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“An exploration of Technology and the Law”

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Answers to questionnaire: Ireland



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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.

- Yes
- No

Please provide an example.

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.

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?

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?

Answer:

1. Yes. The Supreme Court of Ireland is aware of the use by administrative bodies of automated decision making to some extent. For example, the Department of Social Protection uses automated information systems to make decisions in favour of claims for social welfare benefits or payments such as child benefit, maternity or paternity benefit. In this regard, section 247(4) and (5) of the Social Welfare (Miscellaneous Provisions) Act 2003, as amended¹ allows for automated decision making in respect of child benefit. It allows for child benefit to be paid automatically under prescribed conditions when a payment is already being made to a first child of an applicant. However, any issue arises in respect of entitlement the matter must be referred to a deciding officer.²

Existing data protection legislation in Ireland confers on a data subject a right not to be subjected to processing which is wholly automated and which produces legal effects or otherwise significantly affects an individual, and which is intended to evaluate certain personal matters, such as creditworthiness or performance at work, unless a limited number of exceptions applies.³ In that regard, section 6B(1) of the Data Protection Act 1988, as inserted

¹ As amended by s. 31 of the Social Welfare Act 2000 and s. 11 of the Social Welfare (Miscellaneous Provisions) Act 2003.

² S. 247(5).

³ The restriction in section 6B of the 1988 Act does not apply where the processing is undertaken for the purpose of considering whether to enter into a contract with the data subject, with a view to entering into such a contract, or in the course of performing such a contract. It does not apply where the processing is authorised or required by any enactment and the data subject has been informed of the proposal to make that decision. In both circumstances, the effect of the automated decision making must be to grant the request of the data subject, or else adequate steps must have been taken to safeguard the

by section 8 of the Data Protection (Amendment) Act 2003, which transposes the Data Protection Directive (Directive 95/46/EC) provides that:-

“a decision which produces legal effects concerning a data subject or otherwise significantly affects a data subject may not be based solely on processing by automatic means of personal data in respect of which he or she is the data subject and which is intended to evaluate certain personal matters relating to him or her such as, for example... his or her performance at work, creditworthiness, reliability or conduct.”

As there is not much information publically available regarding the use of automated decision-making by administrative bodies, the Supreme Court sought information from a number of administrative bodies, including the Office of the Revenue Commissioners. The Office of the Revenue Commissioners advised that it uses technology to assist in selecting and ‘risk-ranking’ cases, but cases are then manually reviewed and selected for audit, where appropriate. Thus, the decision itself is not automated. However, the Office of the Revenue Commissioners indicated that the evolution of technology, in particular artificial intelligence and machine-learning would allow for the process to be fully automated in years to come, although it acknowledged that such a process may raise issues under the General Data Protection Regulation. The Office of the Revenue Commissioners expressed the view that the advantages of using technology are: consistent treatment of cases, risk-rating and efficiency.

The issue of automated decision making has not yet given rise to any particular consequences for the Supreme Court when assessing decisions in a judicial capacity.

The Supreme Court is not aware of public debate on the specific issue of automated decision-making by administrative bodies. However, there is some public and media debate in relation to the issue of ‘machine learning’ and the possibility of ‘neural networks’ replacing human decision making leading to loss of jobs.⁴

There is also general debate regarding data privacy and ownership, including considerations associated with the collection of data through the use of digital technologies, and the issues posed by the exploitation of such data for purposes which go beyond the initial reasons for capturing such data.⁵ The issue of data privacy is of particular significance in Ireland in light of the large number of ‘data-intense’ companies situated in Ireland, including Facebook, Google, LinkedIn and others.

The Supreme Court of Ireland considers that this topic could form the basis of a more detailed exchange of ideas at the Colloquium. In particular, it would be useful to have a discussion on data protection considerations associated with automated decision making. Although the issue of automated decision making has not yet specifically given rise to any cases before the Supreme Court of Ireland, significant cases in the area of data protection have been a feature of proceedings before the Superior Courts in recent years, with a number of such cases having been referred to the Court of Justice of the European Union.⁶ The evolution of technology

legitimate interests of the data subject. Moreover, the restriction on automated processing does not apply when the subject gives his or consent to the automated decision making.

