Digitalisation of Administrative Law and the Pandemic-Reaction

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Edited by
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and Herwig C.H. Hofmann

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To Laurence, Ben & Kate, with love, RLW

To my family, HCHH

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INTRODUCTION

RUSSELL L. WEAVER[*]
& HERWIG C.H. HOFMANN[**]

In June, 2021, the Administrative Law Discussion Forum was scheduled to be held at the University of Luxembourg's Faculty of Law, Economics and Finance. However, because of the Covid-19 pandemic, the forum was held online. Fittingly, one of the topics at the forum was the impact of the pandemic on administrative law. The papers in this volume explore many different issues related to that topic, including how the pandemic has impacted (and will continue to impact) administrative law, how administrative adjudications were conducted during the pandemic, how governments and administrative agencies used technology to try to respond to and control the pandemic, and how governmental contracts were affected by the pandemic. Other papers focused on the digitization of the administrative state, including such issues as the prospect of cyber-delegation, using artificial intelligence as a check on the administrative state, and the concept of digitally pre-born legislation.

Diana Urania Galetta & Gherardo Carullo's contribution to the symposium is entitled "Using Technology to Support Administrations in Controlling the SARS-CoV-2 Pandemic: Past Problems and Future Perspectives". In their chapte, they examine how technological tools can and have been used to help governmental officials control the Covid-19 pandemic. These devices include *AllertaLOM* (which can be used to provide alerts regarding the pandemic), *COVID-19 Community Mobility Reports* (a Google device that tracks peoples' movements), *Safepaths* (which also helps track the movement of people), *Immuni* (which notifies individuals that they have been in close proximity to an infected person), and the

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interoperable EU Digital COVID Certificate. They examine the necessity and legality of using (or mandating) the use of these tools under European law. In particular, they focus on the privacy implications of using these technological tools, particularly in light of the EU's GDPR (General Data Protection Regulation). They also examine legality from the perspective of various EU rules, including proportionality. They conclude that, given the gravity of the pandemic, the use of these technological tools is both legal and justified.

Also focusing on issues related to the pandemic and administrative law, Elizabeth Fisher & Sidney Shapiro's chapter is entitled "Administrative Law Before, During, and After Pandemics, Recognizing Thick Administrative Expertise in Administrative Law". They argue that the pandemic has highlighted the need to understand how expertise "establishes the government's capacity to implement its statutory responsibilities," and that administrative law constitutes the "law of public administration." Unlike the current U.S. focus, which is concerned with controlling and limiting administrative discretion, the focus should be on "ensuring competent administration" in the sense of making sure that administrations have the capacity to accomplish their missions and the legitimate authority to do so." They go on to note that the public was concerned about how decisions were made during the pandemic, and they emphasize the need to fix systemic weaknesses which undercut administrative effectiveness.

Francois Lichere's contribution is entitled "French public contracts law and the pandemic: is the principle of adaptability adapted?" In his article, he examines French legal rules regarding the performance of public contracts, and how those rules have affected public procurement contracts and concession contracts. In particular, he is concerned about the principle of "adaptation" of contracts and how the pandemic has affected adaptability. He examines a range of actions that could be taken because of the pandemic, ranging from termination of the contract to modification of clauses and the compensation of additional costs. He explores these issues in the context of "irresistibility" (when a contract loses its purpose), as well as contexts that do not involve irresistibility.

Wolfgang Weiss' contribution on "Constitutional Challenges to EU Administrative Soft Law During the Covid-19 Pandemic and Some Proposed Remedies" Studies how during the Covid-19 pandemic, as EU member states struggled to deal with the pandemic, EU officials increasingly resorted to so-called "soft law" to provide guidance to

member states. He concludes that, while there are benefits to using EU soft law for crisis management and domestic implementation of EU, he raises concerns regarding their challenges for democratic legitimacy and the rule of law. He contends that these challenges should be addressed by a legislative enactment that sets forth a general framework for the adoption of EU soft law, core elements of which should be stipulations of subsidiarity vis-a-vis executive rulemaking and minimum procedural, transparency and justification requirements for the adoption of Commission soft law. Their domestic effects and reviewability should be clarified as well.

Russell Weaver's chapter, entitled "Administrative Adjudications During the Pandemic," examines how U.S. administrative agencies adapted their adjudicative processes during the pandemic. As Covid-19 made it difficult or impossible for agencies to conduct in-person hearings, agencies were forced to adapt their processes to deal with the situation. Consistent with the trend towards hosting more online processes (e.g., online notice and comment rulemaking processes), agencies began to move their adjudicative processes online in order to avoid delays or suspensions. In addition to telephonic hearings, video hearings became relatively common. In addition, to analyzing the movement towards online hearings, the article examines not only the advantages that came from online hearings, but the problems and difficulties that arose, and raises questions about whether online adjudicative proceedings will continue to be held in the future.

Other papers in this volume related to the movement towards the digitization of the administrative state. The chapter by Herwig Hofmann addresses the questions of accountability of technological advances that allow for an ever-greater autonomy of automated decision making (ADM) systems in public law leading to forms of cyber-delegation. Cyber-delegation occurs where automated decision making gains in autonomy especially in cases with reduced human input into decision-making or in cases where automated decision making takes over several decision-making phases. Hoffman's chapter analyses whether and if so how, in the EU, the conditions of 'cyber-delegation' can be discussed from the point of view of delegation doctrines. He argues that several factors need to be taken into account, one of which is managing the various interfaces – i.e., between human and ADM technology. Another is the linkage between various regulatory levels by creating joint data bases on which automated administrative procedures are built upon. Third, technology intervenes in various phases of decision-making procedures and may be used to link various actors through granting access and processing data from large

scale databases. Questions of accountability are often therefore, it is argued, linked to the identification of responsibility. Also questions of informational asymmetries must be taken into account especially in cases of machine-learning.

Anne Meuweese's contribution is entitled "Artificial Intelligence as an Aid to Checks on the Administrative State." As the title suggests, her chapter focuses on "how AI may operate as an aid to constitutional checks on administrative actors". While she recognizes that AI has been used to detect more mundane actions (e.g., a legislator who is surfing on his cellphone during an important debate), she argues for its use "to detect patterns in agency decision-making that go against constitutional values and that otherwise could go undetected". These include actions involving "bias, violating privacy and annihilating human agency." While she concedes that consideration needs to be given to the limits of AI application in this context, as well as to the need to devise ways for constitutional actors to remain in control of the process, she believes that it is "likely to be in the interest of good administration to experiment with small-scale pilots involving bias audits and reverse engineering of decision-making procedures."

Last, but hardly least, Michael Gøtze's chapter on "Digitization of the Administrative State: Digitally pre-born legislation - the rule of simplicity or law?" presents the Danish approach to favoring 'digital-ready' legislation. He describes the motivations for the introduction of such approach which lie in the preparation for digital implementation and the drive for administrative efficiency. Digitalization under the Ministry of Finance, may itself push towards prioritizing the efficiency, thus downgrading the rule of law. Discussing the mechanisms put in place in the Danish system in order to allow for its implementation, he points to the additional effort and the changing power and influence in drafting legislation introduced by the digital ready agenda in Denmark. Goetze then discusses the consequences thereof in terms of a focus on eliminating elements of discretion and delegation from legislative acts to regulatory acts of decision making. This approach, he describes risks not paying sufficient attention to the needs and requirements in an increasing diversity in society and the need for developing legislation capable of responding to requirements of uncertainty in future decision-making.

Overall, the contributions to this book give a broad comparative and also interdisciplinary perspective, on two of the most relevant topics of public, regulatory and administrative law of today: The reaction to crises,

especially health crises of unforeseen dimensions and the growing role of automation of decision making and the use of artificial intelligence for achieving public objectives. Much being left to explore, the papers point the direction for further research agendas. Indeed, the role of the administrative law discussion forum is precisely to stimulate such debate, research and discussions.

CHAPTER ONE

USING TECHNOLOGY TO SUPPORT ADMINISTRATIONS IN CONTROLLING THE SARS-COV-2 PANDEMIC: PAST PROBLEMS AND FUTURE PERSPECTIVES*

DIANA URANIA GALETTA[1]
& GHERARDO CARULLO[2]

Introduction

In light of the restrictive measures adopted in Italy, as in many other countries, to contain the SARS-CoV-2 epidemic, the authors analyse how controls on private activities can be supported by technological tools; and how technological tools can effectively support the activities of public administrations. In this perspective, the authors' attention focuses on some technological solutions used to help dealing with the SARS-CoV-2 emergency including, in particular, the *Immuni* app created in 2020 by the Italian government. The author's conclusion is that, in order to make such technological solutions truly effective, they must be widely spread among the population. Having regard to the European rules on privacy and in application of the principle of proportionality, the authors therefore investigate whether, and under what conditions, national authorities can impose the download of an app to citizens. The last paragraphs account also for the most recent developments, which are related to the adoption of the

* Paragraphs 1-5 are by Gherardo Carullo, paragraph 6-7 are by Diana-Urania Galetta, and paragraph 8 is by both authors.

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EU Regulation of July 2021 on a framework for the issuance, verification and acceptance of interoperable EU Digital COVID Certificates.

Quarantine control, an unprecedented challenge

The spread of the SARS-CoV-2 virus, also known as COVID-19 (acronym of COronaVIrus Disease 19), has led the authorities of most Countries to adopt stringent quarantine measures. Italy was one of the first nations to be severely hit by COVID-19 after China. The Government responded by adopting a series of acts that rapidly intensified controls and restrictions[3]. In particular, with the decree of 23 February 2020[4], n. 6, all activities not expressly allowed were quickly suspended and/or prohibited[5].

Thanks to the development of different vaccines, which have proved effective in reducing the impact of the virus, the pandemic situation has slowly improved, although new cases are still recorded in all countries every day. The effectiveness of vaccines in avoiding the spread of the pandemic is linked to the percentage of the population vaccinated. The higher the number of vaccinated individuals, the more the spread of the virus can be slowed down.

For various reasons, a part of the population, at least in almost all European countries, are strongly opposed to being vaccinated. As a consequence, to verify who has been vaccinated, and also to persuade the population to get the vaccine, the authorities have introduced the so-called Green Pass, i.e. a certification of the vaccination status of each subject.

This measure was strongly opposed by the population. Some view it as an undue and excessive intrusion into the sphere of personal freedom[6]. Nonetheless, the adoption of the Green Pass has been somewhat an inevitable consequence of the inability, on the part of the Public authorities,

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[3] The list of regulatory acts adopted at the state level is available on the website https://www.gazzettaufficiale.it/attiAssociati/1/;jsessionid=Zwqrd4FZQjDKkdj7CVr8nw__.ntc-as5-guri2b?areaNode=13. For a list of a selection of the relevant official materials, both of a state, regional and local character, see the collection available on this site at the page http://ceridap.unimi.it/speciale-covid-19/.

[4] "*Urgent measures for the containment and management of the epidemiological emergency from COVID-19*".

[5] See art. 1, c. 1, lett. a), dpcm of 22 March 2020, pursuant to which "*all industrial and commercial production activities are suspended, with the exception of those indicated in Annex 1 and except as provided below*".

[6] See *infra*, par. 7.

to understand the potential of IC technologies to help contain the spread of the pandemic.

This articles on how public authorities failed to intervene during the initial phase of the pandemic, with appropriate technological tools designed to limit the spread of the pandemic. In our view, during the initial stages of the pandemic, more could have been done to improve contact tracing. Tracing could have helped Italy avoid having to impose the much more restrictive measures currently imposed through the so-called Green Pass.

In the following paragraphs we will therefore analyze technologies that could have been used to limit the spread of the virus from the very beginning.

The response of technology

To understand whether, and to what extent, technology could have supported public administrations in the difficult mission of monitoring and controlling the pandemic, and therefore the effectiveness of the containment measures, we can consider two technological solutions that were used by Italian Regional and National public administrations at the beginning of the pandemic.

In the Lombardy Region, the area most severely hit by COVID-19 at the beginning of the pandemic, the app *AllertaLOM* was updated to include new features related to the pandemic. *AllertaLOM*, an app of the Civil Protection of the Lombardy Region that is available on the Apple Store[7] and Google Play Store,[8] is designed to disseminate alerts issued by the Natural Risk Monitoring Functional Center in anticipation of events that may cause damage on the regional territory.

During the coronavirus emergency, the app has been equipped with new features that allow citizens to actively participate in the acquisition of functional data for monitoring the virus, as well as to disseminate useful information on regional measures. An individual actively participates by completing a survey that allows the Lombardy Region to quantify the level of the infection's spread and the territorial distribution of people testing positive, based on symptoms reported by users. The data is used for statistical and epidemiological analysis which help health authorities define

[7] https://apps.apple.com/it/app/allertalom/id1455220682
[8] https://play.google.com/store/apps/details?id=it.lispa.sire.app.mobile.allertalom

models and strategies to fight against Coronavirus[9].

The data obtained through the app is used by the administration to inform its decisions, and the population participates by reporting information, thus creating a form of co-creation of the public information assets. This systems allows the public administration to collect data that it would not have had the resources to acquire on its own, but which plays a crucial role in public authorities decision making, and helps the community fight more effectively against Coronavirus (Carullo 2019, 699).

A positive and worthy of mention aspect of the *AllertaLOM* questionnaire is that everything takes place anonymously. For data entry, it is not necessary for the user to register or provide any personal data. Further, the app does not even require authorization to detect the user's geolocation. In this way, most psychological and technical barriers to completing the questionnaire are reduced or overcome. Moreover, the user is assured that participation by sending the information cannot have any negative individual effect. Even when users declare that they have all the symptoms of COVID-19, the administration cannot directly identify them. This approach is consistent with the purpose of the app: since *AllertaLOM* is aimed at large-scale data collection, the minimization of any obstacle that could have reduced the percentage of participation turns out as consistent and reasonable.

Another tool that was used was the *COVID-19 Community Mobility Reports* made available by Google[10]. The aim of this tool is to be able to provide useful data to combat the COVID-19 virus to all public authorities in as many countries as possible[11]. It is a portal that anonymously aggregates data on the movements of people as recorded by the Google Maps app, especially from mobile devices. This application, when the functionality is activated, essentially monitors all movements in the *background* even when the user has not requested directions.

As in the case of *AllertaLOM*, the Google service *COVID-19 Community Mobility Reports* has the advantage of reusing an infrastructure that was already available. Google, in creating this new service, seems to have reused the travel data it was already collecting before the pandemic, aggregating

[9] Extract of the description of the app found on the stores referred to in the links in the previous notes, relating to version 1.5.0 of the app.
[10] Available at https://www.google.com/covid19/mobility/.
[11] The reports are currently available separately for 131 countries. Last consultation date: April 3, 2020.

the data and making it accessible online. Google has thus made it possible to collect data on a large scale, reusing technological devices already being widely used through devices such as Google Maps. The advantage of this approach is the diffusion of the technologies used by Google, which enables immediate collection of a large quantity of data, globally. However, Google exercises discretion and control regarding the availability of the data, and therefore the uses that can be made of the data. For example, in order to download or use the data and reports, it is necessary to agree to the Google Terms of Service.

The app *Safepaths*, created by the Massachusetts Institute of Technology, helps monitor population movements[12]. The app tracks all movements of an individual within the last 28 days, while. Location data is not shared with third parties as long as the user is Covid-free. However, when an individual tests positive for COVID-19, then the position data, duly anonymized, is published. In this way, those individuals who have been to places where the positive-testing individual has been receive immediate information and can take appropriate precautions. Thus, using data directly collected from the population, Information and Communication Technologies (ICT) can help contain the pandemic. In this instance, the data is collected passively since the collection of data regarding the movements of people is carried out by the software, without the need for any interaction by the user itself.

The prior examples show how ICT can be used to collect information on the progress of the epidemic, verify its flows and alert people of potential contacts with infected individuals. All this can be of great use to public administrations.

The Italian *Immuni* app

The three functions outlined in the prior paragraph have been effectively incorporated by a private company into a single application called the *Immuni*, donated to the Italian public administration and made available to download[13].

[12] Also available for iOS and Android devices, for the time being in beta on the project website. At the date of publication of this contribution, the app can be downloaded from the website https://safepaths.mit.edu/download-safe-paths.

[13] On the App Store (https://apps.apple.com/it/app/immuni/id1513940977) and on the Google Play Store (https://play.google.com/store/apps/details?id=it.ministerodellasalute.immuni&hl=it).

The app *Immuni*, which translates to "*Immunes*", was created to help to fight the COVID-19 pandemic. As explained in the official web site «*users who have been notified by the app of a possible infection can isolate themselves to avoid infecting other people. By doing so, they help contain the epidemic and speed up the return to a normal life*»[14]. The app thus uses technology to warn users that they have been exposed to the virus, even if they are so far asymptomatic. The aim is to interrupt the chain of infections by informing individuals who have been potentially exposed to the virus. The Italian Government tries to achieve this result not by tracking displacements, but by using the sensors normally found in mobile devices. It is explained that «*the app sends a notification to people who were in close contact with a user who tested positive for the COVID-19 virus, alerting them of the risk of infection. Thanks to Bluetooth Low Energy technology, this takes place without the app gathering any data on the identity or the location of its users*»[15]. The objective is to guarantee users' privacy, minimizing or even completely excluding the collection of personal data.

It is stressed that «*Immuni has been designed and developed while taking great care to safeguard user privacy. Any data, collected and managed by the Ministry of Health and by public bodies, is stored on servers located in Italy. All the data and app connections with the server are protected*». In particular, according to the official web site, *Immuni* does not gather the first name, last name, or date of birth of any person, or the telephone number, email address, the identity of the people who came into contact with the user or the location or movements of users.

In practice, according to the official web site, the app works as follows[16]: each smartphone on which *Immuni* is installed sends a continuous Bluetooth Low Energy signal that contains a public code. When two smartphones on which *Immuni* is installed are in close proximity, they mutually store each other's public code, taking note of their proximity. The smartphones also note how long the event lasted and the approximate distance between the two devices. The codes are generated on the basis of one or more private keys stored on the device of the user through a cryptographic algorithm, and they do not contain any information about the user or their device. They also change several times each hour, protecting user's privacy even more.

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[14] See https://www.immuni.italia.it/.
[15] See https://www.immuni.italia.it/.
[16] The following description is inferred from the FAQ available at https://www.immuni.italia.it/faq.html.

If the owner of a smartphone on which *Immuni* is installed later tests positive for SARS-CoV-2, the user is able to transfer his/her cryptographic private key(s) to a server. From these keys, it is possible to derive the user's public codes.

For each user, the app regularly downloads all the new cryptographic keys sent to the server by those users who tested positive for the virus. The app uses these keys to derive the public codes and checks to see whether any of them correspond to those stored in the device memory from previous days. As such, once the app determines that a person has come into contact with a person who later tested positive, the individual will receive the random code of the infected person, and will be able to check the length and the distance of the contact to evaluate the risk of an infection.

The code of the app is entirely available in open source on GitHub[17]. This has two advantages. First, it is possible, for those who have the technical skills, to analyze the source code and verify its functioning. In this way it is possible to verify in practice whether the application really works as stated and, therefore, if it really does not collect personal data. Second, the fact that the *Immuni* app is available in open source makes it easy to reuse its code and deploy it in other countries. Other administrations, from any nation in the world, could easily adopt it too, which would make monitoring the virus far more effective.

