European Review of Digital Administration & Law - Erdal
2024, Volume 5, Issue 1, pp. 85-97
ISSN 2724-5969 – ISBN 979-12-218-1507-8– DOI 10.53136/9791221815078 07

*Taming the Smart Cyber Beast: A Network of Courts and Other Authorities**

Susana de la Sierra
(LL.M. (Bayreuth), Ph.D. (EUI), Professor of Administrative Law, University of Castilla-La Mancha)

ABSTRACT Governments turned digital long ago. This is essential in terms of efficiency, which is in general a constitutional mandate incumbent on public bodies. Many tasks can be executed in a quicker and more effective manner, while leaving to human beings the responsibility of dealing with complex cases, where public interests need to be duly balanced. Yet risks also exist, and they need to be outweighed with benefits when using digital and AI instruments in public action. Controls of this usage are paramount. A theory of control of digital administration using AI instruments, i.e. the intelligent or smart Cyber Beast, needs to be comprehensive and up to date. This article attempts to delve into the main institutions and principles that frame said control.

KEYWORDS: Artificial intelligence – Digital – Agencies – Courts – Judges – Algorithms – Administration – Discretion

1. *Introduction*

Governments turned digital long ago.[1] Traditionally, the expression "electronic administration" or "electronic government" has referred to the use of specific technologies to perform public duties and to the electronic relationship between public authorities and citizens. Emphasis was placed on the transformation of paper-based bureaucracy into a machine-based one. At the beginning, debates were addressed mostly in technical terms, and in general not necessarily on contents, organisational transformation and the challenges to the decision-making process. Yet clearly, fears and risks were already anticipated in the literature, leading prominent administrative law scholars such as Harlow and Rawlings to warn in 2009 that "[m]odernisation has been moving us fast into uncharted administrative territory of 'e-governance' empowered by ICT, bringing promise of greater administrative competence but also new threats to civil liberties and human rights".[2]

Today, concepts such as "digital government" or "digital administration" refer to the extended use of disruptive technologies in public action, mainly through digitalised administrative procedures, and they include the use of artificial intelligence (AI) systems.[3]

* Article submitted to double-blind peer review.
This article has been prepared in the framework of two research projects, of which the author is Principal Investigator (together with Prof. Juana Morcillo Moreno): "Protección jurídica y oportunidades de los colectivos vulnerables ante la digitalización y la inteligencia artificial" [Legal protection and opportunities of vulnerable groups vis à vis digitalisation and artificial intelligence] (PRODIGIA: PID2021-124967OB-I00, funded by MICIN/AEI/10.13039/501100011033/ and the EU) and "Digitalización y colectivos vulnerables: protección, garantías y propuestas para su implantación en Castilla-La Mancha" [Digitalisation and vulnerable groups: protection, guarantees and proposals for its implementation in Castilla-La Mancha] (PRODIGITAL: SBPLY/21/180501/000089, funded by Junta de Comunidades de Castilla-La Mancha and the EU).

[1] The United Nations – through the Department of Economic and Social Affairs – launched, back in 2001, a series of reports on e-Government across all 193 Member States. The latest one, released in September 2024, is entitled "Accelerating Digital Transformation for Sustainable Development" and includes an addendum on the integration of artificial intelligence in digital government development. This series is a good instrument for assessing how governments around the world have turned digital.

[2] C. Harlow and R. Rawlings, *Law and Administration*, 3rd ed., Cambridge, Cambridge University Press, 2009, xviii.

[3] For the purposes of this article, AI is understood in the legal sense provided by article 3.1 of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144

Now the discussion deals not only with technical aspects (which are nevertheless still relevant), but also with the transformation of public action through these instruments.[4] New technologies challenge structures and procedures, which need to be adapted. The decision-making process is influenced by this transformation and many questions arise as to how decisions are now being taken, as well as to the role of the AI systems therein. Organisational changes are required, and so are reforms regarding human resources: new types of civil servants and new competences may be necessary. Recruitment procedures should be updated in an area in which new leaderships are vital.

Digitalisation is not a mere appendix of public action nor is it a minor aspect in daily life. It has a mainstreaming effect and pervades every area of government. From a legal point of view, various types of approach may be conducted.

On the one hand, digitalisation is a means to speed up procedures, store information and simplify the administrative burden. In this general context, AI systems play an essential role in achieving effective and efficient public action. This being so, concerns on equal access to administrative procedures and the protection of vulnerable people come into play. Here, various constitutional values recognised in many national constitutions are implicated: effective and efficient public action, good administration, effective judicial protection and the principle of equality and non-discrimination.

On the other hand, digital tools and AI systems are relevant for the provision of public services, as an aid to providing health care or education in remote zones, for instance, or to promote the provision of social services through economic aid.[5] AI thus contributes to the welfare State. Inclusion may also be a concern here, since some citizens may not be able to benefit from these public services because of their lack of infrastructure or digital capabilities.

Control of public action in this new context differs from classic control systems in certain aspects. Among other issues, personnel at control organs (courts and others, such as supervisory agencies) need to be acquainted with these technologies, in order to be able to supervise their use. Or, at the very least, they should be in a position where they can receive the knowledge they need to perform their duties, for example from specific advisory bodies. This requirement is also linked to the human oversight clause envisaged in article 14 of the AI Act, as there should also be a human being who ultimately has the last word in a controversy in which AI is relevant. Yet one question is whether judges are best placed to exercise this control or, at least, whether judicial control should not be updated and complemented with other instruments.

