DIGITISATION OF LEGAL PROCEDURES

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Introduction

'*What cannot be eschew'd must be embraced*'.[1] The words of Page in *The Merry Wives of Windsor*[2] could also be applied to the digital revolution. Trying to stop this unavoidable phenomenon would be a futile exercise. On the contrary, we must accept it, since it deeply changes the way we live.[3] The digital revolution has had an impact on every domain, including the provision of legal services.[4] France has introduced a number of online platforms providing various public services,[5] and is becoming a 'digital republic', named as such in light of a recent law adopted a few months ago.[6] In 2014, the United Nations found that France was the most advanced nation in Europe, and 4th worldwide when it comes to 'e-government'.[7]

In 2016, the French administration website, *service-public.fr*[8] received 272 million visits[9] and 4.4 million administrative requests were completed online.[10] A lot for a country with a population of just under 67 million.[11]

France also performs equally well in Europe when it comes to the usage of new technologies within its legal system.[12] This cannot ignored in the context of the digital age; digital accessibility is important for the quality of legal systems.[13] The process of digitisation of legal procedures is being undergone in France, and I

[1] 'Ce qui ne peut être évité, il le faut embrasser'.
[2] William Shakespeare, *The Merry wives of Windsor* (1600), act IV, scene V.
[3] Conseil d'Etat, *Le numérique et les droits fondamentaux*, La Documentation française, Paris, 2014, p. 35.
[4] The ways in which legal services can be provided have increased. See J.-M. Sauvé, 'Quel avenir pour les professions du droit en France?', speech before the assemblée générale of the Conseil supérieur du notariat on 17 February 2016 ; see also 'Vers une ubérisation du droit?', *Le Monde*, 19 June 2015, available at http://www.lemonde.fr/idees/article/2015/06/19/vers-une-uberisation-du-droit_4658065_3232.html
[5] http://www.gouvernement.fr/action/le-numerique-instrument-de-la-transformation-de-l-etat
[6] La loi n° 2016-1321 du 7 octobre 2016 pour une République numérique.
[7] United Nations e-government survey, 25 June 2014, available at http://www.un.org/en/development/desa/publications/e-government-survey-2014.html
[8] Created in October 2000, the site provides access to administrative information for individuals, companies and associations.
[9] These statistics were provided in the Rapport d'activité de la Direction de l'information légale et administrative, 2016, available at http://www.dila.premier-ministre.gouv.fr/IMG/pdf/dila-_ra_2016-web.pdf
[10] Since late 2016, the 'plateforme de services en ligne' (PSL) has allowed individuals to register to vote in the general and presidential elections which were held in 2017. It also allows the online creation of an association and the declaration of the existence of a facility which may have an impact on the protection of the environment (*installation classée pour la protection de l'environnement*).
[11] 66,991,000 as of 1 January 2017. See https://www.insee.fr/fr/statistiques/2554860
[12] We learn this from the EU Justice Scoreboard published by the European Commission, which evaluated the justice systems of European Union countries, considering the following 3 elements: efficiency, quality and independence. In France, 95% of lawyers correspond by email, and 50% send legal documents by email. See *Bulletin quotidien*, 11 April 2017, n° 011088, p. 10.
[13] W. Derksen, 'The new digital procedure in civil and administrative law cases', *Judicial Reform in the Netherlands*, Netherlands Council for the Judiciary, 2014, p. 49, discusses the notion of digital accessibility. The article is available online at: https://www.rechtspraak.nl/SiteCollectionDocuments/judicial-refrom-in-the-Netherlands-2014.pdf

will begin by describing this before considering the issues involved and the various perspectives. I will do this from my own perspective, French administrative justice,[14] while also allowing myself to make comparisons with the judicial systems and other legal systems where these appear relevant.

The French administrative system is already largely paperless, when it concerns interactions between the judge and the litigant, and the internal work of the court

Relationship between the judge and the litigant

From one involving choice to one involving obligations.

Making an application by electronic means

This is made possible thanks to an application called *Télérecours* which has been gradually rolled out but is not yet universally available.

a) Progressive rolling out

According to the division of competences under the constitution as between the parliament and government,[15] legal procedure is governed by regulation and not by legislation, unlike criminal matters or fundamental rules and principles.[16]

The decree of 10 March 2005[17] provides that all correspondence between the court and the parties, beginning with the submission of the application, be carried out via an online application. A restricted experimental period began by limiting correspondence to exchanges between the lawyer or the administration, in tax disputes before the Conseil d'Etat.[18] The remit of the law was then widened to include the administrative court and administrative court of appeal in Paris in 2008,[19] and then all administrative courts and administrative courts of appeal in the Paris region from 2009.[20] In 2009, military disputes before the Conseil d'État were also included.[21] This experimental phase took place from 2005 to 2012.[22]

[14] The Conseil d'Etat, the administrative courts of appeal and the administrative courts. However, there are also specialist administrative courts, who are not governed by the code of administrative justice although their decisions are supervised by the Conseil d'Etat.

[15] Articles 34 and 37 of the French Constitution of 4 October 1958.

[16] Conseil constitutionnel, decision of 13 April 2012, *Stéphane C. et autres*, n°2012-231/234 QPC §12.

[17] Décret n° 2005-222 du 10 mars 2005 relatif à l'expérimentation de l'introduction et de la communication des requêtes et mémoires et de la notification des décisions par voie électronique.

[18] Arrêté du 27 mai 2005 relatif à l'expérimentation de l'introduction et de la communication des requêtes et mémoires et de la notification des décisions par voie électronique devant le Conseil d'Etat (published in the Journal officiel de la République française, 31 May 2005).

[19] Arrêté du 11 mai 2007 relatif à l'expérimentation de l'introduction et de la communication des requêtes et mémoires et de la notification des décisions par voie électronique devant le tribunal administratif de Paris et la cour administrative d'appel de Paris (published in the Journal officiel de la République française, 16 May 2007).

[20] Namely the administrative courts in Melun, Montreuil, Paris and Versailles and the administrative courts of appeal in Paris and Versailles.