This last issue, that is the diffusion of the app, leads us to a further problem that needs to be analyzed: fragmentation of technological solutions.

The problem of fragmentation in the urgency of the pandemic

The examples analyzed here – to which undoubtedly others could be added[18] – show us the existence of a widespread sentiment to positively contribute to overcoming the pandemic. On the other hand, these new ICT-tools must have a very wide use in order to be truly effective. The fact that a critical mass of people use a certain service or platform for that service or platform to be actually useful is indeed a very well-known issue. This problem can be seen, for example, in any *social network*. A service such as *Facebook* is

[17] See https://github.com/immuni-app.

[18] For reasons of space, as well as for the continuous evolution of software that aims to contribute to the fight against coronavirus, it is not possible here to analyze all the solutions currently available on the market.

only useful if a sufficient number of people use it. The same applies also to messaging services: however quick and efficient, they are completely useless if there is no person to send messages to. An essential element of these systems is that they are meant to connect people. In the same way, an app like *Immuni* is of no use if it is not employed by a large audience of users.

Under normal market conditions, we know that technology, for various reasons, tends towards standardization, both as regards the technologies used for the realization of the IT systems themselves (Lemley 1996, 1041; Montagnani 2007, 623), and regarding the applications used by users. An important phenomenon is known as the *tipping point* (Gladwell 2006). If a service manages to acquire a certain threshold of users, the number of which varies according to various factors, there is a tendency for market convergence towards this solution.

For this to happen, however, a certain period of time is normally necessary, in which the market, according to the different dynamics that regulate it, is oriented towards one or the other option.

However, the Italian public authorities have chosen not to make the use of *Immuni* mandatory. For various reasons - amongst which the most relevant ones put forward by the authorities were related to the protection of personal data - it was decided to leave the use of the app to the free choice of citizens. This resulted in a complete failure of the initiative. These reasons for the protection of personal data appear unsubstantiated though, considering that the *Immuni* app does not collect any personal data.

The need for centralized coordination and privacy concerns

In order to facilitate the dissemination of technological solutions that can assist the Authorities in protecting public health, as well as in overcoming the pandemic crisis, there must be centralized coordination. In other words, it appears essential that each Authority indicate which technological tools can or should be used by citizens to support governmental activities. It might even be necessary to have the forced use of a specific app, or a specific device, within the limits and conditions strictly necessary for the achievement of the aim pursued. For example, as discussed above, the collection of data on the progress of the epidemic, as well as the movement of people, does not necessarily postulate the acquisition of personal data.

The fact that an app such as *Immuni*, that is used for tracking the pandemic, does not collect personal data does not eliminate all privacy-related concerns under EU law. Pursuant to Article 2, paragraph 1, of Regulation 2016/679/EU (GDPR), the «*Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system*». It follows that, where personal data are not processed, the Regulation does not apply.

However, it should be remembered that the *Immuni* app, on closer inspection, in case of contagion might allow health officials to link the private key of the user to a natural person. As far as is known, this private key is not associated to the natural person, and therefore does not allow the rest of the users to identify the infected person. However, from a technical point of view, whoever has the capacity to associate the private key with the identity of the infected person can always identify the natural person behind the private key. Therefore, for those who are able to make this association (private key-natural person), the key must be qualified as personal data, as must the public codes obtained from this key that have been sent to other users.

On this point, it is possible to recall the provisions of recital 30 of the regulation, pursuant to which «*natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them*». In this regard, by analogy, it is also possible to recall that the Court of Justice held «*that a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person*» (EU Court of Justice, judgment of 19 October 2016, C-582/14, *Breyer*, ECLI:EU:C:2016:779, p. 49).

It cannot be excluded that the association between the private key and the identity of the infected person might be carried out by the public authority once a patient is diagnosed with the virus and, therefore, his/her status in the app is qualified as an infected person. This being the case, the GDPR would

indeed apply, as there would be a processing of personal data.

Even if that is the case, it would still be possible for government to require citizens to install the app. The consent of the data subject is not necessarily required for processing personal data, where other conditions of lawfulness exist. In this case the processing of personal data could be based on the condition of lawfulness referred to in Article 6, paragraph 1, lett. e), GDPR. Pursuant to this rule, processing is lawful when it is «*necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*». In such cases, the EU Regulation requires that the basis for the processing be established by either EU law or Member State law to which the controller is subject, and that such processing must meet the requirement that it be in the public interest and that it be proportionate to some legitimate objective.

Should the use of an app like *Immuni* have been mandatory? A question of proportionality

The SARS-CoV-2 pandemic-situation corresponds to the characteristic scenario where society's interests and human rights needs to become part of a unified legal structure that, at the same time, determines the scope of human rights and allows for their limitation. A context in which the principle of proportionality typically comes into play (Barak 2010).

As a matter of fact, when deciding whether or not to require the use of an app like *Immuni*, a complex balance needs to be struck. On the one hand, there was a public interest in containing the spread of the virus, which was itself essential to the protection of public health and the life of people. On the other hand, there was a need to protect a fundamental right such as privacy, which is in turn essential to autonomy and the protection of human dignity.

This is precisely the context for applying the principle of proportionality, which is a tool for balancing that sets criteria for deciding between the marginal benefit to the public good and the marginal limit to human rights[19].

[19] S. on this point also the case-law of the European Court of Human Rights: "A difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 will also be violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised". GLOR v. SWITZERLAND, 13444/04 30/04/2009. The same reasoning on "such a justification must be assessed

Stemming from German law and widely used in European Union Law, the principle of proportionality has in fact been used from the very beginning exactly for such complex balancing purposes (Galetta 1998). With its structured three step test, it has the advantage of restricting too wide discretion in balancing, while making the act of balancing «*more transparent, more structured, and more foreseeable*» (Barak 2010).

The first step of the proportionality assessment is the suitability test, which requires a prediction on the basis of an *ex-ante* judgment. In this case a judgment which needs to be made as quickly as possible! The basic assumption under this first step of the proportionality test is that the legislature and Public Administration possess a specific expertise allowing them to make complex evaluations and assessments that, at least as a matter of principle, need to be respected in the context of the *ex-post* evaluation made by a judge (Galetta 2021). This is even more true in the present case.

The second step is the necessity test, which is the most important part of the structured proportionality-assessment. The underlying idea is well described by the expression: "imposition of the milder means". If there is a choice among various means, all abstractly suitable for achieving the set objective, the one must be chosen that involves the least negative consequences for the freedom/right/opposing interest at stake. There is no doubt, here, that the effectiveness of such an app like *Immuni* is directly proportional to the number of people who actually use it. So a mandatory use of *Immuni* would be necessary and there is no alternative from an effectiveness-of-the-means-used perspective.

As for the proportionality *stricto sensu* part of the test, this consists of a further comparison: in the present case a comparison between the means used (the supposedly mandatory use of the app) and its impact on the privacy of their users.

Once put on the two different sides of the scale, the problem is how to "assign a weight" which allows one to actually compare both elements on the scale. This problem becomes much easier to solve in cases such as the one we are dealing with here, as the goal of effectively tracking infections in order to avoid a further widespread of the SARS-CoV-2 virus (and the

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in relation to the aim and the effects of the measure concerned and the principles which normally prevail in democratic societies" is applied to all other rights protected by the ECHR, v. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-2724329-2974120%22]}, (consultation date: 30 August 2020).

probable death of many people) is certainly invaluable. In such a situation, the third part of the proportionality test did not even apply, in my opinion. Once made clear that the obligation to use the *Immuni* app would have passed the suitability and necessity test no judge could, in our opinion, legitimately discuss *ex post* its proportionality *stricto sensu*. Doing that would have been tantamount to slipping into a control on the merits of the (very much) political decision (Galetta 2021) that its compulsory use would have involved.

As the EU Court of Justice put it recently, «*in order to satisfy the requirement of proportionality according to which derogations from and limitations on the protection of personal data must apply only in so far as is strictly necessary, the legislation in question which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards […]. It must, in particular, indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary*»[20].

The problem here was rather to identify the appropriate level of government, which needed to make this decision in order to render it really valuable in terms of effectiveness.

A problem which was neither clearly identified as such, nor addressed at the time; but that has been dealt with when adopting the so-called "Green Pass" Regulation, we now need to discuss.

The 2021 Regulation introducing an "interoperable EU Digital COVID Certificate": from a subsidiarity and proportionality perspective

In October 2020 the Council adopted a Recommendation[21] seeking a coordinated approach to the restriction of free movement on grounds of public health in response to the pandemic. The Recommendation recognized the idea that citizenship in the Union confers on every citizen of the Union also the right of free movement.

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[20] Court of Justice, 16 July 2020, C-311/18, ECLI:EU:C:2020:559, paragraph 176.
[21] Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, ELI: http://data.europa.eu/eli/reco/2020/1475/oj

This was only the first step as in March 2021 the EU Commission adopted a proposal for adoption of a Regulation imposing a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate)[22]. There was a clear emphasis on the importance of the Digital Green Certificate as a means for facilitating the free movement of persons within the EU during the pandemic. This instrument is described in the first part of the explanatory Memorandum as "*one of the EU's most cherished achievements*"[23].The Regulation was finally adopted in June 2021[24]. Based on subsidiarity principles, it clearly stated its objectives (namely: "to facilitate the free movement within the EU during the COVID-19 pandemic"[25] by establishing secure and interoperable certificates on the holder's vaccination, testing and recovery status) could not have been achieved by the Member States independently[26]. In fact, if ICT had to be used in order to help in the fight against the pandemic - and also to make sure that free movement was "given back to citizens" (Banks 2021) - a common approach for the issuance, verification and acceptance of interoperable COVID-19 certificates, based on mutual trust, was required. Action at EU level was thus considered as necessary from the perspective of the subsidiarity principle.

Regarding proportionality, Recital no. 14 of the Regulation on the interoperable EU Digital COVID Certificate emphasizes that "*This Regulation is intended to facilitate the application of the principles of proportionality and non-discrimination with regard to restrictions to free movement during the COVID-19 pandemic, while pursuing a high level of public health protection*". But it also specifies that *"It should not be understood as facilitating or encouraging the adoption of restrictions to free movement, or restrictions to other fundamental rights, in response to the COVID-19 pandemic, given their detrimental effects on Union citizens and businesses*". So that "*Any verification of the certificates making up the EU*

[22] Brussels, 17.3.2021, Doc. COM(2021) 130 final (Document 52021PC0130).
[23] See Para 1 of the Explanatory Memorandum, devoted to "Reasons for and objectives of the proposal".
[24] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (Text with EEA relevance), ELI: http://data.europa.eu/eli/reg/2021/953/oj
[25] See previous note.
[26] See Recital no 61 of the EU Digital COVID Certificate Regulation.

Digital COVID Certificate should not lead to further restrictions to the freedom of movement within the Union or to restrictions on travel within the Schengen area".

Paradoxically enough, ithe interoperable EU Digital COVID Certificate has been wrongly perceived by the public, as well as by some experts, as a tool for further restricting free movement and other fundamental freedoms and the rights of citizens, rather than the contrary (Gentilucci 2021). We do not wish to wade into the details of this complex debate (Poggi 2021), which is obviously related to the way in which the interoperable EU Digital COVID Certificate has been implemented in the national legal orders of the Member States[27]. However, it is necessary to draw attention to a fact that is easily forgotten: the legal base for the adoption of the EU Regulation providing for the interoperable EU Digital COVID Certificate was Article 21 para 2 TFUE[28]. The EU Regulation was thus adopted "f*or the purpose of facilitating the holders' exercise of their right to free movement during the COVID-19 pandemic"* [29]. In fact, Art. 1, para 1, of the Regulation emphasizes that "*This Regulation shall also contribute to facilitating the gradual lifting of restrictions to free movement put in place by the Member States, in accordance with Union law, to limit the spread of SARS-CoV-2, in a coordinated manner*". This is the "Subject matter" of the EU Regulation, clearly stated in its article 1! Therefore, the specific point about proportionality is that, if "*Member States may, in accordance with Union law, limit the fundamental right of free movement on grounds of public health*", such limitations should nonetheless be compatible with such principle. Therefore, the restrictions should not only be suitable to achieving the goal of protecting public health (by restricting the free movement of persons within the Union to limit the spread of SARS-CoV-2), but should also be "*be strictly limited in scope and time, in line with the efforts to restore free movement within the Union, and should not extend beyond what*

[27] As for Italy, there still is a huge public and experts' debate on the topic!

[28] Art. 21 TFUE: "*1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1*".

[29] Art. 1, para 1, *alinea* 1 of the Digital Green Certificate Regulation quoted above.

is strictly necessary to safeguard public health"[30].

From this point of view, the interoperable EU Digital COVID Certificate is certainly compatible with the *necessity* test of the proportionality principle. Under the evidence available at the moment when the decision was taken, it was the "solution", which one could assume would have had the least negative consequences for other rights/interests involved[31]. As for proportionality in the strict sense, it has already been highlighted that the COVID digital certificate "*can effectively help prevent the spread of the infection and promote free movement, while upholding the right to health as much as possible" (*G. Montanari/Vergallo/Zaami/Negro/Brunetti/Del Rio/Marinelli 2021).

We agree. From the standpoint of proportionality, there is not much more one can ask of the decision-maker in a time of such uncertainty and unpredictability regarding future evolutions! This is in fact the situation when, from a proportionality perspective, complex assessments and evaluations and a delicate balance are required from the decision-makers (Zilioli 2019). The consequence is that that the final decision can be questioned only if it turns out that there was a manifest error of appreciation by the decision-maker (Galetta 2021).

Concluding remarks and mid-term perspective

The first concluding remark concerns the subsidiarity issue. The COVID-19 pandemic has in fact made it clear that, in a multilevel-Government-context like the present one, where competences are often shared (from the municipal level up to the European Union level), it may not always be easy to identify the competent administration. This must be done from time to time on the basis of the concrete measures to be taken, however taking into

[30] Recital no. 6 of the Digital Green Certificate Regulation.

[31] From this perspective Article 11 of the Digital Green Certificate Regulation is quite clear in stating also that: "*Without prejudice to Member States' competence to impose restrictions on grounds of public health, where Member States accept vaccination certificates, test certificates indicating a negative result or certificates of recovery, they shall refrain from imposing additional restrictions to free movement, such as additional travel-related testing for SARS-CoV-2 infection or travel-related quarantine or self-isolation, unless they are necessary and proportionate for the purpose of safeguarding public health in response to the COVID-19 pandemic, also taking into account available scientific evidence, including epidemiological data published by the ECDC on the basis of Recommendation (EU) 2020/1475*".

due consideration that the virus, like any natural element, ignores the legal boundaries that our societies have established. Therefore, in geographically interlinked or in any case connected areas, shared action is necessary. This is true both nationally and supranationally, starting with the European Union (Ziller 2020).

The extreme "*compartmentalisation of the world into states*", which was complained about during this two years of the COVID-19 pandemic (Kochenov/Veraldi 2021, 405), has been largely overcome, within Europe, with a broad and successful vaccination campaign. The interoperable EU Digital COVID Certificate – which is a digital proof that a person has been vaccinated against COVID-19, has recovered from COVID-19 or has a test result – has so far facilitated the re-establishing of free movement within the EU while the pandemic continues and thus allowed the EU citizens to regain, at least partially, their freedom of movement at least within the EU borders.

From this point of view, the interoperability of the EU Digital COVID Certificate is certainly essential. From the point of view of the principle of subsidiarity, the adoption by the European Union of a common standard is a fundamental aspect. If each Member State had independently chosen its own technical standard, it might have been impossible to have mutual recognition of the certificates. This would have prevented people from circulating freely in Europe, thus to the detriment of the fundamental freedoms protected by the Union. For this reason, the intervention of the European Union, focused on identifying a single technical standard, appears more than appropriate.

The second point, which is related to the first, is that the experience of the SARS-CoV-2 pandemic and the resulting emergency-situation ultimately serve as an acknowledgment of the need to resort to innovative technological solutions.

We have already dismissed all criticisms concerning the proportionality of the interoperable EU Digital COVID Certificate. There is nonetheless one problem which still remains, and it concerns the use of technology to support the coordinated efforts to fight against the virus. The point is that until now the technological as well as the organisational implementation concerning the interoperable EU Digital COVID Certificate have essentially been left to Member States, which have therefore developed "tracing and identification systems" of their own with all the associated problems (Gstrein 2021). That is one of the reasons why the European Commission

recently proposed an update the rules on coordination of safe and free movement in the EU, which are related to the interoperable EU Digital COVID Certificate, and move to a "*person-based approach*" in order to "*avoid diverging measures throughout the EU*"[32].

Nonetheless, while doing that, there are two important elements which need to be kept in mind, and which emerged clearly from the examples shown here. First, in order to introduce innovative solutions, it is not necessary to revolutionize or redesign existing systems. The example of the Lombardy region shows (*AllertaLOM*), that it may be sufficient to adapt and implement tools already in place, thus maximizing the usefulness of the existing technological infrastructures. Second, it is important to emphasize that the use of technologies like the app *Immuni* can constitute an important support for administrative activities, without further affecting the rights of citizens, as the examples above have shown in relation to the protection of *privacy*.

More intruding technological solutions, such as the implementation of the Digital COVID Certificate, should be confined as much as possible, and regarded a last resort. Indeed, in hindsight, the use of technologies that provide a higher degree of users' privacy should have been preferred by Governments at the earliest possible moment. In this way, it would have been also possible to ensure greater compliance with the provision of article 2 of Protocol No. 4 to the European Convention on Human Rights, on Freedom of movement[33].

From this point of view, an important difference must be made between the underlying interests that justify the policies adopted at the European level

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[32] See EU Commission, Press release of 25 November 202, Commission proposes to strengthen coordination of safe travel in the EU, at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6186.

[33] According to Art. 1 of Protocol No. 4 to the ECHR "*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society*", v. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b65c (consultation date: 30 August 2020).

and those adopted at the national level. At the European level, the objective pursued by the legislator is to coordinate the technologies used to guarantee the mutual recognition of Digital COVID certificates, as well as the fundamental freedoms established by the EU Treaties. This is made clear by the EU legislature itself, at the very first Recital of Regulation 2021/953/EU, where it is stated that «*every citizen of the Union has the fundamental right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them*». For this reason, we argue that the proportionality test can be deemed fulfilled by EU provisions.

Conversely, at the national level, the interests to be protected change considerably. It is not the protection of the EU fundamental freedoms that motivates the national legislature. That falls well outside the competences of national authorities. At the national level, the proportionality assessment must take into consideration a much more complex set of rights and obligations, ultimately aimed at guaranteeing the coexistence of the administered population.

Unfortunately, national Governments have favoured policies that seem to not have always been fully consistent with this objective. First, they have not regarded as necessary the imposition of of apps like *Immuni*, to safeguard citizens' privacy, even if such apps do not raise any concrete privacy concerns. Due to the seriousness of the situation, they have abruptly changed course and imposed much more intrusive technologies, beyond those imposed by the EU.

This contradictory and inconsistent behaviour is particularly disappointing both because it fails to protect the health of citizens, as well as because it has led to strong discontent which has resulted in lively disputes across Europe. The hope for the upcoming months is that a more coherent approach- is adopted at all levels of government, to protect public health, and the harmonious coexistence of all social actors, as well.