The use of AI systems in the public sector is covered by the scope of application of the AIA.[6] Several uses of AI systems in the public sector or in relation to the provision of public services or activities of a public dimension are qualified as high-risk systems. These include critical infrastructures, central to the development of smart cities, but also other areas, such as public education, migration and access to and enjoyment of essential private services, public services and benefits. Besides, the AIA applies to other uses in the public sector which are yet to be determined through practice and future regulation (hard or soft law) but it does not apply to certain uses, such as those with military, defence or national

and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act, hereinafter, Artificial Intelligence Act or AIA.). With minor differences, the concept is equivalent to the one embedded in article 2 of the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (Vilnius, 5 September 2024). Expressions such as "smart government" or "smart cyber beast" are used here to describe administrations that use AI systems to perform certain functions.

[4] A thorough account of legislation, case-law and bibliography on Digital Government, from a Spanish perspective, can be found in Catalan, in C.I. Velasco Rico, *Dossier sobre l'administració a l'era digital*, in *Revista catalana de Dret Públic*, 58, 2019, 208.

[5] In the context of smart cities, smart territories or smart communities the relevance of this tool in the provision of public services is obviously significant. See D. Marongiu, *The Ideal City: Space and Time (from the Renaissance to Smart Cities)*, in *European Review of Digital Administration & Law – Erdal, vol. 2, No. 1, 9;* D. Santiago Iglesias, *From Smart Cities to Smart Communities: a Conceptual Approach*, in *European Review of Digital Administration & Law – Erdal*, vol. 2, No. 1, 2021, 33.

[6] See O. Mir Puigpelat, *The AI Act from the Perspective of Administrative Law: Much Ado About Nothing?*, in *European Journal of Risk Regulation*, published online on 30 September 2024 (doi:10.1017/err.2024.54) and O. Mir Puigpelat, *The impact of the AI Act on public authorities and on administrative procedures*, CERIDAP, 4, 17 October 2023.

security purposes. In some cases, the dividing line between ordinary security and national security may be blurred. The Act includes a complex system of supervision and governance that is part of the overall control system of public action.

All this, together with pre-existing control mechanisms, either general or more specific and sector-based, leads to a tentative comprehensive theory of control of public action which includes a constellation of actors, procedures, networks and outputs that could render effective control difficult to achieve at times.

In this article it will be argued, on the one hand, that the digital and *smart* administration is not homogeneous, and it does not act homogeneously. It is important to bear this in mind, as risks posed by digital instruments and uses of AI vary depending on each area of activity. They should also be treated in different ways in legal terms, and by means of different mechanisms. For instance, the potential effects of fines imposed though a digital tool, if AI systems are used for this purpose, are not equally relevant to the law as the potential effects of granting public aid. Different constitutional values and principles (principle of legality and principle of equality) may carry different weight in each case. The Cyber-leviathan is internally heterogeneous, just as the law that rules its action is heterogenous. As a consequence of this, it will also be argued that a composite theory of control is required. New norms, political instruments and ethical charters may be necessary, alongside a new set of public bodies, including but not limited to judges, in order to face these challenges.

2. *The Cyber-leviathan as a complex creature*

2.1. *Challenges and the need of control*

The concept of "Cyber-leviathan"[7] recalls a monstrous creature with no compassion or empathy.[8] It is a modern version of Franz Kafka's castle,[9] as many citizens feel dizzy when facing the obscure intricacies of the arcane digital functioning of public bodies. And even more so when decisions are taken with the help of AI systems, either in an internal preparatory phase or virtually, when the decision is taken "by" the AI system.[10] Interestingly, the original Hobbesian Leviathan was conceived as an "Artificial Man", and the Commonwealth to which the Leviathan referred was envisaged as an automaton that would imitate nature.[11] Here, too, a sort of imitation game was in play.

The administration today is still regarded with scepticism by the average citizen, and in many cases even by those who are better acquainted with it. This may be due to an ever-growing administrative burden in everyday life, and to a lack of transparency. The situation has improved in the last decades thanks to regulation on transparency and access to information, yet some deficits still exist today precisely for instance as to transparency vis-à-vis the use of AI systems and their internal functioning.[12] Citizens' malaise may also exist for reasons that go beyond the law, such as the aforementioned lack of compassion or empathy. These barriers are multiplied in the digital administration for a number of reasons, not least because not all citizens are equally equipped – both technically and educationally – with the necessary tools to become average digital citizens, let alone full digital citizens. In such

[7] This adaptation from the Hobbesian Leviathan is extracted from J.Mª. Lassalle, *Ciberleviatán*, Barcelona, Arpa, 2019.

[8] See S. Ranchordás, *Empathy in the Digital Administrative State*, in *Duke Law Journal*, 71, 2022, 1341.

[9] "K", *The Castle's* main character, has a vision at the beginning of the novel that will remain untouched ever after: "It was late evening when K. arrived. The village lay deep in snow. There was nothing to be seen of Castle Mount, for mist and darkness surrounded it, and not the faintest glimmer of light showed where the great castle lay. K. stood on the wooden bridge leading from the road to the village for a long time, looking up at what seemed to be a void." See F. Kafka, *The Castle*, Oxford, Oxford's World Classics, Oxford University Press, 2009, 5. His other novel *The Trial*, referring to judicial proceedings, may also be applicable to administrative procedures.

[10] On different uses in the public sector, see C. Coglianese, *Regulating Machine Learning. The Challenge of Heterogeneity*, in *TechReg Chronicle*, 2023. On the more general question, see furthermore C. Coglianese and D. Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, in *Georgetown Law Journal*, 2017, 105, 1189.

[11] See H. Bredekamp, *Leviathan. Body politic as visual strategy in the work of Thomas Hobbes*, Berlin, Walter de Gruyter, 2020. In particular, chapter 3 on the "Artificiall [sic] Man".

[12] See A. Cerrillo i Martínez, *How can we open the black box of public administration? Transparency and accountability in the use of algorithms*, in *Revista Catalana de Dret Públic*, 58, 2019, 13.

a context, vulnerability becomes a keyword.[13]

How to interact with the digital government and how to become a digital citizen are two questions that do not have a single answer, let alone a simple one. On the one hand, as it has already been indicated, administrative action is heterogeneous: there is a wide array of public bodies, ranging from local regional authorities to central governments, and also including a number of agencies or bodies. There are even public companies with various degrees of independence but with links to public authorities, because the latter have a meaningful role either in defining their budgets or in nominating the people who sit on the companies' governing boards. The relationship between the average citizen and all these bodies may be different in each case.