[21] Arrêté du 3 février 2009, relatif à l'extension de l'expérimentation de l'introduction et de la communication des requêtes et mémoires et de la notification des décisions par voie électronique devant le Conseil d'Etat (published in the Journal officiel de la République français, 8 February 2009).

[22] The experimental phase was extended up to 31 December 2012 by decree no 2009-1649 du 23 décembre 2009.

This period allowed conclusions to be drawn before the application was fully rolled out. This is what the decree of 21 December 2012 did,[23] naming the application '*Télérecours*', and widening its use to administrative cases in all French metropolitan areas.[24]

b) Complete rolling out

During the experimentation phase, implementation of *Télérecours* was limited to certain areas and certain types of cases.[25] Communication by digital means has become possible due to the centralised architecture of the application. Télérecours has a single mode of functioning. It was built and is managed by one service under the auspices of the Conseil d'Etat's IT department. The administration of these courts is carried out by the general secretariat of the Conseil d'Etat and related services,[26] under the Vice President.[27]

In the ordinary courts, there are also differences between the Cour de cassation where procedures have been paperless for many years, and other courts, as well as between civil and criminal cases.

The obligation to make an online application

On 1 January 2017, digital communications in administrative cases became a legal obligation.

a) The obligation to make an application online

The decree of 2 November 2016[28] came into effect on 1 January of this year[29] and givesn parties the ability to use *Télérecours*.[30] If the procedure set out under the law is not followed, then the application may be deemed inadmissible[31] or a submission not made online may be excluded from legal argument, such as any

[23] Décret n° 2012-1437 relatif à la communication électronique devant le Conseil d'Etat, les cours administratives d'appel et les tribunaux administratifs.

[24] France has used *Télérecours* since 2013 and since the end of 2015 in the overseas territories, although connection to *Télérecours* was delayed in certain overseas territories.

[25] With the exception of certain overseas territories whose connection to *Télérecours* was delayed under article 6 of the decree of 21 December 2012, cited above.

[26] Being the IT Department, Department of Human Resources, Finance Department, Real Estate Affairs Department, Department of Home and Security as well as training centre.

[27] According to Article R. 222-11 of the administrative code provides that the Vice President of the Conseil d'Etat sanctions the expenses of the administrative courts and administrative courts of appeal. Article L. 112-5 of the code also provides that the Conseil d'Etat is responsible for the permanent inspection of the administrative courts. Under Article L.231-3, the Vice President of the Conseil d'Etat ensures the management of bodies in the administrative courts and administrative courts of appeal. The Conseil d'Etat also has jurisdiction over the management of court clerks (articles L. 232-5 and R. 232-28 of the code of administrative justice). See http://www.conseil-etat.fr/Conseil-d-Etat/Missions/Gerer-la-juridiction-administrative together with *Répertoire de contentieux administratif*, Dalloz, Paris, 2006, n°s 48 et s.

[28] Décret n° 2016-1481, cited above.

[29] With the exception of the administrative tribunals in New Caledonia and Wallis and Futuna.

[30] Article R. 414-1, paragraph 1 of the code of administrative justice provides that lawyers making applications before the Conseil d'Etat and the Cour de cassation on behalf of a legal entity under public law other than a commune with a population less than 3,500, or a body governed by private law responsible for the management of a public service, must apply to the court by means of a dedicated online application, otherwise such application will be inadmissible. The same obligation applies to all other submissions made by the applicant.

[31] Article R. 414-1, paragraph 1 of the code of administrative justice.

defence filed.[32] This law has immediate effect in all administrative courts, and applies to cases currently before the courts.[33]

This way of making an application remains an option in towns with a population of less than 3,500,[34] and for legal entities whose role is informing foreign citizens in administrative detention centres of their rights and providing assistance to allow them to exercise such rights.[35] An exception to this obligation is provided in certain contexts, such as summary proceedings, for parties who are not already registered on *Télérecours*.[36]

The obligation to make an online application is wider in the administrative courts than in the ordinary courts, where it is limited to certain procedures, such as a notice of appeal or the briefing of a lawyer before the courts of appeal in matters which require legal representation.[37]

b) Additional obligations

The obligation to make an application online ensures the increased use of communication by electronic means. In effect, the use of *Télérecours* by a party supposes their registration to the application. Once this takes place, the court can communicate with them through the application in relation to any file concerning them.[38] The use of the application therefore has irreversible effects. The digitisation of legal procedures has a similar but lesser 'knock on effect' in the context of membership of the Réseau Privé Virtuel des Avocats (RPVA), which allows communication between lawyers. Registration is optional, but once a person decides to join, they must give their consent to receive communications through the network.[39]

Other obligations flow from electronic communications through the application. Firstly, one must be able to establish the date of all correspondence during a case with certainty. Those who use *Télérecours* are regarded as having taken part in proceedings on the date on which they receive the first piece of correspondence,

[32] Article R. 611-8-2, paragraph 4 of the administrative code.

[33] Meaning all legal documents generated in a case up to 1 January 2017: see articles 3, 1° and 10 of the decree of 2 November 2016. This does not concern disputes relating to the execution of decisions of the administrative courts, as the ability to apply through *Télérecours* was recently introduced: see *supra*, I. A. 1.

[34] Article R. 414-1, paragraph 2 of the administrative code.

[35] Article R. 414-1, paragraph 3 of the administrative code.

[36] Article R. 522-3, paragraph 2 of the administrative code: 'Par dérogation aux dispositions de l'article R. 414-1, les parties et mandataires mentionnés au premier alinéa de cet article non encore inscrits dans l'application informatique peuvent adresser leur requête à la juridiction par tous moyens.'

[37] Article 930-1 du code de procédure civile et arrêté du 30 mars 2011 à la communication par voie électronique dans les procédures avec représentation obligatoire devant les cours d'appel (published in the Journal officiel de la République française 31 March 2011), as amended. Failure to comply with this obligation results in the application being inadmissible.

[38] Prior to the adoption of the decree of 2 November 2016, article R.611-8-2 of the code of administrative justice provided: 'Toute juridiction peut adresser par le moyen de l'application informatique mentionnée à l'article R. 414-1, à une partie ou à un mandataire qui y est inscrit, toutes les communications et notifications prévues par le présent livre pour tout dossier'. The Conseil d'Etat applied these provisions in CE, 6 October 2014, *Commune d'Auboué*, n° 380778, Lebon T. p. 799.

