

Raad
vanState



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“An exploration of Technology and the Law”

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Answers to questionnaire: Norway



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An exploration of Technology and the Law

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Supreme Court of Norway

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

Please provide an example.

In the field of machine-managed, electronic government, Norway and the other Nordic countries are among the most advanced in the world. Today, almost all parts of the public administration is to a certain extent automated, particularly as regards the process of gathering information. Some administrative bodies also deliver fully automated decisions, i.e. without interference of human resources. An example of the latter is decisions by the State Loan Office regarding scholarships and loans for higher education. Applicants for such scholarships/loans may apply using a standardized online application form, where the applicant partly chooses from pre-determined alternatives and partly fills in his or her personal information. The application form is submitted into a case management system which is linked to – and recovers (other) relevant information from – the educational establishments and public registers, and produces a decision to either grant or deny the scholarship/loan with standardized reasons.

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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.

When an administrative decision is made based on a fully automated process, the application of the law providing for the relevant right or duty is done, not on a case by case-basis, but in advance, when developing the case management system. Accordingly, in my view, automated decision-making is, first and foremost, a political and legislative issue. The legislative process must factor in the transformation of the law to programming language, but once adopted and (successfully) transformed, the automated decision-making seems to have few consequences for the courts, other than perhaps reducing the number of decisions that are challenged before the courts.

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- o No

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?

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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?

With reference to the answer above, this topic is – at least at present – not very relevant to the Supreme Court. In general, however, it seems suitable for discussion, particularly if it is seen in connection with the topic of "technology-neutral legislation". Aspects that may warrant discussion could include, inter alia, the protection of privacy and the effects that automated decision-making may have on the citizens' active participation in the process.

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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.

In the state budget for 2017, the Norwegian Government granted funds for the first stages of the project "Digital Courts", which aims to fully digitalize the proceedings in all Norwegian courts by 2020. When completed, all phases of both civil and criminal trials – the reception of the case, the preparatory stage, the hearing, the delivery and service of the judgment and the finishing process – will be conducted digitally. This means that the case documents will be stored, submitted and managed digitally. The project does not, however, include possibilities of online proceedings or other arrangements eliminating the traditional procedural elements of oral hearings and direct presentation of evidence.

During the first stages, the project will be run in certain pilot courts, including the Supreme Court. The Supreme Court already uses digital abstracts, which entails that the attorneys submit the factual and legal documents they want to present to the Court on a pdf-file, which is stored and made available to the judges on an ipad. As of yet, using the digital abstract is optional for the judges, but the majority has started to use it, and their experience seems to be purely positive. In addition to saving time, the digital abstracts make the documents more available, searchable and surveyable.

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- o 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?

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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?

This topic is highly relevant to the Supreme Court and Norwegian courts in general. From our perspective, however, the development towards digital court proceedings is inevitable, feedback from pilot projects is largely positive, and the discussion here is centred on the practical implementation of the digitalization, what support is needed etc., which is probably less interesting to discuss in a forum such as ACA.

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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?

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- 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?

There is a spur of a debate on this issue also in Norway, and I believe that several of the larger law firms have started to envisage the possibility of using artificial intelligence to execute certain "standardized" and repetitive tasks related to transactions and risk assessment. At present, however, this is only at the starting line, and there is no public debate or suggestions on introducing systems such as the ones described above in the public sector.

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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?

In general, this is a very interesting topic, and it seems feasible that at some point, artificial intelligence may relieve judicial institutions of some of their tasks. For the time being, however, this idea is more theoretical than practical. Thus, this topic probably does not warrant a meaningful discussion at the Colloquium.

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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?

- 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.

Technology-neutrality, as a general principle pertaining to the framing of legislation, originates from the European regulation of the "ecom-sector" (telecom, Datacom, broadcasting). However, it has affected also other areas, such as IP-rights, criminal law and procedural law. An example is the Norwegian Civil Procedure Code, which entered into force in 2008. This statute is framed to be technology-neutral, which means that it is consciously framed so as not to prevent the use of electronic communication, including such based on technology not yet developed at the time of adopting the statute. Its neutrality towards technology is clearly expressed in the preparatory works of the statute, which is a relevant source of law when applying the statute.

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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?

The approach adopted by Norwegian courts to the interpretation of such legislation, depends to a certain extent on what area of law the case concerns. For example,

within criminal and administrative law, the courts apply a stricter interpretation than in private-law matters. In general, when faced with a legislative provision framed in terms of specific technologies, the courts will examine whether the case at hand is functionally equivalent to a case which is explicitly covered by the provision in question.

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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, perhaps in conjunction with the topic of "Digital decision-making", given that the principle of technology-neutrality may collide with the need to adapt legislation to an automated decision system. Thus, one could discuss how to balance these developments, and generally how technology-neutral legislation may accommodate the principle of legality.

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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?

An example here is the Norwegian system for collecting road toll, called AutoPASS. The system is based on automatic toll booths that register vehicle crossings and generate invoices to the vehicle owner. Motorists may obtain an AutoPASS-chip that is registered by the toll booths, but if the vehicle lacks such a chip, the toll booth automatically photographs the license plate of the vehicle and recovers the owner's personal information from the vehicle register.

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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?

Yes. This topic seems to raise many of the same concerns as the topic of "Digital decision-making", notably the protection of privacy.

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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.

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.