Meanwhile the use of digital instruments and artificial intelligence systems is also heterogeneous. Not all instruments are applied equally, and their impact on the citizen's legal sphere varies, because of the intrinsic features of the device or the software, and because of the specific use made of it in public action. In particular, the decision-making process is a complex one and the integration of digital instruments and, notably, artificial intelligence systems is not uniform.[14] The legal effects of a chatbot providing information or leading the citizen to the appropriate unit or procedure are not equivalent to those of a device used to diagnose an illness at a public hospital, for instance.

2.2. *Discretion in the* smart *administration*

It is important to bear in mind that in many cases norms leave a margin of discretion or appreciation for the administration to act.[15] Control of public action differs in those cases in which the law clearly states how the administration should proceed in a specific case, even if it is rare to find a legal clause which is absolutely exempt from interpretation.[16] Indeed, interpretation itself already implies some margin of appreciation.

I have argued elsewhere that not all types of discretion are to be dealt with equally in legal terms, something which is relevant when using AI in the public sphere.[17] Political discretion or strategic discretion, i.e. cases in which the norm provides the administration with the possibility of choosing between difference options of public policy, should be granted more deference by controlling organs.[18] But also, in this case, the use of artificial intelligence systems needs to be carefully analysed, as a risk could arise, namely that political decisions are at least in a broad sense delegated to machines.[19]

---

[13] With regard to vulnerability, reference should be made to the work of Martha A. Fineman. See among others M. A. Fineman and A. Grear (eds.), *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*, New York, Routledge, 2013. In addition, focusing on the negative effects of automatization on equality, see V. Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*, St. Martin's Publishing Group, 2018.

[14] P.P. Craig, *Model Rules on Impact Assessment of Algorithmic Decision-Making Systems used by Public Administration*, Report of the European Law Institute (7 August 2022). Available at SSRN: https://ssrn.com/abstract=4318473.

[15] On the scope of discretion in general see D. Galligan, *Discretionary Powers. A Legal Study of Official Discretion*, Oxford, Oxford University Press, 1986. In relation to AI in particular, see T.J. Barth and E. Arnold, *Artificial Intelligence and Administrative Discretion: Implications for Public Administration*, in *The American Review of Public Administration*, 29/4, 1999; and J.B. Bullock, *Artificial Intelligence, Discretion, and Bureaucracy*, in *The American Review of Public Administration*, 49/7, 2019. As for judicial discretion, which leads to a different type of debate, in this regard see AI F. Fagan and S. Levmore, *The Impact of Artificial Intelligence on Rules, Standards, and Judicial Discretion*, in *Southern California Law Review*, 93, 2019-2020.

[16] In relation to this, Paul Craig rightly warns that "[a] public body endowed with statutory discretionary powers cannot adopt a policy or rule that allows it to dispose of a case without any consideration of the merits of the individual applicant". P. Craig, *Administrative Law*, London, Thomson Sweet & Maxwell, 9th ed., 2021, 18-012. There is thus a plethora of possible applications of discretionary powers, which need of course to be duly controlled. It should be noted that this edition of *Administrative Law* already includes a chapter on automated decision-making.

[17] See *El ejercicio de potestades mediante inteligencia artificial. Cautelas jurídicas frente al imperio acrítico de la tecnología* [The exercise of public powers though artificial intelligence. Legal cautions vis-à-vis the non-critical empire of technology], a paper presented at the 18th Conference of the Spanish Association of Administrative Law Professors, January 2024 (draft at www.aepda.es, final version to be published).

[18] Some have argued that AI may indeed promote a better exercise of administrative discretion and have coined the concept of "artificial discretion" to frame this phenomenon. See M. M. Young, J. B. Bullock and J. D. Lecy, *Artificial Discretion as a Tool of Governance: A Framework for Understanding the Impact of Artificial Intelligence on Public Administration*, in *Perspectives on Public Management and Governance*, Volume 2, Issue 4, December 2019, 301.

[19] On cyber-delegation, see H.C.H. Hofmann, *An Introduction to Automated Decision Making (ADM) and Cyber-Delegation in the Scope of EU Public Law*, Law Working Paper Series, paper No. 2021-008, Faculty of

Controlling organs should supervise this, so that the political will expressed in the norm is respected and not automatically transferred to a device. In general, debates arise here on the separation of powers, where the discussion is whether and to what extent one of the three branches of government, the judiciary, could control political decisions taken by the executive on the basis of norms adopted by Parliament. But at this point these debates go beyond classical approaches to the separation of powers, as the question could be whether a machine should substitute political will, used either by the administration or by the controlling actor, be it an independent agency or a court.

Technical discretion might not be considered discretion in the strict sense,[20] as technical assessment is in principle not a matter of free choice for the policy maker. Indeed, the norm may require the best technical decision in specific cases (technical in the realm of engineering, medicine, arts or biology, for example). Here, AI could help with reaching a decision, controlled with the corresponding expertise in order to check whether said decision is a valid one taking the state of the art into consideration. It is not a question of will, as in political discretion, it is an issue of knowledge and/or science.[21]

2.3. *Complexity, taxonomies and a theory of control*

Such a vast panorama reflects a complexity that needs to be borne in mind when addressing the use of AI by the administration, but also when dealing with control. Taxonomies of different uses by different bodies at different stages of public action are necessary.[22] The AIA proposes a taxonomy – both for public and for private bodies – based on risks, from the point of view of the internal market. Yet further taxonomies are required in order to accurately build a system of guarantees, and also to create the conditions for positive promotion of the use of AI to provide public services and, in general, to design a modern, effective and empathic administration.

