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*The Functions of Algorithmic Administration Liability**

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ABSTRACT The evolution of public action in the digital age opens up new avenues for reflection on the functions of administrative liability: while the compensatory function is not disappearing, the normative function of liability could gain prominence.

KEYWORDS: Algorithmic administration - Administrative liability - Compensatory function - Prevention of algorithmic harm

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1. *Introduction*

Algorithms are now spreading within public institutions: as the French *Conseil d'État* noted in 2022, 'no area of public action is impermeable to these systems'.[1] In the postmodern era, algorithms embody the promise of a more efficient administration and better-performing public services, whether in combating tax fraud,[2] ensuring the centralised management of urban infrastructure,[3] or assisting advisers at *France Travail* (the French public agency that assists job seekers). However, the use of algorithms by public administrations also creates risks and may cause harm (discrimination, errors, violations of fundamental rights, denial of access to public services), which may give rise to liability claims against the administration.

In France, such liability falls within the framework of administrative liability established by the landmark *Blanco* decision,[4] whose rules differ from those governing civil liability. The rise of algorithmic public action naturally raises questions regarding the adaptation of long-established mechanisms of liability law to these new digital tools used by the administration. Do existing liability regimes make it possible to hold public authorities liable for damage resulting from the design or use of algorithmic systems? This question has already been examined elsewhere,[5] and the purpose of the present article is different. It explores the functions of administrative liability. A function determines 'what a thing is used for'.[6] In liability law, it refers to the question of the 'purposes and objectives pursued by the legislator when imposing an obligation to compensate on legal subjects.'[7] What functions can be attributed to liability within algorithmic administration?

In administrative law as in civil law, there is now a broad consensus around three main functions of liability: *compensation* for harm, *punishment* of the wrongdoer, and *prevention* through deterrence.[8] These functions have been classified in different ways depending on the authors and historical periods.[9] In private

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[1] Conseil d'Etat, *Intelligence artificielle et action publique : construire la confiance, servir la performance*, 31 March 2022, 6.

[2] C. Lequesne-Roth, *La lutte contre la fraude à l'ère digitale*, in *La Revue de droit fiscal*, no. 5, 2021, 2; H. Pauliat, *L'intelligence artificielle et les risques de rupture d'égalité dans l'accès aux droits et aux services publics*, in *Revue française de droit administratif,* 2025, 45.

[3] This is the Smart City project of the Dijon Metropolitan Area (Ondijon). A comprehensive performance contract was awarded to the consortium comprising Bouygues Energies & Services, Citelum, Suez, and Capgemini following a competitive dialogue.

[4] TC, Blanco, 8 February 1873.

[5] S. Philibert, *The new liabilities of algorithmic administration – France*, in *European Review of Digital Administration & Law*, no. 1, 2026; C. Testard, *L'administration numérique : une responsabilité administrative confortée*, in *L'Actualité juridique Droit administratif,* 2021, 1267; E. Barbin, *Le contrôle juridictionnel de l'outil numérique d'aide à la décision administrative,* in *Revue française de droit administratif,* 2021, 491.

[6] D. de Béchillon, *Hiérarchie des normes et hiérarchie des fonctions normatives de l'État*, Paris, Economica, 1996, 44.

[7] l. De Gastines, *La responsabilité extracontractuelle des personnes morales de droit public*, in *Revue du droit public,* 1992, 134.

[8] P.-L. Frier and J. Petit*, Précis de droit administratif*, Paris, Montchrestien, 2022, 719.

[9] C. Eisenmann*, Le degré d'originalité du régime de la responsabilité extracontractuelle des personnes morales de droit public*, in *La Semaine Juridique,* I, no. 742,

law, a distinction has been drawn between a 'compensatory' function, aimed at victims and intended to ensure compensation for damage suffered, and a 'normative' or 'prophylactic' function directed at the wrongdoer, encompassing 'the objectives of prevention and punishment'.[10] This latter classification, which has also been accepted in administrative law,[11] will provide the framework for our analysis. We therefore distinguish between two major functions of administrative liability: the *compensatory* function, which focuses on harm in order to repair it, and the *normative* function, which focuses on conduct[12] and encompasses both the punitive and preventive dimensions of liability.