[39] Cour de cassation, opinion, 9 September 2013, n°13-70.005, Bulletin 2013, Opinion, n°10.

available on a receipt issued by the application.[40] The frequency of the correspondence does not depend on the recipient being an active user of the application, as it regards them as having received the document within 8 days of it being placed online.[41] If the parties merely received email alerts about new correspondence, then the failure to send a document would not have the same impact.[42] Moreover, this provision is particularly necessary given that there are cases in which a judge must make a ruling within one month.[43] The situation is different, of course, where there is a technical issue with the application preventing access to information and documents on file: the case-law of the Conseil d'Etat was careful to mention such a scenario in a 2015 decision.[44] Digitisation has imposed an obligation on lawyers and the administration to pay close attention to *Télérecours*; as their work is affected if they do not receive documents and correspondence.

Secondly, new procedural obligations were introduced under the decree of 2 November 2016, cited above; the parties must present all documents in a legible form, either in a single file, identifying each document, or in separate, accurately labelled files.[45] Failure to comply with this obligation results in the application being inadmissible, or may result in the exclusion of certain documents.[46] This only occurs where a judge orders that the file be organised in the prescribed manner and this is not done.[47]

These provisions mean that we can avoid the possible negative effects of digitisation. Indeed, the ease at which documents can be transmitted through*Télérecours* could tempt the parties to increase the number of documents sent between them, meaning that it is necessary to avoid drowning in digital paperwork.[48]
The decree of 6 April 2017 allows a party to make a request for enforcement of the judicial decision by way of *Télérecours*, even though the procedure initiated is

[40] Article R. 611-8-2 of the code of administrative justice.
[41] Article R. 611-8-2 of the administrative code; the Conseil d'Etat applied these provisions in a decision *Mme Sek*, n° 387138, 23 March 2015.
[42] CE, 11 May 2015, *Commune de Damouzy*, n° 379356, Lebon p. 168.
[43] Article R. 611-8-2 of the code of administrative justice, cited above. For application of this provision in emergency interim proceedings, see: CE, 7e et 2e ch., 17 Octobre 2016, *Ministre de la défense c/ Société Tribord*, n° 400791 and 400794, to appear in Lebon.
[44] *Commune de Damouzy,* cited above, 'Considérant' no 6.
[45] See for example article R. 414-3 paras 2-4 of the code of administrative justice which provides: 'les pièces jointes sont présentées conformément à l'inventaire qui en est dressé. Lorsque le requérant transmet, à l'appui de sa requête, un fichier unique comprenant plusieurs pièces, chacune d'entre elles doit être répertoriée par un signet la désignant conformément à l'inventaire mentionné ci-dessus'.
[46] Articles R. 414-3, para 3, R. 632-1, para 2 and R. 611-8-2, last paragraph of the administrative code. Before the adoption of the decree of 2 November 2016, there was an obligation to produce a detailed inventory of documents but failure to do so did not result in sanction.
[47] Article R. 612-1 and R. 611-8-2, para 4 of the administrative code. Except in emergency interim proceedings, where the judge does not ask the parties to do this (article R. 522-2 of the same code).
[48] L. Hemlinger, '*Télérecours*: la dématérisalisation devient obligatoire devant les juridictions administratives pour les avocats et les administrations', *RFDA* 2017, p. 12.

initially of non-judicial character. However it was necessary to ensure coherence between two types of proceedings relating to the same court decision.

The work of the court

Digitisation has transformed the work of both the administration within the court as well as magistrates.

The work of courts administration and management

The administration within the courts uses two linked applications: *Skipper* and *Télérecours.*[49]

a) Computerised file management via *Skipper*

The administrative procedure[50] is inquisitorial and not adversarial like civil procedures: the applicant does not address the respondent, but instead addresses the judge, who is charged with providing the documents of each party to the other,[51] playing a central and active role in proceedings.[52] The role of administration and management of the courts is therefore essential[53] and now largely digitised. It is the first to be concerned with the digitisation of documentation in cases.

In this context, the application *Skipper* was created as a tool for computerised file management in legal proceedings. Each file is registered, and each event related to the case.[54] Such tools are available in almost every country in the Council of Europe, aiming to reduce case delays, but all of these tools do not have the functioning required to allow proactive case management.[55]
Skipper has a number of advantages, for the administration of the court but also for the applicant.

Firstly, in terms of statistics, it makes it possible to monitor judicial activity and to optimally allocate resources on the basis of need. *Skipper* has been described by the Senate as a management control tool.[56] It is an instrument which provides an overview of the court's activity and also offers support to the judge who has

[49] *Télérecours* is linked to *Skipper*, the older of the two applications. The two applications function in a synchronised manner, with the information put onto one application feeding into the other: Conseil d'Etat, Manuel d'utilisation de l'application *Télérecours*, updated 20 January 2017, available at http://www.telerecours.fr/actualite/MU-TR-AVO-ADMIN.pdf
[50] As governed by its own code, the code of administrative justice.
[51] See for example B. Stirn and Y. Aguila, cited above, p. 571.
[52] It assures 'la conduite de l'instruction des dossiers' (L. Hemlinger, cited above) in terms of the respect to the right of both parties to a fair hearing.
[53] O. Yeznikian, section entitled '*Tribunal administrative*', *Répertoire de contentieux administratif*, Dalloz, Paris, 2006, n°86.
[54] Such as the receipt of written pleadings and communications with the other party, investigative measures, requests for postponement or closure of the investigation or the reopening of proceedings, etc.
[55] European Commission for the efficiency of justice (CEPEJ), *European judicial systems*, CEPEJ Studies n°24, p. 22-23.
[56] Sénat, *avis présenté au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur le projet de loi de finances pour 2013*, p. 45, available at https://www.senat.fr/rap/a12-154-4/a12-154-41.pdf

their stock of cases, as well as the head of the court and the decision maker,[57] ie the Conseil d'Etat.[58] This is equally the case in the majority of states in the Council of Europe where digital tools assist in the administration of the court, tools which are often, but not always, directly linked to a case management system.[59]

Secondly, some of the information processed by *Skipper* is disseminated to the parties: since 1 September 2004, another application called *Sagace* allows the parties to access to information on *Skipper* via the Internet[60] and to check the status of a case. The majority of Council of Europe states operate such tools which are often linked to case management systems.[61] The European Court of Human Rights runs a search engine called SOP,[62] which allows any person to track the status of an application before the court.[63] The website of the Court of Justice of the European Union also provides information on cases pending before the court, as well as the date for hearing and conclusions of the advocate general.[64]

b) Notifications and communications by electronic means via *Télérecours*

Télérecours constitutes a single adequate interface for all electronic communication,[65] with the parties including at the final stage, a notification of the judge's decision in a case.