The situation described calls for a legal framework and a control system suited to this complexity. A theory of control is thus a complex one, and is the result of a combination of various types of supervision. Ethical and legal supervision are required, yet each one needs to be duly conducted taking account of the different nature of both. And control shall be exercised prior to the use of AI systems as well as during the processes, as well as after outcomes emerge.

A comprehensive model of control is composed on the one hand by a web of various agencies, bodies and offices ("supervisory agencies"[23]) at different levels of government and with functions that sometimes overlap. Formal coordination is necessary here. On the other hand, the rule of law requires a judicial control system, which has the final word in legal disputes.[24] Yet questions arise as to whether the classic judicial system is prepared for the challenges, whether changes are required and how courts interact with supervisory agencies.

3. *An increasingly complex supervisory and control system*

3.1. *Agencies in modern administrative law*

Regulatory and supervisory agencies have long appeared in legal orders which were initially not subject to such organisational entities. European continental countries have traditionally opted for models of administration following a classic hierarchical structure in each level of government.[25] Thus,

Law, Economics and Finance, University of Luxembourg, 2021.

[20] On the distinction between discretion to make policy choices and discretion in conducting technical assessment, proposing a new paradigm of analysis, see J. Mendes, *Chapter 38: Administrative discretion in the EU: comparative perspectives*, in S. Rose-Ackerman, P.L. Lindseth and B. Emerson, *Comparative Administrative Law*, Cheltenham, Edward Elgar, 2017, 632.

[21] On the different types of control of discretion in general, see P. Craig, *Administrative Law*, 18-001.

[22] See for instance F. Palmiotto, *When is a Decision Automated? A Taxonomy for a Fundamental Rights Analysis*, in *German Law Journal*, 25/2, 210.

[23] The concept is hence used here in a broad sense, including classic agencies, as well as independent authorities and other bodies that perform the functions indicated in the text.

[24] Legal disputes frequently have a political dimension, something which is linked to the question of discretion and control. On the recurrent debate on judicial politics, from an updated European perspective, see M. Dawson, B. de Witte and E. Muir, *Revisiting Judicial Politics in the European Union*, Cheltenham, Edward Elgar, 2024. In particular, some chapters address areas in which there is discretion, either political discretion or margin of appreciation related to technical issues, such as science.

[25] In this aspect France has been a model for several other European States. On the French system from an American perspective, see E.N. Suleiman, *Politics, Power, and Bureaucracy in France. The Administrative*

Ministries at State level and equivalent units of government at the regional and local levels were and are still internally divided into layers. Here, State Secretaries, Directors-General and further leading positions are conferred powers to implement the particular public policy that the Ministry in question is in charge of. A common law applies to all of them, as do equivalent organisational standards. Spending power, public procurements, public service requirements, are all matters which share a common legal framework irrespective of the particular Ministry affected (with exceptions in some cases, such as for national security and defence matters).

Over time, other organisational forms put in an appearance. Bodies disposing of various kinds of independence vis-à-vis governments were created to help administer a particular area, with certain supervisory functions in some cases. And public companies were also increasingly set up to lead strategic sectors, where public input was necessary.

More recently, even though the phenomenon may already be considered an "old" one, a new type of public body has also emerged in countries with a classic administrative organisation: agencies. This model, typical of the United States, has also influenced not only member States of the European Union but also – and mainly – the European Union itself, which at first adopted a classical European model and later combined it with the creation of various agencies and other organs with different levels of autonomy.[26] In some cases, this complexity may even lead to composite administrative procedures,[27] something which can be expected in the framework of AI uses by administrations. Many of these agencies are created in highly technical areas, and therefore experts are appointed specifically to deal with them, either for policy purposes or for supervision. The AIA includes a governance system which will be discussed later and which follows this line of thought, as a result of the conviction that enforcement is particularly necessary here.[28]

Today, a plethora of these agencies exists both at EU level and at State level. They have also proliferated at regional and local level. These agencies specialise in a particular subject and in some cases operate in public-private partnerships. They are in many aspects subject to common administrative law, while in other cases private law applies to them. And on many occasions there may be an overlapping of the functions performed by different agencies. For instance, the way in which authorities dealing with competition, data, digital services and artificial intelligence will interact, where they might overlap and how potential conflicts are going to be solved should be scrutinised. Cooperation protocols are desirable, protocols that are to be made public and which can be legally enforced.

Finally, it should be noted that the judiciary has not undergone organisational changes similar to the ones in the administration and we should explore whether classic administrative justice needs readjustments in order to fulfil tasks such as control of the use of AI systems by public administrations.

3.2. *A plethora of actors to supervise the smart Cyber beast: EU and national level*

As we have noted previously, digital administration has evolved over time and is now fairly sophisticated. In addition, the uses of AI in the public sector are increasing. Several norms have been passed so far in order to totally or partially address these changes, norms among which the AIA and the Digital Services Act (DSA)[29] play a pre-

Elite, Princeton, Princeton University Press, 1974.

[26] Edoardo Chiti has conducted a thorough study of European agencies. Among his latest publications, see E. Chiti, *Decentralized Implementation: European Agencies,* R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Legal Order*, vol. I, Oxford, Oxford University Press, 2018, 748

[27] S. Alonso de León, *Composite administrative procedures in the European Union*, Madrid, Iustel, 2017.

[28] See C. Novelli, P. Hacker, J. Morley, J. Trondal and L. Floridi, *A Robust Governance for the AI Act: AI Office, AI Board, Scientific Panel, and National Authorities*, in *European Journal of Risk Regulation* 1–25, 2024. See also, recently, the special report issued by the European Court of Auditors, *EU Artificial intelligence ambition Stronger governance and increased, more focused investment essential going forward*, 8, 2024. See furthermore J.B. Bullock and others (eds.), *The Oxford Handbook of AI Governance*, Oxford, Oxford University Press, 2024.

