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*Constitutional Presuppositions on the Use of AI in the Executive Branch**

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ABSTRACT The purpose of this study is to make an approximation to the constitutionality of the use of AI systems by the Executive Branch, with special reference to the principles of action that should govern administrative activity when it is carried out with the support of these tools. The application of AI systems in the field of administrative activity must be interpreted in a positive key, due to the innumerable advantages it brings to the quality of public services in terms of effectiveness and efficiency. The different algorithmic models, with greater or lesser autonomy, are prepared to support administrative decision-making or produce automated decisions. Their role will depend on the translation of regulatory regulations into precise instructions, and on the suitability of the reference data provided to the system for training. However, the subjection of administrative activity to the principle of legality and its judicial control implies the inexcusable duty to respect all the fundamental rights involved. In the case of the use of AI systems, the protection of personal data, access to public information derived from the principle of transparency, the duty to state reasons for administrative acts derived from the principle of legality, and the principle of non-discrimination are particularly relevant. Due to these circumstances, the greatest risk presented by AI in the field of the Public Sector, and the main reason for its stigmatisation, is a consequence of the opacity of algorithmic systems and the complexity of their operation. In any case, the challenge they pose should not be faced from the exclusion of their use, but from the implementation of greater and better security mechanisms to guarantee effective protection of all the rights of the subjects involved.

KEYWORDS: Artificial intelligence - Public Administration - Automated administrative decision-making - Algorithmic transparency - Fundamental rights

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1. *Introduction*

The use of AI systems in the field of Social Sciences must be included in what is known as the technological revolution or the fourth industrial revolution, which would justify 'the reorientation of the State towards flexible institutions that seek an efficient resolution of social, political, legal and economic problems'.[1] AI would thus become an essential tool for decision-making to the point of being configured as part of the organic structure of the State.[2] This revolution is irreversible and, although it is not without risks, it should be seen as a useful tool to strengthen the rule of law.

In the development of its digital transformation, from digitalisation and e-government to AI, the Public Administration has implemented new technologies in the exercise of public powers and in the provision of public services. Along these lines, the application of AI systems in the field of administrative activity must be interpreted in a positive key, due to the innumerable advantages it brings to the quality of public services in terms of effectiveness and efficiency. The different algorithmic models, with greater or lesser autonomy, are prepared

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[1] T. Vasil, P. Skalfist and D. Mikelsten, *Artificial Intelligence: The Fourth Industrial Revolution,* Cambridge, Cambridge Stanford Books, 2020, 123.

[2] J. Becerra, *La cuarta revolución tecnológica: un nuevo paradigma de comprensión de la sociedad y el Estado más allá del Big Data e Internet*, in J. Becerra (dir.), *Derecho y Big Data*, Bogotá, Editorial Universidad Católica de Colombia, 2018, 30.

to support administrative decision-making or produce automated decisions. Their role will depend on the translation of regulatory regulations into precise instructions, and on the suitability of the reference data provided to the system for training.

However, the subjection of administrative activity to the principle of legality and its judicial control implies the inexcusable duty to respect all the fundamental rights involved. In the case of the use of AI systems, the protection of personal data, access to public information derived from the principle of transparency, the duty to state reasons for administrative acts derived from the principle of legality, and the principle of non-discrimination are particularly relevant. Due to these circumstances, the greatest risk presented by AI in the field of the Public Sector, and the main reason for its stigmatisation, is a consequence of the opacity of algorithmic systems and the complexity of their operation. In any case, the challenge they pose should not be faced from the exclusion of their use, but from the implementation of greater and better security mechanisms to guarantee effective protection of all the rights of the subjects involved. As Bauzá Martorell points out, 'it is essential that the rights and guarantees of citizens, in their legal-administrative relationship with the Public Authorities, are not diminished by the mere implementation of AI systems'.[3]

The Judgment of the Spanish Supreme Court no. 1119/2025, of September 11th, introduces a paradigm shift in the right of access to public information, by considering the source code of algorithms used in administrative procedures to be included in this meaning. The High Court resolves the paradox between automated administrative decision and the principle of transparency, overcoming years of algorithmic opacity justified by the prevalence of intellectual property rights and technical complexity. And it enshrines the primacy of transparency in automated administrative actions. The cassational interest is defined around the development of the right to algorithmic transparency, which is configured as an essential element of the democratic State and the rule of law in the context of automated administrative decision-making, which impact on the sphere of the subjective rights of citizens materialized in the recognition of social benefits.

The purpose of this study is to make an approximation to the constitutionality of the use of AI systems by the Executive Branch, with special reference to the principles of action that should govern administrative activity when it is carried out with the support of these tools (section 2). And to address the impact that the use of these systems may have in the field of automated decisions from two perspectives: the motivation of administrative acts and the transparency and equal treatment that must govern all administrative action (paragraph 3).

2. *Constitutional Provisions Applicable to the Use of AI Systems by the Executive Branch and Principles of Action in the Field of Public Administration*

The impact that technological advances could have on the protection of fundamental rights in general and on the guarantees of administrative procedure in particular, was a concern of the Spanish constituent assembly that was reflected in the Constitution of 1978 (CE), through a series of specific provisions that today can be considered the basic presuppositions for the use of AI systems by the Government, especially in the field of Public Administration.

In this context, the wording given to Article 9.3 of the Spanish Constitution (CE), applied to AI systems, would impose as limits to their use respect for the principles of legality, publicity, legal certainty, responsibility and prohibition of arbitrariness on the part of the public authorities. For their part, Articles 103.1 CE and 106.1 CE, which respectively preach the submission of the Public Administration to the Law and the judicial control of administrative action, expressly including the misuse of power, would also be applicable to automated administrative decisions adopted with the support of AI tools.

Other provisions also include the attribution to the State of exclusive powers, both in terms of promotion and technical research (Article 149.1.15 of the Spanish Constitution), and of establishing the bases of the legal regime of public administrations and

[3] F.J. Bauzá Martorell, *Los derechos y garantías de los particulares ante el uso de la inteligencia artificial por la Administración pública*, in G. Vestri (dir.) and C. Campos Acuña (coord.), *Inteligencia artificial en el sector público. Retos pendientes*, *El consultor de los Ayuntamientos. La Ley*, 2024, 31.

the common administrative procedure (Article 149.1.18 of the Spanish Constitution); the reservation of the law to guarantee citizens' access to administrative archives and records, except in what affects the security and defence of the State, the investigation of crimes and the privacy of individuals [art. 105 b) CE]; the reservation of law to regulate the procedure for the production of administrative acts [art. 105 c) CE]; and the reservation of the Organic Law to limit the use of information technology (art. 18.4 CE in relation to art. 81.1 CE).

Finally, a joint interpretation of Articles 44.2 and 103.1 of the Spanish Constitution would allow us to conclude that the Public Administration could make use of technological research, even promoting it, as long as it uses it for the general interest and in compliance with the corresponding principles, including that of efficiency. Therefore, it would be empowered to promote and implement the use of AI systems within the framework of administrative procedures in order to improve the quality of public services and adapt them to the needs and demands of citizens.

In accordance with the described constitutional anchorage, the principles that should govern the use of AI systems in the field of Public Administration can be grouped into five blocks: principle of legality and judicial control; principle of transparency; principle of equal treatment and non-discrimination; protection of personal data; and recognition and protection of digital rights.

2.1. *Principle of Legality and Judicial Control*

Article 9 of the Spanish Constitution guarantees the fundamental principles of the rule of law. The principle of legality, which enshrines the subjection of all public authorities to the rule of law, takes on a special significance in the field of Public Administration, which is embodied in the submission to the law of all administrative activity (*ex.* art. 103.1 CE) and is linked to the provisions of art. 106.1 CE, which attributes to the competent bodies of the ordinary jurisdiction the control of its legality, expressly including the submission of the Public Administration to the purposes that justify it. Consequently, Article 103.1 of the Spanish Constitution, in conjunction with Article 106.1 of the Spanish Constitution, prevents the existence of conduct by the Public Administration that is immune from judicial review and guarantees that all administrative action will be reviewed, under criteria of impartiality, by a judicial body.

As has already been pointed out, the Constitution attributes to the State exclusive competence to establish the bases of the legal regime of Public Administrations and the common administrative procedure (*ex.* art. 149.1.18a CE) and imposes on the ordinary legislator a reservation of law to regulate the procedure for the production of administrative acts [*ex.* art. 105 c) CE]. In the exercise of the power conferred, and in accordance with the constitutional mandate, Spanish legislation on the legal regime of public administrations and the common administrative procedure was reformed in 2015. In the field of administrative procedure, until that year, the matter was governed by two regulations: Law 30/1992, of 26 November, on the Legal Regime of Public Administrations and Common Administrative Procedure (Law 30/92), which was applied when the relationship with the Public Administration was developed by traditional means (paper); and Law 11/2007, of 22 June, on electronic access of citizens to public services (Law 11/2007), which was applied when the relationship with the Public Administration was carried out electronically. In 2015, both regulations were replaced by two other Laws with a different scheme that established electronic as the usual channel for the action of the Public Administration: Law 39/2015, of 1 October, regulating the common administrative procedure of public administrations (Law 39/2015) and Law 40/2015, of 1 October, on the legal regime of the Public Sector (Law 40/2015). To increase the transparency of administrative action, implement citizen participation in electronic administration and develop the electronic action and operation of the Public Sector, Royal Decree 203/2021, of 30 March, approved the Regulation on the action and operation of the Public Sector by electronic means.