References

Banks, Martin. 2021. «New EU digital COVID certificate paves way for europeans to get freedom back, says MEP». *The Parliament Magazine,* 08.06.2021, at https://www.proquest.com/magazines/new-eu-digital-covid-certificate-paves-way/docview/2538373651/se-2?accountid=12459

Barak, Aharon. 2010. «Proportionality and Principled Balancing». *Law & Ethics of Human Rights*, n. 1: 1-18.

Carullo, Gherardo. 2019. «Open Data e partecipazione democratica». *Istituzioni del federalismo*, n. 3: 685–700.

Galetta, Diana-Urania. 1998. *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*. Milano: Giuffrè.

Gladwell, Malcolm. 2006. *The Tipping Point: How Little Things Can Make a Big Difference*. New York, NY: Little, Brown.

Lemley, Mark A. 1996. «Antitrust and the Internet Standardization Problem», n. 28: 1041.

Montagnani, Maria Lillà. 2007. «Remedies to Exclusionary Innovation in the High-Tech Sector: Is there a Lesson from the Microsoft Saga?» *World Competition*, n. 4: 623.

Ziller, Jacques. 2020. «Unione europea e Coronavirus». *CERIDAP*, n. 1: 1–6.

CHAPTER TWO

ADMINISTRATIVE LAW BEFORE, DURING, AND AFTER PANDEMICS, RECOGNIZING THICK ADMINISTRATIVE EXPERTISE IN ADMINISTRATIVE LAW

ELIZABETH FISHER[1] & SIDNEY SHAPIRO[2]

For the last eight years we have been working on a book about why understanding the administrative expertise is important for US administrative law.[3] When we started, our argument was probably viewed by many (and perhaps even ourselves) as a geeky exercise in administrative law scholarship, but when we published the book in October 2020, the situation was very different due to both the emergence of populism and the COVID-19 pandemic. As Michael Lewis in his 2018 book, *The Fifth Risk*, wrote about the US: "There might be no time in the history of the country when it was so interesting to know what was going on inside these bland federal office buildings—because there has been no time when those things might be done ineptly, or not done at all."[4]

Lewis and others[5] have pointed to the failure of political leadership to understand the nature of public administration and what it can do. A similar pattern can be seen in other countries. One of three reasons why Moody's, the credit rating agency, downgraded the UK's government rating on

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[3] Elizabeth Fisher & Sidney A. Shapiro, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW (2020).
[4] Michael Lewis, THE FIFTH RISK 68-69 (2018).
[5] Lawrence Wright, *The Plague Year: The Mistakes and the Struggles Behind America's Coronavirus Tragedy*, NEW YORKER, Dec. 28, 2020.

October 16, 2020 was a "weakening in the UK's institutions and governance that Moody's has observed in recent years."[6] Responses to COVID-19 are a case in point. As *The Economist* noted in reflecting on the Moody's downgrade, "government failures are often the consequence of hasty ministers listening to civil servants too little, not too much."[7]

While government's administrative handling of the pandemic is a matter of significant public importance, even a brief glance at the administrative law literature indicates scholars and lawyers have not regarded it as a matter for "administrative law" because, simply put, it is largely understood as not being "law."[8] The prevailing viewpoint is this is a catastrophe to be sorted out by public administration types. Our book takes issue with this perspective. Administrative law should be the "law of public administration," and it cannot be so unless scholars and lawyers understand how expertise establishes the government's capacity to implement its statutory responsibilities. An argument that was geeky is no longer so.

This chapter briefly states our argument about administrative law as the "law of public administration," and it then explains the relationship of "thick" expertise concerning pandemic and the role of law. We end by considering the implications of argument for administrative law.

I. Our Argument

Our book, *Administrative Competence: Reimagining Administrative Law*, contends that administrative law should have the purpose, but does not, of ensuring "competent" public administration – which is administration that has necessary capacity to accomplish its mission and the legitimate

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[6] Moody's Investor Service, Moody's Downgrades the UK Ratings to Aa3, Outlook Stable, Oct. 16, 2020, https://www.moodys.com/research/Moodys-downgrades-the-UKs-ratings-to-Aa3-outlook-stable--PR_434172.

[7] *Dominic Cummings and The Unchained Ministers*, THE ECONOMIST, Nov 21, 2020, https://www.economist.com/britain/2020/11/19/dominic-cummings-and-the-unchstersained-mini.

[8] The legislative response and the impacts of government action on the public have been of interest, however. See, e.g., Emmanuel, Slautsky, *Federal Belgium's Covid 19 Response, Dualism and Exclusive Powers Under Pressure,* May 13, 2021, https://lexatlas-c19.org/federal-belgiums-covid-19-response-dualism-and-exclusive-powers-under-pressure/; *Special Issue: Law and the Covid-19 Pandemic*, J. NAT'L SECURITY L. & POL., Oct. 21, 2020, https://jnslp.com/2020/10/21/special-issue-law-and-the-covid-19-pandemic/.

authority to do so.[9] By comparison, administrative law in the United States is focused almost exclusively on controlling and limiting the administrative state. A similar focus can arguably be seen in other jurisdictions.[10]

The singular focus on legal authority to act leads to understanding administrative law in binary terms.[11] The role of law is to determine that authority and the matter of administration is, as far as law is concerned, a matter of discretion, to be policed by political oversight, if at all. The choice is thus between control and letting administration be. That choice has led some administrative lawyers, frustrated with ossification and over legalization, to abandon law altogether.[12] Or it has led other scholars to shift focus away from law to bureaucratic practice.[13] Given that law is an important source of legitimate authority and a stabilizing force, we do not see this as option.[14] But we also object to the idea of administrative law as simply about control for two fundamental reasons.

First, it ignores the "expectations of that the American public have of public administration – not just that it's power is not unbounded, but that its power is given for a set of purposes that the public expects to be accomplished."[15] The legitimacy of government depends not only on its legality, but on its capacity to deliver on its statutory responsibilities.

Second, we challenge the notion that public administration has little or no relevance for administrative law because it is not "law. Law constitutes agencies, interacts with public administration, and shapes public administration. It is intertwined with the use of expertise in complicated and complex ways that can differ substantially from agency to agency. The legislative powers of the Consumer Product Safety Commission are different from those of the Occupational Safety and Health Administration. A court carrying out 'arbitrary and capricious' review of the Environmental

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[9] FISHER & SHAPIRO*, supra* n. 3, at 15.
[10] See, e.g., H.W.R. WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW ch. 1(11th ed, 2014);
Carol Harlow & Richard Rawlings, LAW AND ADMINISTRATION ch. 1 (3rd ed 2009).
[11] FISHER & SHAPIRO, supra n. 3, ch.1
[12] Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL LAW REVIEW 95 (2003)
[13] Jerry Mashaw, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY (2018)
[14] BRUNO LATOUR, THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D'ÉTAT (2010).
[15] FISHER & SHAPIRO, *supra* n. 3, at 15-16

Protection Agency is acutely aware that the expertise of that agency is different from that of the Securities and Exchange Commission. Law and administration are coproduced as each influences the other.[16] If administration law is to be "the law of public administration," it needs to be understood as "simultaneously constituting administration, holding it to account, and demarcating its powers to legitimate."[17]

This reimagined idea of administrative law is not wishful thinking. In the book we show how it provides a more robust account of history and doctrine. We also show how in the 1970s there was a narrowing of the administrative law thinking.[18] But our claim is not just a descriptive one. It is also prescriptive. Administrative law has and should play a role in ensuring that administration is "competent." Public administration is "competent" when it has both legitimate authority and the necessary capacity to accomplish its mission.

Crucial to our argument is the need to see that what occurs inside of an agency as legally relevant. On the one hand, the idea that lawyers need to think about the internal workings of institutions is not radical. Corporate law scholars do not seek to construct corporate law without attention to the theory of the firm. On the other hand, administrative law scholarship for the most part treats an agency as a "black box" that is legally irrelevant to the task of controlling public administration.[19] The language of expertise, technocracy, and bureaucracy may be used by administrative lawyers (often in pejorative ways), but expertise is rarely deconstructed. This is even when, as we argue, deconstructing those terms can help make sense of much administrative law doctrine – *Chevron* is a case in point.[20]

In the book we focus on expert administrative capacity. Administrative lawyers tend to think about expertise in a 'thin' sense - too often there is an

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[16] ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM (2007). On co-production, see Sheila Jasanoff, *The Idiom of Co-Production*, in STATES OF KNOWLEDGE: THE COPRODUCTION OF SCIENCE AND SOCIAL ORDER (Sheila Jasanoff ed., 2004).

[17] FISHER & SHAPIRO, *supra* n. 3, at 15.

[18] Id. at ch. 6.

[19] Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST LAW REVIEW 1097, 1098 (2015).

[20] Elizabeth Fisher & Sidney A. Shapiro, *Disagreement About* Chevron*: Is Administrative Law the "Law of Public Administration?"*, 70 DUKE LAW JOURNAL Online (Feb. 2021)

assumption that the capacity of expert public administration is monolithic—offices of cloned bureaucrats or scientists doing the same thing over and over in a routinised fashion. For example, Sheila Jasanoff, one of the most thoughtful scholars writing about EPA, astutely notes that its expertise is "conceptualized in the thinnest terms"—either as a form of elite objective knowledge or as simply politics in another guise.[21] For example, some administrative lawyers tend to understand expertise as a "truth machine" that churns out pure objective facts.[22] Justice Gorsuch's description of "executive fact finding" *Gundy v. United States* is an example.[23] Others understand administrative expertise as a smokescreen for a political power play.[24]

But, as we show in the book, public administration is replete with many different people equipped with many different skills, knowledge, and experiences who are interacting in a variety of ways in institutional frameworks. Some of what they do is routine, but much is not and involves the exercise of professional and craft judgment. Drawing on work from the sociology of science,[25] we show how administrative expertise is a complex set of institutional knowledge practices,[26] involving both tacit and explicit knowledge, forms of interactional, contributory, and meta expertise, and forms of accountability.[27] None of this is to say that administrative

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[21] Sheila Jasanoff, *(No?) Accounting for Expertise*, 30(2) SCIENCE AND PUBLIC POLICY 157, 159(2003).

[22] Wendy E Wagner, Elizabeth Fisher & Pasky Pascual, *Misunderstanding Models in Environmental and Public Health Regulation*, 18 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 293 (2010).

[23] Gundy v. United States, 588 U.S. ___ (2019).

[24] Patrick Morrisey & Elbert Lin, *Federal Overreach in Environmental Regulation: "A Severe Blow to the Separation of Powers*," in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE, (Dean Reuter & John Yoo eds., 2016).

[25] Our account draws particularly on HARRY COLLINS AND ROBERT EVANS, RETHINKING EXPERTISE (2007); HARRY COLLINS, TACIT AND EXPLICIT KNOWLEDGE (2010). See also, FISHER, ADMINISTRATIVE CONSTITUTIONALISM, *supra* n. 16; Shapirio, *Failure to Understand Expertise*, *supra* n. 19; Elizabeth Fisher, *Sciences, Environmental Laws, and Legal Cultures: Fostering Collective Epistemic Responsibility*, THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW, May 2019, https://www.oxfordhandbooks.com/view/10.1093/law/9780198790952.001.0001/law-9780198790952-chapter-33; SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS (1998).

[26] COLLINS, TACIT AND EXPLICIT KNOWLEDGE, *supra* n. 25.

[27] FISHER & SHAPIRO, *supra* n. 3, ch. 2.

expertise is always guaranteed. It needs to be fostered. Nor is expertise detached from politics (it is not). Nor are we saying that internal accountability practices displace law. Rather it is to point to the fact that this thick" expert capacity is fundamental to administrative competence and thus is legally relevant.

That legal relevance is not just academic musings on our part. Understandings of these thick institutional practices can be seen to have shaped administrative law over time. For example, the Attorney General's Committee on Administrative Procedure Report was a study of this thick administrative expertise, and much in the rulemaking architecture of the Administrative Procedure Act (APA) reflects an attempt to craft a legal framework that accommodates that expertise.[28] The doctrinal debate over the nature of hard look review in the DC Circuit in the 1970s was a debate about how to carry out substantive review of a decision grounded in an agency's expert capacity. Likewise, much sense can be made of the *Chevron* doctrine by seeing how assumptions about expertise shape *both* its steps. Concerns about competence – and thus capacity – have always haunted the subject. Our argument is that administrative lawyers have failed to recognize that fact.

II. Expert Administrative Capacity

One of the challenges in putting forward our argument is that it is all too easy to perceive it in terms of the binary that dominates administrative law. From this perspective, we are simply just putting forward another variation of being "for" the administrative state and thus "against" law. But while the necessity of administrative competence in modern constitutional democracies cannot be doubted, so too must the failures of public administration be acknowledged. Administrative lawyers ignore both the internal workings of public administration and these failures. For example, the botched government responses to Hurricane Katrina were the subject of a number of government reports but received little attention from

[28] U.S. Justice Department, Office of the Attorney General, Final Report of the Attorney General's Committee on Administrative Procedure (1941).

administrative lawyers.[29] The same is true of the BSE crisis in the UK.[30] In arguing that administrative law is about administrative competence, we are not contending the administrative state always gets its right – if it did we arguably would not need administrative law. We are arguing that it, as a body of law, must acknowledge the significance of authority but also capacity. The institutional nature of public law is a fundamental aspect of the subject.[31] The pandemic and the response to it sadly highlights this.

A. COVID 19

COVID-19 has put administrative capacity in the frame. A pandemic is a collective action problem that requires a coordinated response that integrates expertise from disparate groups of those with specialist expertise and knowledge. Some of that knowledge is explicit, such as information about viruses, but much is also tacit knowledge, such as expertise about how to model human behavior or model economic intervention. The widespread disruption caused by the pandemic has meant this expertise relates not only to public health, but also to areas such as education, entertainment, building design, and so on. What all of this has in common is that none of it involves experts giving isolated "expert" opinions. What it does involve is the networking of this expertise in ways that it is integrated into decision-making and is evaluated. At bottom, administrative expert capacity is a complex set of institutional processes that is also governed by norms.

Some of this expertise already existed in forms of networks developed for pandemic response. Some of it needed to be developed rapidly. While this networked expertise was in the administrative sector, it also drew from (was

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[29] See, e.g., Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, H.R. Rep. No. 109-377 (2006); Senate Committee on Homeland Security and Government Affairs, Hurricane Katrina: A Nation Still Unprepared, S. Rept. 109-322 (2006); U.S. Department of Homeland Security – Office of Inspector General, A Performance Review of FEMA's Disaster Management Activities in Response to Hurricane Katrina, OIG-06-32 (2006); Frances Fragos Townsend, Letter to the President: The Federal Response to Hurricane Katrina: Lessons Learned (2006), https://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned/letter.html.

[30] FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM, *supra* n. 16, at ch. 2.

[31] Brian Tamanaha, *A Realistic Theory of Law* 226 (2017); Peter Cane, *Public Law in the Concept of Law* 33 OXFORD JOURNAL OF LEGAL STUDIES 649 (2013).

networked with) expertise in other sectors including the private sector, universities, international bodies, and other jurisdictions. Moreover, the federal, state and local governments were involved. All of this points to the fact that expert administrative capacity was not a black box, but an organizational structure bringing skill, knowledge, and judgment from different areas of specialization in pursuit of a set of institutional aims.

This account of expertise is very different from how administrative lawyers tend to think about expertise. An extreme example of this is how Richard Epstein notoriously commented on the pandemic in its early days.[32] His basis for doing so appeared to be his own assumptions about how to assess risks. This was as an example thinking about expertise in isolated and thin terms. If expertise is thought about in this way, it becomes difficult to discern between one "expert" account and another. Epstein may be exceptional in his views, but considering how little administrative lawyers think about the nature of expert administrative capacity, his thought that he could go it alone is perhaps not surprising. There is little awareness of how expertise is something that is developed and fostered in communities. It is not just the doing of a quick calculation.

Pointing to expertise and the importance of it in response to the pandemic does not automatically legitimize it. The pandemic is again a case in point. While there should be no pretense that responding to a pandemic is easy, or that it could yield simple solutions, the emerging accounts of public responses in the UK and US show a series of institutional failures. These should be considered a failure of expert administrative competence rather than a failure of expertise or even expert administrative capacity.

B. What Went Wrong

What we mean is that, while expertise often existed in administrative institutions or outside them, it was not integrated into the administrative architecture of responding to COVID-19. We note three problems in the early stages of the pandemic: it was ignored, supplanted, and/or detached. Let us briefly say something about each.

[32] Richard A. Epstein, *Coronavirus Perspective*, Defining Ideas, HOOVER INSTITUTION JOURNAL, March 16, 2020, https://www.hoover.org/research/coronavirus-pandemic.

1. *Ignored Expertise.* The first failure was the failure of political leaders to listen to and heed the advice of expert officials.[33] Slow responses at the start of the pandemic as well as policy flip-flops are two examples. There are several reasons for this. In an era of populism in which strong leaders should speak for "the people," it was easy to ignore expert advice.[34] Trump was an extreme example of this.[35] But even putting populist politics to one side, the perception of the need to be democratically responsive was prioritized. If the public disliked wearing masks, then political leaders went along. This situation was exacerbated by the disinterest in public administration, as presciently charted by Lewis. The ignoring of expertise may seem odd. But given the lack of interest in public administration, it is somewhat inevitable. It is easy to ignore what is not visible to you.

2. *Supplanted Expertise*. Second, as many accounts show, it was not that expertise didn't exist, but it was supplanted by the creation of new institutions – some public, some private – rather than building on existing institutions and institutional norms. This clearly relates to the issue of ignoring expertise, but also reflects the way in which that ignorance can lead to a significant waste of resources by creating a perception that new bodies need to be assembled – often which will not have the thick expert capacity described above. The creation of a new track and trace system in the UK is an example here. Rather than building on existing public health surveillance networks, a new system was created which never effectively succeeded in what it was doing. As some commentators have noted, this development reflected an ongoing hollowing out of the state.[36]

3. *Detached Expertise:* Third, expertise became detached in that it was often isolated from other aspects of decision-making. The problems of integrating scientific advice into decision-making in both the US and the UK are examples here as are problems of co-ordination of personal protective equipment (PPE) delivery. Such integration is challenging, and it is one of the strongest arguments for the thick institutional capacity of public administration. As the Institute of Government in a recent report on the UK

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[33] Wright, *supra* n. 3.

[34] Paul E. Rutledge, *Trump, COVID-19, and the War on Expertise* 50 AMERICAN JOURNAL OF PUBLIC ADMINISTRATION 505 (2020).

[35] Donald Moynihan and Alasdair Roberts, *Dysfunction by Design: Trumpism as Administrative Doctrine*, 81 PUBLIC ADMINISTRATION REVIEW 152 (2021).