[29] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) OJ L 277/1. Mention should be made also of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L 265/1 (DMA). The DMA also creates a

eminent role.

Both the DSA and the AIA envisage a specific system of network governance, where national authorities play a relevant role, together with EU institutions and *ad hoc* organs.[30] The DSA mainly addresses contributing to the proper functioning of the internal market for intermediary services (article 1.1 DSA). In principle, the DSA is not intended to operate in public legal relationships. Yet the administration may in certain cases use the services that the platforms concerned provide, for information purposes, for example. Moreover, public companies are in some cases subject to law that is common to all companies, thus ultimately also being subject to norms such as the DSA. Among other duties, according to article 34 DSA, "[p]roviders of very large online platforms and of very large online search engines shall diligently identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services." In a broad sense, then, the DSA – which also relates partially to the use of AI algorithms by platforms – could affect administrations or bodies that pertain to the public sphere due to reasons such as the budget they are conferred.

Implementation, enforcement and control are essential means of attaining a healthy provision of digital services. To that end, according to article 49 DSA, Member States shall designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and enforcement of the DSA. In addition to this, they shall designate a specific competent and independent authority as the Digital Services Coordinator (DSC), which will be responsible for all matters relating to supervision and enforcement of the DSA in the particular Member State. They ensure coordination within the State among the authorities which, from one viewpoint or another, may have competences in the issue, but also outside the State, with other DSCs and with European institutions, in particular the Commission. In order to foster cooperation,[31] among other goals, a European Board for Digital Services (EBDS) is also envisaged in the DSA, a Board composed of representatives of the DSCs and chaired by the Commission. The Board held its first meeting on 19th February 2024. Other competent authorities may also participate in the Board and other national authorities may be invited to meetings.

The AIA includes a Title VII on Governance, with at least a double structure, i.e. a European and a national one, each composed of various elements.[32] Firstly, article 64 RIA foresees an AI Office for the Commission to take leadership in this area. The Office was created by a Commission Decision on 24th January 2024[33] and is now operational. Its tasks are listed chiefly in article 3 of the Commission Decision and, among other activities, the AI Office shall coordinate "the establishment of an effective governance system, including by preparing the set-up of advisory bodies at Union level, as well as monitoring the establishment of relevant national authorities and other bodies at national level".[34]

Furthermore, and still at EU level, as in the DSA, a European body is created, namely the European Artificial Intelligence Board (EAIB). According to article 65 AIA, the Board shall advise and assist the Commission and the Member States, in order to facilitate the consistent and effective application of the

governance system to implement and enforce the Regulation. Yet as it is not potentially as closely linked to administrative law as the DSA, its structure will not be further elaborated on here.

[30] It should nevertheless be noted that because of the global impact of digitalisation and AI, international norms and an international governance is more than desirable. In this regard see M. Chinen, *The International Governance of Artificial Intelligence* Cheltenham, Edward Elgar, 2023.

[31] See J. P. Schneider, K. Siegrist and S. Oles, *Collaborative Governance of the EU Digital Single Market established by the Digital Services Act*, Indigo Working Papers, Law Research Paper Series, nº 2023-09.

[32] On the relevance of public authorities in the Commission's strategy for AI, see Y. Poullet, *Artificial Intelligence and Public Services – the Role of Public Authorities in the Service of the "Third Way" Drawn up by the European Commission*, in *European Review of Digital Administration & Law*, vol. 2 (2), 2021, 129. In particular, see furthermore C. Novelli, P. Hacker, J. Morley, J. Trondal and L. Floridi, *AI Robust Governance for the AI Act: AI Office*. On the importance of governance in an ever-increasing context of complexity, see C. Ansell, E. Sørensen, J. Torfing and J. Trondal, *Robust Governance in Turbulent Times*, in *Cambridge Elements in Public Policy*, Cambridge, Cambridge University Press, 24 April 2024.

[33] Commission Decision of 24 January 2024 establishing the European Artificial Intelligence Office.

[34] Article 3.2.g) of the Commission Decision.

AIA. In the Commission's original AIA proposal, the Board was meant to only assist the Commission and be chaired by it. Through the legislative process, the nature of the Board changed, and it is now not only meant to assist Member States as well, but shall be chaired by one of the representatives of the Member States. The AI Office, which did not exist in the Commission's initial proposal, shall provide the secretariat for the Board, convene the meetings upon request of the Chair, and prepare the agenda in accordance with the tasks of the Board pursuant to this Regulation and its rules of procedure.[35]

The Board is comprised of one representative per Member State. In the Commission's original proposal, reference was made to national supervisory authorities represented at the highest level, whereas other national authorities could be invited, along with external experts and observers. The AIA includes some criteria for representatives of Member States to be selected and as before, allows for the invitation of other national and Union authorities, bodies or experts, something which is to be assessed on a case-by-case basis, *where the issues discussed are of relevance for them*. Here, specific meetings or even working groups could be envisaged, in particular those including judges, who should assess the use of AI systems by administration. General guidelines issued after these meetings could be useful for legal certainty and in general for effective judicial protection in this area.

Both the Board and the Commission shall have an advisory forum, that will provide technical expertise and advise them in order to contribute to their task under the AIA.[36] Members of this forum shall be stakeholders, including industry, start-ups, SMSs, civil society and academia. The Fundamental Rights Agency of the EU shall be a permanent member of this forum. Again, ideally this forum will include specific stakeholders related to the justice system and to the application of AI systems in administrations. And, indeed, the advisory forum may establish standing or temporary sub-groups as appropriate for the purpose of examining specific questions related to the objectives of this Regulation, such as judicial control of the *smart* administration and the use of AI systems by the judiciary.