Article 41 of Law 40/2015, in relation to Article 13 of the Regulation on the action and operation of the Public Sector by electronic means, contemplates automated administrative action within the framework of an administrative procedure, imposing the

obligation to identify the body responsible for the system, the rules of operation and their periodic verification, but they do not pronounce on the traceability of the algorithmic models that may be used to participate in greater or to a lesser extent in the making of these decisions, which could lead to a violation of the principle of legality of the administrative decision and make it difficult to control it by the courts.

2.2. *Principle of Transparency*

In compliance with the mandate set out in Article 105 b) of the Spanish Constitution, Law 19/2013, of 9 December, on transparency, access to public information and good governance (Law 19/2013) was approved, which structures the regulation of the principle of transparency in the Spanish legal system around two aspects: the obligation of active publicity for all public activity or with an impact on the public sphere; and the recognition and guarantee of the right of access to public information by citizens. And it specifies the application of its content around two aspects: the establishment of binding obligations for taxpayers; and the establishment of legal consequences for those responsible in the event of violation or non-compliance.

Transparency has been revealed as a phenomenon that has spread omnipresently over many aspects of life. Its emergence has been parallel to the turn of the century and has occurred as a result of a social demand generated by the concurrence of diverse circumstances and elements, highlighting among them those brought about by the technological development of the network, mainly the breadth and immediacy of the information available, the ease of accessing it and sharing it in real time, and the need to establish protection frameworks against fake news and disinformation.

In this context, respect for the principle of transparency in the public sphere is already considered a structural element of the democratic State and entails, as an unavoidable premise, the need to improve the channels of access to public information, as it is an essential aspect for the system. Along these lines, the Constitutional Court has contemplated in its Judgment 55/1996, of 28 March, that the right of access to information is a manifestation of the principle of publicity and freedom of information in the field of Public Administration (FJ 8º). And more recently, the Supreme Court has declared in its Judgment 1119/2025, of 11 September, that the right of access to public information is not only an objective guiding principle of the actions of the Public Administration, but also constitutes a constitutional right that can be exercised against the Public Administration, which derives from democratic requirements and is inseparably linked to the democratic State and the rule of law (FJ 2º).

In accordance with the provisions of Article 13, Law 19/2013 considers public information to be 'the content or documents, whatever their format or medium, that are in the possession of any of the subjects included in the scope of application of this Title and that have been prepared or acquired in the exercise of their functions'. The Council for Transparency and Good Governance (CTBG) has interpreted, through two Resolutions issued in 2021,[4] that the right to an explanation of automated decisions, including access to the algorithm used, is accommodated in that definition. Law 1/2022 of 13 April, on transparency and good governance of the Valencian Community, has imposed on Public Administrations the obligation to publish the list of AI systems that have an impact on administrative procedures or the provision of public services [ex. Art. 16.1 l)] by considering this information 'of legal relevance'. And the Supreme Court, in the aforementioned Judgment 1119/2025, has established that Law 19/2013 must be interpreted in an evolutionary way and in accordance with the principle of active publicity, extending the notion of public information 'to digital assets that support decision-making' (FJ 3º) and 'to the logical and technical elements that allow us to understand how automated decisions are adopted' (FJ 4º).

2.3. *Principle of Equal Treatment and Non-Discrimination*

Article 14 of the Spanish Constitution guarantees equal treatment and non-discrimination for all citizens in all areas, expressly including that of the Public Administration.

Law 15/2022, of 12 July, comprehensive

[4] CTBG Resolution RT 0748/2021 and Resolution RT 0253/2021, both of 19 November of the Council for Transparency and Good Governance.

for equal treatment and non-discrimination (Law 15/2022) imposes specific obligations on the Public Sector in terms of equality; and in its art. 23 it obliges Public Administrations to implement measures that minimise biases with a discriminatory impact on the use of algorithms for automated decision-making, thus seeking an ethical and responsible use of AI.

For its part, Law 39/2015 guarantees the principle of equality in the treatment granted to citizens before Public Administrations, ensuring that everyone has the same rights and obligations in their relations with them. Thus, art. 13, referring to the rights of people in their relations with Public Administrations, and art. 53, referring to the rights of the interested party in the administrative procedure, include a reference to the recognition in the field of the Public Administration of all the rights recognized by the Constitution, which is expressly included in art. 14 CE. And Article 12 guarantees assistance to those interested in the use of electronic means when they do not have access or do not have the necessary ones. Likewise, after the entry into force of Law 15/2022, art. 77.3 bis reverses the burden of proof and transfers to the Public Administration the obligation to prove that the discriminatory situation attributed to it has not occurred.

2.4. *Protection of Personal Data*

Article 18.4 of the Spanish Constitution (interpreted in relation to Article 81.1 of the Spanish Constitution) includes a mandate to the legislator to limit the use of information technology by Organic Law to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.[5] This mandate is currently fulfilled after the approval of Organic Law 3/2018, of 5 December, on the protection of personal data and guarantees of digital rights (LO 3/2018), which is the legal instrument that has adapted the Spanish legal system on personal data protection to EU regulations.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) states in Article 24.2 that the protection of the rights and freedoms of natural persons with regard to the processing of personal data requires the adoption by the controller of appropriate technical and organisational measures in order to ensure and be able to demonstrate that the processing is in compliance with the GDPR, including the regulation of data protection policies. In compliance with European regulations, Article 28 of LO 3/2018 provides that data controllers shall determine the appropriate technical and organisational measures to be applied to guarantee and prove that the processing of data carried out is in accordance with regulatory regulations.

For its part, Law 39/2015, includes in its art. 13.h), the right to the protection of personal data in relations with the Public Administration and, in particular, to the security and confidentiality of the data contained in the files, systems and applications of the public administrations. And Law 40/2015 establishes that public administrations will interact with each other and with their bodies, public bodies and related or dependent entities through electronic means. These means must ensure the interoperability and security of the systems and solutions adopted, guarantee the protection of personal data and preferably facilitate the joint provision of services to the data subjects. Finally, it should be noted that Royal Decree 311/2022, of 3 May, which regulates the National Security Scheme, set out in art. 156 of Law 40/2015, establishes the basic principles and minimum requirements necessary for adequate protection of the information processed and the services provided by the entities within its scope of application, in order to ensure access, confidentiality, integrity, traceability, authenticity, availability and conservation of the data.

[5] The Constitutional Court pointed out in its Judgment 94/1998, of 4 May, that the protection of personal data is a fundamental right that guarantees the person control over the use and destination of their data, to avoid illicit trafficking of the same or harmful to the dignity and rights of those affected (FJ 3º). And in its Judgment 292/2000, of 30 November, it defined it as an autonomous and independent right that consists of a power of disposition and control over personal data that empowers the person to decide what data they want to provide to a third party, State or individual, what data this third party can collect, and to know who owns those personal data and what it is used for, being able to oppose that possession or use (FJ 5º). In this line, the right has been configured as a faculty of citizens to oppose the use of certain personal data for purposes other than the one that justified their collection.

2.5. *Recognition and Protection of Digital Rights*

The expression 'Digital Rights' is embedded in what has been called 'digital constitutionalism'; an expression coined to identify a series of measures planned to face the challenges that the digital world poses in the distribution and delimitation of powers, both public and private.[6] These measures are aimed at preserving the rights of citizens in the face of the intrusive potential that, among others, the processing of personal data and automated decision-making by different public and private actors entails for them. It is, therefore, an emerging concept that refers to the process of adaptation and evolution of the principles and values of traditional constitutionalism (e.g., the protection of fundamental rights, the control of public power and the separation of powers) to the context of a digital society. This development comes after it has been realized that many of the rights and freedoms guaranteed by traditional constitutions, such as privacy, freedom of expression and equality, are unprotected in the digital society and must be reconfigured. In this context, different regulatory responses have emerged at the supranational, international and national levels, which reflect the effort being made to develop a framework of digital constitutionalism essentially made up of the recognition of specific digital rights in favor of citizens.[7] Among the main initiatives, the following should be highlighted.

At the regional level of the European Union (EU), the Regulation on Artificial Intelligence (2024), is the first comprehensive legal framework on AI in the world and aims to promote trustworthy AI by ensuring that AI systems respect fundamental rights, safety and ethical principles, and addressing the risks presented by different models. The European Declaration on Digital Principles and Rights (2023) promotes a digital transition based on European values; reaffirms the protection of privacy, freedom of expression, and the right to net neutrality as basic principles; and includes among its commitments the assurance of transparency in the use of algorithms and AI. For its part, the aforementioned GDPR, in force since 2018, has strengthened the protection of the fundamental rights of individuals in the digital age, as it clarifies the rules applicable to companies and public bodies in the digital single market and puts an end to the fragmentation resulting from the different national systems.

At the level of the Council of Europe, the Framework Convention on Artificial Intelligence (2024), establishes a common approach to ensure that AI systems are compatible with human rights, democracy and the rule of law, while enabling innovation and trust. It includes a number of key concepts such as the risk-based approach, transparency throughout the lifecycle and AI-generated content, detailed documentation obligations for AI systems considered to be high risk, and risk management obligations, with the possibility of introducing prohibitions for AI systems considered a clear threat to fundamental rights.

