

Digitalisation and Good Administration Principles

Emilie Chevalier and Eva M^a Menéndez Sebastián

Digitalisation, algorithms, blockchain, automation, internet of things, metaverse, etc., are terms that have burst into our lives with force in this millennium. However, their use is disparate in the private and public spheres. And this is not accidental, but rather frequent, due to a variety of reasons, including the difficulties of transforming public organisations, the necessary controls, the high cost ...

Like any human activity, the administration has been affected by the digitalisation process. Since the end of the 1990s, digitalisation process has been implemented at the level of States, but also within international organisations, such as the European Union. In this respect, digitalisation has been linked to the promotion of New Public Management,¹ contributing to the reinforcement of the efficiency of the administrations. However, the introduction of new technologies cannot be seen as a purely technical process, reflected in the online availability of information to the administration and the development of electronic means of communication with citizens. Academic work, noticeably in this Review,² highlighted and analysed, and is still doing so, how digitalisation has had a profound impact on the administration, and has renewed its organisation and how it operates.³ *Administration 2.0* is not just an

electronic version of the 20th-century administration. It constitutes a renewed framework for the definition and exercise of administrative action as well as for the development of relations between the administration and citizens.

Among the principles of administrative law, the principle of good administration plays a central role. It has been for some decades a fundamental principle for the European administrative area. It is recognized at the level of the European Union, enshrined in Article 41 of the Charter of Fundamental Rights, and recognized or at least implemented within the national legal orders. Good administration is therefore a common standard for European administrations, so much so that it has even been said that this century will be the century of good administration. This notion is defined as the promotion of a quality administration, based on a double dimension, on the one hand an efficient administration, on the other hand at the service of citizens, i.e. able to take into account the expectations of individuals, by guaranteeing the respect of procedural administrative rights, and noticeably impartiality and due diligence.⁴ The principle of good administration is therefore a two-sided principle, and good administration expresses a goal, or even an ideal of how the administration should function, based on a balance between these two sides, which may vary according to the times and contexts⁵. Indeed, one particularity of the notion of good administration is its standard nature, i.e. a notion whose content is determined by the actors involved in its implementation, a legislator, an administrative authority or the

¹ See for example, OECD, *The e-Government imperative*, Paris, OECD Publishing, 2003; OECD, *e-Government for Better Government*, Paris, OECD Publishing, 2005.

² See for example, A. Barone, A.G. Orofino and J. Valero Torrijos (eds.), *The Use of Artificial Intelligence by Public Administration*, in *European Review of Digital Administration & Law*, vol. 1, 2020.

³ For some examples, see P. Cossalter, H. Rassafi-Guibal and P. Tifine, *Droit de l'administration numérique*, Paris, LexisNexis, forthcoming, 2024; J.-B. Auby, *Contrôle de la puissance publique et gouvernance par algorithme*, in D.U. Galetta and J. Ziller (eds.), *Le droit public face au défi des technologies de l'information et de la communication, au-delà de la protection des données*, Baden-Baden, Nomos, 2018; E. D'Orlando and G. Orsoni, *Nuove prospettive dell'amministrazione digitale: Open Data e algoritmi*, in *Istituzioni del federalismo*, vol. 3, 2019, 593; D.W. Scharthum, *Law and algorithms in the public*

domain, Etik i praksis, in *Nordic Journal of Applied Ethics*, vol. 1, 2016, 15.

⁴ J. Ponce Solé, *Quality of Decision-Making in Public Law. Right to Good Administration and Duty of Due Care in European Law and in US Law*, in *European Review of Public Law*, 2009, vol. 21, No. 3, 73.

⁵ R. Bousta, *Essai sur la notion de bonne administration*, Paris, L'Harmattan, 2010; E. Chevalier, *Bonne administration et Union européenne*, Bruxelles, Bruylant, 2014.

judge.

The special issue proposes to consider the links and the mutual impact of the simultaneous development, from the beginning of the 21st century, of good administration and of the process of digitalization. Indeed, their respective developments interact to a large extent. The new technologies are one more tool in the hands of the public sector, which must enable it to better address its service to citizens. From this perspective, the connection between technological disruption and good administration is evident. This must be the objective of the use of artificial intelligence and, in general, of the digital transformation in which public administrations are immersed.