Which functions of administrative liability are engaged in actions brought against public authorities for harm resulting from the use of algorithms? Does the need to protect individuals in the face of expanding algorithmic public action confer new functions on administrative liability? Does it require a reassessment of the relative weight of its different functions, possibly giving precedence to one over the others? The discussion necessarily has a prospective dimension. On the one hand, the liability of algorithmic administration has not yet been established before French courts, and there is therefore a lack of concrete litigation examples. On the other hand, the conditions for establishing liability currently make the success of such claims uncertain. Holding an administration liable for algorithmic harm will require proof of several elements: a triggering event (for example, a biased or erroneous algorithmic design, a lack of transparency, or insufficient human oversight in its use), damage (which may be tangible and material, but also moral or intangible), and a causal link between the two – something that the opacity of algorithms may make particularly difficult to demonstrate.[13]

In an article published in 2020, we examined the evolution of the functions of administrative liability in relation to another issue: environmental protection.[14] We showed that the growing number of claims brought before French administrative courts seeking to establish the State's environmental liability for failures in combating climate change had intensified functions of administrative liability that had previously been considered secondary – particularly its normative function. In this context, claimant associations are less interested in seeking compensation (how can one put a price on melting ice?) than in stigmatising the state's negligence and preventing future risks.

Is the same phenomenon occurring in the field of algorithmic public action? In this area, the pursuit of liability against algorithmic administration can still be seen as serving a compensatory function (2). At the same time, however, one may observe – just as in environmental matters – the growing importance of the normative function of administrative liability (3).

2. *Preserving the Compensatory Function of Algorithmic Administration Liability*

One might first question the relevance of administrative liability in its compensatory dimension, due to the proliferation of *ex ante* compliance mechanisms. Indeed, the numerous legal instruments seeking to regulate digital activities are based on a logic of compliance; they aim to make actors in the sector accountable, and one may wonder whether this *ex ante* responsibility is replacing traditional *ex post* liability. In this sense, some authors have pointed to the 'risk of dilution of administrative liability within *ex ante* compliance'.[15] Indeed, the GDPR, as well as the AI Act, the DSA, and the DMA, are based on a logic of upstream risk prevention and on

1949; D. Lochak, *Réflexions sur les fonctions sociales de la responsabilité administrative,* in *Le droit administratif en mutation*, Paris, PUF, 1993, 275; B. Starck, *Essai d'une théorie générale de la responsabilité civile, considérée dans sa double fonction de garantie et de peine privée*, Paris, thesis Paris, 1947.

[10] C. Grare, *Recherche sur la cohérence de la responsabilité délictuelle. L'influence des fondements de la responsabilité sur la réparation*, Paris, Dalloz, 2005, espec. IX and 87.

[11] A. Frank, *Le droit français de la responsabilité administrative à l'épreuve des fonds d'indemnisation,* Paris, L'Harmattan, 2008.

[12] N. Fournier de Crouy, *Intensification de la fonction normative de la responsabilité civile*, colloque du 17 mai 2019, Metz, *Lexbase,* no. 187, 2020.

[13] N. Lasbleiz, *Le contrôle des algorithmes publics*, PhD thesis, Université Paris Nanterre, 2026, n. 588, 'At the time of writing, there is no case law on administrative liability concerning public algorithms'.

[14] I. Hasquenoph, *L'évolution des fonctions de la responsabilité administrative en matière environnementale*, in *Revue du droit public*, 2020, 943.

[15] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 638.

the implementation by public authorities of mechanisms for 'control, impact assessment, and documentation of algorithmic processing'.[16] The administration might therefore seek to minimise its liability by invoking compliance with procedures validated upstream and consistent with legal requirements. Such a risk of absorption of *ex post* liability by compliance logics would, however, be particularly concerning. As Nina Lasbleiz writes in her doctoral thesis on the control of public algorithms, 'the issue is not only legal but democratic: in the face of automated decisions affecting fundamental rights, administrative liability is essential to ensure that public authorities are accountable for their choices and decisions […] the time is not for the overcoming of the compensatory function of administrative liability law, but rather for its reaffirmation'.[17] This new logic of *ex ante* accountability through compliance therefore in no way replaces *ex post* liability and it remains necessary to examine the main features of this compensatory function of liability in algorithmic administration.

