

Legal Aspects Related to Digitisation – Practical Experience, Legal Challenges and Theories

PhD course – the 5th and 6th of October 2017

Track 1: Private law

The legitimacy of legal frameworks is affected by the way the legal rules are created, and the ICT systems influence the range of legal sources, especially with regard to their availability and comprehensibility. The mass adoption of digital services and solutions by nearly all groups of actors in our society, i.e. consumers, business and governments, raises fundamental legal issues in almost every aspect of law and legal practices – including issues categorized as private law relations.

Company law:

Digitisation has an immense influence on company law. Companies can be formed online, and they may be dissolved by declaration online. Shareholders may attend the annual general meeting by electronic means. The increased application of digital means in companies' life cycle "from cradle to grave" may potentially constitute a practical as well as a legal challenge, as existing company and capital market law provisions are not always geared to this digital revolution. An example is the shareholders' ability to exercise their shareholder rights on a cross-border basis, and neither national nor supra-national legislation should act as an obstacle to shareholders' basic rights.

The employment sector:

There are several challenges related to the employment sector and digitalisation. Firstly, certain forms of work in the "gig-economy", such as crowd working and work-on-demand, pose the problem of an uncertain employment status and thus uncertain employment rights and protection. This is because the theoretical apparatus of labour law comes under strain with regard to the classification of such new forms of employment that apparently lack clear linkage with the traditional parameters of salaried employment. In this respect, several proposals have been put forward, ranging from the identification of a new category of employment to the interpretative adaptation of existing categories. Secondly, as the employment relation and the regulatory mechanisms thereof are central to the Danish welfare society, the digitised work development poses questions to the attained societal balances between the freedom to conduct business on the one hand and the economical and social security for employees on the other hand. Thirdly, in the broader perspective, the new digital business strategies include workers as "digital galley slaves", casting light on the creeping processes of commodification of work and casualization of employment. These models and rhetorics mirror the approach to employer-employee relations from the mid- to late-1800s, and thus in itself poses questions of a socio-legal character. Thus, digitisation in the employment sector requires investigation of existing regulatory and policy tools, including job classification, personal data protection, the reach of employee surveillance, working time arrangements and training.

Contract law:

Digitalization is one of the catchwords used to define the changes resulting from the application of IT to business models, productive processes and work organization. The law firms use digital marketing, e-commerce-approaches, computer protocols that facilitate the design of contracts and other digital facilities. Focusing on the implications of digitalization for contractual relations, it may be provisionally defined as encompassing operations and processes brokered, organized or performed within digital platforms or by means of digital devices. In this perspective, digitalization cuts across different forms of contract relations

(standard and non-standard), and it has consequences on the issues covered by contracts, including issues related to the organization of services (in-house performance and ICT-based relations) and productive processes (material and immaterial). On the one hand, digital tools can be conceived as a means to establish more horizontal and cooperative relationships within organizations and to provide “smart” workers and relations between companies as well as between the public and the private sector with greater flexibility in the definition of their roles, while providing better opportunities to match their capacity with the demand for quality, compatibility etc. from any physical or geographical boundary. On the other hand, digitalization represents a challenge for the common theoretical categories of contractual relations as well as the material conditions of the parties signing the contracts. All of the developments mentioned above have major repercussions on the normative and regulatory patterns of contractual relations.

Track 2: Public law

In December 2016 the Danish Agency for Digitalisation has published guidelines on how to ensure that legislation is based on the eGovernment Strategy 2016-2020 that includes guidelines made by the Danish Ministry for Justice in Annex 2 on how to ensure respect for the principles of public law in the design of law. But several problems are still not solved. The eGovernment Strategy is e.g. based on data sharing between authorities.,but is such a sharing of data always in harmony with the traditional law and order principles?

Taxation:

The common debt collection system, developed by the Danish Customs and Tax Administration, has proved that systems may not be able to deliver, what they were developed for. Part of the reason why the system was unable to deliver, was the complexity of the underlying regulations. ICT systems alone are not the answer to make systems ready for digitisation. It is equally important to look at the regulations on which the system is based. If these regulations are overly complicated, it may be impossible to develop and administrate an ICT system that can manage them.

The environmental sector:

The decision-making process is currently characterized by use of standard formats and digitization. Advance dialogue with the applicants and the need for public servants to check that applicants understand the IT-self-service-systems (e.g. ‘Byg & Miljø.dk’ and ‘husdyrgodkendelse.dk’), is now the primary task in the administration. Under the Environmental Protection Act, the applicants are not asked for any details about their proposed projects, if they are subject to the executive order on standardization of terms. The needed information lies in the IT-decision-making-systems. Digitalized maps with binding legal effects in the decision-making, and statutory orders covering more than 2,600 pages are among the consequences of the digitalization of the decision-making systems. As the digitalised decision-making is taking over, the traditional interpretation of legal rules, the assessment of the individual case by use of discretionary power, the former concrete assessment etc. are replaced by general rules with very technical and natural scientific terms and conditions that most layers cannot handle, and the terms laid down in the licence are in practice based on a standardization (including many terms that are contradictory).

Criminal law:

The implementation of ICT in everyday life implies a change in the way of committing and suffering crimes. The growth of the information society is accompanied by new and serious threats. Attacks against information infrastructure and Internet services have already taken place. Online fraud and hacking attacks are just some examples of computer-related crimes that are committed on a large scale every day. The legal, technical and institutional challenges posed by the issue of cybersecurity are global and far-reaching.