The court directly benefits from digitisation of communication such as saving on postage costs and greater ease or fluidity in the processing of files. [66] Furthermore, less paperwork may result in a real change to the work of the administration in

[57] The European Commission for the efficiency of justice discusses the notion of business intelligence, defined the tools , methods and resources used to collect, consolidate, model and report an organisation's data to give the head of that organisation an overview of activity as a decision-making aid. (CEPEJ, cited above, p. 26).

[58] See *supra* I.

[59] CEPEJ, cited above, p. 24.

[60] By way of a confidential code.

[61] CEPEJ, p. 34.

[62] State of Proceedings or *état de la procedure*.

[63] Communiqué of the European Court of Human Rights, 2 September 2016.

[64] Sections on *jurisprudence* and *calendrier judiciaire*, available at https://curia.europa.eu/jcms/jcms/Jo2_17661

[65] This unique interface is distinct from the 'bridges' or links necessary for the digitisation of judicial procedures between various networks, those of the courts *(réseau privé virtuel de justice*: RPVJ), lawyers (*réseau privé virtuel des avocats*: RPVA) or bailiffs (*réseau privé sécurisé huissiers*: RPSH), which is explained by the existence of direct exchanges between the parties in the context of adversarial proceedings: T. Ghera, 'Dématérialisation des procédures judiciaires: l'équilibre entre professions à l'épreuve de l'évolution culturelle', *Gazette du Palais*, 20 September 2011, n ° 263, p. 9. Ces différences n'empêchent pas, pour autant, l'articulation des systèmes : en application d'un accord conclu entre le vice-président du Conseil d'Etat et le président du Conseil national des barreaux, les avocats peuvent se connecter et s'inscrire à *Télérecours* par l'intermédiaire du RPVA développé à l'usage de la communication électronique devant les juridictions civiles, sur le fondement de l'article 748-1 et suivants du code de procédure civile. Mais l'avocat peut également s'inscrire par une autre voie, en demandant au greffe du tribunal administratif un identifiant et un mot de passe qui lui sont envoyés par courrier. L'avocat, une fois inscrit, l'est automatiquement devant toutes les juridictions administratives, pour tous les échanges qu'il aura avec l'une quelconque d'entre elles. Son identification vaut signature pour l'application des dispositions du code de justice administrative (CE, 16 février 2015, *Ministre délégué, chargé du budget c/ Comité d'agglomération Saint-Etienne métropole*, n° 371476).

[66] As reported by the work of the Senate under la loi de finances from 2014, 'the use of this tool should generate savings, in terms of postage, which are assessed by the services of the Conseil d'Etat to be 1.5 million euros in 2015, or about 15% of the postage costs. It will also improve productivity due to the disappearance of manual operations linked to the paper communication of the letters and documents. Beyond the savings generated, the *téléprocedures* should bring a certain fluidity in the processing of files.' (document available on the Senate website: http://www.senat.fr/rap/a13-162-4/a13-162 -41.html).

the courts, and in turn lead to an improvement in services provided to the parties.[67]

At the moment, 'asymmetric' files, composed of both electronic and paper documents, lead to complex file management and additional tasks for clerks.[68] However, the existence of such files will decrease given the increased use of *Télérecours*.[69]

The work of judges

a) Digitisation of the work of judges

The modernisation of the administrative courts has resulted in the computerisation of the work stations of all magistrates. This has been done in a secure manner: networks are not accessible via wifi, workstations are located in areas that are not accessible to the public, and their use is subject to personal authentication, by logging in with a username and password. The infrastructure has numerous technical safeguards in place to protect the network from viruses and a probe is currently being installed to detect any attempts to access the network by those not allowed on the system.

Judges have assistance in drafting from rapporteurs [70] and legal databases. Magistrates can access databases via the administrative courts intranet, and from outside the courts. Private databases of legal publishers requiring paid subscriptions are available, as well as databases dedicated to the administrative courts, known as *Ariane* and *Ariane Archives* where access is reserved to members of the court. All administrative decisions are available on these databases and are easily accessible through search engines. The databases also have a system of classification in place, and include conclusions of public rapporteurs, abstracts (*analyses*) and opinions.

The development of *Télérecours* completes this digital transformation, as it led to the digitisation of documents themselves, accessible to judges on the application, allowing them to consult documents from both parties at any time and from anywhere, and also to see events in the proceedings.

b) The hearing

Members of the court may bring laptops to the hearing, which are connected to the computer network. They have access to all electronic files relevant to the proceedings, as well as the draft judgment, the rapporteur's note, written

[67] L. Hemlinger, cited above.
[68] Most notably, digitisation of paper documents in order to communicate them by electronic means.
[69] L. Hemlinger, cited above.
[70] O. Yeznikian, cited above, n°60.

document on the conclusions of the public rapporteur, along with any other useful documentation.

Access to this information has been made easier. Moreover, members of the court can simultaneously consult the same document. This facilitates exchanges between the judges and the parties during the hearing, contributing to the smooth running of the hearing itself.