⁴ See Insight Centre for Data Analytics ‘A Future for Data Analytics in Ireland’ A summary report of a one-day event held at the Helix, Dublin City University, hosted by the Insight Centre for Data Analytics, Friday 16th September 2016.

⁵ Ibid.

⁶ For example, *Ireland v. European Parliament and Council* Case 301/06 [2009] E.C.R. I-593; *Digital Rights Ireland v Minister for Communications et al*, Cases C-293 and 594/12 EU:C:2014:238; *Schrems v Data Protection Commissioner*, Case C-362/14 [2015] E.U.C:2015:650; *Nowak v Data Protection Commissioner*, Case C-434/16

enabling automated decision making, coupled with the strengthening of rights of data subjects and obligations of data controllers under the General Data Protection Regulation (Regulation (EU) 2016/679), including in relation to the issue of automated decision-making,⁷ could conceivably give rise to legal issues which may ultimately end up being the subject of court proceedings.

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⁷ See Article 22 of the General Data Protection Regulation.

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?

Yes

Please describe your experiences, positive and/or negative.

No

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?

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?

Answer:

2. In considering the position in Ireland, it is important to note that Ireland has a common law legal system of an adversarial nature, with a written constitution which requires that justice be administered in public.⁸ Most contested cases involve a paper-based, oral hearing following which the judge(s) delivers a decision which, in the High Court, Court of Appeal and Supreme Court generally takes the form of a written judgment.

The Irish courts have moved towards paperless proceedings in certain areas.

Personal Insolvency

Personal Insolvency cases brought under the Personal Insolvency Act 2012 may be processed entirely online, with no paper files required. Virtually all such applications are now dealt with by a judge of the High Court electronically. The applications and supporting documentation are lodged to the Courts Service Online system (CSOL), which allows for the making of online applications, uploading of court documents, dissemination of Court documents, listing of cases, payment of fees and the production of court orders and other documents. In personal insolvency proceedings, applications are lodged electronically by the Insolvency Service of Ireland. The judge receives the file electronically and has access to the papers before, during and after court in electronic format. A summary of the case is displayed in open court on a large screen. Court results and court orders are available for the Insolvency Service of Ireland to download online.

⁸ Article 34.1 of the Constitution of Ireland.

A practical issue which has been encountered in respect of this process is that many judges prefer to deal with cases in paper format and request that documents filed electronically be printed out, and it is therefore difficult to change the paper-based culture. In addition, legislative developments can sometimes by-pass technology systems which have been implemented. For example, a change to personal insolvency legislation has allowed applications from creditors and debtors to be made directly to the Court without going through the Insolvency Service of Ireland. In that regard, the system has not been adapted to date to enable full electronic submission of these applications and a manual workaround is in place, which is cumbersome.

Small claims applications (alternative method of commencing and dealing with a civil proceeding in respect of small claims) may also be filed online via CSOL, and electronic applications for liquor licences is currently being developed. There are also plans to use the system for liquidated debt claims.

Electronic applications for leave to appeal to the Supreme Court

The Supreme Court has commenced a project which envisages electronic filing of applications for leave to appeal to the Supreme Court. Since 2014, a party wishing to appeal a case to the Supreme Court must obtain leave from the Supreme Court itself.⁹ Previously, there was an almost universal right of appeal to the Supreme Court.

Applications for leave to appeal may be determined by the Supreme Court other than by oral hearing, and under the new regime applications are generally decided on the papers.¹⁰

It is envisaged that an electronic filing system would be a first step towards a wider use of electronic filing in Supreme Court proceedings, and would include features to enable the following activities:

- Creation on-line by an applicant of an electronic case file subject to authentication of an applicant's identity;
- Paperless consideration of applications on a computer desktop, iPad or other portable device in conference (meetings of the Supreme Court) or, where oral hearings arise, in court;
- Searchability of materials for key words/phrases;
- Extraction of textual material for use in drafting case notes and determinations
- Import of key case information (parties, record number etc) into templates of determinations and orders;
- Case management, including scheduling, legal diary production, case event alerts, issuing of notifications etc;
- Generation of case-flow statistics;
- Facilitating on-line payment of court fees;
- Reduction of paper storage in the office and chambers (judges' offices);

⁹ Under the amended Article 34.5.3° of the Constitution: “[T]he supreme court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the court of appeal if the supreme court is satisfied that—i the decision involves a matter of general public importance, or ii in the interests of justice it is necessary that there be an appeal to the supreme court.”