In an article published in 1949, Charles Eisenmann, a leading French administrative law scholar, explained that the purpose of legal obligations to repair harm imposed by the legislator on certain subjects is to 'provide beneficiaries of the rule with compensation for the damage they have suffered'.[18] In other words, compensation aims to 'restore the victim, as far as possible, to their original legal position'.[19] As Nina Lasbleiz has noted, this compensatory and reparative logic remains relevant in the context of algorithmic use by public administrations.[20] Indeed, a configuration error, biased algorithm, or malfunctioning system may cause individuals concrete and quantifiable harm (loss of resources, denial of a right, etc.). Compensation then makes it possible to repair an actual economic loss.

However, this compensatory function of administrative liability in the algorithmic context faces several limitations, also highlighted by Nina Lasbleiz.[21] First, algorithmic malfunction may generate harms that are difficult to quantify, such as moral or non-material damages. Their compensation is complex both practically and ethically (can the value of a person subjected to discrimination be equated with a monetary indemnity?). Second, some harms caused by algorithmic administrative action may be of such intensity that 'no compensation could truly make them good,' particularly because these algorithms may affect 'systematically and repeatedly entire categories of the population, generating phenomena of discrimination, marginalisation, or exclusion.' Third, it cannot be entirely excluded that the administration internalises the cost of compensation within its decision-making: compensation indeed has a reverse side and may be perceived as a 'comfortable solution' for the administration,[22] 'the price to pay for the right to engage in a lawful activity, even if it causes harm'.[23] To these limitations must be added the difficulty of satisfying the conditions for liability, namely proving not only damage, but also a triggering event and a causal link between the two. At present, administrative liability for algorithmic action has not yet been established in France, and many authors call for adjustments to administrative liability law (even if it does not appear entirely inadequate).

The limits of the compensatory function of liability in algorithmic administration invite us to turn to another function of liability: its normative function.

3. *Strengthening the Normative Function of Algorithmic Administration Liability?*

Applying administrative liability law to damages caused by algorithmic public action could lead to a reassessment of its normative function – that is, its role as both a punitive and preventive mechanism.

[16] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 638
[17] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit. no. 639.
[18] Ch. Eisenmann, *Sur le degré d'originalité du régime de la responsabilité extra-contractuelle des personnes publiques*, in *La semaine juridique,* 1949, 1-751.
[19] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 643.
[20] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 643.
[21] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 644 ff.
[22] A. Jacquemet-Gauché, *Une distorsion des fonctions (et) du droit de la responsabilité administrative*, in A. Jacquemet-Gauché (dir.). *Dépasser la fonction indemnitaire du droit de la responsabilité administrative,* 21.
[23] Ch. Eisenmann, *Sur le degré d'originalité du régime de la responsabilité extra-contractuelle des personnes publiques,* cit.

3.1. *The Punitive Function of Algorithmic Administrative Liability*

Does the punitive function of liability come into play when seeking to hold the algorithmic administration liable? This function of liability, which is closely tied to the identification of *fault*, gained prominence under the influence of the Church: while Roman law viewed liability as a means of restoring a prior order, a 'just balance' (*suum cuique tribuere*), with the development of Christianity, the emphasis shifted to the idea of sin and its expiation.[24] Liability here takes on a retrospective dimension: 'one is responsible for what one has done.'[25]

Even in administrative matters, fault has a subjective and moral dimension: it serves as a disciplinary tool for the administration.[26] As Benoît Plessix notes, by holding the administration liable for fault, the judge sometimes seeks more to impose a firm sanction for a failure than to compensate a victim for harm, thereby 'implicitly sketching the portrait of a virtuous public administration'.[27] Based on fault, administrative liability therefore serves not only a compensatory function but also an expiatory one. However, the emergence of non-fault liability regimes – against a backdrop of increasing risks and growing public demand for safety – has led to this punitive function being overshadowed by the compensatory function. The history of administrative liability law is one of an increasing emphasis on its compensatory function.

Nevertheless, new concerns, such as climate change or the risks associated with the administration's use of algorithmic tools, could lead to a revival of this punitive aspect of administrative liability.