This development also reinforces the recent trend of promoting exchanges between the judge and the parties in the administrative process, traditionally considered as being of little importance. The ordinary procedure is written, meaning that investigation into the matter is closed before the hearing, during which new submissions cannot be presented nor new arguments raised. In addition, as we have seen, members of the court play an active role during the investigation, both individually and collectively examining the documents with a fine tooth comb. This is why it is unnecessary for the parties to present their arguments in an exhaustive manner at hearing. Rather, the traditional practice is that lawyers make either no submissions, or make a brief submission, and instead rely on their written submissions, and it is quite rare for judges to even ask them questions.[71]

Hearings have grown in importance over the past number of years. Oral proceedings, such as the hearing in which inquiries into the matter continue, have developed since the reform of emergency interim proceedings introduced under the law of 30 June 2000.[72] Moreover, even in ordinary matters, orality has been developing as a concept, notwithstanding the written character of such proceedings. In particular, this is due to the change in speaking order at hearings. Traditionally, the public rapporteur spoke last, after the parties. The European Court of Human Rights has held that this order is compatible with the right to be heard, a component of the right to a fair trial, but only because of a number of guarantees.[73] A decree of 23 December 2011 reversed the speaking order in cases before administrative courts and tribunals.[74] In the Conseil d'Etat, according to the decree of 7 January 2009, the parties still present their arguments before the public rapporteur, but may respond to the rapporteur to present brief observations.[75] Moreover, under that decree, [76] the parties are allowed to get a sense of the findings of the rapporteur in advance, in order to better prepare for the hearing. Thanks to another application, this is not only formal law but also a

[71] Notably contrary to Anglo-Saxon practices.
[72] Loi n° 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives.
[73] That is, that the parties can be informed before the hearing of the conclusions of the rapporteur, and also that they may receive, following the hearing, a note under advisement which will allow them to discuss what is set out in the conclusions of the rapporteur.
[74] Codified in article R. 732-1 of the code of administrative justice.
[75] Codified in article R. 733-1 of the code.
[76] Codified in article R. 711-3 of the code.

systematic practice which no longer requires a party to specifically make a request in advance. A sense of the rapporteur's findings must be placed on the *Sagace* application a few days before the hearing, which the parties can then take note of them in consulting their documents.

c) The deliberations

After the hearing, the panel of judges on the case deliberate. Digital tools provide support for this in the same way as during the hearing itself.

Sometimes a decision cannot be made immediately, because of the complexity of the case, and deliberations can be prolonged over a number of days. Electronic communication between members of the court and their access to digitised records and documentation facilitates the organisation as well as the manner in which such extended deliberations are conducted. This is even more so the case when a party produces a note during the deliberations, which will generally be transmitted directly by the clerk via e-mail to all members of the court, so that they can all take note of this and discuss the party's submission. Digital tools offer a remote means of communication between judges that ensures that collegial discussion can continue beyond formal deliberations, to the extent required by the case until a satisfactory decision can be reached.[77]

Issues and perspectives on justice in the 21st century: digital justice

At first I considered distinguishing the function of the various actors involved in legal proceedings, including judges, but such a distinction does not matter because what is ultimately always involved is the quality of justice rendered in accordance with our philosophies as well as the rules laid down, for example, by the European Convention on Human Rights, on the right to a fair trial.

Another distinction appears to be even more relevant: on one hand, systems of digitisation and also other elements of digitisation, including private legal databases used by judges and those contributed to by the courts themselves.

[77] CE, 27 février 2004, *Préfet des Pyrénées orientales contre M. Abounkhila*, n° 252988, jugeant que lorsque, postérieurement à la clôture de l'instruction, le juge est saisi d'un mémoire émanant d'une partie qui n'en a pas exposé les éléments dans le cadre de la procédure orale, il lui appartient de faire application dans ce cas particulier des règles générales relatives à toutes les productions postérieures à la clôture de l'instruction ; qu'à ce titre, et conformément au principe selon lequel, devant les juridictions administratives, le juge dirige l'instruction, il lui appartient, dans tous les cas, de prendre connaissance de ce mémoire avant de rendre sa décision, ainsi, au demeurant, que de le viser sans l'analyser ; que s'il a toujours la faculté, dans l'intérêt d'une bonne justice, d'en tenir compte - après l'avoir visé et, cette fois, analysé - il n'est tenu de le faire, à peine d'irrégularité de sa décision, que si ce mémoire contient soit l'exposé d'une circonstance de fait dont la partie qui l'invoque n'était pas en mesure de faire état avant la clôture de l'instruction écrite et que le juge ne pourrait ignorer sans fonder sa décision sur des faits matériellement inexacts, soit d'une circonstance de droit nouvelle ou que le juge devrait relever d'office ; que dans tous les cas où il est amené à tenir compte de ce mémoire, il doit - à l'exception de l'hypothèse particulière dans laquelle il s'agit pour le juge de la reconduite de se fonder sur un moyen qu'il devait relever d'office, - le soumettre au débat contradictoire, soit en suspendant l'audience pour permettre à l'autre partie d'en prendre connaissance et de préparer ses observations, soit en renvoyant l'affaire à une audience ultérieure.

I will limit myself to considering the following six questions. In my view, these are decisive in the context of this issue:

1. Security

The security of the electronic communication system guarantees the efficiency and the performance of this system. The cyber attacks that hit several dozen countries simultaneously, including the United Kingdom on May 12,[78] reminded us, if we needed reminding, of the importance of security issues in a digital context. The quality of *Télérecours'* security must meet four requirements: availability, integrity, confidentiality and traceability.

Availability: the entire infrastructure has been strengthened.[79] Servers in all courts are under surveillance from Paris. A hotline was installed in the Conseil d'Etat and responds to calls from courts and all users, such as lawyers and administrative staff.[80]

Integrity is ensured by two daily safeguards.

Confidentiality: This is ensured by encryption[81] of all communications. Judges have limited rights of access depending on their functions.

Traceability: Every user action is recorded by *Télérecours*. So far, there have been no intrusions, modification or theft of files on the application. The security of *Télérecours* is subject to continuous surveillance, and no doubt this will be necessary into the future and will continue to improve. It is therefore important to keep abreast of developments in this area. The need for courts to have IT skills is further strengthened, as is the need to combine, for greater efficiency, the expertise of judges, clerks and IT specialists. Thus, within the Department of Information Technology of the Conseil d'Etat, there is a support office for project management, comprising of a magistrate and clerks who assist with *Télérecours* and are the representatives within each court in their field of expertise. Each court of first instance and appeal has at least one IT officer. The digitisation of legal procedures and their security is therefore also an organisational issue.