[36] Lee Jones & Shahar Hameiri, *COVID-19 and the Failure of the Neoliberal Regulatory State* REVIEW OF INTERNATIONAL POLITICAL ECONOMY advance access (2021)

noted, this is not a new problem and arose in relation to previous crises such as that over BSE. Furthermore, it is not just a problem of connecting advice but also the institutional architecture around that connection.[37] As the Institute noted:

> But many of the problems identified by inquiries into those crises have returned: the blurring of policy decisions and expert advice; the need for politicians to interrogate advice, and for advisers to understand the policies they are informing; the risks of relying on uncertain modelling and of 'groupthink'; and a lack of transparency in explaining how evidence and advice are used.[38]

Expertise cannot just be 'plugged in' but must be part of the administrative architecture. It should also be noted that building such architecture comes with risks of creating siloes.[39]

III. The Relevance for Administrative Law

There is a rich literature in public administration appearing on these issues.[40] As the OECD has pithily put it – "the rules of good governance apply now more than ever."[41] But administrative lawyers may have reacted to the last section by thinking that this has very little to do with the law in administrative law. It is the sort of stuff that is useful background knowledge but nothing more. To the contrary, it is relevant. As already discussed, public administration is a creature of law in the form of legislation and administrative law. But understanding administrative competence in relation to Covid is also important for administrative lawyers to understand, because it helps lawyers understand how law is contributing or detracting from responding to the pandemic. Administrative law plays a significant

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[37] Fisher, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM, *supra* n. 16, at ch. 2.
[38] Institute for Government, SCIENCE ADVICE IN A CRISIS 5 (2020), https://www.instituteforgovernment.org.uk/sites/default/files/publications/science-advice-crisis_0.pdf
[39] Gillian Tett, THE SILO EFFECT (2015).
[40] E.g., C. Ansell, Eva Soresen, and Jacob Torking, The COVID-19 Pandemic as a Game Changer for Public Administration and Leadership?: *The Need for Robust Governance Responses to Turbulent Problems,* 23 PUBLIC ADMINISTRATION REVIEW 949 (2020); Mariana Mazzucato and Rainer Kattel, *COVID-19 and Public-Sector Capacity*, 36 OXFORD REVIEW OF ECONOMIC POLKCY S256 (2020).
[41] https://www.oecd.org/governance/public-governance-responses-to-covid19/ accessed 3 April 2022.

role in shaping understandings of what is possible, what is acceptable, and what action is accountable within and outside of public administration. As that is the case, how administrative law understands public administration is important because it will affect how law contributes to administrative competence or detracts from it**.**

This impact is seen in a decision by the United States Supreme Court staying an Occupational Safety and Health Administration (OSHA) regulation regarding COVID.[42] OSHA had issued a rule that required companies employing more than 100 persons to require their employees either to be vaccinated or undergo weekly testing at their own expense and wear a mask at work.[43] After OSHA was sued by an array of businesses and trade associations, the Supreme Court ruled the plaintiffs were likely to succeed in their argument that Congress had not authorized OSHA to promulgate it's rule. Although the legislation that created OSHA contained language that gave OSHA the legal authority to adopt the rule, all but three justices refused to accept that language as supporting the rule. They explain that, despite the language, Congress could not have meant to have authorized such a "significant encroachment into the lives – and health" – of "84 million Americans."[44] Considering that the entire nation was impacted by the pandemic, the majority characterized COVID as a "public health" issue and "no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise."[45] For the majority, the fact that "OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind, coupled with the breadth of authority [OSHA] now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach."[46]

The dissent began by noting the majority did not dispute that the statutory terms "read in the ordinary way … authorize this [rule]."[47] It then reviewed OSHA's justification for protecting workers from COVID and the considerable evidence that supported that justification, which led to this conclusion:

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[42] Nat'l Fedn. of Indep. Bus. v. OSHA, 595 U.S. __, 142 S.Ct. 661 (2022).
[43] COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61552 (2021).
[44] 142 S.Ct. at 665.
[45] Id.
[46] Id. at 666.
[47] Id. at 673.

> Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate.[48]

The majority was clearly focused on controlling and limiting the administrative state. What happened inside of the agency, which was crucial for the dissent, was of no interest to the majority. For them, with their thin understanding of expertise, giving OSHA more authority to regulate was to allow the agency free reign to decide on the scope of regulation. In so doing, it robbed OSHA of the capacity it needed to protect to protect employees from the pandemic. Moreover, in doing so the majority showed little fidelity to the legislative text – their adoption of what has become known as the "major questions" doctrine is striking for its lack of legal content. While Congress in the OSH Act did not recognize the potential threat of a pandemic on workers when it created OSHA, it created the agency to use its expertise to address the very kind of risk to workers created by the pandemic using its thick institutional expertise. And that was what OSHA did.

Another illustration of the relevance of public administration for administrative law comes from New South Wales (NSW), Australia.[49] On March 19, 2020, 2650 passengers of a cruise ship, the *Ruby Princess,* were allowed to disembark in Sydney, Australia without being tested for Covid-19 despite there being suspected cases on board. As of early August 2020, this decision had been linked to 900 infections and 28 deaths. The NSW government set up a Special Commission of Inquiry into the Ruby Princess, which published its 320-page report in August 2020.

The report is wide ranging. An important part of the report is a study of the "carpentry of delegated legislation and statutory instruments involved,"[50] which created the framework for how decision-makers understood their job.

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[48] Id. at 675.

[49] This account is extracted from Liz Fisher, *Thinking Collectively: Law and Scholarship in Precarious Times*, 32 JOURNAL ENVIRONMENTAL LAW 339 (2020).

[50] Report of the Special Commission of Inquiry into the Ruby Princess 1.44 (August 14, 2020).

The report is also a study of thick expertise and examines the roles of different specialists and how they interact with other each. While it focuses primarily on the actions of the NSW Health Department and its risk assessment criteria and testing practices,[51] the report also shows how those issues were embedded in a wider set of supply chain and other issues. The report concludes:

> The mistakes made by NSW Health public health physicians were not made here because they failed to treat the threat of COVID-19 seriously. They were not made because they were disorganised, or did not have proper processes in place to develop a plan to assess the risks posed by this disease, and how to limit those risks. Those physicians relied on the best science, not pseudoscience or matters of political convenience. They were diligent, and properly organised. There are no "systemic" failures to address. Put simply, despite the best efforts of all, some serious mistakes were made.[52]

But, as also noted in the report, "it is not an adequate answer to scrutiny of a public health official's conduct in this Inquiry to assert that he or she was doing their best."[53]

The Ruby Princess report is striking as it is one of the few reports into failures of pandemic decision-making. But it is also striking in the way it sees the entwined roles of law and administration. Carried out by an eminent lawyer, it is a paradigm example of how issues of administrative competence are entangled with law.

IV. Making Public Administration Competent

It is a sobering thought that the pandemic offers a teachable lesson about the significance of understanding "thick expertise" and its connection to administrative competence.[54] The capacity of government to address collective action problems requires thick expertise. As our discussion also illustrates, it requires institutions that understand that expertise and how to

[51] *Id.* at 1.34.
[52] *Id.* at 9.126.
[53] *Id.* at 1.141.
[54] The lesson, however, is not a new one. The need to respond to pandemics was a reason for administrative expansion in the nineteenth century. Christopher Hamlin, PUBLIC HEALTH AND SOCIAL JUSTICE IN THE AGE OF CHADWICK, BRITAIN 1800-1854 (1998)

foster it. The pandemic, Katrina, the Ruby Princess, and other examples indicate what happens when that capacity is not taken seriously.

The need to take administrative capacity seriously is also true for administrative law. If administrative law is to be the law of public administration, legal frameworks, reasoning, accountability mechanisms, and doctrines must be shaped to ensure the capacity and authority of public administration. The binary that dominates how we view the subject is wrong. This is not a choice between limiting public administration or letting it run free. Administrative law scholars and lawyers are confronted with a set of more nuanced issues concerning how to craft law and legal reasoning to ensure that government is competent. As we noted above, there are examples of judges indeed crafting their reasoning.

Stuck in the binary, administrative law has decided that public administration is above the pay grade of administrative law scholars. Since public administration is not "law," it must be discretion, and it is the responsibility of political oversight to provide accountability. The growth of the administrative presidency in the US is exhibit A of this tendency.[55] The limitations of such oversight are there for all to see including the myth that the President is accountable to voters for the direction of public administration. The issue here, however, is what should administrative law do to promote administrative capacity, whatever contribution to it political oversight makes.

Our book suggests how understandings of administrative competence should inform administrative law doctrine, teaching, and the revision of the Administrative Procedure Act.[56] Here we highlight additional ways that US administrative law can promote administrative competence. Further debate and development are no doubt necessary. It would be interesting to explore arguments in other jurisdictions. Nevertheless, the following indicate how we see administrative law evolving to be a law of public administration which ensures both the agency's capacity to act and its authority to act. Importantly, it is notable that our recommendations rely on law, and they

[55] Wendy Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power,*"115 COLUMBIA LAW REVIEW 2019 (2015); Sidney A. Shapiro and Richard Murphy, *Constraining White House Political Control of Agency Rulemaking through the Duty of Reasoned Explanation*, 48 U.C. DAVIS LAW REVIEW 1457 (2015); Elena Kagan, *Presidential Administration*, 114 HARVARD LAW REVIEW 2245 (2001).
[56] FISHER & SHAPIRO, *supra* n. 3, at ch. 10.

indicate that law is inexplicably intertwined with administration in government.

A. Inaction

Courts currently give agencies carte blanche to refuse to regulate.[57] Under existing doctrine, judicial review is only authorized when there is agency "action,"[58] and the failure to regulate is not "action."[59] It is possible to petition an agency to start a rulemaking, but the courts allow agencies to take years to respond to a petition. As result, any agency can "respond to a petition for rulemaking designed to remedy indefinite agency delay with more indefinite agency delay."[60] Once the petition is rejected, judges give agencies so much deference that judicial review is in effect non-existent.[61]

If we are to take seriously that administrative law supports agency competence, the courts will need to use a less deferential form of review than the toothless one now used for rulemaking inaction. One of the authors has recommended that a judge should require agencies to offer an adequate explanation for the rejection of a petition or a delay in responding to a petition. The scope of review, in other words, should be just the same as when an agency adopts a rule, prompting a judge to take a hard look at the agency's explanation, although courts could adjust what constitutes an adequate explanation by considering contextual factors such as the necessity of agency priority setting.[62]

B. The Inclusion of Underrepresented Groups

While it is possible to think of administrative procedures as being neutral between competing points of view, the empirical evidence is clear that corporate interests dominate the rulemaking process, and the same is true of the lobbying that occurs at agencies, while public interest groups are hard pressed to match the previous advocacy.[63] A closer look also reveals that

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[57] Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L. REV. 1805, 1818 (2019).
[58] 5 USC 701(13).
[59] Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004).
[60] Shapiro & Murphy, supra n. 55, at 1487.
[61] Shapiro, Inaction, supra n. 57, at 1820-1822.
[62] Id. 1838-39.
[63] Shapiro & Murphy, supra n. 55, at 501-02.

structural or institutional racism is built into the rulemaking process.[64] It is also no secret, as the environmental justice movement (EJ) keeps reminding us,[65] there is little or no participation by marginalized communities in rulemaking. Yet, as the pandemic has taught us, the country's most disadvantaged citizens are the ones that bear the brunt of inadequate government protections. Nevertheless, agencies make little or no effort to reach out and speak to such communities as a regular part of rulemaking practice. There may be no legal barrier to such participation, but we have overlooked the considerable structural and economic barriers that can bias rulemaking.

The Administrative Conference of the United States (ACUS) has recently taken a small step regarding the inclusion of racial and other underrepresented groups. It recommended that when agencies promulgate a rule specifying the procedures that they will use for rulemaking, they should "consider a broad range of means of seeking public input, even if the Administrative Procedure Act does not require it."[66] Such efforts, according to ACUS, should include the participation of "underrepresented communities."[67]

C. Citizen Suits

The failure of leadership to foster agency competence extends to the enforcement of regulations.[68] Prior to the election of President Biden, for example, the Occupational Safety and Health Administration, made little or no effort to inspect workplace of essential workers to ensure that employers were taking reasonable precautions to protect them. An investigation by Reuters, for example, found 106 U.S. workplaces where employees had complained to OSHA of slipshod COVID-19 practices, the agency either never inspected the workplaces or, if it did, waited months to do so.[69]

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[64] Sidney A. Shapiro, *Administrative Law and Racism*, YALE J. ON REG., NOTICE AND COMMENT, August 11, 2020, https://www.yalejreg.com/nc/administrative-procedures-and-racism-by-sidney-a-shapiro/.
[65] Alice Kaswan, *Distributive Justice and the Environment*, 81 U.N.C. L. REV. 1-31 (2003).
[66] Administrative Conference of the U.S., Recommendation 2020-1, Rules on Rulemakings, 86 Fed. Reg. 6613 (Jan. 22, 2021).
67 Id.
[68] Joel A. Mintz, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES (2012).
[69] Chris Kirkham & Benjamin Lesser, Special Report-U.S. regulators ignored workers' COVID-19 safety complaints amid deadly outbreaks, Reuters, Jan. 6, 2021,

Meanwhile at least 4,500 workers were infected by the coronavirus and 26 died after contracting COVID-19 at 70 of those workplaces. When it did conduct an inspection, the agency only penalized 12 of 106 employers in response to workers' complaints.[70]

Congress has established citizen enforcement of agency regulations in some environmental statutes, such as the Clean Air Act and the Clean Water Act,[71] to make sure that protective regulations are enforced. Similarly, the California Private Attorney General's Act authorizes workers to recover civil law penalties for violations of the state's labor code.[72] The Protecting the Right to Organize (PRO) Act, introduced in Congress in 2019, would authorize establish a private right of action under the National Labor Relations Act (NLRA).[73] And worker advocates support establishing a private right of action to enforce OSHA regulations.[74]

The more general use of citizen suits would promote agency competence because these laws are structured to give an agency the opportunity to bring an action itself. At the same time, the availability of citizen suits recognizes that even well-intentioned agencies may lack the resources to ensure legislative mandates are enforced by make regulatory beneficiaries into "private attorney generals" for this purpose.[75]

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https://www.reuters.com/article/us-health-coronavirus-workplace-safety-s/special-report-u-s-regulators-ignored-workers-covid-19-safety-complaints-amid-deadly-outbreaks-idUSKBN29B1FQ.

[70] Id.

[71] See Jeffery G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVIRONMENTAL LAW REPORTER 10309 (1983), https://elr.info/sites/default/files/articles/13.10309.htm.

[72] California Department of Labor Relations, Private Attorney Generals Act (PAGA), https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html.

[73] House of Representatives, Education & Labor Committee, Protecting the Right to Organize Act: Section by Section, 109(c), https://edlabor.house.gov/download/pro-act-of-2021-section-by-section/.

[74] Michael C. Duff, Thomas O. McGarity, Sidney Shapiro, Rena Steinzor, and Katie Tracy, Legislating a Private Right of Action to Empower Workers, Center for Progressive Reform (CPR), July 2020, https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf.

[75] See Sidney A. Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 ADMINISTRATIVE LAW REVIEW 939 (2006).

D. Protecting Scientific Expertise

The protection of the integrity of scientific expertise in government has drawn the attention of scholars[76] and a wide span of scientific and professional groups.[77] As these articles and reports note, political interference in science has been around for a long time, but in recent years "the suppression, manipulation, disrespect, and disregard of our federal science and scientists has become widespread and pervasive."[78] The various proposals to protect agency science and scientists demonstrate how law and science are intertwined and why institutional architecture makes a difference.[79]

As one of the authors has commented, "Regulatory science cannot and should not be isolated from policy, but science should be allowed to bring its best work to the table."[80] The protection of a "thick" process of science is necessary to meet that objective. An "agency's formative scientific analysis" [is] essentially a communal product of science that attempted to summarize what the available scientific information suggests for pressing policy questions of the day. To ignore attempts by politically elected and appointed individuals to dictate how science should be conducted is to betray the very essence of science."[81] While there is not necessarily agreement on what reforms would work best, the protection of science

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[76] See, e.g., Kathleen M. Rest, & Michael H. Halpern, *Politics and the Erosion of Federal Scientific Capacity: Restoring Scientific Integrity to Public Health Science*, 97 AMERICAN JOURNAL OF PUBLIC HEALTH 1939 (2007).

[77] See, e.g., Jacob Carter, Taryn MacKinney , Gretchen Goldman, The Federal Brain Drain: Impacts on Science Capacity, 2016-2020, Union of Concerned Scientists (Jan. 30, 2021), https://www.ucsusa.org/resources/federal-brain-drain; Union of Concerned Scientists, Restoring Science, Protecting the Public 43 Steps for the Next Presidential Term, June 2020, https://blog.ucsusa.org/michael-halpern/restoring-science-protecting-the-public-43-steps-for-the-next-presidential-term;
Milliken Institute, Protecting Science at Federal Agencies: How Congress Can Help, Nov.2018,
https://publichealth.gwu.edu/downloads/research/Protecting_Science_at_Federal_Agencies.pdf.

[78] Rest & Halpern, supra n. 76, at 1939.

[79] Wendy Wagner, Elizabeth Fisher, Pasky Pascual, *Whose Science? A New Era in Regulatory "Science Wars,"* 362 SCIENCE 636 (2018).

[80] Id.

[81] Id

requires that we understand how science contributes to policymaking, and how it can be disrupted.

E. OIRA Transparency

The conduct of White House oversight of the rulemaking process is problematic in terms of an agency's capacity to implement its statutory mission and how administrative law relates to this form of presidential leadership. To the public, the control over rulemaking by Office of Information and Regulatory Affairs ("OIRA"), located in the Office of Management and Budget (OMB),[82] may "the single most powerful office most people have never heard of,"[83] but administrative lawyers recognize OIRA gives the White House a means to alter rules to its liking. Despite this authority, OIRA review occurs with little or no transparency,[84] which may account for its lack of notoriety. In any case, the opaque nature of White House intervention reduces its accountability for forcing changes in a rule that an agency does not support.[85]

The supporters of OIRA oversight strongly defend it as a necessary and appropriate function of presidential management of the government,[86] although not all scholars agree.[87] Putting aside this argument, there is considerable evidence that OIRA delays rules for long periods of time without any explanation to an agency or the public,[88] rules are delayed or

[82] Exec. Order No. 12,866, 3 C.F.R. 638.
[83] Stephanie Young, *OIRA Chief Sunstein: We Can Humanize, Democratize Regulation*, Harv. L. Rec (Mar. 12, 2010), http://hlrecord.org/?p=9714 (quoting Dean Martha Minow's introduction of OIRA Administrator Cass Sunstein).
[84] U.S. Government Accountability Office, Federal Rulemaking: Improvements Needed to the Monitoring and Evaluation of Rules Development as Well As to the Transparency of OMB Regulatory Review 32 (2009), http://www.gao.gov/new.items/d09205.pdf.
[85] Shapiro & Murphy, *supra* n. 55, at 1460.
[86] See, e.g., Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARVARD LAW REVIEW 1838 (2013).
[87] Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICHIGAN JOURNAL OF ENVIRONMENTAL & ADMINISTRATIVE LAW 209, 238-67 (2012).
[88] Shapiro & Murphy, *supra* n. 55, at 1466-69.

changed for political reasons,[89] and that OIRA requires changes in rules that displace agency expertise.[90]

As with the other recommendations, this one demonstrates that law can aid in producing agency competence. Like the protection of scientific integrity, law can protect thick expertise, although finding the right balance between political oversight and this goal may not be easy.