Within the framework of the Digital Spain 2026 Strategy and with the aim of leading the development and integration of AI in Spanish society and the Spanish economy, the National Artificial Intelligence Strategy was approved in 2024. In line with this strategy, the Charter of Digital Rights had been drawn up in 2021, which includes in section 5.XXV the basis of fundamental rights in the face of AI, by virtue of guaranteeing non-discrimination, transparency and human oversight in decisions made by smart technologies. Although the Charter has no normative value, and only serves as a guideline for the Public Authorities, its constitutional presupposition is the dignity proclaimed in Article 10 of the Spanish Constitution, and is articulated on three pillars: freedom and personal autonomy; equality and participation in public space; and the principle of transparency as the guiding axis of the action of the digital Administration, extolling the need to guarantee the right of access to public information, the right to transparency in the use of AI instruments, and the right of the interested party to have the administrative decision based on an automated or intelligent system motivated or explained. On the other hand, LO 3/2018, which, as already mentioned, was the instrument that adapted Spanish legislation on data protection to EU

[6] R. Tur Ausina, El *constitucionalismo ante la digitalización de la realidad social*, in *Cuadernos Digitales. Derecho y Nuevas Tecnologías*, 2023, 18.

[7] A. Rallo Lombarte, *Una nueva generación de derechos digitales*, in *Revista de Estudios Políticos*, no. 187, 2020, 110.

regulations, incorporates in its Title X a broad catalogue of digital rights (e.g., digital neutrality, universal access to the internet, digital disconnection in the workplace, right to be forgotten on the internet, etc.).

3. *Legal Relevance of the Use of AI Systems in the Field of Public Administration*

3.1. *Conceptual Approach and Planning*

The Independent High-Level Expert Group on AI, set up by the European Commission in 2018, concluded in its research that AI refers to 'the relationship of computer programs (and possibly also computer equipment) designed by human beings who, given a complex objective, act in the physical or digital dimension by perceiving their environment through data acquisition, the interpretation of structured or unstructured data, the reasoning on the knowledge or processing of the information, the result of this data and the decision of the best actions to be carried out to achieve the objective set'.[8]

Computer Science experts, Russell and Norvig, consider that the expression AI identifies a set of techniques and tools that, through the combination of algorithms, pursues the purpose of creating systems endowed with the same capabilities as human beings.[9] And, in summary, they differentiate the following types:[10] systems that think like human beings: they are characterized by their ability to automate human-like activities such as decision-making, problem-solving, and learning (e.g., artificial neural networks); systems that act like human beings: they are characterized by their ability to perform tasks in a similar way to how humans do them (e.g., robots); systems that think rationally: they are characterized by the fact that they try to emulate the rational logical thinking of human beings (e.g., expert systems); and systems that act rationally: they are characterized by the fact that they try to imitate rational human behavior (e.g., intelligent agents). This classification of AI systems is related, to a greater or lesser extent, to the distinction between general AI and weak AI that was introduced by Searl in 1980.[11]

General AI, also known as strong AI, refers to a specific line of research in the development of AI that pursues the objective of equipping machines with human-like intelligence, that is, endowed with self-awareness and the ability to solve problems, learn and plan.[12] Like humans, general AI would have to learn through data and experiences, progress constantly, and improve its skills over time. Examples of general AI include advanced robotics; advanced virtual assistants; autonomous vehicles; advanced strategy games; and expert systems. These applications have the potential to revolutionize, among others, the ways humans work and travel.

Weak AI refers to the ability of systems to perform specific tasks and solve specific problems according to their programming.[13] Examples of weak AI include speech recognition; machine translation; the identification of images; chats, bots; and data analysis. These applications are mainly used in industry and defense to improve the efficiency and accuracy of processes.

The distinguishing feature between weak AI and general AI is the latter's ability to perform tasks beyond its specific programming. Unlike weak AI that is limited to following instructions, general AI is able to reason, learn, adapt to new situations, and even make decisions. However, while AI research and development programs are focusing their efforts on creating general AI, the 'Turing Test' is still used to assess the level of intelligence in an AI system.[14]

[8] AI HLEG (High-Level Expert Group on AI), *A Definition of AI: Main Capabilities and Scientific Disciplines*, Brussels, European Commission, 2019, 6, available at https://digitalstrategy.ec.europa.eu/en/library/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines [last accessed 12 January 2026].

[9] S. Russell and P. Norvig, *Artificial Intelligence: A Modern Approach*, Madrid, Pearson Educación, 2004, 2.

[10] For its clarity, the different AI models considered by Russell and Norvig, *Artificial Intelligence are synthesized. A Modern Approach*, cit., 28-30.

[11] J. Searle, *Minds, Brains and Programs*, in The *Behavioral and Brain Sciences*, vol. 3, 1980, 52.

[12] M. del Cerro, *Transparencia y eficiencia algorítmica en un escenario de "IA fuerte": ¿hacia un cambio inminente de paradigma en la ciencia jurídica?*, in *Ars Iuris Salmanticensis*, vol. 10, no. 2, 2022, 12-13.

[13] J.M. Roldán Tudela, La *inteligencia artificial y la fricción de la guerra*, in La *inteligencia artificial aplicada a la defensa*, Madrid, Instituto Español de Estudios Estratégicos – Ministerio de Defensa, 2019, 105.

[14] Alan Turing developed the Turing Test in 1950 and exposed it in his article, *Machinery and Computational Intelligence*. Originally known as the imitation game, this test assesses whether a machine's behavior can be distinguished from that of a human. In this test, there is a person, known as the 'interrogator,' who tries to identify the difference between the output generated by the system and that generated by humans, through a

AI is a concept of computing that belongs to the Exact Sciences because its basis is essentially mathematical. However, for a decade, its application has been projected on different scenarios of the Social Sciences in general and the Legal Sciences in particular, due to the effectiveness it demonstrates in obtaining responses to different approaches.[15] From the point of view of quantitative response needs, AI is attributed an efficiency effect by applying the time-result factor (given its speed in obtaining a valid response). From the field of qualitative needs, an efficacy effect is attributed to it by application of the result-success factor (given its success rate due to the use of combinations of algorithms in the calculation of probabilities).

In the legal field, the use of AI has gone through several stages that have begun in the predictive order and have reached the decision-making stage. Expert and big data systems are increasingly important, both for the practice of law and for the development of the judicial function, since, although specialized search engines are not directly applied to decision-making, they are especially useful for their motivation.[16] This reality is what justifies the development of legal informatics as a category of its own with repercussions in three areas: documentary, decision-making and management.[17]

The application of AI systems to legal decision-making has undoubted advantages. Its main asset lies in its ability to increase efficiency in the use of available resources. AI systems make it possible to take advantage of the potential found in data, to obtain predictions that facilitate the success of future decision-making. And to optimize the time spent on carrying out simple and repetitive tasks, prior to decision-making, as it is possible for systems to identify their patterns and perform them autonomously and competently. However, the application of these systems raises a doubt: should it only be instrumental in nature or could it reach a finalist or result-oriented character? This question arises when analyzing the different AI models that can be applied to decision-making. Stadlmann and Zehetner thus distinguish systems that are limited to identifying the elements that, according to the legal system, are decisive in determining the meaning of the decision;[18] and models that can influence the meaning of the decision because, in addition to translating the rule and applying it to the specific case, they provide criteria that may or may not be taken into account to establish the content of the decision.[19]

Transferring these models to the field of Public Administration, no one would dispute that the application of AI systems to the making of a regulated decision (such as the recognition and calculation of a contributory retirement benefit or compensation for patrimonial liability) is directly related to the principles of effectiveness and efficiency and does not have an impact on the meaning of the decision. since all the factors that must be taken into account for the decision are likely to be introduced in an application or computer program.[20] However, this certainty becomes a doubt when its application is proposed to the preparation of a discretionary decision or with a certain margin of appreciation by the Public Administration,[21] or to the weighing of the

series of questions. If the interrogator cannot reliably distinguish machines from humans, the machine passes the test. However, if the evaluator can identify human responses correctly, the machine is ruled out of being categorized as intelligent. Although there are no defined assessment guidelines for the Test, Turing specified that a human assessor will only have a 70% chance of guessing whether it is a conversation with humans or a computer-generated conversation after 5 minutes. The Turing Test introduced general acceptance around the idea of machine intelligence. G. Longo, *El test de Turing: historia y significado*, in *Novática*, no. 206, 2010, 63-74.

[15] D. Chiappini, *Inteligencia artificial y decisiones jurídicas,* in J.M. Asencio Mellado (coord.), *Inteligencia artificial y proceso: eficiencia versus garantías*, Porto, Juruá, 2023, 207-209.

[16] R. Zafra Espinosa de los Monteros, *Inteligencia artificial y proceso judicial*, in S. Calaza López and M. Llorente Sánchez-Arjona (dirs.), *Inteligencia artificial legal y administración de justicia*, Cizur Menor, Thomson Reuters Aranzadi, 2022, 502.

[17] E. Suñé Llinás, *Informática jurídica y Derecho de la informática*, in *Estudios Jurídicos*, 2007, 8-10.

[18] C. Stadlmann and A. Zhetner, *Human Intelligence Versus Artificial Intelligence: A Comparison of Traditional and AI-Based Methods for Prospect Generation, in Marketing and Smart Technologies*, Singapore, Springer, 2021, 11-22.