[78] The National Health Service in Britain was partially paralysed. See 'Une vague d'attaques informatiques frappe plusieurs dizaines de pays', Le Monde, Sunday 14 May and Monday 15 May editions, p. 2.
[79] The servers are on the premises of the Conseil d'Etat and the doubles in Montreuil.
[80] In 2016, it received 600 calls on average per month. Since the beginning of this year, it has received more than 2000 per month. The service is also available on standby at the weekends.
[81] A computer protection system for ensuring the integrity and inviolability of data during transmission or storage. The security methods adopted guarantee a higher or lower level of confidentiality and are based on the use of one or two encryption keys in the form of series of numbers used during the sending and receiving of communications.

2. Collegiality in judicial decision-making

The guiding principle of the administrative system is collegiality. One fear which stems from digitisation is that as judges become more flexible in terms of their work, as they are able to work from home, that this principle may be undermined as a result.[82] While the practice of having a single judge has developed in recent years with the goal of expediting justice, this is only the case in certain limited circumstances.[83]

Intense discussions between judges, especially during a ritual, or administrative inquiry, embodies this principle of collegiality. This is a pre-deliberation meeting held before the hearing between the members of the chamber, namely the panel of judges and the public rapporteur, a magistrate who occupies a particular function: they do not make a decision, but instead they inform their colleagues of their conclusions on a particular matter.[84] During this meeting, each upcoming case for hearing is discussed.[85] The culture of collegiality is also embodied in ongoing informal discussion of the issues between magistrates beyond the courtroom.

Digitisation makes the work of judges more flexible and free, to the point where we may fear that judges will leave court and prefer to work from home, which could harm collegiality.

But in my view, digitisation appears to be more of an advantage as opposed to a risk in terms of collegiality.

First of all, digitisation does not result in the end of the hearing as we know it, as there is no plan to replace these with videoconferences or web conferences. Email correspondence may however, to some extent, replace from informal discussions in person, at least to some extent.

Secondly and above all, our new digital context may strengthen collegiality between members of the court by making their work more collaborative.[86] This

[82] Article L.3 of the code of administrative justice provides that judgments are given by a panel unless otherwise provided for by law.

[83] The presidents of panel on a case may make rulings in the least complex cases, calling for a dismissal for manifest lack of competence in administrative jurisdiction or manifest inadmissibility (articles R 122-12 of the code of administrative justice). Single judges sit in urgent proceedings (eg summary proceedings), but also in the context of ordinary proceedings on certain matters and/or cases of a certain nature set out in Article R. 222-13 of the code of administrative justice, that are considered to be of minor importance.

[84] Article L. 7 of the code of administrative justice: 'A member of the court, appointed to act as consultant judge, presents his or her opinion, in public and with total independence, on the issues that must be decided by the court, that arise from the applications or appeals, and on the possible solutions.'

[85] According to whether it is before the courts or before the Conseil d'Etat.

[86] Speech made by Mr Patrick Frydman, president of the Paris Court of Administrative Appeal, at a hearing to mark the return of the judicial year on 10 October 2013, discussing 'collaborative networking, which in particular enabled the collegiality to be intensified within the chambers and thus contributed to improving the quality of decision-making' (available at http://paris.tribunal-administratif.fr/content/download/11214/33772/version/1/file/discours_du_president_frydman.pdf). This expression was again used by Mr J.-M. Sauvé, vice president of the Conseil d'Etat, in his address at the annual meeting of

word has been used within the administrative system to describe the improvement of the conditions in which group discussion takes place, using digital tools. Magistrates can work simultaneously on a shared digital medium, both during individual and group work sessions. The judgment drafted by the rapporteur is also subject to modification following suggestions made by the judges. Digital tools and the use of tracked changes in Microsoft Word facilitates these exchanges, even before the inquiry. These facilitate debates, as members of the court have simultaneous access to the computer network and legal databases, and for example the draft judgment and other useful documentation may be projected onto the wall of a meeting room for the viewing of all members.[87]

In this way, collegiality is based on digital tools that provide numerous ways in which ideas may be exchanged.

3. Quality of legal reasoning

The risk in this context may paradoxically lie with the growth of legal databases. A judge may be encouraged to make a decision in light of previous case law where the current case is similar, as he or she is able to search these databases for legal precedents.[88] This may result in a certain level of conformism at the expense of legal criticism and 'mechanised' justice, to the detriment of individual consideration of each case, which is required in order to have real impartiality, and to respect the fundamental right to a fair trial. This criticism is of the use of compensation benchmarks in the assessment of damages. In France[89] in recent years, their development has been facilitated by the adoption of a classification of heads of damages,[90] but also by another digital tool.

This is becoming more and more the case as we live in a time of algorithms.[91] Due to the development of the latter and the use of these in legal databases, their use is no longer limited to the search for bare legal documentation, but also in searching for directly relevant material,[92] which is becoming a tool of assistance in the context of legal *reasoning* itself.

presidents of the administrative courts at the Department of Justice, 31 March 2015 (available at http://www.conseil-etat.fr/Actualites/Discours-Interventions/Reunion-annuelle-des-presidents-des-juridictions-administratives2).

[87] As is typical in certain courts, for example in the administrative courts of Versailles and Strasbourg over the past number of years.

[88] While such an approach does not really have its place in a written system of law, which is the reverse of the common law tradition, as it does not attach legal value to precedent, given that this is not a formal source of law provided for under article 4 of the civil code.

[89] See for example the benchmark of l'Office national d'indemnisation des accidents médicaux, available at http://www.oniam.fr/procedure-indemnisation/bareme-indemnisation

[90] J.-P. Dintilhac, Rapport du groupe de travail chargé d'élaborer une nomenclature des préjudices corporels, ministère de la justice, March 2006, available at http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000217.pdf

[91] Ensemble de règles opératoires dont l'application permet de résoudre un problème énoncé au moyen d'un nombre fini d'opérations. Un algorithme peut être traduit, grâce à un langage de programmation, en un programme exécutable par un ordinateur. (http://www.larousse.fr/dictionnaires/francais/algorithme/2238)

[92] C. Cousin, 'Le débat sur le référentiel indicatif de l'indemnisation du préjudice corporel des cours d'appel à l'heure des bases de données', JCP G, n° 17, 24 April 2017, pp. 830 et s.