V. Conclusion

We have reflected on administrative law before, during, and after the Covid-19 pandemic considering our recent book. Our book focuses on the United States, but the book and the pandemic have lessons for all administrative law cultures. As a recent Institute for Government report notes:

> There is substantial and justified public concern about how decisions were made during the crisis, and their outcomes. This will not be the last pandemic and the government needs to fix systemic weaknesses in how it reacts to complex situations. There is much to learn and a public inquiry is the right way to do it.[91]

Administrative lawyers also have much to learn. The pandemic provides a painful and tragic catalyst for reimagining administrative law in a way that puts both the capacity and authority of public administration at the heart of the subject. Our are more a starting point for discussion rather than an exhaustive examination of all the issues that arise from the times we live in. For many administrative lawyers they will not be new issues. The pandemic may be extraordinary, but the problems of administrative competence and how it is thought about are not.

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[89] Id. at 1470-72,

[90] Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis,* 53 WASHBURN. LAW JOURNAL 1 (2013).

[91] Institute for Government, THE CORONAVIRUS INQUIRY: THE CASE FOR AN INVESTIGATION OF GOVERNMENT ACTIONS DURING THE COVID-19 PANDEMIC 4 (2021), https://www.instituteforgovernment.org.uk/sites/default/files/publications/coronavirus-inquiry.pdf

CHAPTER THREE

FRENCH PUBLIC CONTRACTS LAW AND THE PANDEMIC: IS THE PRINCIPLE OF ADAPTABILITY ADAPTED?[1]

FRANÇOIS LICHÈRE[2]

The existence of specific legal rules regarding the performance of most of public contracts has a long tradition in France[3]. The French regime is primarily based on the idea that public contracts promote public interest objectives and therefore must be adapted to the evolution of public needs and of circumstances. The pandemic has challenged the ability of these rules to offer room for adaptation, and doubt exists regarding whether they have fully adapted to this new situation. While all contractual situations have been affected by the pandemic, including public contracts, the focus of this article is on so called 'contrats de la commande publique', i.e. public procurement contracts and concession contracts.

Public procurement and concession contracts require special analysis for two reasons. First, with rare exceptions, subject to advertising and competitive bidding requirements which lead to questions regarding the extent to which they can be modified without having to be put out to tender again. Second, many of them are 'contrats administratifs', which means that

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[1] This article is mainly the result of the translation of my article « L'exécution des contrats de la commande publique au risque de la crise sanitaire », published in *Le droit des affaires, instrument de gestion et de sortie de crise*, LGDJ 2021. The author is indebted to Russ Weaver for editing my translation.

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Director of the Chair on public contracts law

[3] See our book, co-written with Prof. John Bell, *Contemporary French administrative law*, Cambridge University Press, 2022, chapter 9, to be dowloaded online.

they are subject to rules that differ in part from those of private law in order to allow adaptation. This last characteristic could, *a priori*, make it easier to respond to the new situation resulting from this crisis than in private law. However, the limits to adaptation of the contract imposed by the obligation to competition creates a tension with the principle of adaptatibility of administrative contracts, an administrative law principle that only the legislator can supersede[4].

By adaptation of public contracts, we include a very broad spectrum which can be envisaged as a decrescendo: it starts with termination of the contract, but can involve modification of its clauses and finally the compensation of additional costs. Of course, some of these categories can be combined as shown by the practice of the Chair on public contracts[5].

In this article, we consider four hypotheses successively after examining the applicable sources. As in many legal fields, the health crisis has led the government to adapt the law, in this case to "public contracts", a new concept in French legislation which corresponds to the broad notion of contracts signed by public authorities. It did so through Ordinance No. 2020-319 of March 25, 2020, amended by an order of April 22, 2020. But this law only applies to contracts signed before July 24, 2020, and does not answer all the questions posed by the pandemic. The fact that some of these temporary provisions have since been included permanently in the *Code de la commande publique* (thereafter 'CCP') by the Law No. 2020-1525 of December 8, 2020 does not make up for these shortcomings. Therefore, it is necessary to resort to the *Code de la commande publique* administrative contracts case law and, of course, contractual clauses. In this last respect, one must know the role of the general administrative clauses of public procurement contracts (*Cahiers des clauses administratives générales des marches publics* – CCAG), which importance result from the fact that they are published via ministerial orders and that almost all public entities' contracts make reference to them, although they sometimes change certain clauses

[4] Adaptability of public service is one of the most important 'Principes généraux du droit' which are principle set by the case law of the *Conseil d'Etat*, the supreme administrative court in France. For the sources of french administrative law, see footnote 1 above.

[5] See our collective report of 267 pages (in French) on 'Sanitary crisis and publics contracts', https://chairedcp.univ-lyon3.fr/medias/fichier/crise-sanitaire-et-contrats-publics-rapport-1_1617358857993-pdf?ID_FICHE=117834&INLINE=FALSE

I - Adaptation through termination

The "solution" of termination applies differently, depending on whether it is envisaged by a contracting authority or by a private party, called in EU law the “economic operator”. For the contracting authority, the agency for which the public procurement contract or concession has been signed, the *Code de la commande publique* clearly envisages *force majeure* as a cause for termination by itself[6]. But as in private law, administrative law requires that the contracting party be in a situation of irresistibility. In the case of a public procurement contract, it means that the contract must lose its purpose, and lack of financial means is not a sufficient justification[7]. This is clearly the case for a contract involving a one-time event that cannot legally take place because of public order measures imposed by the health crisis. In such a case, there is no right to a postponement of the event since the date change is equivalent to a change of purpose. But what about an event that could legally be held, albeit in deteriorated conditions, which the contracting authority has chosen to cancel? What about a contract that is terminated due to a significant drop in attendance? It is possible that disputes of these latter two types do not necessarily involve irresistibility since it is possible for them to go forward.

Administrative law can be more demanding in this respect than private law, since it admits that the contracting authorities may unilaterally adapt the contract to the new situation, even if it means reducing the scope of the contract or, on the contrary, extending it, subject to financial compensation. If termination were really the only solution in the event of *force majeure*, the other party would not be entitled to compensation for loss of profit, unlike in the case of termination for reasons of public interest. In fact, a provision of Ordinance No. 2020 No. 2020-319 can be seen as a general rule of law: its article 6, 3° provides that ‘when the cancellation of a purchase order or the termination of the contract by the buyer is the consequence of measures taken by the competent administrative authorities in the context of the state of health emergency, the contractor may be compensated by the purchaser expenses incurred when they are directly attributable to the execution of a cancelled purchase order or a terminated contract’. But he is not entitled to compensation for loss of profit.

Of course, clauses may limit or extend the contracting authority’s power to unilaterally terminate a contract for *force majeure*, and above all to regulate

[6] Articles L. 2195-1 CCP for public procurement and L. 3136-2 CCP for concessions.
[7] CE (Council of State), 26 July 1947, Bongert, recueil Lebon p. 35

the compensation required for cancellation. But litigation risks arise here regarding the irresistible nature of the event. It is likely that the case law will reconsider the requirements governing irresistibility, whether it is to be assessed by the contracting authority or by its co-contractor, since the existing case law is so old. As regards the latter, irresistibility may be assumed for contracts with instantaneous execution which cannot be honored because of the consequences of the lockdowns or its consequences, such as supply disruptions.

Rather than termination, i.e. a formal decision to terminate, it is the definitive non-performance of contractual obligations that we should be talking about, i.e. an implicit termination. Unless there is a specific clause, the contracting party of the public entity cannot terminate on its own, but must proceed by lodging a complaint with a court. This is the case with force majeure in administrative law, which is identical to force majeure in private law, as well as with "force majeure administrative" which is a confusing expression. It means that a situation of an unforeseeable event which does not prevent from performing the contract but entitles the private contractor to partial damages (as seen in section IV) extends over time[8]. IN hat case, one party can ask the court to terminate the contract but it rarely happens.

And all concessions and most public procurement contracts, because of a tendency to plan purchases of procurement through framework agreements, are not instantaneous, so that it is the suspension of the contract which was the main consequence of the health crisis, beginning with the first lockdown that started in March 2020.

II - Adaptation through the suspension of all or part of the contractual obligations

Rather than suspension of the contract, corresponding to a temporary but complete non-performance of the contractual obligations, we often speak about suspension of all or part of the contractual obligations. In fact, very few public contracts have had to be suspended entirely, with the exception of certain service contracts that could not take place at a distance (e.g., cleaning activities). And even then, full suspension could only be allowed if the provider having suffered from a proven lack of employees due to sickness or family care obligations. For the remainder of the situations, there

[8] CE, 14 June 2000, Commune de Staffelfelden, n° 184722

are always tasks to be accomplished, whether it be maintenance in the field of concessions or custody of sites in public works contracts.

Ordinance No. 319-2020 did not provide for the possibility of partial suspension when it provided consequences for suspensions, and therefore raised doubts about the applicability of partial suspension except in a few situations that are not free of ambiguity. For example, the aforementioned article states that 'at the end of the suspension, a rider shall determine any changes to the contract that may be necessary, and provides for its resumption in the same form or its termination as well as provisions for the sums due to the holder or, where applicable, the sums due by the latter to the purchaser'. This may cast doubts about the right, for the private contractor, to amend the contract (i.e. to financial compensation for the private parties), but this should not be the case, the government having refused, after hesitation, to create a true right to financial compensation by rejecting draft legislation which would have systematized that right. And If the administrative theory of unforeseeability (*théorie de l'imprévision*, see below section IV) may have given rise to some hope for private parties, the jurisprudential requirement that the contract continue to be performed sounds the death knell for these claims[9]. Private parties must, therefore, rely on the contractual clauses and the various notes and circulars in order to obtain recovery.

In a note issued on June 2020, and updated on August 6, 2020, the State Purchasing Directorate, a service that is part of the Ministry of Economy, considered three situations: 1) when there is an adjournment of the work within the meaning of the *CCAG travaux*, decided by the public entity, and the co-contractor is entitled to compensation for all costs related to this postponement. 2), when the contractor has requested the suspension and is not entitled to compensation or 3/ there is a suspension imposed by the public entity but outside the *CCAG travaux* so that he is entitled to some compensation. In practice, the first two hypotheses have been implemented, as well as a third one, which consists of the public entity suspending the contract by taking note of the impossibility of the other party to perform in order to prevent right to compensation. Such an attitude was not supported by any clause or law.

These situations create significant distortions between economic operators due to the attitude of the public parties concerned and because of the clauses

[9] CE Sect., 5 November 1982, Société Propétrol, n° 19413

in question, unsatisfactory from the point of view of equity or even from the point of view of macro-economic recovery[10].

Interestingly, the new *CCAG*, adopted in March 2021, contains two model clauses dealing with unforeseeable events, which the Chair on public contracts helped to draft. The first one deals with the suspension of a contract which the contracting authority must consider within a period of two weeks after seizure by the private contractor. The second one is a review clause which imposes a duty on both parties to make "good faith" consideration of the economic impact of the event, but without a duty to amend the contract. However, most of the contracts did not have such a clause during the first waves of the Pandemic and, in any event, is not going very far as a review clause so the question arose of the modification of the clauses.

III - Adaptation through modification of the clauses

As mentioned above, Ordinance No. 2020-319 does not give private contractors the right to make amendments, and therefore changes can only be made if the contracting authority consents. This is where, in such a case, the obligation to put the contract out to competition restricts pretty much the parties. Under the rules of modification prior to the EU directives of 26 February 2014 were to apply, there would be strong constraints, at least if the amendment did not consist solely of compensation. However the EU case law states that member states shall apply the new rules on modification to existing contracts.

Eu law directives on public procurement contracts and concessions are based upon several hypotheses. There is no prohibition against an amendment - or a unilateral modification for that matter when it comes to administrative contracts - if it does not amount to a "substantial modification" of the initial contract. Article 72 of Directive 2014/24 for public procurement contracts, equivalent to article 43 of Directive 2014/23 for concessions, states that a public procurement contract's modification

> '*shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be*

[S] See our article, « La crise sanitaire, la commande publique et la relance économique », AJDA, 8 June 2020, p. 1105

considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favor of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract or framework agreement considerably'

The examples given - which are admittedly not exhaustive - may suggest that compensation for the additional costs linked to coronavirus may not lead to the characterization of substantial modification: it may be that the modification would be seen as reaching conditions a, b or c.

In the event it does not, there are other avenues. First, there may be an increase in the contract up to 10% of the amount of the contract, a threshold which is increased to 15% for public works contracts, without any other conditions or reasons, but subject to a threshold which is currently set at 5.382 millions of euros for public works. Second, there are other hypotheses of substantial modifications authorized, one of which is of particular interest to us: the case where a diligent contracting authority could not foresee circumstances which give credit to amend the contract. There can be little doubt that, at least for contracts signed before March 11, 2020, the date on which the WHO officially declared the pandemic nature of the coronavirus, the virus and its consequences were unpredictable. The only constraint is that the increase cannot be greater than 50% of the contract amount, which will rarely be the case.

In practice, there may be other constraints. The French administrative law principle under which a public authority cannot be ordered to pay more than it owes is overvalued. The above-mentioned note from the DAE reflects a certain ambivalence: its first page explains that 'The legal basis on which the claim for compensation rests (the stipulations of the contract, contractual liability, the theory of unforeseeability, the unilateral modification of the contract by the buyer...) conditions the heads of damage that can be compensated and the part of the damage that the buyer can accept to bear'. However, the last page states that 'in the absence of an amendment, the contractor may only obtain compensation only if the changes in the performance conditions the general economy of the contract, on the basis of

the theory of unforeseeability'. It is difficult not to admit the *a contrario* here, i.e. that an amendment may very well provide for allowing costs beyond of the texts or the conditions of unforeseeability. But it is sometimes difficult to convince public entities that there is no need to demonstrate the presence of the conditions of this theory for the implementation of amendments.

Furthermore the theory of unforeseeability (*Théorie de l'imprévision*) is subject to conditions that are difficult to interpret and to implement; as a result, it is difficult to know what the private party is entitled to, which makes it difficult to negotiate an amendment of the contract.

IV - Adaptation through indemnification

In the absence of a clause clearly providing for indemnification of the private contractor for additional costs related to an epidemic, or an event of force majeure, the other party will only be entitled to compensation, in administrative contracts law, if he demonstrates that the conditions of *théorie de l'imprévision* have been met, a case law principle created in 1916 by the *Conseil d'Etat*[11]. The alternative theory of *fait du prince* is, in fact, invokable in administrative law only if the prejudicial measure to the contracting party is taken by the public contracting party, which is generally not the case, in the context of the coronavirus pandemic. In France, only the State can do so with very rare exceptions for the mayors, so that the *fait du prince* can rarely be invoked. This theory has the advantage of allowing for full compensation, and the conditions for its implementation are simply to establish a causal link between the administrative police measure and prejudice on the contractual performance.

Quite different is the theory of unforeeseability *(théorie de l'imprévision*), a 'theory' which seems to be better adapted to the pandemic situation. This theory presupposes, in addition to unforeseeability, a disruption of the contract. However, administrative case law varies as to the requirement of "disruption" for public procurement contracts[12]. For concessions, it is the existence of an operating deficit that characterizes the disruption, although it is not clear how this deficit is to be assessed or over what period of time.

[11] CE 30 mars 1916, Compagnie générale d'éclairage de Bordeaux, n°59928, https://www.conseil-etat.fr/fr/arianeweb/CE/decision/1916-03-30/59928

[12] Overheads representing more than 7 % of the amount of the contract (CAA Marseille, 17 January 2008, n° 05MA00492) or 10 % (CAA Versailles, 31 December 2015, n° 13VE02894).

And since the risk is part of the contract, the case law requires that part of the overehead be borne by the private contractor, but this too varies between 5 and 20% with no clear clues regarding the criteria for this variation.

Finally, it should be remembered that a lasting unpredictability authorizes the parties to ask the administrative judge to terminate the contract on the grounds of 'force majeure administrative'. But it is unlikely that the so called 'degraded performance of contracts' will lead to termination.

The health crisis has revealed failures, not only in the medical response to a pandemic, but also perhaps in the legal response to the effects of a pandemic on public contracts.

It is time to take stock of the situation in order to determine whether the rules and clauses should be adjusted in light of the possibility of a new pandemic or of a new important unforeseeable event with such a macro-economic scale, such as a war. The report that the Chair on public contract law has been able to carry out, quoted above, has led to the proposal of a certain number of reforms. Only one proposal reached the government in the form of the two model clauses quoted above. But the main proposal - to give more legal certainty to the conditions and consequences of the *théorie de l'imprévision* through a piece of legislation - has not yet been implemented. In March 2022, the French prime minister, facing criticism for the relative lack of governmental action regarding the consequences on prices of the Russian-Ukrainian war, explicitly called on the public authorities to use the *theorie de l'imprévision*. Considering the legal uncertainty explained above, it is unlikely that this theory will serve as a way forward.

All in all, the paradox is that French administrative law has produced interesting theories for adapting public contracts to unforeseeable events, but there are t barriers to using those theories. The first barrier is the perception that when the contract changes it may require that the contract be reopened to competition. Interestingly, EU directives offer ways to avoid this risk in case of unforeseeable events, but the fear of breaching the law remains. The second barrier relates to the uncertainty relating to implementation of the well-known *théorie de l'imprévision even thought* it has been used several times since it was introduced by the Conseil d'Etat in 1916 in the case law quoted above. One may conclude that this theory for adapting public contracts has not been fully applied to a situation involving an unpredictable event with such a macro-economic scale. But little is required in order to adapt it and render it more legally certain so that it can

be applied to any new unforeseeable event. It remains uncertain whether the legislature will intervene. An alternative would be for the parties to adapt their clauses as a common lawyer would expect. Since French administrative law offers public entities the power to adapt their contracts unilaterally, there is a lack of culture of negotiation among them which may justify government intervention.

