematicity”
    - Aims directly at protecting clerk’s offices from legal tech requests covering huge amounts of court decisions

- Who are the “persons concerned” whose privacy should be respected?
  - Individuals who are parties or third parties in the dispute
    - Art. 33:
      - Individuals’ first name and family name must be erased
      - Other identification elements must also be erased when required by the necessity to protect their safety or privacy
  - What about judges, clerks, lawyers?
How can there be a debate on the anonymisation of judges?

- Contrary to common law systems, the French judiciary system is marked by the blurring of the personality of each judge
  
  “The judges of the nation are only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour“ (Montesquieu, The Spirit of the Laws (1748))
  
  — Judgments are not rendered in the name of “Judge X” but in the name of “the French people” by “the court of [place], Chamber [No.], panel [No.]”
  
  — The normal form of issuance is by a panel of 3 judges who rule collectively
    - Impersonal drafting
    - Secrecy of the deliberations; no dissent
    - Turnover (condition for career advancement)

- Debate on whether personal identification of judges has real relevance except for the parties and the judicial institutions
  
  — Art. 33: has opted for a compromise solution
    - For judges and clerks, no general obligation to erase identification elements, except if required by the necessity to protect their safety or privacy
The judicial “analytics ban”

- France has not made it illegal to conduct analytics based on the practice of the originator of the judgment
  - On the contrary, French legislation aims at opening an unprecedented number of court decisions for analysis and/or re-use
  - But origin = judicial entity, not individual judges

- How was this provision introduced?
  - Not an express recommendation of the Cadet Report
    - But the Cadet Report expressed the concerns of many stakeholders about the limitations and dangers of “predictive” tools in the judicial field
  - The ban was not in the original bill presented by the Government
    - Introduced by a Senate amendment, supported by the Government
The reasons alleged in favour of the ban

- Alleged risks associated with analytics based on individual judges
  - Pressure on judges, with possible threat on their independence
    - Profiling based on possibly questionable correlations and superficial analyses
    - Risk of increasing partiality allegations undermining the functioning of justice
    - Safety issues
  - Forum shopping strategies
    - Based on the judges' real or perceived tendencies

versus

- Feeling that benefits for the general public are limited
  - Relevance is questionable except for parties and courts (cf. p.10)
    - Recognized even by some legal start-ups auditioned by the Cadet Commission
  - The quality and predictability benefits expected from analytics could be fulfilled, without enabling anybody in the world to profile individual judges (more or less accurately)
    - E.g. unredacted databases available to judges and the administration
Arguments against the ban

- Fundamental principle that “Society has the right to call for an account of the administration of any public agent”
  - art. 15 Declaration of the Rights of Man and of Citizens
  - The development of new tech tools enabling analyzing of judges’ practices is “a new dimension of democratic control” (Cadet Report)
    - Notably by opening such analysis capacity to a public larger than small communities of well-connected specialists

- Hypothetic future risks vs. concrete actuality of ban and penalties

- Broadness of the ban
  - “for the purpose or effect of evaluating, analyzing, comparing or predicting their actual or alleged professional practices”
    - The prohibition exceeds the needs alleged in favor of the ban
    - Possible threat on counsels’ practices, the legitimacy and value of which had never been questioned

- Doubtful efficiency
  - Full text search
  - Unrealistic to limit citizens’ demands by boundaries that would not stand if citizens were invited to express their opinion on this subject

- May be more undermining for justice credibility than the risks alleged
3. Conclusion
Future of the ban?

- Challenging the constitutionality of the ban?
  - Validated by the Constitutional Council
    - Judgment No. 2019-778 of 21 March 2019

- Interpretation of the ban
  - Likely to be restrictive

- Impact on practices
  - Ban likely to be of little efficiency
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