[19] C. Stadlmann and A. Zhetner, *Human Intelligence Versus Artificial Intelligence: A Comparison of Traditional and AI-Based Methods for Prospect Generation*, 17-18.

[20] A. Huergo Lora, *Una aproximación a los algoritmos desde el Derecho administrativo*, in A. Huergo Lora (dir.), *La regulación de los algoritmos*, Cizur Menor, Aranzadi, 2020, 72; and M. Llorente Sánchez-Arjona, *Inteligencia artificial, valoración del riesgo y derecho al debido proceso*, in S. Calaza López and M. Llorente Sánchez-Arjona (dirs.), *Inteligencia artificial jurídica y administración de justicia*, Cizur Menor, Thomson Reuters Aranzadi, 2022, 377.

[21] A. Huergo Lora, *Administraciones públicas e IA:*

burden of proof in a sanctioning procedure.[22] In theory, it would be technically possible to use a computer program to make such decisions (e.g., triage in health care or allocation of resources in social services), but this would require the introduction into the program of numerous parameters or options not always provided for in the standard and which are usually weighed when the specific decision is made (e.g., the seriousness of the situation, the need for resources or the principle of proportionality).

Faced with this dilemma, it can be concluded that two different approaches concur in the use of AI for administrative decision-making. One that focuses on AI systems and sets out procedural requirements for their use: e.g., tax applications for tax filing. And the other is aimed at the use and effect of a specific AI system for a specific procedure: e.g., the use of algorithmic models to determine the initiation of administrative sanctioning procedures.

3.2. *AI Systems and Administrative Decisions*

Focusing on the application or use of AI systems in the field of Public Administration, the distinction between weak AI or general AI acquires special relevance and allows us to distinguish several levels or categories, depending on the autonomy granted to the computer program or the algorithmic model in the decision-making phase of the administrative procedure.[23]

At the first level, AI systems that make it easier for the Public Administration to automatically apply the rules in different procedures are frequent. The use of (weak) AI thus makes it possible to implement the principles of effectiveness and efficiency, minimizing errors and freeing human resources from performing mechanical and repetitive tasks. These systems are limited to applying the standard that has been incorporated into their programming, without adding additional data or criteria that could influence the direction of the decision. The administrative resolution of the procedure is subject to the same legal treatment that would be applied if it had been issued without making use of an AI system: to verify on appeal whether the administrative act is in accordance with the legal system. In these cases, it is irrelevant that an AI system has participated in the production of the administrative act, because the programming has no impact on the meaning of the decision. And, therefore, it does not seem necessary to provide citizens with information about the program or application used. Likewise, any error or deviation in the application of the rule will be attributable to the programming and will result in an administrative act contrary to law. This type of system is easy to apply in regulated administrative actions, e.g., the granting of holidays or leave for public employees; for the granting of licenses; the recognition of contributory benefits; etc.

At the second level, the AI system does not introduce additional elements to those provided for in the regulation to produce the administrative act, but it is impossible to know how the regulation has been applied to make the decision without resorting to the computer program or application (weak or general AI). In these cases, it is essential to determine the impact that the AI system has had on the direction of the decision, to monitor how it has worked and to verify whether it has been limited to translating the regulatory framework. Administrative action continues to be regulated and the differentiating element with the previous level lies in the chain of successive actions, so that each of them influences the starting point of the next. E.g., procedures for transfer competitions or assignment of MIR places in which the allocation of the first place affects the places available for the following participants.

The third level involves AI systems based on predictive algorithm models that introduce data, elements or criteria that may or may not be foreseen in the standard, and that influence the direction of the decision (general AI). Of course, to the extent that the algorithm contributes to the basis of the administrative act, by providing the prediction on which it is based, it must be subject to control. The application in the administrative field would be restricted to contexts in which the action of the Public Administration is discretionary or endowed with a wide margin of action, which

¿más o menos discrecionalidad?, in *El Cronista del Estado Social y Democrático de Derecho*, October-November 2021, 91.

[22] L. Cotino Hueso, *Ética en el diseño para el desarrollo de una inteligencia artificial, robótica y Big Data confiables y su utilidad desde el Derecho*, in *Revista Catalana de Dret Públic*, no. 58, 2019, 43.

[23] For its clarity, the classification into three differentiated levels explained by A. Huergo Lora, *Administraciones públicas e IA: ¿más o menos discrecionalidad?*, cit., 78-95.

empowers it to choose between several valid options. For example, the ex officio initiation of a procedure, which is a procedural act, or the carrying out of inspections, which do not constitute administrative acts per se.

Based on the above, it can be concluded that the use of a weak AI system in the field of Public Administration is acceptable, and even recommended, as it speeds up the development of administrative procedures and optimizes the work of public employees, characterized by a frequent performance of routine and repetitive tasks. However, the integration of general AI tools raises more doubts than certainties and raises questions about the reliability of the decisions taken, as a result of the lack of transparency inherent in AI systems based on so-called 'opaque or black box algorithms'; a name that, in Baz Lomba's opinion, is attributed to them due to the concurrence of three circumstances: technical complexity, opacity of the content and restriction of access to its source code.[24] In these cases, there is agreement, both in recognizing its efficiency and success in a high percentage, and in highlighting the complexity in understanding the logic of its decision and the difficulty in explaining the reasons that justify it. This difficulty, known as 'the problem of AI interpretability',[25] is the greatest weakness of general AI systems (since the most effective are those with the most complex interpretation); and it constitutes the main obstacle to their greater implementation in the field of Public Administration.

3.3. *Automated Administrative Decisions*

Automated administrative action is a derivation of automated decision-making, a term from the technological field directly related to AI, which can be defined as a technological solution that through data processing facilitates the achievement of an objective without human intervention.[26] Automated decision-making requires the concurrence of three requirements: data processing; construction of a decision on the basis of these data; and absence of human intervention, both in the processing of the data and in the decision-making process. Automated decision can be executed with or without profiling. Profiling is defined as the use of personal data processing to evaluate certain aspects of a human being:[27] professional performance, economic situation, health, preferences, interests, reliability, behavior, location, movements, etc.

The application of this technology to the administrative procedure and its impact on the Public Administration has led to its definition and regulation as a legal concept in Article 41 of Law 40/2015.

As established in Article 41.1 of Law 40/2015, 'Automated administrative action is understood to be any act or action carried out entirely through electronic means by a Public Administration within the framework of an administrative procedure and in which a public employee has not directly intervened'.[28]

Automated administrative action thus identifies any act or action carried out entirely through electronic means by a Public Administration, within the framework of an administrative procedure, without direct intervention by a public employee. This legal regime only applies to formalised administrative activity, expressly including AI systems that support decision-making (algorithms), and therefore excluding (weak) AI systems that are limited to improving the material provision of public services.[29]

For its application, Article 41.2 of Law 40/2015 requires the concurrence of a series of requirements: 'In the case of automated

[24] C. Baz Lomba, Los *algoritmos y la toma de decisiones administrativas. Especial referencia a la transparencia*, in *Revista CEF Legal*, no. 243, 2021, 128.

[25] P. Linardatos, V. Papastefanopoulos and S. Kotsiantis, *Explainable AI: A Review of Machine Learning Interpretability Methods*, in *Entropy*, vol. 23, 2021, 14.

[26] B. Olivares Olivares, *La toma de las decisiones automatizadas y el derecho fundamental a la protección de datos de carácter personal*, in *Quincena Fiscal*, no. 15-16, 2022, 23.

[27] D. Sancho Villa, Las *decisiones individuales automatizadas, incluida la elaboración de perfiles (comentario al artículo 22 RGPD)*, in A. Troncoso Reigada (dir.), *Comentario al Reglamento General de Protección de Datos y a la Ley Orgánica de Protección de Datos y Garantía de Derechos Digitales*, vol. 1, Cizur Menor, Civitas, 2021, 1737-1739.

[28] The wording of the provision is not original, the concept is taken from the definition included in the Annex to the now repealed Law 11/2007, of 22 June, on Electronic Access of Citizens to Public Services (Law 11/2007), with a single difference: Law 11/2007 referred to natural persons, while Law 40/2015 refers to public employees.

[29] E. Gamero Casado, *Sistemas automatizados de toma de decisiones en el Derecho administrativo español*, in *Revista General de Derecho Administrativo*, no. 63, 2023, 5.

administrative action, the competent body or bodies must be previously established, as the case may be, for the definition of the specifications, programming, maintenance, supervision and quality control and, where appropriate, audit of the information system and its source code. Likewise, the body that must be considered responsible for the purposes of challenge shall be indicated.'

Automated administrative action requires the prior identification of the competent body for the definition of the specifications, programming, maintenance, supervision, quality control and audit of the information system and its source code and of the responsible body for the purposes of challenge. The wording given to the provision rules out any possibility of considering that automated administrative action is autonomous in nature, since it will always be attributed to a specific administrative body and will be subject to subsequent review. It also establishes the obligation of human supervision of the entire system.

From a technical point of view, automated decision-making is an effective tool in any area that requires the use of data or the use of big data for decision-making: commercial, financial, insurance, legal, educational, health, etc.

From a legal point of view, the use of automated administrative action has special application in the field of regulated activity, which is characterised by the fact that, based on a specific factual situation, the application of the previously delimited legal framework only allows a single valid administrative decision to be produced.