Finally, at EU level, the Commission shall make provisions on the establishment of a scientific panel of independent experts, which will focus on the enforcement of a number of questions related to general-purpose AI models.[37]

Again, as a reflex to the DSA model of governance, national competent authorities shall be established or designated for the purpose of ensuring the implementation and enforcement of the AIA. The Act foresees a complex structure that reflects previous experiences in areas such as product safety and market surveillance. Thus, a number of entities are contemplated in the norm: 1) national supervisory authorities (at least one per Member State);[38] and 2) national notifying authorities (at least one per Member State).[39]

There are, moreover, the so-called notified bodies,[40] which are not strictly speaking governance bodies, as they are not public bodies entrusted with the implementation or enforcement of the AIA. Yet they perform relevant functions in the certification of AI systems in the EU, under the supervision of the governance network set up in the Regulation.

According to article 70.1 AIA, these national competent authorities shall exercise their powers independently, impartially and without bias so as to safeguard the objectivity of their activities and tasks, and to ensure the application and implementation of this Regulation. The members of these authorities shall refrain from any action incompatible with their duties. Independence is thus one of the key features of these authorities and independence should be understood in a double sense here. On the one hand, it refers to stakeholders active in the AI industry, so that no conflicts of interest arise when supervising or enforcing the norm. On the other hand, it should also be related to the

[35] Art. 65.8 AIA.
[36] Art. 67 AIA.
[37] Art. 68 AIA.
[38] Art. 70 AIA. In the Commission's original proposal, one national supervisory authority was to be designated to act both as notifying authority and market surveillance authority. The existence of more than one authority per Member State was considered as an exception, justified only by organisational and administrative reasons. Now, provided that these principles are observed, such activities and tasks may be performed by one or more designated authorities, in accordance with the organisational needs of the Member State.
[39] *Ibid.*
[40] Article 31 AIA.

State, as these authorities perform their functions regardless of the legal nature of the body using an AI system. Thus, a public administration that has recourse to an AI system is subject to control and supervision as well. Therefore, independence also means that elements of the State, such as Ministers, Secretaries of State and the like, should not be part of the governing bodies of these authorities. In addition, civil servants working for those authorities should not follow orders from public administrations.

It has been correctly argued that "the effective implementation of the Artificial Intelligence Act throughout the European Union (EU) depends on a uniform, coordinated, and well-funded governance setting".[41] This being so, emphasis will be placed on the need for coordination between all the bodies and authorities that have been mentioned so far. This includes those specifically created by the AIA, but also others that operate in relation to the digital ecosystem, where AI acts. Furthermore, other authorities exist with potential overlapping competences: data protection authorities, competition authorities (as it is also a matter pertaining the internal market) or, among others, authorities active in the area of transparency and good governance. The latter is the case, for instance, of Spain, where the national Council of Transparency and Good Governance (*Consejo de Transparencia y Buen Gobierno*) has issued relevant decisions granting protection to citizens who wanted to obtain access to the source code of certain algorithms that had been used in administrative procedures. Some of these decisions have been challenged before courts, but so far there is no ruling of the Supreme Court dealing with this matter.

Coordination is therefore key for clear and efficient implementation and enforcement. This has led to reasonable claims on the need for establishing formal cooperation protocols between all these authorities.[42] And, of course, in a rule of law system, these authorities are also under the control of courts.

4. *The judiciary in a smart world: principles, challenges in judicial review and organisation*

4.1. *The rule of law, AI and the judiciary*

The rule of law is one of the values on which the European Union (EU) is founded, as stated in article 2 of the Treaty on European Union (TEU).[43] And effective legal protection is one of the core elements of the rule of law, together with the principle of legality, among others. Furthermore, courts and judges play a decisive role in guaranteeing the enforcement of EU law in particular, thus including the enforcement of the European legal framework related to the *smart* administration, too. How well prepared they are to perform such a function is still to be assessed and some changes may be necessary. Moreover, due process of law needs to be carefully considered, as it could also be disrupted when AI comes into play.[44]

Reforms may be required by EU law, but also by legal international norms, such as the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. Article 14 of this Convention expressly states that "[e]ach Party shall, to the extent remedies are required by its international obligations and consistent with its domestic legal system, adopt or maintain measures to ensure the availability of accessible and effective remedies for violations of human rights resulting from the activities within the lifecycle of artificial intelligence systems".

Digitalisation – including the use of AI systems – is a mainstreaming concept that pervades both private and public life and all aspects of public action. Increasingly, specific Ministries and other organisational units at the top of each administration exist and focus on this. They shall assume a leadership role and cooperate with other units and other

[41] C. Novelli, P. Hacker, J. Morley, J. Trondal and L. Floridi, *A Robust Governance for the AI Act: AI Office, AI Board, Scientific Panel, and National Authorities*, 1.

[42] See A. Sola, *Il coordinamento amministrativo nelle funzioni di regolazione di fenomeni complessi: le economie dei dati* [Administrative coordination regarding regulatory functions of complex phenomena: data economy], PhD Thesis, LUISS University, Rome, 2023. The thesis is related in particular to the data economy, but its main arguments could perfectly be applied to other sectors.

[43] See on this S. de la Sierra, *Enhancement of Common Values in Europe: The Role of Judges*, in *European Review of Public Law*, vol. 33, No. 1, 2021, 109.

[44] From the US perspective, alerting about this, see F. Pasquale, *Inalienable Due Process in an Age of AI: Limiting the Contractual Creep toward Automated Adjudication*, in H.-W. Micklitz, O. Pollicino, A. Reichman, A. Simoncini, G. Sartor and G. De Gregorio, "Constitutional Challenges in the Algorithmic Society", Cambridge, Cambridge University Press, 2021, 42.

administrations, also at an international level.

In most countries, there is either a separate set of judges and courts or a distinctive system of judicial proceedings to deal with conflicts arising from administrative action. In many of these cases, both features apply, i.e. a specific set of judges and courts deal with distinctive judicial proceedings, different from those competent in private or criminal law issues. The same is true – so far – of the digital society. Thus, all judges, independently of their competences, may deal in one way or another with cases in which legal questions related to digital instruments or AI systems are at stake.