Several paths can be followed to explore those interactions. First, it is interesting to focus on the conditions for exercising discretionary power. In the context of digitalization, the exercise of the administration's discretionary power is subject to certain pressures. The development, for example, of automated decisions tends to constrain, or even put aside, discretionary power. Digitalisation thus renews the methods of exercising discretionary power, perhaps limiting it, whereas the principle of good administration requires that individual situations be duly taken into account, in particular in compliance with the due diligence requirement. In what way then does the confrontation of good administration with new forms of digital administrative action have an impact on the meaning and exercise of the administration's discretionary power?⁶

Secondly, digitalisation reinforces certain dimensions of good administration: openness, transparency, efficiency and accountability. The use of new technologies is a source of new areas of interaction between the administration and citizens. Furthermore, the digitalization of the administration tends to renew the ways in which administrative action is legitimized, and the use and implementation of discretionary power. It can help to develop more collaborative and open methods and thus

contribute to the promotion of administrative citizenship.

Finally, the principle of good administration can also be mobilised to guide the accountability of the process of digitalisation of the administration. Indeed, digitalisation is not an end, but a means to an end, which is to improve the quality of administrative action. The principle of digitalisation is rarely discussed as such, but perhaps in view of the upheavals it brings, it could be. Can the principle of good administration then serve as a compass, a guide in the conduct of reforms promoted by digitalisation? Thus, it is necessary to assess changes in the way the administration operates, particularly regarding its values, and the balance to be struck between efficiency and the protection of fundamental rights. Does the development of digital administration offer new ways in this respect, or on the contrary, does it only reproduce, or even accentuate, the classic difficulties and obstacles of the implementation of the administrative decision-making process? Good administration is a moving and adaptable concept, capable of integrating new expectations, but it must not lose its meaning, or its mind, with those evolutions. Should there then be limits to its adaptation?

The administration is therefore undergoing transformations, not without important challenges, which administrative law must face, and on which this monograph reflects.

Firstly, Prof. Isaac Martín Delgado illustrates the challenges of automation in public administration, how artificial intelligence, after offering a definition of it, can contribute to the improvement of the administration, but being aware of its limitations, of its current state in the public sector, of its rather complementary nature to human action and especially of the fact that it is a means and not an end. Moreover, it rightly distinguishes between material and formal activity and, within the latter, particularly the due administrative procedure. The use of artificial intelligence systems, which must be guided by the principle of good administration, and which cannot be done in any old way, with particular emphasis on algorithmic, internal and external transparency. The author also makes three proposals, such as the principle of minimum autonomous algorithmic activity; the drafting of a specific regulation on the process of

⁶ J. Mendes, *Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law*, in *Common Market Law Review*, 2016, vol. 53, No. 2, 419; M. Oswald, *Algorithm-assisted decision-making in the public sector: framing the issues using administrative law rules governing discretionary power*, in *Philosophical Transactions of the Royal Society A*, vol. 376, issue 2128, 2018.

adopting software and the transparency of its operation that specifies and reinforces the principles of transparency, impartiality and participation when configuring the system and its action process; and the existence of a specialised and independent supervisory body or authority with the function of approving algorithmic systems and supervising the specific way in which it operates, as well as guaranteeing its correct operation during its life cycle.

For his part, Prof. Juli Ponce analyses a specific and very interesting issue in the use of Artificial Intelligence, both in the public and private spheres, such as digital *nudges*, choice architectures, *hypernudges*, and how these could contribute to the achievement of good administration, obviously, if they are transparent and focused on the general interest, by attending to people with a citizen-centred approach. But it highlights the multiple risks, the manipulation, the possible infringement of rights - some of them fundamental - such as freedom of thought, autonomy of will, and even, at a general level, the democratic system and the rule of law. It also highlights the need to address its regulation proactively and based on the precautionary principle, given the insufficiency that self-regulation has shown, for example, with the prohibition of obscure patterns, which is the aim of the future EU Digital Services Act, and as some American precedents already do. In short, using the best of Artificial Intelligence and avoiding the worst of it.