¹⁰ However, the Court, having considered the documents lodged, may direct that the application be heard via oral hearing. Court of Appeal Act, section 7(11).

- Platform for further development of the system.

Piloting of paperless litigation in the Supreme Court

In 2016, the Supreme Court piloted the first paperless litigation in Ireland in the appeal case *Lannigan v Barry* [2016] IESC 46. The entire hearing was conducted using an eCourt App, using documents which were scanned and uploaded to tablets which were provided to members of the Supreme Court and the legal teams. The software facilitates ease of access to any particular document which may be under discussion at a specific point in the hearing.

It would be of great benefit to have a more detailed exchange of ideas at the Colloquium in relation to the extent to which other courts have embraced paperless proceedings.

In light of the proposal for electronic filing of applications for leave to appeal to the Supreme Court of Ireland, it would be very useful to obtain the experience of any other courts which have a filtering process in relation to applications for leave to appeal, and to discuss whether they have implemented electronic processes.

The Supreme Court of Ireland would also be interested in the extent to which other courts conduct full hearings digitally, and whether such processes have given rights to any challenges on the grounds of the right of access to courts, or any requirement that justice be administered in public.

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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.

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?

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?

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?

Answer:

3. The Supreme Court is not aware of digital dispute settlement arrangements for non-commercial public law bodies.

Online Dispute Resolution Regulation

However, the Online Dispute Resolution Regulation 524/13/EU, which provides for an online platform for non-court based Alternative Dispute Resolution (ODR), is an example of digital dispute resolution. This is a web-based platform designed to help consumers to submit to an ADR entity their disputes in relation to online transactions with traders established within the EU. The ODR platform allows the conducting of the ADR procedure online through the ADR entities listed by each Member State. It can be used in all 23 official languages of the European Union free of charge. Under the European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015, responsibility is conferred on ECC (European Consumer Centre_ Ireland to host the Irish ODR contact point and carry out the functions set out in article 7 of the ODR Regulation.

Technology Assisted Review for Discovery

A technological development in the pre-trial process which may be of some relevance to the issue is the use by firms of solicitors of technology assisted review (TAR) for discovery. As a common law system, discovery plays a key role in the pre-trial process, by allowing for the

preparation of case, encouraging settlement by making each party aware of the value of his or her claim, exposing insubstantial claims that should not go to trial and to reduce the element of surprise in litigation.

Technology assisted review for discovery was first approved by the Commercial Court, a division of the High Court, in 2015 in an application in which over 700,000 electronic documents had to be reviewed.¹¹ Fullam J noted that “in discovery of large data sets, technology assisted review using predictive coding is at least as accurate as and, probably more accurate than, the manual of linear method in identifying relevant documents”¹² and TAR as “more efficient than manual review in terms of saving costs and saving time.”¹³ This decision was upheld on appeal by the Court of Appeal.

TAR uses machine-learning algorithms to analyse data, identify patterns and predict relevance to allow electronically stored information to be produced in a quicker and more cost-effective way.¹⁴

Although the issue of digital dispute resolution is interesting, the Supreme Court of Ireland is unaware of any digital dispute settlement process in the public sector and considers that such processes would not be directly relevant the role of courts.

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¹¹ Irish Bank Resolution Corporation Ltd. v Quinn [2015] IEHC 175.

¹² Ibid at 622.

¹³ Ibid.

¹⁴ See Karyn Harty ‘Discovery Program’ Law Society Gazette (April 2017) 44.

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?

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.

No

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

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?

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?