Such tools have undeniable advantages, in particular in harmonising and securing the judicial decision-making process, in limiting arbitrariness in decision making, as well as the inequality between the parties depending on the judge assigned to their case.[93]

However, there is a risk of developing a justice system in which algorithms replace human decision-making. At the very least, such tools should never be the main basis of a decision. This was dealt with in a decision of the Wisconsin Supreme Court in a decision of 13 July 2016,[94] concerning sentencing in a robbery case. The trial judge in that case used a system known as COMPAS in order to assess the convicted individual's risk of recidivism. The court found that while the judge could use COMPAS, this could only be done in order to *corroborate* his own assessment of the risk.

The use of such an instrument, for now, seems inconceivable in France. At the same time, experimentation within the judicial system is currently taking place as magistrates in civil matters test a platform known as *Predictice*, which can anticipate the outcome of a case thanks to an algorithm which undertakes a review of all jurisprudence in the area.[95]

4. Virtual hearings?

With time, digital tools may result in hearings becoming more interactive. One can imagine a day when digital documentation is projected onto the wall of a courtroom, such as a map or a photograph of locations relevant to a planning dispute.

In this way, digital tools become a support and not a substitute for the physical nature of hearings.

Hearings cannot be replaced by the use of videoconferencing, given the level of distance it introduces. Thus, as an author writes with some irony:

> 'Those who enjoy theatre or tennis know very well that there is no comparison between, or substitution for, an evening at an orchestra or an afternoon at Roland-Garros, and their televised broadcast (...). The essential element is absent. As with court hearings, such broadcasts lack the creation of a link (...), as vital as it is fleeting, between the parties to the case (...) in a unique place where this encounter can be formed and flourish. It lacks the noise and the fury, the emotion and

[93] C. Cousin, cited above.
[94] Supreme Court of Wisconsin, *State of Wisconsin v. Eric L. Loomis*, case no. 2015 AP157-CR.
[95] 'Un logiciel pour aider les juges à trancher', *Le Parisien*, 26 April 2017 edition, p. 13.

> the transcendence that will create spontaneous, indispensable, irreplaceable moments at hearing'.[96]

For these reasons, the use of videoconferencing remains the exception in administrative courts.[97] In metropolitan France, it is confined to the asylum courts where an individual has been refused entry into French territory[98] or is the subject of a detention order.[99] The hearing may then be held in a courtroom near the applicant's location while the magistrate sits the court of which they are a member, connected to the courtroom by the use of audiovisual communication, while also guaranteeing confidentiality.

It is also necessary that the applicant does not oppose the use of videoconferencing, and must be informed of the use of this tool. Videoconferencing in this context is of particular importance because it avoids transferring the applicant from place to place, who, given their situation, requires a police escort, which results in the use of both human and material resources over a very short period of time, as such cases must be decided upon within 72 hours of their referral of the judge.[100]

Overseas, the use of videoconferencing at hearings is possible in all matters but subject to restrictive conditions,[101] as their use must remain exceptional. This technology is used when magistrates are simultaneously assigned to two or more administrative tribunals and their attendance at a hearing is not materially possible within the time limits prescribed by law[102] or where it is required given the nature of a particular case. This may also occur because of the distance between overseas courts to which magistrates may be simultaneously assigned; for example, a magistrate may be assigned to a court in Martinique, located in the Lesser Antilles, and a court in St Pierre and Miquelon, off the coast of Canada. Due to a low frequency of flights, it takes two days to travel between them.

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[96] F. Defferrard, 'Contre la vidéojustice', *Recueil Dalloz* 2011 p.2878.

[97] The National Court for Asylum Law is a specialised administrative court which generally uses video link technology (article L. 733-1 paragraph 2 of the administrative code).

[98] Article L. 213-9 du code de l'entrée et du séjour des étrangers et du droit d'asile, sixième alinéa, issu de la loi n°2007-1631 du 20 novembre 2007 - art. 24 JORF 21 novembre 2007.

[99] Article L. 512-1 du même code dans sa rédaction issue de la loi n°2016-274 du 7 mars 2016 relative au droit des étrangers en France.

[100] This is the reason why the ability to have videoconferencing was introduced by loi n°2011-672 du 16 juin 2011 for the magistrate to rule in a courtroom assigned to the Ministry of Justice specially set up in the immediate vicinity of the place of detention (Article L. 512-1 III, last paragraph of the code of administrative justice). But the principle of 'delocalised' hearings remains controversial and results in reluctance on the part of the magistrates, because of the material constraints for them, but also since they presuppose that the magistrate shall rule outside the premises of a court. From this perspective, videoconferencing offers an interesting alternative to such hearings.

[101] Telehearings are provided for under Articles L. 781-1 and R. 781-1 to R. 781-3 of the Code of Administrative Justice, introduced by order No. 2005-657 of 8 June 2005 and inspired by Articles L. 513-4 and L. 513-8 of the code de l'organisation judiciaire.

[102] Appeals involving a person arguing that their freedoms have been seriously infringed by a legal entity under public law must be decided upon within 48 hours from the making of the application (article L. 521-2 of the code of administrative justice).

5. Storing paperless decisions - the issue with electronic filing

Until a few years ago, files were archived in paper format. *Télérecours* was exclusively designed exclusively for the transmission of documents, the services of the secretary general of the Conseil d'Etat are working to put an electronic solution in place which allows the archiving of case documents in electronic format. The services of the General Secretariat of the Conseil d'Etat are working on the implementation of a computerised solution that should ultimately archive all files in a digital format.[103] This future paperless archiving solution will automatically archive relevant files by connecting to the *Skipper* and *Télérecours* applications. The rolling out of this application is planned for 2019.

In the meantime, the files that are in digital format are stored on *Télérecours* - but they cannot be stored indefinitely, otherwise application's functioning would be impaired. They must be prepared according to certain requirements[104] with a view to their future transfer to the application.