Prof. Eva Menéndez Sebastián, with the collaboration of Belén Mattos Castañeda, explains in her contribution how the use of artificial intelligence and, specifically, algorithms can contribute to improved decision-making and, therefore, to good administration. To this end, they start with a brief analysis of the very notion of good administration and its various functionalities, among which, for these purposes, the notion of good functioning and improved decision-making stands out. However, this work also highlights the possible risks associated with the use of artificial intelligence in the public sector, such as the digital divide or, especially, algorithmic discrimination, proposing solutions in this regard, such as prior audits, certifications and, above all, transparency.

Next, Prof. Diana-Urania Galetta highlights the various steps to be taken to achieve a 4.0,

digitalised, efficient and effective public administration, which responds more adequately to the right to good administration. Diana-Urania Galetta highlights the various steps that need to be taken to achieve a digitised, efficient and effective Public Administration 4.0, which responds more adequately to satisfy the right to good administration, proclaimed as a fundamental right in art. 41 of the Charter of Fundamental Rights of the European Union. In short, how the use of ICTs by administrations can contribute to their improvement, as well as the role that the National Recovery and Resilience Plan could play in all of this. In this way, it analyses crucial aspects such as the dematerialisation of documents, interoperability problems, the role of the civil servant responsible for the procedure, the relevance of quality data in the due diligence required by the CJEU within good administration and, in short, it offers ideas regarding the essential aspects to be taken into consideration in order to achieve a genuine quality digital administration, which does not entail a digitalisation of complexity.

Professor Katrin Nyman Metcalf explains in a very graphic way how e-governance can contribute to the objective of achieving an efficient and effective administration, improving the provision of services, offering personalised, citizen-based and faster attention. In doing so, she gives examples from the Estonian system, one of the countries that is undoubtedly the most advanced in e-governance. The author explains how automatic digital identity and electronic signature, as well as the important interoperability system - also with noteworthy safeguards, such as the identification of the person accessing the data or the footprint that the access leaves - facilitate the widespread use of digital public services. However, he also appreciates the challenges that this transformation faces, not only in relation to data protection, which can certainly be more protected even than in paper format, but also, for example, possible attacks, such as the one Estonia itself suffered in 2007 - hence the relevance of cybersecurity - or even the lack of acceptance by society. However, none of this justifies not moving towards e-governance, but rather avoiding risks as much as possible.

The digital transition is not only a European issue, but a global one. To find out

how this transformation is being carried out in Latin America, Prof. Mirko Maldonado-Meléndez offers us an interesting overview of the subject, and, specifically, in his work he analyses the creation and implementation of the regulatory organisations of digital government in the various Latin American countries, as governing bodies for digital transformation policies. These digital government agencies or secretariats have become true managers of the public policies designed by the executive powers to direct the digital transformation process of their administrations; however, they are not exempt from certain difficulties, such as their dependence on and proximity to the government, which may imply a certain bias, or the infralegal category of their instruments.

Finally, Hanne Marie Motzfeldt explains in detail the use of artificial intelligence in one of the most developed countries in this field, Denmark, how the principles of Danish administrative law are applied (inquisitorial principle, equality, proportionality, etc.), the impact assessment of good administration, the risk approach and the different categories in this respect, such as verifiable information, value estimates, professional assessments, expert estimates or legal valuations, and the measures that must accompany these different types of application of artificial intelligence by public authorities. All this implies important similarities with the provisions of the future EU Artificial Intelligence Act, although with certain differences, especially from the subjective perspective. Therefore, it will be necessary to amend Danish legislation to make it consistent with the future European regulation and avoid duplication and excessive burdens on citizens and entrepreneurs, undoubtedly an important challenge, especially considering that, as the author points out, most of the artificial intelligence systems used by Danish public authorities are high-risk, according to the classification proposed by the European Union.

In short, this technological disruption that is transforming our lives, also from the perspective of the relationship between authorities and citizens, requires studies, reflection and proposals, such as those presented in this monograph, that can contribute to the constant improvement to which we must aspire in the century of good administration.