The 5th of October 2017

- 9:30-9:45: ‘Welcome and introduction to the overall issues of the first day’
Lecturer: Tine Sommer, the Department of Law, Aarhus BSS, AU
- 9:45-10:30: “The impact of digitalization on legislation and the design of public decision-making-platforms etc.”
Lecturer: Jens Nonbo Andersen, KMD
- 10:45-11:45: “Data protection” Introduction to Regulation 2016/679/EU on Protection of natural persons with regard to the processing of personal data and the free movement of such data.
Lecturer: Charlotte Bagger Tranberg, Bech-Bruun
- 11:45-12:15: ‘Challenges related to the competence of legislators and courts in the field of European Union law’
Lecturer: Graham Butler, the Department of Law, Aarhus BSS, AU,
- 12:15-13:00 Lunch
- 13:00-14:00: “The impact of digitalization in the court system”
Lecturer: Frederik Wage, Department of Law, University of Southern Denmark
- 14:45-15:15 Coffee
- 15:15-16:15: “Legal theories and methodologies challenged by the the digitalisation of Law’.
Lecturer: Steen Schaumburg Müller, the Department of Law, University of Southern Denmark
- 16:15-17:30 Plenum discussion
- 18:00- Dinner

The 6th of October

Day two of this PhD course will be focused on the challenges and possibilities in handling the challenges in legal science that are related to the new legal sources, databases and decision-making systems.

8:30-9:00: Welcome back, summing up from the first day and presentation of the overall issues of day two with *Coffee*

Lecturer: Ellen Margrethe Basse, the Department of Law, AU.

Private law

Public law

9:00-9:45: Company law:

Lecturer: Mette Neville, the Department of Law, AU

Data protection of children

Lecturer: Caroline Adolpsen, the Department of Law, AU

10:00-10:45: Employment sector

Lecturer: Natalie Videbæk Munkholm, the Department of Law, AU

The environmental sector

Lecturer: Ellen Margrethe Basse, the Department of Law, AU

10:45-11:15 Coffee

11:15-12:00 *Contract law:*

Lecturer: René Franz Henschel, the Department of Law, AU

Criminal law:

Lecturer: Nicolaj Sivan Holst, the Department of Law, AU

12:00-13:00: Lunch

13:00-14:30: *'Reflections on the PhD students' ideas on the challenges and possibilities – including methodology and theory*

Comments and discussions will be based on the PhD students' own project experiences and problems, which are described in the papers that they have sent to the lecturers of this course

Lecturer: (to be decided).

14:30 -15:30: PhD students' workshop on how to share experiences and challenges related to digitalization

15:30 -15:45: Coffee

15:45 -16:30: PhD students' presentations and plenum discussion.

Assignments for PhD students

Participation in the course requires that each PhD student prepares a paper – deadline 20 September 2017. The paper should be no more than 6 pages (a standard page includes 2,400 characters, including spaces). The content of your paper may include any experiences that you have in your work with your PhD project related to the consequences of digitalization and other sorts of ITC on the legal methodology, the legal sources etc.

As an important part of this PhD course we will focus on the shift in the state's regulatory, administrative and judicial mechanisms as well as on the challenges to the traditional approach to territorial jurisdiction that are introduced by ICT along the major functions. There are several other challenges that digitization places on the traditional legal framework.

As part of your preparation, we want you shortly to describe the focus of your own research project – including some information on the legal sources that you have to study – and explain

1. *If – and where it is relevant – how this legal area is effected by the current ITC-development;*
2. *if the relevant Danish legislation has been changed as a consequence of the use of digitalization etc.;*
3. *if you think that the current legislation is up-to-date in respect to the current ITC-development;*
4. *if you think that there are some special challenges in respect to the traditional legal principles or other issues related to the rule of law in the legal area that you are studying?*

Readings - The following materials and articles:

Cybercrime and the Charter of Fundamental Rights

The European Commission's Communication of 10 January 2017 on Exchanging Protecting Personal Data in a Globalised World; COM(2017) 7 final - http://europa.eu/rapid/press-release_IP-17-16_en.htm

Judgment of the European Court of Justice in joined cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* – the preliminary ruling concerning the validity of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of public available electronic communication services or of public communications networks

The Convention on Cybercrime (Budapest Convention)

http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf

Concerning eGovernment

Thomas Zwahr and Matthias Finger “Critical steps towards e-Governance: a case study analysis”
https://www.researchgate.net/publication/37423655_Critical_steps_towards_e-Governance_a_case_study_analysis

Thomas Zwahr, Matthias Finger and Philipp Mueller, “More than Digitalisation – The Transformative Potential of E-Governance: An Exploratory Case Study”
<https://www.computer.org/csdl/proceedings/hicss/2005/2268/05/22680127-abs.html>

The European Commission's communication on EU eGovernment Action Plan 2016-2020. Accelerating the digital transformation of government; COM(2016) 179 final of 19 April 2016

<https://ec.europa.eu/digital-single-market/en/news/communication-eu-egovernment-action-plan-2016-2020-accelerating-digital-transformation>

Ellen Margrethe Basse ”Digitalisering af sagsbehandlingen på miljøområdet” (Digitalisation of the Decision-making Regulated by the Environmental Legislation” in Danish - in press in Tidsskrift for Miljø)

Concerning business law and company law

BDI The Voice of German Industry: “Industrie 4.0 Legal challenges of digitalization. An input for the public debate”

https://www.noerr.com/~/_/media/Noerr/PressAndPublications/Brochures/studien/Legal-challenges-of%20digitalisation-Industrie-40.pdf

The Informal Company Law Expert Group (ICLEG): Report on digitalisation in company law, March 2016

Danish articles and books of relevance:

Niels Fenger ”Den automatiserede forvaltning – tekniske og retlige udfordringer”, NAT 2013

Hans Christian Spies and Peter Blume “Ret og Digital forvaltning”, Jurist- og Økonomforbundet