In view of the above, it can be concluded that the automated administrative decision is an instrument that reinforces the effectiveness of the rule of law for different reasons. It facilitates decision-making, mainly those based on big data; it speeds up the decision-making process; prevents and limits errors; reduces the effort of complex, repetitive or unstimulated tasks; it favors regulatory compliance; and ensures the coherence of the set of decisions adopted within the scope of a Public Administration. The main risk lies in the automation of complex decisions, which affect a plurality of people, and display influence over the following.[30] In these cases, it is common to resort to the computer support of algorithmic models, which by their very design can generate unfair and discriminatory decisions.[31] For this reason, in 2016 the European legislator limited the use of decisions based solely on automated processing if they significantly affect or produce legal effects vis-à-vis interested third parties (art. 22.1 GDPR).[32]

3.4. *Impact of Algorithmic Models on Automated Administrative Decisions*

3.4.1. *Conceptual Approach*

The basis of AI is, essentially, mathematical and its core is algorithms.

The algorithm can be defined as a step-by-step procedure: a set of rules that must be followed to perform a task or solve a problem. The concept originated in the real world,[33] long before the advent of computers and computing, and the oldest is considered to have been formulated by Euclid in 300 B.C. to find the greatest common divisor. Apparently, it is a term of Arabic origin from Al-Khwarizmi, the nickname of the Persian mathematician Mohammed ben Musa who, around 820 A.D., introduced decimal numerals to the West, and spread the elementary arithmetic rules linked to it.[34]

Nowadays the word algorithm is identified as a term characteristic of the technological field, which is directly related to computer programming and AI systems.[35] In a simple way, it can be defined as a logical sequence of commands, steps or instructions, established in an orderly and delimited manner, for a computer to solve a problem, make a calculation or execute a task using the data or information that has been previously provided. An algorithm is, therefore, the procedure that

[30] A. Huergo Lora, *El derecho de transparencia en el acceso a los códigos fuente*, in *Anuario de Transparencia Local*, 2023, 38.

[31] B. Olivares Olivares, *La toma de las decisiones automatizadas y el derecho fundamental a la protección de datos de carácter personal*, cit., 25.

[32] D. Sancho Villa, Las *decisiones individuales automatizadas, incluida la elaboración de perfiles (comentario al artículo 22 RGPD,* 1725-1745.

[33] Cooking recipes, assembly instructions… e.g., for furniture, and user manuals are examples of algorithms that humans use continuously.

[34] J.P. Úbeda Rives, *Algoritmo*, in L. Vega and P. Olmos (coords.), *Compendio de lógica, argumentación y retórica*, Madrid, Trotta, 2011, 38-44.

[35] On the concept of algorithm in the technological field and its relationship with AI, A. Huergo Lora, *El uso de algoritmos y su impacto en los datos personales*, in *Revista de Derecho Administrativo*, no. 20, 2021, 166-168.

the computer follows step by step to achieve a specific goal. There are essentially three parts of an algorithm: input, the information that is supplied to the system; process, the set of steps that the computer must follow based on the data received; and output, the result obtained by the computer with the transformation of the data during the process. The function of the algorithm is to convert the data into a concrete result through a specific computational procedure.

Algorithms are the backbone of computer programming and therefore computers: humans can act using algorithms or not, but computers can only function by following an algorithm. Computer programs are a set of algorithms ordered and coded in a programming language (basic, java, pascal, etc.), which tell the computer what steps it must follow and in what order it must perform them to execute a specific task.

The source code is the set of lines of text, written in a programming language, that describe the algorithm that the computer must follow for the correct execution of a specific program.[36] Its function is to convert computer programs into executables for computers. The Commission for the Guarantee of the Right of Access to Public Information of Catalonia has defined it in its Resolutions 123-124/2016, of 21 September 2016, as 'the set of written instructions, in the corresponding programming language, of the computer program used to implement the algorithm'. In the field of computer programming, the definition of the algorithm is always prior to the writing of the source code.

3.4.2. *Legal Nature*

The use of algorithms to increase resource efficiency and process effectiveness has been common in the private sphere for many years now,[37] and is becoming increasingly common in the public sector.[38] The application of algorithms in the field of Public Administration poses specific problems because administrative action is subject to qualified regulatory presuppositions. In the case of administrative action, the automated system must be expressly established (*ex.* art. 41.2 of Law 40/2015). This requirement has sparked a debate in the doctrine on the legal nature of the algorithms that the Public Administration can apply in the processing of an administrative procedure. The main protagonists have been Boix Palop, who considers that algorithms are regulations (minority position) and Huergo Lora, who defends that they are not.

Boix Palop supports his position in the following terms.[39] The algorithms used by Public Administrations to make decisions are regulations for two reasons: because they fulfil a function of regulating the future actions of the Administration, similar to that which regulations perform in general; and because they must be subject to the same control that the law provides for regulations. Its argument establishes a necessary link between the function performed by algorithms, their qualification and the legal regime to which they must be subject.

Huergo Lora considers that administrative procedures are algorithms, since they are made up of steps endowed with a certain content that must be followed to reach a solution (the resolution or final act of the procedure). And, therefore, that the novel phenomenon is algorithmic predictions based on data that are used for decision-making,[40] in

[36] On the concept of source code and its relationship with computer programming, J. de la Cueva, *Código fuente, algoritmos y fuentes del Derecho*, in *El Notario del Siglo XXI*, no. 77, 2018, 24-27.

[37] Since 2010, an entire economy based on the algorithmic exploitation of data has flourished, which has launched the big technology companies (Alphabet-Google, Facebook, Amazon or Netflix) to the top places by market capitalization. Algorithmic predictions are widely used in the banking sector to analyse the creditworthiness of potential customers in credit operations.

[38] In April 2023, it was made public that the INSS has been using a predictive system for the management and control of temporary disabilities since 2018. The system known as the appointment prioritization model defines the order in which INSS Inspectors must review patients. Likewise, Royal Decree-Law 2/2021, of 26 January, amending the revised text of the General Social Security Law, approved by Royal Legislative Decree 8/2015, of 30 October and the revised text of the Law on Infringements and Penalties in the Social Order, approved by Royal Legislative Decree 5/2000, of 4 August, it provides for the massive analysis of data for the detection of non-compliance and contemplates the initiation of the sanctioning procedure through the extension of automated infringement reports.

[39] A. Boix Palop, *Los algoritmos son reglamentos. La necesidad de extender las garantías propias de las normas reglamentarias a los programas empleados por la Administración para la adopción de decisiones*, in *Revista de Derecho Público: Teoría y Método*, vol. 1, no. 1, 2020, 223-270.

[40] The most common AI systems are based on predictive algorithms. Its main function is to forecast future events based on the analysis of past data. In these cases, the algorithm works as a kind of scale that is automatically

some cases automatically, in view of the result provided by the algorithm, and in other cases as a report prepared by the algorithm that the decision-maker will have to assess. He understands that algorithms present the same risks as human intervention and that what is relevant is not who acts but how they act and, above all, how that action can be controlled and how it can be guaranteed that it respects the previously established regulatory program.[41] Its argument establishes that the legal qualification of the algorithm will depend on the function attributed to it in the process of creation and application of the law. And, therefore, its legal nature will depend on the administrative action in which it is inserted and not on the algorithm itself.

Both positions have had an impact on the doctrine, with the argument that denies algorithms the status of regulation being better received. Along these lines, Gamero Casado considers that algorithms are mere tools for the Public Administration and cannot be equated to regulations because they do not innovate the legal system and must respect it.[42] For his part, Arroyo Jiménez understands that algorithms do not become regulations because they fulfill a regulatory function of the Public Administration since, by themselves, they do not constitute a prerequisite for the validity of administrative acts and, therefore, if the Public Administration departs from them in future actions, the corresponding acts will not necessarily be invalid because they will not have incurred in an infringement of the legal[43] system. This discussion has been settled by the Supreme Court when it stated in the aforementioned Judgment 1119/2025, endorsing the position defended by the State Attorney's Office, that algorithmic applications or systems do not have the nature of administrative acts or general provisions of regulatory rank and that they can only be considered applications or computer programs of an instrumental nature (FJ 7º).

3.4.3. *Projection on the Duty to State Reasons for Administrative Acts*

The authorship of automated administrative decisions is attributed by law to the administrative body that exercises the power and is entrusted with the competence (*ex.* art. 41.2 of Law 40/2015).

The classification of the algorithms used by the Public Administration depends on the function and autonomy attributed to them in the decision-making phase of the procedure. And, as the majority position in the doctrine defends, this function will be decisive in identifying its legal nature. In the field of automated administrative decision-making, the measures contemplated by Spanish legislation to safeguard the rights and freedoms and the rights and legitimate interests of the data subject include the right to challenge, but not the right to obtain human intervention from the controller (*ex.* art. 41.2 of Law 40/2015).

In 2020, it was discovered that the Public Administration was resorting to different AI systems based on the so-called 'opaque or black box algorithms'.[44] In this context, the use carried out by the Public Administration of algorithmic models or predictions acquires special relevance,[45] due to the risk they entail for the principle of transparency that must preside over all administrative action and, especially, because of the impact they may have on the duty to state reasons for administrative acts and decisions. Data-driven predictions are the result provided by certain algorithms. The procedure consists of analyzing large amounts of data and extracting correlations that allow predicting future events. The result provided by the algorithm can generate an automated decision (without human intervention) or it can guide the decision-maker.