Some have argued about the possibility of creating a set of judges to deal specifically with digital issues, independently of the area of law involved.[45] While this is an interesting proposal, I would not recommend such an option, mainly due to the following reasons. On the one hand, in the future many cases will increasingly be related to a digital instrument, including the use of AI systems. Therefore, bestowing a specific competence to judges may not be an operational criterion. Besides, most cases where digital instruments are concerned include legal questions related both to the use of those instruments and to aspects which are not related to it. Thus, it would be difficult to assess whether a case is a "digital one" or not.

On the other hand, digital instruments and AI systems are indeed instruments or tools which apply in various contexts, some of them referring to private law relationships and others to public law relationships. Constitutional principles applying to private law relationships and public law relationships differ. There are of course some common grounds, but in general there are particular principles applicable in the context of administrative law. In particular, the rule of law and the principle of legality require a legal basis for administrations to act, something which is not necessary for ordinary citizens. Furthermore, administrations are subject for instance to transparency obligations, and are also constrained when using public funds, such as in the case of public procurement.

Efficiency is in many cases also a constitutional mandate, together with effectiveness. These principles focus on results rather than on procedures and, in particular, efficiency is usually linked to measurable goods or variables, such as money and time. Efficiency is frequently evoked when addressing the benefits of using disruptive technologies, such as AI systems. And it is at the basis of reforms of the legal framework of administrative action, but also of judicial proceedings.[46] While this is necessary, due to the backlog that usually characterises both areas, other principles should not be neglected. Indeed, the concept of vulnerability[47] or solidarity,[48] for instance, which proposes positive action to address the needs of heterogeneous societies, should be considered.

Worth mentioning here is the European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, adopted by the European Commission for the Efficiency of Justice (CEPEJ). The text starts by acknowledging "the increasing importance of artificial intelligence[1] (AI) in our modern societies, and the expected benefits when it will be fully used at the service of the efficiency and quality of justice". As a consequence of this, the CEPEJ adopts the Charter, which develops five principles that will in a sense counterbalance the efficiency goal. These five principles are the following:

· Principle of respect for fundamental rights.
· Principle of non-discrimination.
· Principle of quality and security.
· Principle of transparency, impartiality and fairness.

Principle "under control", which precludes a prescriptive approach and ensures that users are informed actors and in control of their choices.

4.2. *Judicial review of administrative action in a new context: control of the smart administration*

Judicial control of administrative action is usually different from judicial proceedings

[45] See M. Barrio, *Los derechos digitales y su regulación en España, la Unión Europea e Iberoamérica* [Digital rights and their regulation in Spain, the European Union and Latin America], A Coruña, Colex, 2023, 112.

[46] Indeed, the European Commission for the Efficiency of Justice (CEPEJ) is devoted to this goal in the context of the Council of Europe.

[47] See M. A. Fineman and A. Grear (eds.), *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*.

[48] See recently in Italian G. Alpa, *Solidarietà. Un principio normativo* [Solidarity. A normative principle], Bologna, Il Mulino, 2022.

related only to individuals. In continental law systems, this control is usually conferred on a particular category of judges through specific proceedings, different from those competent in private law conflicts. Even if there are some common features in judicial review and proceedings in private matters, which are worth exploring, judicial review has some particularities. Indeed, the use of AI systems by administrations poses a wide array of questions, different from those applying in private law.

From a broader viewpoint, relevant questions arise of a constitutional and political dimension. Certainly, judges dealing with public and private law face in some cases equivalent problems concerning the technical difficulties linked to the functioning of AI systems. Yet judicial review has a wider dimension, as it implies that one of the three branches of the State, the judiciary, controls another one, the executive, and its bureaucratic apparatus. As a consequence of this, classical debates on the intensity and depth of the control exerted by the judiciary over the administration also apply here. For instance, we could ask how deferent a judge should be in controlling the use of AI systems by public administrations and, in particular, in controlling how administrations regulate this use.

This is important, as the legal framework for the use of AI by administrations has hitherto been very fragile. Until the adoption of the AIA, there was no specific legal basis for the use of AI by administrations in Europe, with reference to particular guarantees in relation to this specific set of technologies. Even today, this norm is partial; it focuses on an internal market perspective and is not specifically designed to impose limits on administrative action or, alternatively, to establish the legal basis for improved use of AI in a positive sense, in order to promote a better provision of public services. The situation internally in the member States mirrors that of the European Union as, in general, the legal framework for the use of AI by the administration is equally fragile.[49]

There are some minor references in norms such as those regulating administrative proceedings, and some regional initiatives that are worth mentioning, yet these do not specifically focus on administrations, but on AI in general.[50] In addition other initiatives, not all of which are of legal nature, should be mentioned: the Portuguese Charter of Human Rights in the Digital Age, passed by the national Parliament in 2021,[51] and in Spain, on 14 July 2021 the adoption by the Government of a Charter of Digital Rights, which was elaborated by a Group of Experts, as entrusted by the Secretary of State of Digitalisation and Artificial Intelligence. The document is not legal in nature, rather it is a policy document that paves the way for future regulation and public policies. Both the Portuguese and the Spanish Charters include references to the use of AI systems, and the Spanish Charter specifically mentions the legal framework necessary for them to be used in the public sector.

It can be legitimately argued that Member States have waited for a European norm to be in force before moving forwards. On the one hand, this is so, because normative enforcement might also be required, for instance in order to adequately address organisational and governance issues. On the other hand, it is only once the EU framework exists that member States are aware of the legal limits for their own action. Whether or not they can include more intensive guarantees on the basis of fundamental rights, if this touches upon internal market institutions, is an important debate.

