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

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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:

Former system	New system
Database availability depends on: - type of court - area of law (e.g. Legifrance.gouv.fr; INPI database; private publishers…)	Database availability of <u>all</u> court decisions (with a few exceptions) - Free of charge - **<u>Condition*</u>: "*in respect of the privacy of the persons concerned*"**
Copies of judgments available on demand at the court clerks' offices	Unchanged

- *The condition was added by the Senate against the wishes of the government

Court decisions in the Digital Republic Act (2016)

- 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
  - November 2017: Cadiet Report on "*The open data of court decisions*"
    - 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 Cadiet Report
    - But the Cadiet 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 Cadiet 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*” (Cadiet 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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