Predictive algorithms have displaced the criteria that have traditionally been used in decision-making, objective (based on rules, reasoning or principles) and subjective (based

generated from past data. A. Huergo Lora, *Administraciones públicas e IA: ¿más o menos discrecionalidad?*, cit., 95.

[41] A. Huergo Lora, *Una aproximación a los algoritmos desde el Derecho administrativo*, cit., 64-75.

[42] E. Gamero Casado*, Sistemas automatizados de toma de decisiones en el Derecho administrativo español,* cit., 7.

[43] L. Arroyo Jiménez, *Algoritmos y reglamentos, in Almacén de Derecho*, 2020, available at https://almacendederecho.org/algoritmos-y-reglamentos [last accessed 12 January 2026].

[44] S. de la Sierra Morón, *Inteligencia artificial y justicia administrativa: una aproximación desde la teoría del control de la Administración Pública*, in *Revista General de Derecho Administrativo*, no. 53, 2020, 7.

[45] On algorithmic predictions, A. Huergo Lora, *El uso de algoritmos y su impacto en los datos personales*, in *Revista de Derecho Administrativo*, no. 20, 2021, 179-182.

on experience, training or values), and have replaced them with profiling based on the analysis of large amounts of data from the past.[46] Given that big data is one of the essential elements of this phenomenon (along with the procedure and computing capacity), the first legal response to the use of algorithms by the Public Administration came from the field of data protection.[47]

In general terms, the GDPR and LO 3/2018 data protection regime is applicable to all automated processing of personal data. This regulation protects all 'information about an identified or identifiable natural person' (art. 4 of the GDPR), therefore, its provisions will be limited to algorithmic models for several reasons:[48] the data they use are usually anonymised; the legitimacy of the processing derives from the public function performed by the Administration (letters e), and, where appropriate, c) and f) of Article 6.1 of the GDPR]; and the predictions obtained are not always directly addressed to a specific interested party, but in most cases serve exclusively the Public Administration that may or may not consider them.

Article 22.1 of the GDPR contains a prohibition that affects automated individual decisions, expressly including profiling, if two conditions are met: the lack of human intervention; and the production of legal effects or the significant impact on a data subject. To circumvent the ban, human intervention must be qualitatively significant at the decision-making stage. For this reason, only if the decision made by the algorithm is the one that is adopted automatically, or the one taken by the controller under mere supervision and without carrying out a detailed analysis, should it be understood that it is fully automated and included in the prohibition. It is more difficult to specify the scope of the second condition. Decisions 'affecting a person's access to health services, benefits or education' could fall within the category of 'legal effects or sufficiently significant impact on a data subject'.[49] In any case, this condition is also limited to algorithmic predictions, since they are generally used by the Administration as a tool to improve the allocation of resources in the selection of areas of action (both in tax actions and the initiation of sanctioning procedures, as well as favourable ones, e.g., social services), rather than to determine the content of a specific decision. However, if the application of the algorithm is decisive in making the decision or for the application of the rule (e.g., in the assignment of MIR places that chains successive actions, so that each of them influences the starting point of the next), it could be understood that it affects the interested party in the terms provided for by this precept of the GDPR.

The prohibition admits exceptions when the conditions contemplated in art. 22.2 of the GDPR are met, which lists the only legal bases that justify this action: that it is 'necessary for the conclusion or execution of a contract between the data subject and a data controller'; that it is 'authorised by Union or Member State law that applies to the controller and that it also provides for appropriate measures to safeguard the rights and freedoms and legitimate interests of the data subject'; or that it is based 'on the explicit consent of the interested party'. Of the three exceptions, the most relevant for public law is the need for regulatory authorisation so that Public Administrations can adopt decisions based solely on the automated processing of personal data, if the decision is to significantly affect or produce legal effects on the data subject. It also requires compliance with an additional requirement consisting of the adoption of appropriate measures to safeguard the rights and freedoms and the rights and legitimate interests of the data subject.

In the case of Spain, the regulatory enablement prescribed by Article 22.2 b) of the GDPR is Law 40/2015, which regulates automated administrative action in Article 41. Huergo Lora considers that after the entry into force of the GDPR, the Spanish State should have established a specific regulatory authorization for the adoption of a specific

[46] A. Huergo Lora, *Una aproximación a los algoritmos desde el Derecho administrativo*, cit., 70.

[47] A. Roig, *Las garantías frente a las decisiones automatizadas: del Reglamento General de Protección de Datos a la gobernanza algorítmica*, Barcelona, Bosch, 2020, 21.

[48] J. Ponce Solé, *Inteligencia artificial, Derecho administrativo y reserva de humanidad: algoritmos y procedimiento administrativo debido tecnológico*, in *Revista General de Derecho Administrativo*, no. 50, 2019, 11.

[49] I. Jiménez-Castellanos Ballesteros, *Decisiones automatizadas y transparencia administrativa: nuevos desafíos para los derechos fundamentales*, in *Revista Española de la Transparencia*, no. 16, January-June 2023, 198.

type of automated decisions, not maintain a general authorization for automated decision-making, 'because what is relevant is the use of algorithmic models and not that the decision is adopted automatically'.[50]

According to Art. 22.3 GDPR, controllers 'must take appropriate measures to safeguard the rights and freedoms and legitimate interests of the data subject, at least the right to obtain human intervention from the controller, to express his or her point of view and to challenge the decision' only when the processing is necessary for the conclusion or performance of a contract, or when it is based on the consent of the individual; but not in relation to the Public Administrations. In this case [art. 22.2 b) of the GDPR] it has been interpreted that in the face of a Public Administration, individuals will only enjoy the 'right to obtain human intervention from the controller' if this is contemplated in the rules of the Member States.[51] Palma Ortigosa considers that the GDPR should have extended the guarantee established in Article 22.3 to all cases of Article 22.2 of the GDPR, and not leave that decision in the hands of the Member States.[52]

The right to explanation of automated decisions is being considered as a new guarantee introduced by the GDPR, through the wording given to recital 71 of the GDPR (of dubious binding nature), and to which articles 13.2 f), 14.2 g) and 15.1 h) of the GDPR present in an identical way, which, when regulating information and access to personal data, oblige the data controller to inform the data subject about 'the existence of automated decisions, including profiling', and, in those cases, to provide him with 'meaningful information on the logic applied, as well as the importance and expected consequences of such processing for the data subject'. This interpretation, made by Roig,[53] would be aligned with the Asilomar Principle that preaches judicial transparency. However, as Medina Guerrero points out, it is very difficult to argue that the obligation to provide 'meaningful information on the logic applied' imposed by the GDPR can result in a right to a full explanation of the automated decision, including the disclosure of the algorithm used, as a harmonised standard for the entire EU.[54]

In Spanish law, the Council for Transparency and Good Governance has interpreted, through two Resolutions issued in 2021,[55] that the right to an explanation of automated decisions, including access to the algorithm used, is based on the right of access to public information proclaimed in Article 105 b) of the EC and developed by Law 19/2013, that in its art. 13 provides that public information is understood as 'the contents or documents, whatever their format or support, that are in the possession of any of the subjects included in the scope of application of this Title and that have been prepared or acquired in the exercise of their functions'.

Along these lines, Law 1/2022, of 13 April, on transparency and good governance of the Valencian Community, imposes on Public Administrations in its article 16.1 l) the obligation to publish: 'The list of algorithmic or artificial intelligence systems that have an impact on administrative procedures or the provision of public services, with the description in an understandable way of their design and operation, the level of risk involved and the point of contact to be addressed in each case, in accordance with the principles of transparency and explainability', by describing it as 'information of legal relevance'.

It should also be noted that in the administrative sphere, the right to obtain an explanation of the automated decision and access to the algorithm used are directly related to the duty to state reasons that the rule of law imposes on the Public Administration under the provisions contained in Articles 9.3, 24 and 106 of the EC. which are expressly developed in art. 35 of Law 39/2015, which constitutes one of the central guarantees of the administrative procedure. Along these lines, Gamero Casado highlighted two issues: 'that algorithms, automated administrative action and AI do not escape the need to motivate

[50] A. Huergo Lora, *El uso de algoritmos y su impacto en los datos personales*, cit., 187.
[51] I. Jiménez-Castellanos Ballesteros, *Decisiones automatizadas y transparencia administrativa: nuevos desafíos para los derechos fundamentales*, cit., 199.
[52] A. Palma Ortigosa, *Decisiones automatizadas en el RGPD. El uso de algoritmos en el contexto de la protección de datos*, in *Revista General de Derecho Administrativo*, no. 50, 2019, 32.
[53] A. Roig, *Las garantías frente a las decisiones automatizadas: del Reglamento General de Protección de Datos a la gobernanza algorítmica*, cit., 28.
[54] M. Medina Guerrero, *El derecho a conocer los algoritmos utilizados en la toma de decisiones*, in *Teoría y Realidad Constitucional*, no. 49, 2022, 165.
[55] CTBG Resolution RT 0748/2021 and Resolution RT 0253/2021, both of 19 November of the Council for Transparency and Good Governance.

decisions based on them'[56] and that, according to Law 39/2015 'black box algorithms cannot be used to support decision-making, as it is impossible to know why the system makes that decision'.[57] Likewise, the Supreme Court in the aforementioned Judgment 1119/2025 warns that the lack of technical explainability empties the obligation to give reasons for administrative acts of content, considering, therefore, that this technical explainability is part of the legal reasoning. (FJ 6º).