Indeed, many authors have noted that the administration's use of algorithms could, in fact, give rise to administrative liability for fault.[28] Since Planiol's writings, fault has been defined as a 'breach of a preexisting obligation':[29] yet the administration's use of algorithms creates numerous new obligations for the administration (compliance with transparency requirements, protection of personal data, system security), and failure to comply with these obligations may constitute misconduct.[30]

Admittedly, the administration could also be held liable without fault. As Nina Lasbleiz points out in her thesis, four distinct forms of liability without fault exist under French law: 'liability for risk, liability for breach of equality before public burdens, liability based on custody, and liability for defective products.' Nevertheless, 'neither of these would truly allow for a comprehensive consideration of future disputes involving public algorithms'.[31] As she has shown, liability based on fault 'remains, in the vast majority of cases, the most appropriate basis for future litigation involving a public algorithm'.[32] Of course, identifying fault is not sufficient to establish the administration's liability: it is still necessary to prove harm and a causal link. But the emphasis on fault could serve to reinvigorate the punitive function of administrative liability.

The preventive function of administrative liability also appears to be called upon in the search for algorithmic administrative liability.

3.2. *The Preventive Function of Algorithmic Administrative Liability*

Algorithmic public action may exacerbate functions of administrative liability that have until now been considered secondary. This is particularly true of the preventive function of liability. The same trend can be observed in climate-related lawsuits, where liability claims for the state's negligent failure to act aim to encourage the state to work toward protecting the environment and preventing environmental damage: here, the deterrent dimension of liability is at stake.

It is noteworthy that *prevention* is the primary function assigned to liability by proponents of the economic analysis of law.[33]

[24] P.-M. Dupuy, *Responsabilité*.
[25] P. Ricoeur, *Le concept de responsabilité, essai d'une analyse sémantique*, in *Esprit*, no. 206, issue 11, 1994, 28.
[26] B. Delaunay, *La faute de l'administration*, Librairie générale de droit et de jurisprudence, t. 252, 2008.
[27] B. Plessix, *Droit administratif général*, 4th ed., 2022, Paris, LexisNexis, no. 1265, 1672.
[28] N. Lasbleiz, *Le contrôle des algorithmes publics,* cit.; E. Barbin, *Le contrôle juridictionnel de l'outil numérique d'aide à la décision administrative.*
[29] M. Planiol, *Droit civil*, 3rd ed., T. II, no. 913, Librairie Générale de Droit et de Jurisprudence, 1949.
[30] C. Testard, *L'administration numérique : une responsabilité administrative confortée.*
[31] N. Lasbleiz, *Le contrôle des algorithmes publics*, no. 613.
[32] N. Lasbleiz, *Le contrôle des algorithmes publics*, no. 623.
[33] M. Faure, *L'analyse économique du droit civil français : le cas de la responsabilité*, in B. Deffains

Economists view liability rules through an *ex ante* lens:[34] they are designed to encourage actors to adopt efficient behaviour in order to 'minimize the social costs of accidents.'[35] Liability law is necessary because the Coase theorem cannot operate in practice.[36] The existence of transaction costs prevents the achievement of an efficient solution through direct negotiation between potential victims and potential injurers – a negotiation that would otherwise allow victims to compel injurers to adopt adequate precautionary measures. Liability rules therefore become the mechanism through which incentives to prevent harm are established. The law of liability must set rules capable of achieving an optimal level of prevention, and economic analysis seeks to contribute to identifying that level.[37] From this perspective, compensation serves as a means of encouraging potential injurers to take the necessary precautions. In other words, liability aims to prevent antisocial behaviour[38] by enabling actors to anticipate the costs of their actions. Although the model of the rational, calculating *homo economicus* is ill-suited to public administration, the deterrent function of administrative liability nevertheless operates with regard to public authorities.

Within legal scholarship private lawyers have been the ones primarily interested in this preventive function of liability. As Mathilde Boutonnet notes in her doctoral thesis, ecological disasters 'suddenly remind us of the limits of the compensatory function' of liability,[39] while the emergence of the concept of irreversibility – that is, harm 'that cannot be remedied'[40] – highlights the usefulness of liability's preventive role.

Traditionally, administrative lawyers, who often reduce liability to compensation, have been less familiar with this preventive approach.[41] Its relevance in environmental matters has nevertheless been emphasised in recent public law scholarship.[42] The same observation may be made regarding the administration's use of algorithmic tools. Yet the question remains whether administrative liability law truly provides adequate instruments for preventing infringements of fundamental rights arising from the use of algorithms by public authorities.