The digitisation of archives makes sense: it is technically easy to archive files in paper format, whereas computer archiving requires filing be done in a systematic manner. It is necessary to neutralise document formats to ensure their preservation into the future, while creating marks from the file's metadata in order to be able to retrieve it for later viewing.

6. Circulation of judicial decisions in the hour (or era) of Open Data

Administrative decisions are placed on internal legal databases such as *Ariane* and *Ariane archives*, and ranked in accordance with their legal importance. They also allow databases outside the administrative courts, starting with *Légifrance*[105] or *Arianeweb*, which can be accessed from the Conseil d'Etat's website,[106] which only include certain decisions in the light of their legal importance. These also feed into private databases operated by legal publishers which require paid subscriptions.

A process of anonymisation is required for administrative decisions placed on private databases in order to protect the private lives of the individuals concerned.[107] The state is liable for any failure to do so.[108]

[103] According to a note addressed by the general secretary of the administrative courts and courts of appeal to the heads of court on 14 February 2014.
[104] Set out in the above cited note.
[105] Decree No. 2002-1064 of 7 August 2002 creates a public service for the circulation of the law via the Internet, namely the *Légifrance* site, which is entrusted to the directorate of legal and administrative information.
[106] *Arianeweb* includes the decisions available on *Légifrance* but also the conclusions of public rapporteurs.
[107] The release of an online database which is not totally anonymised is an automated processing of personal data within the meaning of the law of 6 January 1978, the persons concerned having a right of opposition (CE, 23 March 2015, *Association Lexeek pour l'accès au droit*, n°353717). However, with regard to the execution of a public service, decisions are not placed on

A policy of openness and reuse of public information is evident in the the wake of law n° 2015-1779 of 28 December 2015 relative à la gratuité et aux modalités de la réutilisation des informations du secteur public, which transposes Directive 2013/37/EU of 26 June 2013. Judicial decisions cannot remain outside this movement: they are handed in the name of the French people.[109] The law on a digital republic adopted on 7 October 2016[110] provides for free public access to decisions of the administrative[111] and judicial courts[112] with respect for the privacy of the individuals concerned. A process of reflection in light of its implementation is already being engaged with by both ordinary and administrative court judges.

However, there are risks associated with this policy of widespread circulation of judicial decisions.

Firstly, we cannot ignore the fact that the widespread dissemination of decisions increases the opportunities for errors in the redaction of personal details of individuals which would undermine respect for privacy rights.

Secondly, the circulation of decisions, at the time when it was only possible to do so in paper format, effectively implied that certain decisions were chosen for specific reasons, ie on the basis of their legal importance. The *Lebon* collection which includes all Conseil d'Etat decisions was the traditional manner in which decisions were circulated. Considerations of legal relevance and importance are also evident in the publication of select decisions on *Légifrance* and *Arianeweb*. The widespread online circulation of these decisions may give the false impression that they are all of equal legal importance, and may therefore prove counterproductive in terms of promoting access to the law. Thus, 'in order to make jurisprudence more easily accessible and more easily understood, what counts is not exhaustiveness, but rather selection'. There is reason to fear that the online publication of all decisions will 'result in a shapeless and confused mass of data'.[113]

line with the consent of the parties concerned, subject to prior anonymisation, in order to respect their right to privacy. (Tribunal Administrative Court of Paris, 2nd ch., 7 November 2016, n° 1507125)

[108] Tribunal Administrative Court of Paris, 2nd ch., 7 November 2016, no 1507125, cited above: in that case, the publication on the *Légimobile* and *Légifrance* websites for three and a half years of the non-anonymised judgment of the Court of Appeal of Douai of 20 January 2011, ruling on the applicant's divorce and containing, in addition to the name and address of the applicant, the names of her children and information relating to her income and expenses, which relate to the applicant's private and family life, is in itself such as to infringe the right to respect for private and family life. She was compensated for the non-pecuniary damage resulting from the disturbance caused to her by the unexpected discovery that private information about her had been available on the Internet for three and a half years.

[109] Article L.2 of the code of administrative justice.

[110] Cited above.

[111] Article L. 10 of the same code.

[112] Article L. 111-13 du code de l'organisation judiciaire.

[113] J-H. Stahl, 'Données publiques – Open Data et jurisprudence', *Droit administratif*, n°11, November 2016.

Thirdly, this policy of openness combined with the freedom to reuse information fuels the development of 'predictive justice'. Thus, as the aforementioned *Predictice* indicates, from the information available, that the chances of success in a legal claim particularly depends on one's location.[114] We are thus witnessing the emergence of a veritable market for predictive justice, promoted by the development of artificial intelligence but also the opening up of public data.
As the first president of the Paris Court of Appeal recently pointed out, 'the emerging phenomenon of *big data* in legal matters ... can lead to predictive justice ranging from referencing previous decisions to the profiles of judges who made a particular type of decision', and if 'predictive justice can respond to society's demand for greater predictability in legal decisions ... it may also result in significant risks: risks for freedom, risk of pressure on magistrates, risk of decontextualisation of decisions, risk of a standardisation of practices...'.[115] There are still concerns about forum shopping, to the extent that the rules of territorial jurisdiction of the courts do not preclude it. It should be noted, however, that administrative jurisprudence is characterised by a high degree of homogeneity, promoted precisely by the efforts to rank decisions on the basis of their authority and importance, which demonstrates that there is little to fear about the development of predictive justice.[116]

Conclusion

Administrative justice is very open to new technologies; it does not consider digitisation as an end in itself but as a means of improving the quality of justice, which must be used wisely, with anticipation of the risks involved.

> '*For there is nothing either good or bad but thinking makes it so*', Hamlet, Act 2, scene 2.

Comparative law and international exchanges also feed into our consideration of this topic, and our meeting on the occasion of this conference.

[114] 'Un logiciel pour aider les juges à trancher', *Le Parisien*, 26 April 2017 edition, p. 13, cited above.
[115] Speech of Madame Chantal Arens, first president of the Paris Court of Appeal before the beginning of the judicial year, 16 January 2017, available at http://www.ca-paris.justice.fr/art_pix/discours%20PP%20rentr%E9e%202017.pdf
[116] F. Melleray, 'La justice administrative doit-elle craindre la 'justice prédictive'?', *AJDA* 2017 p. 193.