In view of the above, it could be concluded that, if the use of AI systems is intended to improve the quality of the provision of public services, or to adopt decisions within the framework of regulated activity, the opacity about the operation of the algorithm would be irrelevant for legal purposes. However, if the purpose of the applications is to support the Public Administration in making complex decisions, which affect a plurality of people and display influence over the following ones, or the algorithms introduce data, elements or criteria that influence the direction of the decision (whether automated or not), for the sake of the principle of transparency that governs all administrative activity and, especially, in compliance with the duty to state reasons regulated in Article 35 of Law 39/2015, the Public Administration is obliged to provide all affected citizens with an explanation of how the algorithm works in understandable language. For this reason, the creation and implementation of a public registry has been proposed to identify the algorithms used by the Public Administrations.[58]

3.4.4. *Impact on the Principles of Non-Discrimination and Transparency That Govern the Actions of the Public Administration*

The concern for equal treatment and non-discrimination in the field of automated administrative decisions, especially those adopted with the support of algorithmic models, can be recognised in Article 23 of Law 15/2022, which directs Public Administrations that use algorithms for decision-making to a series of mandates. To promote the implementation of mechanisms so that the algorithms involved in the decision-making used take into account criteria of minimisation of bias, transparency and accountability; to address the potential discriminatory impact of algorithms; to promote the performance of impact assessments that determine the possible discriminatory bias of algorithms; prioritising transparency in the design of algorithms involved in decision-making processes and the implementation and ability to interpret the decisions adopted by them; promoting the use of ethical, trustworthy AI that respects fundamental rights, following the recommendations of the European Union; and promoting a seal of quality for algorithms.

This regulation aims to minimise discrimination due to bias in the algorithmic model used in administrative decision-making, mainly automated ones. As already highlighted, the use of AI in the legal field brings advantages and opportunities, but it also entails risks of various kinds. Perhaps the one that has generated the greatest social alarm is the verification, against the odds, of the ability of algorithms to hide, provoke or intensify discriminatory situations. The tendency of humans to trust the neutrality of automated systems originally validated the replacement of human reasoning by AI, considering that it would inform objective, fairer and less discriminatory decisions. The passage of time ended up showing that the premise was weak and had cracks. The starting point of learning an algorithm is based on the data provided to it and the design of its computer program, in both cases by human beings who may be influenced by certain stereotypes. For this reason, and given the characteristic self-learning capacity of AI, the ability developed by algorithms to replicate discriminatory human biases in profiles should not be surprising.

This was the case at Amazon, the e-

[56] E. Gamero Casado, *Sistemas automatizados de toma de decisiones en el Derecho administrativo español*, cit., 17.
[57] E. Gamero Casado, *Sistemas automatizados de toma de decisiones en el Derecho administrativo español*, cit., 18.
[58] Jiménez-Castellanos defends this proposal in accordance with article 157.2 of Law 40/2015, which empowers Public Administrations to declare as open sources applications, developed by their services or that have been the subject of contracting and whose intellectual property rights they own, when this results in greater transparency in the operation of the Public Administration. I. Jiménez-Castellanos Ballesteros, *Decisiones automatizadas y transparencia administrativa: nuevos desafíos para los derechos fundamentales*, cit., 197.

commerce company, which in 2014 launched an algorithmic system to optimize resources and increase neutrality in its recruitment processes to hire personnel in the technical category. Three years after its implementation, the program had to be eliminated for being sexist, since the algorithm took as its starting point the profile presented by the workers who held or had held that position, traditionally men, and learned to discard the candidacies of women because they included female words.[59] Something similar occurred at Microsoft with Tay, the computer program developed in 2016, to explore the interaction between computers and human beings, which was designed with the aim of maintaining an informal and fun conversation on social networks with an audience between 18 and 24 years old but that, at great speed, it learned from network users, became xenophobic and had to be deactivated two days after its launch, because it responded using racist messages.[60]

It is considered that there are several reasons that could explain why a tool originally intended to eliminate biases, even unconscious, from human decisions, has become a source of possible discrimination.[61] Firstly, the design of the algorithm, which can be established as an instrument to generate discrimination by action or omission, consciously or unconsciously. Secondly, the evolution of the algorithm, which can depart from neutrality when configuring profiles as a result of the lack of plurality in the data provided to it. Thirdly, the opacity of the algorithm, due to the complexity of the internal decision-making process, its capacity for self-learning and the difficulty in accessing it; and, finally, the social context in which the algorithm is applied, which can contribute to perpetuating discriminatory situations.

In order for decisions based on algorithmic models to incur in cases of direct discrimination, it will be necessary for the system to be fed with data that should not have been considered because it should not have been considered because it is prevented by art. 9.1 of the GDPR (ethnicity or race, ideology, religion, trade union membership, genetics, biometrics, health, sex or sexual orientation). However, decision-making based on other data not included in the provision, which are apparently innocuous, may also constitute direct discrimination by inference if the data supplied to the system are insufficient, outdated or not representative.[62] In these cases, access to the algorithm is essential to prove discriminatory bias and prove causality between the processing of the data and belonging to the group disadvantaged by the decision.

Situations of indirect discrimination, decisions that appear to be neutral but that mostly harm the members of a specific group, can also occur in the field of automated decisions. In these cases, in order for the justification to be considered sufficient, it is necessary to prove that the apparently neutral measure pursues a legitimate objective, and to pass the proportionality test: adequacy, necessity and proportionality of the measure adopted. Identifying that an algorithmic system is causing this type of discrimination is complex, since the majority sentiment invites us to trust in the neutrality of AI and this tendency favors the decision to pass, even in court, the proportionality test, because trust is placed in the precision of the program and the bias of the algorithms is interpreted as necessary. Even if it contributes to perpetuating a situation of disadvantage or inequality.[63] As Soriano Arnanz points out, 'what is not valued is that the accuracy of the system is perhaps the result of having transferred a discriminatory social structure to the algorithm'.[64]

The versatility of computer programs means that, although the algorithmic model does not present harmful biases against people belonging to traditionally disadvantaged groups or collectives, its application to decision-making causes an indirect discriminatory situation. This is what has

[59] The news item 'The algorithm that doesn't like women' can be consulted on www.bbc.com/mundo/noticias-45823470 [Last accessed 12 January 2026].

[60] The news item 'Tay, Microsoft's racist and xenophobic chatbot' can be found on www.bbc.com/mundo/noticias/2016/03/160325tecnologiamicrosofttaybotadolescenteinteligenciaartificial [Last accessed 12.01.2026].

[61] Due to its clarity, the most relevant reasons considered by F.J. Calvo Gallegos, *Algoritmo y discriminación*, in *Revista Latinoamericana de Derecho Social*, no. extra, 2022, 10-19.

[62] I. Jiménez-Castellanos Ballesteros, *Decisiones automatizadas y transparencia administrativa: nuevos desafíos para los derechos fundamentales*, cit., 208.

[63] F.J. Calvo Gallegos, *Algoritmo y discriminación*, cit., 20.

[64] A. Soriano Arnanz, *Decisiones automatizadas: problemas y soluciones jurídicas. Más allá de la protección de datos*, in *Revista de Derecho Público: Teoría y Método*, vol. 3, 2021, 97.

happened in Spain with the BOSCO application, a computer program used by electricity companies and developed by the Ministry of Energy, Tourism and Digital Agenda, to evaluate applications and manage the processing and granting of the so-called 'electricity social bonus' (which generates a discount on the electricity bill in favor of specific groups: large families, low incomes, etc.), which has denied the status of beneficiary to numerous people who met the requirements set out in the regulatory regulations.

As can be seen from art. 8 of Royal Decree 897/2017, of 6 October, which regulates the figure of the vulnerable consumer, the social bonus and other protection measures for domestic consumers of electricity, the decision to grant or deny the social discount is clearly determined by the algorithm of the application. Since the aforementioned precept establishes that 'once the application for the application of the social bonus has been received, the reference marketer, through the computer platform available for this purpose in the Electronic Office of the Ministry of Energy, Tourism and Digital Agenda, will check the data contained therein'.

The so-called BOSCO case (name of the application) or CIVIO case (name of the Foundation that detected the failure and requested access to the source code) is the most significant to date in the Spanish public sector, and the only one that has been prosecuted.[65]

The CIVIO Foundation carried out a study for social purposes and detected that the algorithm failed to deny the social bonus to widows, so it turned to the Ministry for the Ecological Transition and the Demographic Challenge and, exercising the right of access to public information (*ex.* arts. 12 and 13 of Law 19/2013), requested access to the technical specifications of the application, the result of the functional tests, the source code, and any other deliverable documentation to know and verify the operation of the application.

When access to the requested information was denied, due to the Ministry's silence within the one-month period established by Law 19/2013 (*ex.* art. 20.1), CIVIO filed a complaint with the Council for Transparency and Good Governance (CTBG), which partially upheld it by virtue of Resolution 701/2018, of 18 February 2019, allowing access to the technical specifications of the application and the result of the operational tests, but denying access to the source code in order to protect industrial property. The independent administrative entity thus urged the Ministry to send the claimant entity the technical specifications of the application, the result of the tests carried out to verify that the implemented application complies with the functional specification, and any other deliverables that allow to know the operation of the application.