French administrative liability law provides mechanisms for anticipating risks. These mechanisms include compensation for future harm or loss of opportunity, the application of the precautionary principle, and the administrative judge's power to issue injunctions (which can effectively supplement the 'preventive aspect' of liability actions[43]). The issue is whether these anticipatory mechanisms are suited to disputes involving the administration's use of algorithms. As Nina Lasbleiz has shown in her doctoral thesis, 'preventive mechanisms, although theoretically available, encounter practical realities that limit their effectiveness in this field.'[44] Several reasons explain this limitation. First, proving the certainty of future harm caused by an algorithm – a prerequisite for compensation of future damage – is virtually impossible. Second, demonstrating a loss of opportunity requires access to the functioning of the algorithm, which is equally difficult given that algorithms are often regarded as 'black boxes.' Third, administrative courts remain reluctant to make extensive use of their injunctive powers in order to require public authorities to cease unlawful conduct.

Ultimately, the class action mechanism, reformed by the Act of 30 April 2025, appears to be the 'most promising tool for algorithmic prevention.' As Nina Lasbleiz observes: 'Such a procedure could prove particularly useful in addressing systemic failures in the use of algorithms: lack of explainability, opacity of processing criteria, breaches of the principle of equality, or violations of fundamental rights. In this respect, it would make it possible to intervene at an early stage, from

(dir.), *L'analyse économique dans les pays de droit civil*, Paris, Editions Cujas, 2000, 113.

[34] M. Faure, *L'analyse économique du droit de l'environnement*, Bruxelles, Bruylant, 2007, 89.

[35] G. Calabresi, *The Cost of Accidents. A Legal and Economic Analysis*, New Haven, Yale University Press, 1970.

[36] R. Coase, *The Problem of Social Cost*, in *The Journal of Law and Economics,* vol. 3, 1960, 1; M. Faure, *L'analyse économique du droit de l'environnement*.

[37] M. Faure, *L'analyse économique du droit de l'environnement,* cit., 92 ff.

[38] M. Faure, *L'analyse économique du droit de l'environnement,* cit.

[39] M. Boutonnet, *Le principe de précaution en droit de la responsabilité civile*, LGDJ, Bibl. de droit privé, t. 444, 2005, no. 33, 18.

[40] M. Prieur, *L'irréversibilité et la gestion des déchets radioactifs dans la loi du 30 déc. 1990*, in *Revue juridique de l'Environnement,* special issue*,* 1999, 125.

[41] A. Jacquemet-Gauché, *La responsabilité de la puissance publique en France et en Allemagne, étude de droit comparé*, LGDJ, 2013, t. 275, no. 1241, 455.

[42] A. Van Lang, *L'hypothèse d'une action en responsabilité contre l'État,* in *Revue française de droit administratif,* no. 4, 2019, 652; S. Lavorel, *L'émergence d'une responsabilité climatique des Etats ?*, in M. Torre-Schaub, C. Cournil, S. Lavorel and M. Moliner-Dubost (eds.), *Quel(s) droit(s) pour le changement climatique*, Paris, Mare&Martin 2019, 157.

[43] *Ibid*.

[44] N. Lasbleiz*, Le contrôle des algorithmes publics*, no. 660.

the moment an automated system is implemented, in order to obtain its suspension, modification, or an expert assessment'.[45] This potential will, however, depend on whether the actors empowered to bring class actions – associations, trade unions, and the public prosecutor – make effective use of this mechanism. Nevertheless, the publicity generated by class actions may itself contribute to deterring unlawful conduct,[46] thereby strengthening the preventive function of administrative liability.

The evolution of public action in the digital age thus opens up new avenues for reflection on the functions of administrative liability: while the compensatory function is not disappearing, the normative function of liability could gain prominence. The normative function 'encourages us to view liability not only as a response to proven harm, but also as a lever for guiding administrative action'.[47] The development of the preventive function of liability, however, requires a renewal of 'the tools available to both claimants and administrative judges, in order to enable more effective consideration of algorithmic risks and more effective prevention of future harm'.[48]

[45] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 660.
[46] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 659.
[47] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 662.
[48] N. Lasbleiz, *Le contrôle des algorithmes publics*, cit., no. 662.