Bibliography

1. Vincent Brenot, Benoît Feroldi, Crise sanitaire et commande publique, Droit Administratif, mai 2020, p. 42
2. Lucie Cochet, Commande publique et pandémie: un premier aperçu de l'état d'urgence sanitaire, Semaine Juridique, éd.A, 30 mars 2020, p. 22
3. Gabriel Eckert, Le droit de la commande publique au temps de la pandémie de Covid-19, Contrats et marchés publics, juin 2020, p. 6
4. Laurence Folliot Lalliot, Les Etats se livrent une concurrence sans merci pour s'approvisionner en matériel sanitaire, Le Monde, 31 mars 2020, p,28
5. Jose Maria Gimeno Feliu, La crisis sanitaria COVID-19 y su incidencia en la contratacion publica, El Cronista, n°86-87, 2020, p. 40
6. Hélène Hoepffner, L'indemnisation des surcoûts liés à l'épidémie de Covid-19 dans les contrats de la commande publique, Contrats et marchés publics, août-septembre 2020, p. 7
7. François Lichère: « Commande publique, crise sanitaire et relance économique », AJDA 2020, p. 1105 et s.
8. François Lichère : « Catastrophes naturelles, calamités publiques et droit des contrats publics », AJCT, Septembre 2020, p. 21 et s.
9. François Lichère : « L'exécution des contrats de la commande publique au risque de la crise sanitaire », in *Le droit des affaires, instrument de gestion et de sortie de crise*, LGDJ 2021
10. François Lichère : « L'exécution dégradée des contrats administratifs de la commande publique et la crise sanitaire », in [Actes de colloques] Les contrats publics à l'épreuve de la crise sanitaire, Lexbase Hebdo édition publique n°625 du 6 mai 2021 : Contrats administratifs
11. François Lichère (with Fanette Akoka, Valentin Lamy and Adeline Meynier-Pozzi), « Crise sanitaire et contrats publics, une approche de sociologie juridique », L'Actualité juridique. Droit administratif, N° 25, 2021, p. 1425
12. Florian Linditch, Covid-19 et exécution des marchés publics. Ne pas confondre distanciation sociale, confinement et suspension des marchés en cours, Semaine Juridique, éd.A, 30 mars 2020, p. 25; Guide

méthodologique « Contrats de délégation de service public et crise sanitaire Covid-19: exécution financière des contrats, Contrats et marchés publics, août-septembre 2020, p.3

13. Hélène de Pooter, La passation conjointe de marchés de contre-mesures médicales dans le contexte de la pandémie de COVID-19, Europe, mai 2020, p.8
14. Pierre Villeneuve, Le retour de l'Etat, d'urgence, Semaine Juridique, édition A, 4 mai 2020, p. 31

CHAPTER FOUR

CONSTITUTIONAL CHALLENGES TO EU ADMINISTRATIVE SOFT LAW DURING THE COVID-19 PANDEMIC AND SOME PROPOSED REMEDIES

WOLFGANG WEISS[1]

Abstract

This contribution takes the proliferation of EU soft law instruments in the management of the COVID-19 pandemic as an opportunity to illustrate and analyse the benefits, but also the long-lamented weaknesses of the use of EU soft law in the implementation of EU law, in particular with a view to their challenges to democracy and rule of law in the EU. With the aim of enhancing the legitimacy of EU governance and address the challenges, this contribution will propose a general legal framework for EU soft law that establishes minimum procedural, transparency and participatory safeguards for the adoption of EU soft law.

1. Introduction

The management of the exceptional situation caused by the Corona pandemic in the EU Member States (MS) at the level of the European Union (EU) initially occupied primarily the European Commission. The first lockdown in spring 2020 immediately raised legal questions on which the MS expected prompt guidance from the Commission. The Commission reacted

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quickly and used a tried and tested crisis response instrument, i.e. the enactment of soft law. The Commission clarified questions that arose, for example, in the application of EU competition law by national authorities, through various soft law texts.[2] Other issues in need of quick clarification concerned the implementation of the fundamental freedoms in the EU, e.g. with regard to seasonal workers and their unhindered access to the labour market in other MS,[3] or with regard to transport or tourism services.[4] Soft law – traditionally defined as rules of conduct aiming at observance or other practical effects on human behaviour, but neither legally binding[5] nor justiciable nor enforceable – has in fact been used by the EU for decades to rather informally guide the application of its law by national bodies in its multi-level system; hence it is an administrative instrument. The reality of the implementation of EU law in domestic legal orders, while increasingly coined by an interaction between national and European level bureaucracies in the application and even enforcement of EU law, still is founded on the prevalence of decentral implementation and application of EU rules by MS authorities. Thus, legal issues of how to apply and interpret EU rules in a quasi-state of emergency following the sudden outbreak of COVID-19 in

[2] With regard to state aids, the Commission published a Temporary Framework for State Aid Measures to support the Economy in the COVID-breakout and revised it six times, see for the consolidated version <https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_de> accessed 30 November 2021. For the role of state aids soft law in the pandemic, see D Ferri, 'The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis' (2021) 12 EJRR 176. With regard to cooperation of competitors under antitrust rules, the Commission issued a comfort letter to address their cooperation targeting the shortage of critical medicines, Commission, 'Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients' COMP/OG – D(2020/044003) <https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf> accessed 17 December 2021.

[3] Commission, 'Guidelines on seasonal workers in the EU in the context of the Covid-19 outbreak' (Communication) C(2020) 4813 final.

[4] Commission, 'Guidelines on progressive restoration of transport services and connectivity – COVID-19' (Communication) C/2020/3139 (2020 OJEU C 169/17) and Commission, 'Guidelines on progressive resumption of tourism services and for health protocols in hospitality establishments' (Communication) C/2020/3251 (2020 OJEU C 169/1).

[5] See eg F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19, 32; L Senden, *Soft Law in European Community Law* (Hart 2004) 112 and O Stefan, *Soft Law in Court. Competition Law, State Aid and the Court Justice of the European Union* (Wolters Kluwer 2013) 15-16.

early 2020 in the EU posed new challenges to domestic authorities, as the management of the pandemic required quick reactions by MS executives which prompted a need for deviation from the normal course of rule application and raised new issues in their application. In addressing them, the Commission issued hundreds of soft law instruments to set out emergency policies for the MS in many policy fields.[6] This, however, exacerbated the long-standing demand to address the weaknesses of EU soft law, in particular from a perspective of democratic and legitimate exercise of public powers and rule of law.[7] Already after the financial crisis, assessments of the soft law issued then led many scholars to point out their challenges to the balance of powers between the EU executive and legislator, EU democratic values and input legitimacy.[8]

The present contribution will analyse the challenges to democracy and rule of law posed by the proliferate use of EU soft law in the COVID-19 crisis, with a particular emphasis on the role of EU soft law in decentral implementation of EU law by its MS. While updating the long-standing debate about EU soft law´s legitimacy with a view to its use in the COVID-19 crisis, this contribution focuses on its role in the domestic implementation of EU law and on solutions to its challenges in EU multi-level governance.

Therefore, the contribution first recalls the role of soft law in the implementation of EU law, before their salience and effects for domestic implementation will be illustrated with regard to COVID-19 soft law instruments. Then the contribution addresses the benefits of soft law, before the long-standing debate about its challenges for the rule of law and democracy in the EU is reintroduced, both with a view to COVID-19 soft law.[9]

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[6] M Eliantonio and O Stefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 EJRR 159, count 197 soft law instruments from March to autumn 2020.

[7] See e.g. M Dawson, *Soft Law and the Rule of Law in the EU*, EUI Working Papers RSCAS 2009/24.

[8] For a brief overview of this literature and its findings, see Eliantonio and Stefan (n 6) 160, 165f.

[9] For first analyses of COVID-19 soft law ´s challenges see O Stefan, 'The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19' (2020) 7 JICL 329; idem, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (2020) 5 European Papers 663.

2. The Role of EU Soft Law in the Domestic Implementation of EU Law

Soft law instruments have established themselves as important means in the implementation of EU law, by which the Commission not only accounts for its own application policy and its understanding of the interpretation of EU rules (therefore, the Commission being the author, is bound to follow its soft law by virtue of the principles of protection of legitimate expectations and equal treatment).[10] Likewise, the Commission also influences, even steers the domestic implementation of EU law, where EU soft law fulfils different functions[11] and is employed in all phases of the policy cycle. Soft law prepares, accompanies and supplements legislation and its application,[12] which reflects different modes and rationales of Europeanisation.[13] Thus, soft law is used in the formulation of policies and in the preparation of EU secondary law and may accompany it. Soft law informs or escorts the domestic transposition of EU directives. By issuing soft law, the Commission endeavours to increase its impact on decentral application in order to strengthen the uniform and effective application of EU law in all MS. With soft law instruments, the Commission aims to guide the interpretation and application of EU law by providing information on its own interpretative views and application practice, or by determining further concretisations of EU law, which may also direct the implementation of EU law by national authorities and courts. In this respect, soft law steers but also limits the exercise of discretion by the Commission or by national authorities.[14] Hence, EU soft law

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[10] CJEU, Joint Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, C-213/02 P *Dansk Rørindustri* [2005] EU:C:2005:408; GC, Case T-68/15 *HH Ferries* [2018] EU:T:2018:563 para 309; see also W Weiß, 'After Lisbon, Can the European Commission Continue to Rely on "Soft Legislation" in its Enforcement Practice?' (2011) 2 JECL & Pract 441, 443f.

[11] Senden (n 5) 457 and A Peters and I Pagotto, 'Soft Law as a New Mode of Governance: A Legal Perspective. New Modes of Governance Project. Project no. CIT1-CT-2004-506392' (2006) <https://ssrn.com/abstract=1668531> accessed 6 September 2021, 23.

[12] See M Knauff, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (Mohr Siebeck 2010) 378ff; M Rossi, 'Soft Law im Europarecht – Auswirkungen auf die vertikale und horizontale Kompetenzverteilung' (2020) 35 Zeitschrift fuer Gesetzgebung 1, 9-12.

[13] C Bérut, 'The European Union as an opportunity: structures and uses of European soft law in French, Austrian and Irish eHealth policies' (2021) 44 WEurPol 155, 157-159.

[14] CJEU, Case C-424/07 *Commission v Germany* [2009] EU:C:2009:749 para 76.

employs – according to *van Dam* – five ways of impacting the implementation and application of EU law by giving interpretative, implementing, explanatory or technical guidance and by enabling the dissemination of good practices. These categories describe the gateways for 'practical and legal effects' of the use of EU soft law for the EU and the MS level.[15]

At first sight, this may come as a surprise since EU soft law in principle, being no part of binding law, might be deemed of no legal significance for national administrations/courts. Undoubtedly, however, EU soft law does have practical effects, which also gives rise to certain domestic legal effects, at least in specific situations as the Court of Justice of the European Union (CJEU) recognized (to be addressed below).[16] Legal practice responds positively to EU soft law instruments and welcomes them as they at least further legal certainty and uniformity of interpreting and applying EU law in the MS. Due to its functions in the national application and implementation of EU law, EU soft law is legally relevant; it leads, however, not to uniform effects, but to a 'graduated normativity' before domestic fora.[17]

EU soft law first of all invades domestic implementation and application of EU law in informal ways by communicating ideas and concepts and hence, impacting the cognitive processes and the determination of priorities and preferences in the domestic administrative bureaucracy when applying EU law. This takes place when the application of EU law is embedded in common institutional arrangements with the EU level, i.e. in the EU´s shared/composite administration.[18] Domestic institutions take note of EU soft instruments due to their socialisation and education, the discursive and

[15] C van Dam, 'Guidance Documents of the European Commission: a Typology to trace the Effects in the National Legal Order' (2017) 10 (2) REALaw 75.
[16] For a critical account of the CJEU´s non-uniform jurisprudence on the legal effects of soft law for national institutions, see E Korkea-aho, 'National Courts and European Soft Law: Is Grimaldi Still Good Law?' (2018) 37 Yearbook of European Law 470; W Weiß, 'Reconsidering the Legal Effect of EU Soft Law in National Implementation: Bindingness in an Individual Rights Perspective' in P Láncos, N Xanthoulis and L Arroyo Jiménez (eds), *The Legal Effects of EU Soft Law* (Edward Elgar 2022, forthcoming).
[17] See PL Láncos, 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?' (2018) 24 EPL 755, 758; A Peters, 'Typology, Utility and Legitimacy of European Soft Law' in A Epiney, M Haag and A Heinemann (eds), *Die Herausforderung von Grenzen. Festschrift Roland Bieber* (Nomos 2007) 405, 410.
[18] P. Craig, *EU Administrative Law*, 3rd edn (Hart 2018) 80ff; O Jansen/B. Schoendorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011).

informative function and the proliferation of EU soft law in MS where institutions transfer ideas from EU soft law into domestic contexts.[19] Such processes lead to very heterogeneous and unpredictable appropriations of EU soft law by national institutions and may be particularly pertinent when EU law is vaguely drafted, leaves legal gaps or where it uses general legal concepts for whose application national institutions seek further guidance. The guidance following from EU soft law will reinforce their interpretative approach and increase legitimacy. Its practical success, of course, depends on institutional factors such as awareness of EU soft law or its usage by higher institutions as a role-model. Empirical studies point to diverse and policy-specific results in MS.[20]

In this way, EU soft law can lead to approximation of domestic administrative practices that it did not intend, as in case of soft law issued for informative purposes only in order to reason the implementing policy and exercise of discretion. An example are the Guidelines of the Commission on the method of setting fines in EU competition law[21] that were issued by the Commission with respect to its own sentencing practice at EU level. Nevertheless, these guidelines influenced domestic competition authorities; they aligned their fining practice to the Commission's one,[22] even though they were not issued to address also national sanctioning of EU competition law and even though MS enjoyed considerable procedural autonomy.

Consideration of EU soft law by domestic institutions can also be connected to 'soft' enforcement mechanisms (lacking judicial enforceability) which do not oblige compliance with EU soft law, but a reaction from MS authorities if they do not want to comply with EU soft law. An example are 'comply or

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[19] J Zeitlin, E Barcevicius and T Weishaupt, 'Institutional Design and National Influence of EU Social Policy Coordination' in idem (eds), *Assessing the Open Method of Coordination. Institutional Design and National Influence of EU Social Policy Coordination* (Palgrave Macmillan 2014) 26ff (with regard to the open method of coordination); Bérut (n 13) 156.

[20] See the national contributions in M Eliantonio, E Korkea-aho and O Stefan (eds), *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence* (Hart 2021); for example M Hartlapp, A Hofmann and M Knauff, ibid 155ff; PL Láncos, ibid. 177ff.

[21] Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' OJEU 2006 C 210/02.

[22] See PL Láncos, 'The Power of Soft Law: Spontaneous Approximation of Fining Policies for Anti-competitive Conduct – Part 1' (2019) 40 ECLR 538 and N Dunne, 'Convergence in Competition Fining Practices in the EU' (2016) 53 CMLRev 458.

explain' mechanisms or mutual expectations which require the domestic authorities to report, to respond, to cooperate or to otherwise engage with ideas, project or proposals from the EU level.[23] EU soft law is also received positively by national institutions when it accompanies EU directives to steer their transposition, as it may reduce complexity, explain the provisions of the directive and in this way increase legal certainty.[24] Even though in this case the steering effect is directed at the domestic legislative transposition, EU soft law may still be relevant for the interpretation of the new national rules thereafter, in domestic institutions´ endeavour to interpret them in compliance with EU directives.

3. EU COVID-19 Soft Law

The above practical and legal effects of EU soft law for domestic implementation of EU law have also been employed by the Commission in the management of the COVID-19 crisis. The Commission issued a multitude of soft law instruments across a diverse range of policy fields,[25] in particular in the area of public health,[26] competition and economic policy, including trade and investment,[27] with a view to coordinate MS reactions, achieve

[23] See F Coman-Kund and C Andone, 'Chapter 8. European Commission's Soft Law Instruments: In-between Legally Binding and Non-binding Norms' in Popelier et al (eds), *Lawmaking in Multi-level Settings*. *Legislative Challenges in Federal Systems and the European Union* (Nomos 2019) 173, 177. For the legal effects of comply and explain obligations with regard to EU soft law for national regulatory agencies in financial market regulation, see A-K Wolff, Cooperation Mechanisms within the Administrative Framework of European Financial Supervision (Nomos 2019) 166; M Simoncini, 'Legal Boundaries of European Supervisory Authorities in the Financial Markets' (2015) Yearbook of European Law 319, 326 f.

[24] M Hartlapp and A Hofmann, 'The Use of EU Soft Law by National Courts and Bureaucrats: how Relation to Hard Law and Policy Maturity matter' (2021) 44 WEurPol 134, 137.

[25] For an overview over the policy areas affected, see O Stefan, 'The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19' (2020) 7 JICL 329, 333. The EU has established a general website about its COVID response, see Commission, 'Coronavirus response' <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response_en> accessed 16 December 2021.

[26] For an overview, see the documents listed with regard to health policy, Commission, 'Public health' <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health_en#documents> accessed 1 December 2021.

[27] For an overview, see Commission, 'Jobs and economy during the coronavirus pandemic' <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic_en> accessed 1 December 2021.

convergence in the domestic responses to the pandemic and clarify legal issues in the application of EU law.[28] A Commission communication of 13 March 2020 dealt with a coordinated economic response to COVID-19,[29] only few days after its character as a pandemic had been recognized by the MS. A week thereafter, the Commission issued the first version of its Temporary Framework for State Aid Measures,[30] which quickly became adjusted to current needs, in particular to the demand for aids for recapitalisation of undertakings and support for small and start-up companies, and has since then been adjusted several times.

Apart from guidelines that address specific issues in a general, quasi-legislative way, the Commission also issued individual letters to clarify specific cases, like the cooperation of undertakings in the pharmaceutical and medical equipment sector.[31]

Beyond policy-specific guidelines, the Commission was also involved in managing the pandemic more generally. It issued a Joint European Roadmap towards lifting COVID-19 containment measures in April 2020,[32] which gave a set of general policy recommendations on how to gradually lift containment measures (i.e. end the lockdowns) and to break transmission chains. These recommendations intended to guide domestic institutions, in particular national governments, in their endeavours. In the Roadmap, the Commission promised to continue 'providing EU level tools as well as guidelines, both for the public health and the economic response'. The Commission reminded the MS to use the instruments available at EU level and announced to 'continue to analyse the proportionality of measures taken … to deal with the COVID-19 pandemic as the situation evolves and will intervene to request the lifting of measures considered disproportionate, especially when they have an impact on the Single Market.'[33]

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[28] O Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (2020) 5 European Papers 663, 664.
[29] Commission, 'Coordinated economic response to the COVID-19 Outbreak' (Communication) COM (2020) 112.
[30] Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (Communication) COM (2020) 1863.
[31] Commission, 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak' (Communication) COM (2020) 3200, 2020 OJ.EU C 116/7.
[32] Commission, 'Joint European Roadmap towards lifting COVID-19 containment measures' (Information) C/2020/2419, 2020 OJ.EU C 126/1.
[33] ibid p 11.

The Commission clearly expresses its expectation that the MS follow its advice, and announces intervention if domestic lockdown measures are disproportionate, especially when they have a negative impact on the EU Market. This particularly illustrates the Commission's attitude towards using soft law to trim domestic reaction to what it considers required by EU law and to restrict MS in the exercise of leeway actually granted to them by the public health exception to the fundamental freedoms.

4. Benefits of EU Soft Law, and the Competence Issue

Exceptional situations sometimes raise novel problems for which stakeholders look for reliable guidance from responsible administrations. Hence, soft law is an instrument, even though not formally binding, which contributes to clarifying what the law demands in a given situation. Soft law contributes to a type of legal certainty which flows from the informal guidance stakeholders or bureaucracies infer from them, and which usually is received positively as it interprets EU law in new circumstances. Hence, soft law supports the effectiveness of hard rules and principles. The informal guidance the Commission offered through its COVID-19 soft law in competition and procurement policy, for example, has been welcomed wholeheartedly by companies and competition enforcers.[34]

Beyond this, soft law has further advantages. The Commission can enact and amend it quickly, allowing adjustments and instant responses as necessary in crises and as happened in the COVID-19 case, too. The Temporary Framework in State Aids, for example, was amended six times to adjust to current needs as the crisis evolved. Hence, soft law is a valuable governance tool. There are no lengthy legislative procedures to go through. In principle, there are also no fixed rules for the enactment of soft law instruments by the Commission (as opposed to the Council, see insofar Article 292 sentence 2 and 3 TFEU); there is no prescribed procedure in place requiring participation and information rights or consultations. Thus, the flexibility and speed of enacting soft law makes it an ideal crisis response tool.