CIVIO filed a contentious-administrative appeal against the resolution of the CTBG that had denied access to the source code based on two arguments: 'that Article 13 of the Consolidated Text of the Intellectual Property Law provides that legal or regulatory provisions and their corresponding projects, decisions of the courts and acts are not subject to intellectual property, agreements, deliberations and opinions of public bodies, as well as official translations of all previous texts'; and 'that the limit provided for in article 14.1, section j) of Law 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance, can only be applied when it is an intellectual property owned by someone other than the person obliged to transparency, since what is intended with such limitation is the safeguarding of the rights of a third party'. In his brief, the Foundation's lawyer endorses the thesis put forward by Boix Palop and defends that the algorithms used by the Public Administration in a non-purely instrumental way materially produce the same effects as any regulation and, therefore, considers it necessary to extend the guarantees of the regulatory rules to the programs used by the Public Administration for decision-making, which includes their access as they constitute public information relevant.

For its part, the Ministry focused its argument on the risk that access to the source code would pose to National Security, since the system shared information with sensitive databases that would be exposed and put at risk. To support his position, he relied on a report prepared by the National Cryptologic Center.

[65] A detailed analysis of this case is carried out by E. Gutiérrez David, *El derecho de acceso al código fuente y a los algoritmos públicos. El "caso Civio". Esperando a Godot*, in *Once relatos sobre cómo el acceso a la información impacta sobre nuestras vidas*, J. Meseguer Yebra (coord.), Madrid, Federación Española de Municipios y Provincias, 2021, 81-98.

The Central Administrative Court no. 8 dismissed in its entirety the appeal filed by Judgment 143/2021, of 30 December (Ordinary Procedure 18/2019) by accepting the arguments put forward by the Ministry. The Judgment, in summary, reflects the following conclusions: that the administrative act is not issued by a computer application, but by an administrative body and that, in the event of disagreement, the addressee may challenge it through administrative and judicial channels; that the legality of the administrative act is not justified by the computer application that is instrumentally used in a phase of the corresponding administrative procedure, but by the regulations that regulate the matter; that the denial of access to the source code of the computer application does not imply a violation of the principle of legality, since it will always, in the last instance, be possible to verify whether the applicant meets the requirements for being granted the social bonus; and paraphrasing the report of the National Cryptologic Center, that 'the disclosure of the source code objectively increases the severity of the vulnerabilities of any computer application. If it also handles classified or sensitive information of the administration, knowledge of the source code increases the risk that the exploitation of vulnerabilities could affect national security, public safety or the security of those administered.'

The judicial decision was appealed before the corresponding Chamber of the National High Court. On appeal, the CTBG departed from the arguments maintained by the State Attorney's Office and modified its position by showing itself in favour of granting segmented access to the source code in the terms provided for in Article 16 of Law 19/2013, i.e., eliminating the elements that could affect National Security and maintaining those that explain the rules or criteria applied by the algorithm.[66] However, the appeal was dismissed for CIVIO by Judgment of 30 April 2024, of the Seventh Section of the Contentious-Administrative Chamber of the National High Court (Appeal 51/2022), which confirmed the Judgment of first instance arguing the prevalence of the security of the system and intellectual property rights, considering that the obligations arising from the principle of transparency do not include access to the source code of automated decision-making tools, and arguing that the legality of the administrative act (granting of the voucher) is based on the regulations governing the procedure and not on the algorithm used.[67]

An appeal was lodged against the decision of the National High Court, CIVIO raised the following question before the Supreme Court (SC) with objective cassational interest for the formation of jurisprudence: 'to determine the appropriateness –or not– of providing the source code of the computer application to determine if the requirements to be a beneficiary of the social bonus are met'.

The question raised was resolved by the Supreme Court, applying and interpreting Articles 14 and 16 of Law 19/2013 in relation to Article 42 of the Charter of Fundamental Rights of the European Union and Article 105.b) of the EC, by virtue of the Judgment of 11 September 2025 (STS 1119/2025-Appeal 7878/2024), issued by the Third Section of the Contentious-Administrative Chamber, which upheld the appeal filed by CIVIO by concluding that the source code is public information and that access to it can be requested in accordance with Law 19/2013, and establishing the jurisprudential doctrine that is summarized below on the right of access to public information.[68]

[66] From 2024, the CTBG began to recognise the right of access to the Source Code of algorithms used in the field of Public Administration 'for their inspection, both by those who may feel harmed by their results and by the general public, for the sake of the observance of ethical principles and justice'. This is stated in its Resolution RT/1071/2024 on the application for the Appointment Prioritization Model of the Ministry of Inclusion, Social Security and Migration; in RT/253/2021 on the computer application used for the drawing of tribunals associated with selection processes in the community of Madrid; in RT/748/2021 regarding the algorithm of the computer application used in the admission process of students for the 2021/2022 academic year in Castilla-La Mancha; or in RT/7/2023 on the source code of the State Public Employment Service (SEPE) application for calculating contributed days of unemployment.

[67] An exhaustive analysis of this Judgment is carried out by J. Ponce Solé, La *transparencia algorítmica y los entes locales: lecciones de las sentencias recaídas en el caso BOSCO, con especial atención a la de la Audiencia Nacional de 30 de abril de 2024*, in *El Consultor de los Ayuntamientos y de los Juzgados*, no. 3, 2024.

[68] Among the exhaustive analyses of this Judgment are: J. Moreno García, *La transparencia de los algoritmos en la STS 1119/2025, de 11 de septiembre de 2025: el caso Bosco, un paso decisivo en la lucha contra la opacidad algorítmica*, in *Revista Vasca de Administración Pública*, no. 133, 2025, 317-351; and P. Toral Oropesa, *El principio de buena administración en*

The High Court stresses that the right of access to public information is not only an objective guiding principle of the actions of the Public Administration, but also constitutes a constitutional right exercisable against the Public Administration, which derives from democratic requirements and is inseparably linked to the democratic State and the rule of law (FJ 6º). And it concludes that this subjective right acquires special relevance in view of the risks involved in the use of new technologies in the exercise of public powers or the provision of public services, as is the case with the use of computerized systems for automated decision-making in the activity of the Public Administration, especially when they are aimed at the recognition of social rights. Adding that in these cases the computer processes used entail additional requirements of transparency, in order to provide citizens with the information necessary for their understanding and knowledge of their operation, which may require access to its source code, to enable the verification of the conformity of the algorithmic system with the regulatory provisions that it must apply.

The aforementioned Judgement of the Spanish Supreme Court 1119/2025 also states that the notion of 'public information' must be extended to 'the logical and technical elements that allow us to understand how automated decisions are adopted', which includes not only the source code, but also the user manuals, decision rules, training data sets and audit logs (FJ 6º). And it recalls that intellectual property does not constitute an absolute limit, explaining that, in accordance with Article 14.1.f) of Law 19/2013, trade secrets or copyrights only justify the denial of access when their disclosure causes real and concrete damage, and not when it is invoked in a generic way. With this reasoning, the SC definitively departs from the argument that defended the *ipso iure* exclusion of the source code from the concept of public information. And it clarifies that Law 19/2013 must be interpreted in an evolutionary way and in accordance with the principle of active publicity, which includes access to both traditional administrative documents and digital assets that support decision-making (FJ 7º). The right of access to public information is thus connected with the duty to state reasons for administrative acts and justifies the need to link algorithmic transparency and administrative motivation[69] (e.g., if a decision is based on an algorithmic result, the Public Administration must be able to explain in an understandable way how that result has been achieved). It is also noted that the lack of explainability empties the obligation to give reasons for administrative acts of content and violates the principle of prohibition of arbitrariness (FJ 6º). The scope of the principle of administrative reasonableness is therefore broadened by considering, now, that technical explainability is part of the legal reasoning. Consequently, the Public Administration is required to keep the technical documentation up to date and to offer intelligible explanations to the interested parties, without taking refuge in technicalities.

In accordance with the above, it could be concluded that algorithmic transparency in the field of Public Administration, after Judgement of the Spanish Supreme Court 1119/2025, would have ceased to be a mere legal obligation inherent in the principle of transparency, to become a requirement of democratic legitimacy in the adoption of automated administrative decisions. On the other hand, it could be inferred that algorithmic opacity in the field of administrative procedures erodes citizens' trust in the institutions and hinders the exercise of their fundamental rights. Finally, it should be noted that the doctrine established by the Supreme Court is built entirely in the light of the specific characteristics of the BOSCO case, so that its application to any other algorithm used by the Public Administration is not foreseeable. Consequently, although the Supreme Court has enunciated a general principle of algorithmic transparency in the field of Public Administrations, the scope of its pronouncement is intentionally limited to a specific typology of algorithms: the opaque ones that adopt decisions in the exercise of public powers in areas as sensitive as Social Rights. Despite this, it must be recognized that the doctrine established by the High Court marks a very important milestone by reminding the Public Administration that all automated decisions must be transparent, explainable and auditable.

la era de la inteligencia artificial y la transparencia algorítmica, in *Revista Jurídica de la Comunidad de Madrid*, no. 2, 2026, 93-123.

[69] M. Bonnet Parejo, *El principio de transparencia algorítmica en el Derecho público español: fundamentos, jurisprudencia reciente y desafíos regulatorios*, in *Revista Canaria de Administración Pública*, no. 6, 2025, 269.