Answer:

4. There are a number of examples of technology-neutral legislation in Ireland. For example, the Electronic Commerce Act, 2000 is drafted in a technology neutral way. Sections 12, 13 and 14 of the Act facilitate the substitution of documents in writing, written signatures and witnessing in writing of signatures, by electronic alternatives.

Copyright legislation, which is governed by the Copyright and Related Rights Act, 2000, is also technology-neutral.

In interpreting legislation relating to defamation, the High Court has noted that section 33 of the Defamation Act 2009, which allows the court to make an order prohibiting the publication of a defamatory statement, is technology neutral, and therefore internet publications are also covered by that section.¹⁵

¹⁵ Philpott v Irish Examiner Ltd [2016] IEHC 62 at para. 8.

The Supreme Court of Ireland does not have a legislative advisory role, and therefore cannot comment in relation to whether or not the legislation in question has succeeded in the context of such a role.

There have been cases in which Irish courts have been required to consider legislation which was enacted in different social and technological contexts. In certain circumstances, judges have sometimes given a legislative term an updated construction in order to uphold the original intention of the legislature.

For example, in *Universal Studios v Mulligan* [1998] ILRM the High Court found that ‘videotape’ came within the meaning of the words “cinematograph film” under the Copyright Act, 1963, which governed copyright law at that time.

In *Mandarin Records v MCPS (Ireland) Ltd* [1999] 1 ILRM 154 the plaintiff contended that a “power CD” producing both visual images and audio material, did not come within the definition of a ‘record’ for the purposes of section 13 of the Copyright Act, 1963. The definition of ‘record’ in section 2 of the 1963 Act was based on the concept of a device “in which sounds are embodied.” In the High Court, Barr J was of the view that it is desirable that, where possible, advances in technology should be accommodated by a court engaging in statutory interpretation, but only “where that can be done without straining the words used beyond their ordinary statutory meaning and having paid due regard to the structure and intent of the statute.”¹⁶ The Court was of the view that a broad interpretation did not distort the statutory definition of ‘record’ nor do violence to the wording of it.¹⁷

Legislation authorises courts to take into account changes in technology since the enactment legislation. Section 6 of the Interpretation Act 2005 provides that:

“In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit.”

¹⁶ [1999] 1 ILRM 154 at 159.

¹⁷ Ibid at 160.

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?

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?

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?

Answer:

6. The Supreme Court is aware of the use of digital data in the enforcement of road traffic legislation.

Digital tachographs became mandatory in new commercial lorries and buses in Ireland in May 2006. The digital system records information on a range of vehicle and driver activities. Data is stored in the vehicle unit memory and on driver cards. The data contains a range of information including distance covered, vehicle speed (for previous 24 hours of driving), vehicle licence number, and driver activity (driving, rest, breaks, other work, periods of availability). A transport operator must download data from the card every 21 days and the Vehicle Unit every 3 months. The data must be retained for inspection by enforcement officers for at least 1 year from the date of downloading.

Since 2010, safety cameras which operate from vans detect the speed of vehicles on Irish roads. When a motorist is detected speeding, the offence details, images and vehicle registration number are sent electronically to the Garda (Irish police) IT section, where they are uploaded into the Fixed Charge Processing System. The motorist then receives a fixed charge notice. The fixed charge notice system allows the driver of a vehicle who has been detected of committing certain offences under the Road Traffic Acts to pay a fixed charge or fine as an alternative to going to court to answer the driving offence. In 2017, Ireland's first

average speed camera enforcement system was introduced in a 4.5km tunnel, which monitors a driver's average speed while driving through the tunnel. Once the system determines that a vehicle has exceeded the speed limit, it will automatically create a record of the violation which will then be transmitted to the police for action.

As indicated in question 1 above, the Office of the Revenue Commissioners uses technology to assist in selecting and 'risk-ranking' cases, but cases are then manually reviewed and selected for audit, where appropriate. Thus, the decision itself is not automated.

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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.

There are no technological developments other than those mentioned under the specific questions above which the Supreme Court believes will soon have far-reaching consequences for administrative courts.

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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.

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