Also in substantive terms, soft law might be more flexible than hard law due to its lack of binding effect. MS might decide to depart from guidelines due

[34] R Baratta, 'EU Soft Law Instruments As a Tool to Tackle The COVID-19 Crisis' (2020) 5 European Papers 365, 370f; G De Stefano, 'Covid-19 and EU Competition Law: Bring the Informal Guidance On' (2020) 11 JECL & Pract 121.

to local peculiarities or national specificities,[35] and they can do so much easier than under the reign of hard rules.

Additionally, soft law texts may be received with greater acclaim compared to general, rather broad or vaguely drafted legislation because soft instruments might rule a situation on the basis of technocracy and practical approaches to urgent needs. Rather specific guidance by soft instruments might be deemed more suitable to guide through a crisis than general legislation.

A further advantage of soft law might concern the competence question. In view of the EU principle of conferral (Article 5 (1) TEU, Article 13 (2) TEU), EU institutions are allowed to adopt legal acts only if acting within conferred competences. The competence issue is twofold: the EU must be competent for the relevant policy field, and within this competence, the acting EU institution must have an institutional competence to act. Do these two requirements also apply to the adoption of soft instruments by an EU institution? Even though there is no formal legal bindingness, soft law nevertheless may entail, in specific circumstances, legal obligations for domestic institutions, e.g. a duty to consider.[36] Consequently, the enactment of soft law cannot be completely detached from said need of EU competence. The CJEU in some cases has rejected a binding effect for national authorities exactly with reference to their procedural autonomy, i.e. MS competence for transposition and implementation.[37] Any obligation to follow soft law, even if only in the sense of an obligation to take account of it, encroaches on this national competence. Furthermore, if there was no requirement of an EU competence also for soft law, the Commission could act in areas without EU legislative competence or no EU competence at all. Hence, an EU institution may only adopt soft law in policy fields subject to EU competences (see Article 2-6 TFEU). Secondly, with regard to the institutional competence to adopt soft law, this requirement might be reduced compared to the adoption of EU legislation, particularly in view of Article 292 TFEU which expresses that the requirements for a competence for EU institutions to

[35] Stefan (n 28) 664.
[36] For soft law bindingness in the MS, see E Korkea-aho, 'National Courts and European Soft Law: Is *Grimaldi* Still Good Law?' (2018) 37 YEL 470; PL Láncos, 'Hard Core in a Soft Shell: How Binding Is Union Soft Law for Member States?' (2018) 24 EPL 755.
[37] See eg CJEU, Case C-428/14 *DHL Express (Italy) und DHL Global Forwarding (Italy)* [2016] EU:C:2016:27 para 57.

adopt recommendations must not be set as specific as for legislative or executive law-making. The Treaty here introduces a differentiation depending on the task attributed to an EU institution. Council and Commission can both make recommendations; this power is not restricted further, so that Article 292 sentence 1 and sentence 4 may basically serve as the Treaty provision attributing their general competence to adopt soft law, even beyond the explicitly mentioned recommendations. The situation is different with regard to the European Central Bank (ECB), where Article 292 provides it can only make recommendations in the specific cases provided for in the Treaties. The competence of the ECB to adopt recommendations is thus more restrained as it needs an explicit primary law basis, while the adoption of soft acts by the Commission is generously granted, not least due to its general executive and administrative mandate in Article 17 (1) TEU. Article 292 TFEU therefore grants a general competence to the Commission to issue recommendations, which applies to all sorts of soft law instruments as notifications, communications and the like are not mentioned in the Treaties.[38] In sum, one can conclude that the Commission when enacting soft law instruments is not obliged to observe the strict limits of competences for the adoption of formal legal acts, but has to observe EU competences by acting within one of the EU policies. Consequently, the Commission can adopt soft law in EU policy areas, in which EU legislation or the harmonisation of national law is excluded (as e.g. in Articles 165 (4), 167 (5), 168 (5) TFEU). Interference with MS competence by Commission soft law, for example with regard to their decentral implementation of EU law, hence may be easier to justify than the transfer of formal legal implementing powers on the Commission, which – according to Article 291 (2) TFEU - may only be conferred upon the Commission in a legal act in case of need for uniform conditions for implementation. An example for acting by soft law within EU policies without hard legislative competences during the COVID-19-crisis are the soft law instruments in policy fields in which the EU hardly has any rule-making competence at all, such as in the area of supportive, coordinative or supplementary policies of Article 6 TFEU. The Commission adopted recommendations to the MS on how to combat and exit COVID-19, though the management of pandemics and emergencies is the genuine competence of the MS (limited EU competences to foster cooperation are provided in Article 196 TFEU). Nevertheless, the Commission adopted recommendations on a common EU toolbox aiming at a coordinated approach for the use of mobile apps for warning and contact tracing

[38] There are some very specific exceptions that do not contradict the above statement.

and for predicting the evolution of the virus.[39] Instead of citing specific EU competences, the Commission based its action on Article 292 TFEU generally and on the EU principle of solidarity.[40]

Another area for recourse to soft law are EU policies where the EU has only limited rule-making competences due to very restraint Treaty mandates or due to clear carve-outs from the EU´s legislative competences, as in certain areas of shared competences. In health policy, for example, the EU cannot harmonize national legislation, but the Council may adopt recommendations (see Article 168 (4) to (6) TFEU). Nevertheless, also the Commission adopts soft law instruments in health policy[41] that directly impact MS actions.[42]

Thus, the COVID-19 soft law in most cases remains within the boundaries of EU competences as they are defined only very generously, it stretches the limits of EU competences and sometimes might be seen to go beyond. Soft law that stays within the realm of EU competences as it does not lose the connection to EU policies (even though merely cooperative or supportive ones) is employed by the Commission to expand its institutional competences, which causes concern from a constitutional perspective with regard to the EU´s institutional balance of powers.

5. EU Constitutional Challenges, and Some Ways to Remedy Them

5.1 Constitutional Challenges of EU Soft Law to Democracy and the Rule of Law

The constitutional problems of EU soft law could be observed in the COVID-19 crisis. The critique refers to the shifts in the balance of power in

[39] Commission, 'Recommendation on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data' Commission Recommendation (EU) 2020/518 (2020 OJ.EU L 114/7).
[40] Ibid, recital 1.
[41] For an overview of the related soft law, see again Commission, 'Public health' <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health_en#documents> accessed 1 December 2021.
[42] KP Purnhagen et al, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) 11 EJRR 297.

favour of the executive, and consultations with stakeholders or even MS took place only at a rudimentary level.[43] Guidance of crises by soft law thus adds to the general concern over the EU´s democratic deficit. Therefore, calls for more informal guidance, in particular with a view to novel issues of e.g. adapting EU competition law to the requirements of the new Green Deal and the challenges posed by the digital economy[44], must be treated with utmost caution. The fundamental issues raised by the implementation of the Green Deal or the adaptation of EU competition law to digital business models are not to be compared with the urgencies of exceptional situations as caused by COVID-19. The new orientations for competition policy demanded by the implications of the Green Deal or of the Digitisation of the economy must be clarified in the usual political and legislative processes provided for in the EU as they raise fundamental questions. Otherwise, the abnormal situation could prevail under which crisis governance tools would become permanent mechanism of rulemaking. Such development clearly would deteriorate the legitimacy of EU governance as it might undermine or circumvent the legal safeguards of the usual procedures of rulemaking. Legislative processes engender a higher input and throughput legitimacy due to their institutional setting; there are detailed procedures and legislative frames to be followed which guarantee transparency, provide participatory capacities, and involve diverse institutions.

The EP clearly identified the constitutional problems of using soft law in a 2007 resolution[45], recognizing deficits in judicial protection and protection of individual rights. It held that the use of soft law, the key decision-making mode of traditional international organizations lacking formal law-making capacities, was a clear contradiction to the unique Community method. It opined that where the EU has legislative competence, the adoption of legislation is the proper way to act, having to respect subsidiarity and proportionality. The EP´s criticism is clearly directed against central interpretative and supplementary functions of soft law. The EP also urged the Commission

[43] Eliantonio and Stefan (n 6) 166ff and Stefan (n 255) 336ff.
[44] See G De Stefano, 'Covid-19 and EU Competition Law: Bring the Informal Guidance On' (2020) 11 JECL & Pract 121, 122.
[45] European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)).

to make efforts 'to guarantee transparency, visibility and public accountability' in adopting soft law.[46] Consequently, the EP demanded its consultation before the adoption of soft law, also with a view to more effective monitoring of the Commission.[47]

5.2. Proposal for a Remedy: A General Legal Framework for the Adoption of EU Soft Law

These constitutional challenges of soft law, in particular to its democratic legitimacy and rule of law, could be addressed by a general legal framework on the adoption of soft law by the Commission, formulated as a legislative act based on Article 298 TFEU.[48] The mandate in said Article for establishing a European administration could be used for establishing procedures for the adoption of non-binding executive acts. The rules should distinguish between adopting soft law in normal circumstances and EU soft law as crisis response, where rules for the latter category reflect the need for urgency and flexibility. Such a legislative framework should enshrine some basic legal principles and procedures for the adoption of EU soft law, which reflect the right to good administration (Article 41 CFR) and the duty of transparency (Article 15 TFEU). Alternatively, an Interinstitutional Agreement could be agreed between the Commission, the Council and the Parliament. It is, however, preferable to use an interinstitutional agreement only for hammering out the details of the proposed legislative act, in accordance with their usual function (Article 295 TFEU).

a) Subsidiarity and State Control

The first two principles to be included in the legislative framework are the principle of subsidiarity and control with specific contents. Subsidiarity means subsidiarity of Commission soft law vis-à-vis hard executive rule-making. In countering the concerns over soft law replacing hard law, the Commission must be obliged to give priority to the use of executive rule-making under Article 290 and Article 291 TFEU as the Commission very often is mandated in legislative acts to adopt delegated or implementing acts (Article 290 and 291 TFEU), in order to amend non-essential provisions of

[46] Ibid, para. 7.
[47] Ibid. para. 14, 16 ff.
[48] Also Eliantonio and Stefan (n 6) 174-175 demand a general legal frame that outlines detailed procedures of parliamentary involvement and consultations with stakeholder and national level.

EU legislative acts or to implement legislation. Making use of these mandates clearly is to be preferred over soft law. Executive rulemaking under Articles 290 and 291 TFEU is subject to procedural stipulations and constitutional requirements, under control by the EP, the MS and the Court. They serve the democratic legitimacy of EU rulemaking much better than EU soft law, while having benefits similar to soft law as regards technocratic expertise and flexibility. Executive rule-making requires clear legal bases, compliance with their procedures, and is subject to control mechanisms. Provisions for urgency, exceptional situations and expedited procedures in case of implementation rules exist (Articles 7 and 8 of the Comitology-Regulation 182/2011). If delegated or implementing rulemaking is not used, the Commission must be obliged to explain why it had preferred soft law.

The need for control relates to parliamentary involvement in order to remedy the fears of illegitimate quasi-rulemaking. The legal framework for the Commission´s implementation is set out in Article 291 (2) and (3) TFEU and in the Comitology Regulation 182/2011, which provide for a – though limited – control by the EP and by MS representatives. These rules may inspire the type of control mechanisms to be enshrined in the general framework as Commission soft law interferes with the domestic implementation of EU law. Therefore, Commission should be under a duty to consult with MS representatives before adopting soft law. In case of urgency, ex-ante information and ex-post consultation with MS governments within strict deadlines of e.g. two weeks may be required.[49] With regard to the EP, a control over Commission soft law comparable to Article 11 Regulation 182/2011 would constitute a considerable step forward, so that there is a consultation mechanism with the EP, consisting of an early information about the draft text and a right for the EP to adopt recommendations within four weeks. The EP´s objections could address the substance of the soft law, or the need for it, or the above-mentioned issue of subsidiarity. The Commission should be obliged to indicate how it dealt with the objections raised before adoption of soft law. In policy fields in which there hardly exists any EU legislation, one might even provide for a veto right of the EP. In case of urgency, the Commission can adopt the soft law quickly, with consultations ex-post requiring quick information for the EP, a duty for the EP to deliver any comments within a strict deadline of two weeks and an obligation for the Commission to consider them and make necessary adjustments within another two weeks thereafter.

[49] Two weeks are the deadline for ex-post information of MS foreseen in Article 8 (3) Regulation 182/2011 on urgency procedures.

b) Consultations

Another rule to be included would be the duty to consult with stakeholders before adoption of soft law.[50] The Commission has committed to consult or at least to enable stakeholders to provide feedback on draft delegated or implementing acts within four weeks.[51] This should be transferred to the adoption of soft law (except for merely preparatory one), at least in situations where soft law interferes with the implementation of EU law. The formal requirements for consultations may not reach the standard for legally binding acts. A duty of the Commission to provide stakeholders with the opportunity to give feedback to a draft soft instrument is sufficient. In case of urgent measures, such opportunity must be available in hindsight.

c) A Duty for a Provisional, Transparent and Reasoned Soft Law

Further provisions to be enshrined in the framework should pertain to limited duration of soft law, provide for procedural transparency and contain a duty to give reasons for the choice of a soft law instrument and its substance. Soft law should only have a limited temporal applicability. In case of urgency measures, soft law should automatically expire after six months, as provided for in Article 8 (2) Comitology Regulation 182/2011 with regard to urgent implementing measures, combined with the possibility to prolong if need be. Transparency should be implemented through a duty to publish information about the drafting and adoption procedures, in particular with regard to consultations with the EP, the MS and stakeholders, briefly indicating also their results. The duty to give reasons should, beyond the abovementioned subsidiarity, include an obligation to indicate a legal basis for the soft law (even though it may only refer to an EU policy field), to report about the situation that led to its adoption, and to state the objectives. In case of urgency, the duty to provide procedural transparency and to state reasons can be mitigated. The ReNEUAL Model Rules on EU Administrative Procedure may serve as an inspiration.[52] Similar to Article II-6 of the ReNEUAL Rules on General Administrative Decision-Making on expedited procedures, the Commission adopting an instrument without prior notifica-

[50] For such demand see Eliantonio and Stefan (n 48).
[51] See Better Regulation Guidelines, Commission Staff Working Document SWD (2017) 350, 40.
[52] 'ReNEUAL. Research Network on EU Administrative Law' <http://www.reneual.eu/projects-and-publications/reneual-1-0> accessed 8 December 2021.

tion and consultation, shall make public that an act has been adopted as urgent measure, give reasons, and start the necessary consultation and participation procedure within four weeks after the adoption.

d) Deciding about Domestic Legal Effect and Judicial Reviewability

Another challenge posed by EU soft law is its unclear legal effect before domestic institutions, an issue which has not been sufficiently clarified in the twists and turns in the CJEU case law. A general legislative framework for EU soft law hence opens the opportunity to clarify the topic by including a provision that entails a template guidance mechanism (unless otherwise provided), such as a duty of domestic institutions 'to comply or explain'. Hence, national institutions would be legally obliged not only to consider EU soft law but to comply with it, unless they can explain deviation. A milder alternative would be a duty of the Commission to engage with domestic authorities in order to discuss the domestic effect of a soft law instrument.[53]

Another, related challenge is the lack of judicial review of soft law to which the EP in its above-mentioned resolution of 2007 clearly drew attention. Responsibility of the Commission before Courts also in its capacity as a soft law maker is important for ensuring the rule of law in the EU. Due to its lack of legal bindingness, soft law is, by and large, not accepted by the CJEU as a challengeable act in actions for annulment.[54] The approach of the CJEU is more relaxed under the preliminary reference procedure as Article 267 TFEU confers on it jurisdiction to deliver a preliminary ruling on the validity and interpretation of all EU acts, without exception.[55] The latter, however, is of little help in the soft law context as domestic courts are not under a legal obligation to apply or comply with soft law; CJEU case law is not even consistent on the question of whether national courts must or only may consider EU soft law.[56] Consequently, domestic courts do not hold soft law decisive for their application of EU rules; there is no need for them to refer questions about interpretation or validity of soft law to the CJEU. A clear statement in a general framework on EU soft law regarding the usual legal

[53] For this proposal see Stefan (n 28) 669.
[54] For the inconsistencies in the case law of the CJEU insofar see A Arnull, 'Recommendations and Judicial Review' (2018) EUConst 609, 618 ff.
[55] CJEU, Case C-16/16 P *Belgium v Commission* [2018] EU:C:2018:79, para. 44.
[56] See CJEU, Case C-322/88 *Grimaldi* [1989] ECR 4407, paras 16, 18 versus CJEU, Case C-226/11 *Expedia*, EU:C:2012:795, para. 31; Case C-360/09 *Pfleiderer*, EU:C:2011:389 para. 21.

effect of EU soft law for domestic institutions might contribute to a reconsideration of this issue.[57]

6. Conclusion

The proliferation of soft law instruments the Commission used to cope with the COVID-19 pandemic has again illustrated the high salience of soft modes of EU governance in particular with regard to domestic implementation. While the benefits of EU soft law for crisis management and domestic implementation of EU law could be observed again during the COVID-19 pandemic, their challenges for democratic legitimacy and rule of law have also become manifest. These challenges should best be addressed by a legislative act that sets out a general framework for the adoption of EU soft law, core elements of which should be stipulations of subsidiarity vis-a-vis executive rulemaking and minimum procedural, transparency and justification requirements for the adoption of Commission soft law. Their domestic effects and reviewability should be clarified as well. The pending project of an EU regulation on administrative procedures[58] would be a suitable opportunity to incorporate the present proposals.

Bibliography

Arnull, Anthony, "Recommendations and Judicial Review - ECJ 20 February 2018, Case C-16/16 P, Kingdom of Belgium v European Commission", European Constitutional Review, Vol. 14, No. 3 (2018), 609-621.

Baratta, Roberto, "EU Soft Law Instruments As a Tool to Tackle The COVID-19 Crisis", European Papers, Vol. 5, No. 1 (2020), 365-373.

Bérut, Chloé, "The European Union as an opportunity: structures and uses of European soft law in French, Austrian and Irish eHealth policies", West European Politics, Vol. 44, No. 1 (2021), 155-175.

Coman-Kund, Florin and Andone, Corina, 'Chapter 8. European Commission's Soft Law Instruments: In-between Legally Binding and Non-binding Norms' in Patricia Popelier; Xanthaki, Helen; Robinson, Willian; Silveira, João Tiago and Uhlmann, Felix, Lawmaking in Multi-

[57] As demanded by Advocate General Bobek in his opinion in Case C-16/16 P *Belgium v Commission* [2017] EU:C:2017:959, para. 4.

[58] For a brief report of the state of affairs in this regard, see Parliament, 'Legislative train schedule' <https://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-eu-administrative-procedure> accessed 20 December 2021.

level Settings. Legislative Challenges in Federal Systems and the European Union, Nomos (2019).

Craig, Paul, EU Administrative Law, Oxford University Press, 3rd edn 2018.

van Dam, Clara, "Guidance Documents of the European Commission: a Typology to trace the Effects in the National Legal Order", Review of Administrative Law, Vol. 10, No. 2 (2017), 75-91.