Meanwhile, as well as the scant normative action in Member States, including regions, an increasing number of plans and strategies have been developed. Various questions arise in this framework. First, is the ordinary regulation procedure being replaced by instruments that do not have a legal nature, but which guide public powers in an ever-changing context? Second, how do judges use these plans and strategies in their reasoning? And third, do they all share identical features? Here, some authors have explored the internal

[49] From a comparative perspective, see A. Cerrillo i Martínez, F. Di Lascio, I. Martín Delgado and C.I. Velasco Rico, *Inteligencia artificial y Administraciones Públicas. Una triple visión comparada* [Artificial intelligence and Public Administrations. A comparative triple vision], Madrid, Iustel, 2024.

[50] See for instance the "Statutory Decree" of the Spanish region of Extremadura on the boost of AI in Extremadura, 8 March 2023. A "Statutory Decree" or "Decreto-ley" is a norm passed by government that has statutory legal force and is subject to certain legal conditions for this.

[51] Law no. 27/2021, of 17 May, approving the Portuguese Charter of Human Rights in the Digital Era.

diversity of plans, leading to a useful categorisation, where some of them may in fact have a legal nature.[52]

Until now courts have acted creatively in protecting rights in the new context, when harm has allegedly been caused due to the use of AI systems by administrations. Since the concept of AI systems is so broad, it should be noted that the focus here is placed on the use of algorithms with a high level of autonomy to take decisions in various fields, in some cases with automation. Among others, these include the control of social subsidies granted in The Netherlands, the assignment of places in the civil service in Italy or the conferral of subsidised payment of energy bills on certain vulnerable persons in Spain.[53] In most cases, judges have applied existing law, which had so far been used for "analogue life", making the appropriate adjustments for the "digital environment".

Effective judicial protection and due-process requirements[54] also apply when controlling the *smart* administration. As it was indicated above, classical principles apply, yet there is a need to adapt them to the new contexts. Here, a strong judicial activism may be expected, as long as a sound case-law does not exist and as long as norms are not passed to regulate in detail the various fields of administrative action. Such a situation may lead to judges acting as "quasi-regulators" when they have to face conflicts for which there is still not enough legal density.[55]

As a consequence of this, regulation is required, for instance to formally recognise the right to contest an automated decision and the requirements therefor from a rule of law perspective. For instance, so as to require the "human touch" when controlling how that decision was taken. Furthermore, the principle of transparency is linked to the right to access the source code of algorithms, in case this is needed for judicial protection. Yet the precise contours of such a right should be clearly stated. And, among other questions that are to be addressed, the exercise of discretion through AI requires a detailed legal framework, so that judges can correctly perform their controlling functions also in this area.

5. *A glance at the future*

Public action has evolved alongside social, political and economic changes. The constitutional framework that sets the boundaries for public powers to act and encourages them to take appropriate measures to fully guarantee fundamental rights and principles may need updating. Nevertheless, classical rights and principles, such as those related to the rule of law are still valid in new contexts, maybe just with a few adjustments.

Yet something which is of the utmost importance is the need of correctly framing public action using AI. To this end, appropriate statutes, regulations and codes of conduct are required, as well as norms and soft law that are time-proof and that can be rapidly modified in case of need. The way norms are elaborated in modern societies requires a thoughtful revision, also so as to assess what type of norms are more useful in changing contexts while at the same time complying with rule of law requirements.

The AIA is a step forward, but a limited one. Its perspective is an internal market one, and therefore it needs to be completed with other norms. In particular, specific norms addressed to administrations are necessary, so as to regulate the use of AI systems in the various fields pertaining to administrative action. A democracy and fundamental rights perspective, broader in scope than the AIA, is paramount. Here, the Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law goes in the good direction, albeit with limits.

Implementation and enforcement are always key in legal contexts. To this end, a plethora of independent authorities, bodies and agencies are being created under the auspices of norms such as the DSA, DMA and

[52] Referencia J.M. Rodríguez de Santiago, *Planes administrativos: Una teoría general del plan como forma de actuación de la administración* [Administrative plans: A general theory of plans as a form of administrative action], Madrid, Marcial Pons, 2023.

[53] I have analysed this case law in S. de la Sierra, *Control judicial de los algoritmos: robots, administración y Estado de Derecho* [Judicial control of algorithms: robots, administration and rule of law], in *Revista de Jurisprudencia. Lefebvre El Derecho*, 17, 2021, 18.

[54] See on this D.K. Citron, *Technological Due Process*, in *Washington University Law Revie*w, 2008, n. 85, 1249; D.K. Citron and F. Pasquale, *The Scored Society: Due Process for Automated Predictions*, in *Washington Law Review*, 89, 2014, 1.

[55] I have developed this question in the framework of digital media in S. de la Sierra, *European Courts as Digital Media Regulators*, in E. Psychogiopoulou and S. de la Sierra, *Digital Media Governance and Supranational Courts*, Cheltenham, Elgar, 2022, 17.

AIA, among others. Technical specialisation and good knowledge of the field lies under the legal bursting of these entities. Control is therewith meant to be more effective. Yet formal coordination systems are necessary, to foster that common goals are achieved but also to avoid loopholes in supervision.

Furthermore, according to the rule of law, judicial control should always be available. Nevertheless, the judiciary, as it stands today, has some limitations. AI cases and, more generally, "digital" cases may be of such a non-legal complexity that judges may tend to rely on how independent authorities have previously dealt with them. A certain "automatization bias" could be expected to here and human oversight, as required by article 14 AIA, is to be extended also to control organs, such as judges, to verify that this oversight took place effectively and correctly. Organisational reforms in the judiciary are to be encouraged, for instance so as to include experts in AI in the judicial structure that can assess the court when taking decisions. Besides, digital competences of judges may need to be fostered. And this is so because there are of course many complex technical issues judges have to deal with, but digitalisation and the use of AI systems are transversal both in public and in private law.