Dawson, Mark, "Soft Law and the Rule of Law in the European Union: Revision or Redundancy?", EUI Working Papers RSCAS 2009/24.

Dunne, Niamh, "Convergence in Competition Fining Practices in the EU', Common Market Law Review, Vol. 53, No. 2 (2016), 453-492.

Eliantonio, Mariolina and Stefan, Oana, "The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU", European Journal of Risk Regulation, Vol. 12, Special Issue 1: Special Issue on COVID-19 and Soft Law (2021), 159-175.

Eliantonio, Mariolina; Korkea-aho, Emilia and Stefan, Oana (eds), EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence, Hart Publishing (2021).

European Commission, Staff Working Document, Better Regulation Guidelines, SWD (2017) 350 final.

European Commission, Temporary Framework for State Aid Measures to support the Economy in the current Covid-19 Outbreak, C(2020)1863 (OJEU CI 91/1) and its amendments, https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_de

European Commission, "Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients", COMP/OG – D(2020/044003), <https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf

European Commission, Communication, "Guidelines on seasonal workers in the EU in the context of the Covid-19 outbreak", C(2020)4813 final (OJEU CI 235/1).

European Commission, Communication, "Guidelines on progressive restoration of transport services and connectivity – COVID-19', C(2020) 3139 (OJEU C 169/17).

European Commission, Recommendation 2020/518, "Recommendation on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data", C(2020)3300 (OJEU L 114/7).

European Commission, Communication, "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak", C(2020)3200 (OJEU C 116/7).
European Commission, Information, "Joint European Roadmap towards lifting COVID-19 containment measures", C(2020)2419 (OJEU C 126/1).
European Commission, Communication, "Coordinated economic response to the COVID-19 Outbreak",COM(2020)112 final.
European Commission, "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003", OJEU 2006 C 210/02
European Commission, Communication, "Guidelines on progressive resumption of tourism services and for health protocols in hospitality establishments", C(2020)3251 (OJEU C 169/1).
European Parliament, Resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)).
Ferri, Deli, "The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis" Vol. 12, Special Issue 1: Special Issue on COVID-19 and Soft Law (2021), 176-195.
Hartlapp, Miriam and Hofmann, Andreas, "The Use of EU Soft Law by National Courts and Bureaucrats: how Relation to Hard Law and Policy Maturity matter", West European Politics, Vol. 44, No. 1 (2021), 134-154.
Jansen, Oswald and Schöndorf-Haubold, Bettina (eds), The European Composite Administration Intersentia (2011).
Knauff, Matthias, Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem, Mohr Siebeck (2010).
Korkea-aho, Emilia, "National Courts and European Soft Law: Is Grimaldi Still Good Law?" Yearbook of European Law, Vol. 37 (2018), 470-495.
Láncos, Petra Lea, "A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?", European Public Law, Vol. 24 No. 4 (2018), 755-784.
idem, "The Power of Soft Law: Spontaneous Approximation of Fining Policies for Anti-competitive Conduct – Part 1", European Competition Law Review, Vol. 40 (2019), 538-546
Peters, Anne, "Typology, Utility and Legitimacy of European Soft Law" edited by Astrid Epiney, Marcel Haag and Andreas Heinemann, Die Herausforderung von Grenzen: Festschrift für Roland Bieber, Nomos (2007), 405-428.

idem and Pagotto, Isabella, "Soft Law as a New Mode of Governance: A Legal Perspective.", New Modes of Governance Project, Project no. CIT1-CT-2004-506392, (2006).

Purnhagen, Kai P.; De Ruijter, Anniek and Flear, Mark L.; Hervey, Tamara K.; Herwig, Alexia, "More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak", European Journal of Risk Regulation (2020), 297-306.

Rossi, Matthias, „Soft Law im Europarecht – Auswirkungen auf die vertikale und horizontale Kompetenzverteilung", Zeitschrift für Gesetzgebung Vol. 35, No. 1 (2020), 1-21.

Senden, Linda, Soft Law in European Community Law, Hart Publishing, (2004).

Simoncini, Marta, "Legal Boundaries of European Supervisory Authorities in the Financial Markets", Yearbook of European Law, Vol. 34, No. 1 (2015), 319-350.

Snyder, Francis, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques", The Modern Law Review, Vol. 56, No. 1 (1993), 19-54.

Stefan, Oana, "The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19", Journal of International and Comparative Law, Vol. 7, No. 2 (2020), 329-350.

idem, "COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda", European Papers, Vol. 5, No. 1 (2020), 663-670.

idem, Soft Law in Court. Competition Law, State Aid and the Court Justice of the European Union, Wolters Kluwer Law & Business (2012).

De Stefano, Gianni, "Covid-19 and EU Competition Law: Bring the Informal Guidance On", Journal of European Competition Law & Practice, Vol. 11, No. 3-4, 121-123 (2020).

Weiß, Wolfgang, "After Lisbon, Can the European Commission Continue to Rely on "Soft Legislation" in its Enforcement Practice?", Journal of European Competition Law & Practice Vol. 2, No. 5 (2011), 441-451.

idem, "Reconsidering the Legal Effect of EU Soft Law in National Implementation: Bindingness in an Individual Rights Perspective", in Petra Lea Láncos, Napoleon Xanthoulis and Luis Arroyo Jiménez (eds), The Legal Effects of EU Soft Law: Theory, Language and Sectoral Insights into EU Multi-level Governance, Edward Elgar (forthcoming, Edward Elgar 2022).

Wolff, Ann-Katrin, Cooperation Mechanisms within the Administrative Framework of European Financial Supervision, Nomos (2019).

Zeitlin, Jonathan; Barcevicius, Egidijus and Weishaupt, Timo, 'Institutional Design and National Influence of EU Social Policy Coordination' in idem (eds), Assessing the Open Method of Coordination. Institutional Design and National Influence of EU Social Policy Coordination, Palgrave Macmillan (2014).

CHAPTER FIVE

ADMINISTRATIVE ADJUDICATIONS DURING THE PANDEMIC

RUSSELL L. WEAVER*

In 2020, the Covid-19 pandemic engulfed the world, forcing societies and economies into lock down,[1] and completely disrupting day-to-day life. Weddings were postponed,[2] courts were closed, and churches were discouraged from holding in-person services.[3] France shuttered restaurants,[4] theaters[5] and museums,[6] and imposed a nightly curfew (couvre-feu).[7]

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[1] *See* Gabriel Leung, "Lockdown Can't Last Forever, Here's How to Lift It," *International New York Times,* April 8, 2020. https://www.nytimes.com/2020/04/06/opinion/coronavirus-end-social-distancing.html

[2] *See* Ceylan Yeginsu, "The Wedding is Postponed. Again", *International New York Times*, February 11, 2021. https://www.nytimes.com/2021/02/11/travel/coronavirus-destination-wedding-postponed.html

[3] *See* Elizabeth Dias, "After Weeks on Zoom, Churches Consider Plans to Reopen," *International New York Times*, May 9, 2020. https://www.nytimes.com/2020/05/07/us/church-reopening-coronavirus.html

[4] *See* Roger Cohen, "Paris, Shuttered, Must be Imagined", *International New York Times*, January 30, 2021. https://www.nytimes.com/2021/01/30/world/europe/covid-france-paris.html

[5] *Id.*

[6] *Id.*

[7] *See* Adam Nossiter, "Will a Half-Step by Macron be Enough to Blunt France's Second Wave?", *International New York Times*, Oct. 17, 2020.

While hotels remained open, they had few occupants.[8] Paris even halted the tourist boats that ply the Seine River,[9] and the French stopped giving their beloved "bisous" (the French greeting whereby one greets another with a kiss on both cheeks) for fear of spreading the virus.[10]

In the U.S., as the pandemic gripped society, day-to-day life changed from in-person to online in most areas of life. Not only did elementary and secondary schools and colleges move to remote teaching,[11] many churches began holding online services.[12] In the judicial arena, because the Covid-19 virus was rampant in prisons and jails, many courts stopped holding jury trials, as well as many other in-court activities, for fear of spreading the virus.[13] One court even held a criminal jury trial online.[14] As one commentator noted, it is clear that this pandemic is forcing us to live differently, and we are left to ponder what changes to our lives and our society may become permanent.[15]

This article examines how the pandemic affected administrative adjudications, and speculates regarding the permanency of these changes. Since much of the literature regarding online adjudications focuses on traditional civil and criminal courts, rather than administrative courts, observations regarding traditional courts are woven into the discussion.

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https://www.nytimes.com/2020/10/15/world/europe/france-coronavirus-second-wave.html

[8] *See* Jack Ewing, "Europe Risks a New Economic Downturn as Lockdowns Return", *International New York Times*, November 2, 2020. https://www.nytimes.com/2020/10/30/business/european-economy.html

[9] *See Paris, Shuttered, Must be Imagined, supra* note 4.

[10] *Id.*

[11] *See* Scott Simon, "How Students At A North Carolina Elementary School Are Faring With Remote Learning", National Public Radio, Weekend Edition Saturday (Jan. 30, 2021). https://www.npr.org/2021/01/30/962357982/how-students-at-a-north-carolina-elementary-school-are-faring-with-remote-learni

[12] *See After Weeks on Zoom, Churches Consider Plans to Reopen, supra* note 3.

[13] *See* Jenia I. Turner, "Remote Criminal Justice", *Tex. Tech. L. Rev.* 197, no. 53, 198 (2021).

[14] *Id.*

[15] *See* Benjamin Cooper, "Preliminary Thoughts on Access to Justice in the Age of Covid-19", *Gonz. L. Rev.* 227, no. 56, 228 (2021).

I. The Movement Online

Even before the pandemic, the internet had begun to alter the way that administrative agencies function. For example, the U.S. government had already begun publishing many documents online, including the Federal Register,[16] the Code of Federal Regulations,[17] the U.S. Government Manual,[18] and a host of other documents.[19]

The internet had also transformed administrative rulemaking.[20] The formerly paper-laden "notice and comment" rulemaking process had become an electronic system[21] as federal agencies came "to use e-rulemaking to inform regulatory processes by making rulemaking materials—including proposed rules, scientific and technical support, and public comments—widely accessible, enabling diverse and effective public participation."[22] Not only had agencies moved their notices of public rulemakings (NOPRs) online, they also made it possible for individuals to submit comments online, remotely review the comments submitted by others, and electronically respond. When agencies issued final rules, they routinely published those rules (along with a statement of their basis and purpose) online.

II. The Pandemic Spurs Further Online Activity

The pandemic provided a major impetus towards online adjudications, not only in administrative agencies, but in traditional (non-administrative) civil and criminal courts. Faced with the worst public health crisis in a century,[23] during which it was unwise to hold in-person hearings,[24] courts

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[16] https://www.federalregister.gov/
[17] https://www.ecfr.gov/cgi-bin/ECFR?page=browse
[18] https://www.usgovernmentmanual.gov/
[19] *See* https://libraryguides.law.pace.edu/c.php?g=319332&p=2134043
[20] *See* Russell L. Weaver, "Rulemaking in an Internet Era: Dealing with Bots, Trolls & 'Form Letters'", *George Mason L. Rev.* 553, no. 27, 554-569 (2020).
[21] *See* Jeffrey S. Lubbers, "A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking", *Admin. L. Rev.,* 451, no. 62 451 (2019), 452-453; Nina Mendelson, "Rulemaking, Democracy and Torrents of Email", *Geo. Wash. L. Rev.*, 1343, no. 79 (2011); Laura Moxley, "E-Rulemaking and Democracy", *Admin. L. Rev.* 661, no. 68, 2016.
[22] Moxley, *supra* note 9, at 663.
[23] *See* Jeremy Graboyes, "How Agency Adjudication is Evolving During the Covid-19 Pandemic", 46 *Admin. & Regul. Law News*, 7, no. 46, 2020.
[24] *See* Steve Inskeep, "Courts Try To Resume In-Person Proceedings As Safely As

struggled for ways to maintain the continuity of their operations while fulfilling the cultural and societal necessity of social distancing.[25]

Although online judicial proceedings had not been used frequently before the pandemic, they had existed since 1972.[26] In 2016, the United Kingdom court system had allocated £730 million to revolutionize courtroom technology, including the creation of new online courts charged with handling small claims of up to £25,000.[27] That same year, British Columbia created an online small claims tribunal for claims of up to Can$5000.[28] Likewise, the Netherlands created a system which allowed divorcing couples and disputing neighbors to resolve their cases online.[29] In the United States, pre-pandemic, some state courts were using Matterhorn software to process outstanding warrants and traffic violations.[30]

The pandemic brought an entirely new urgency to the movement towards online adjudications. Traditional criminal courts faced particular urgency as some arrestees languished in jail for weeks or months with no prospect of relief.[31] In an effort to deal with this problem, many criminal courts began making bail determinations, accepting pleas, and conducting sentencing hearings online.[32] But many other trial courts held online hearings in both civil and criminal cases as a way of moving cases forward without jeopardizing public health.[33] Some U.S. appellate courts offered the parties the choice of submitting cases without oral argument in order to avoid delay,[34] or of holding in-person arguments with enforced social distancing, masks and plexiglass barriers.[35] They also began holding telephonic arguments (as did the U.S. Supreme Court), and video/Zoom

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Possible", National Public Radio, Morning Edition, September 10, 2020 ("Along with so much of American life, the pandemic stopped ordinary court proceedings.") https://www.npr.org/2020/09/10/911349856/courts-try-to-resume-in-person-proceedings-as-safely-as-possible

[25] *See* Pierre Bergeron, "Covid-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?", *J. App. Prac. & Process*, 193, no. 21, 194 (2021).

[26] *See id.* at 199; Turner, *supra* note 13, at 201.

[27] Ethan Katsh, "The New New Courts", *Am. U. L. Rev.*, 165, no. 67, 166 (2017).

[28] *Id.*, at 166-167.

[29] *Id.*, at 167.

[30] *Id.*, at 167.

[31] *Id.*

[32] *See* Turner, *supra* note 13, at 198.

[33] *See id.*, at 223.

[34] Bergeron, *supra* note 25, at 200.

[35] *Id.*, at 200.

arguments.[36]

The movement towards online hearings in criminal cases was spurred by the passage of the CARES Act in 2020.[37] That Act authorized the use of videoconferencing for a range of federal criminal proceedings, including arraignments, detention hearings, preliminary hearings, and misdemeanor plea hearings in emergency situations.[38] In response to the CARES Act, the Judicial Conference of the United States found that "emergency conditions due to the national emergency declared by the President … with respect to the Coronavirus Disease 2019 (COVID-19) will materially affect the functioning of the Federal courts generally."[39] This declaration empowered "chief district judges, under certain circumstances and with the consent of the defendant, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings during the COVID-19 national emergency."[40] State courts were also authorized "to use online hearings for urgent and essential matters, including bail, plea, and sentencing hearings.[41]

Traditional courts also responded to the pandemic by modifying their procedures. For example, some courts allowed e-signatures, permitted virtual notarization of documents, and accepted digital documents for filing.[42] In addition, some courts held online proceedings. In Texas, for example, courts began holding thousands of Zoom hearings per week, including a summary jury trial.[43] Other states also used videoconferencing to conduct court hearings.[44]

At administrative agencies, the pandemic also accelerated the movement to online work and online hearings. Electronic case management systems were commonplace before the pandemic,[45] and the Department of the Interior had routinely posted administrative opinions online.[46] Likewise,

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[36] *Id.*
[37] Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, § 15002 (2020).
[38] *See* Turner, *supra* note 13, at 223-224.
[39] *See* Turner, *supra* note 13, at 223.
[40] *Id.*
[41] *Id.*, at 223-224.
[42] *See* Cooper, *supra* note 15, at 235.
[43] *See id.*, at 235.
[44] *See id.*
[45] *See* Graboyes, *supra* note 23, at 6.
[46] *See* https://www.doi.gov/oha/searchdecisions

the Social Security Administration (SSA) required "most representatives to submit documents and view records through an online portal,"[47] and Securities and Exchange Commission employees completely moved to telework.[48]

Once the pandemic set in, immigration courts began postponing hearings in all non-detained cases.[49] For cases that were actually heard, the agency imposed a variety of Covid-19 restrictions.[50] Many other agencies (e.g., the Susquehana River Basis Commission) began holding telephonic hearings.[51]

Following an initial period when many offices simply postponed in-person hearings, agencies began developing detailed protocols to conduct hearings using videoconferencing platforms like Zoom and Cisco WebEx. SSA announced it would begin offering online hearings through Microsoft Teams.[52] Virtual hearings were held by the Environmental Protection Agency,[53] and the Louisville Air Monitoring Network.[54] The Board of Veterans Appeals deployed its virtual hearing application in April, 2020.[55] In order to facilitate the movement to online work, the Federal Communications Commission sought to keep Americans connected

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[47] *Id.*
[48] *See* https://www.sec.gov/sec-coronavirus-covid-19-response
[49] *See* https://www.justice.gov/eoir-operational-status ("Hearings in non-detained cases at courts without an announced date are postponed through, and including, April 16, 2021.").
[50] *See* https://www.justice.gov/eoir/public-health-notice
[51] *See* https://www.federalregister.gov/documents/2020/10/20/2020-23173/public-hearing
[52] *See* Graboyes, *supra* note 23, at 6.
[53] *See* https://www.gov/coronavirus/virtual-public-meetings-during-covid-19-national-emergency ("Consistent with the Presidential Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak and state and local stay-at-home directives, EPA is supportive of holding public hearings and meetings virtually in order to continue to provide meaningful public participation and engagement during the current circumstances."); https://www.epa.gov/sites/production/files/2020-04/documents/ogc_virtual_hearing_memo_4-16-2020.pdf
[54] *See* https://louisvilleky.gov/government/air-pollution-control-district/covid-19-information ("The APCD conducts its public meetings and hearings online now due to the COVID-19 restrictions on large gatherings.").
[55] *Id.*

through broadband and telephone services.[56]

One of the agencies with the most adjudications, the Social Security Administration (SSA), completely stopped holding in-person hearings, and moved to telephonic and online hearings only.[57] SSA issued the following announcement:

> In March 2020, we closed Social Security hearing offices to the public for in-person service due to the COVID-19 pandemic. This closure protects the population we serve—older Americans and people with underlying medical conditions—and our employees during the Coronavirus (COVID-19) pandemic. Our hearing offices will be closed to the public for the foreseeable future, and we will not be offering in-person service in our hearing offices. Instead, we are providing two flexible, safe and secure hearing options. In order to have a hearing and receive an answer on your claim, we strongly encourage you to accept either a telephone hearing or—coming soon—an online video hearing.

The Department of Labor did likewise.[58] The Department's initial order, issued on March 13, 2020, focused primarily on telephonic hearings:

> In view of the risks presented by the novel coronavirus COVID-19, the United States Department of Labor, Office of Administrative Law Judges (OALJ) is, effective Monday, March 16, 2020 through Friday, April 10, 2020, suspending all in-person hearings, settlement judge conferences and mediations. With the consent of the parties and in coordination with the presiding administrative law judge, hearings may continue by telephone or by other means.[59]

As the pandemic progressed, the Department of Labor explicitly endorsed the idea of video hearings:

> Due to the continuing travel and social proximity risks attendant with the ongoing COVID-19 pandemic, the moratorium on in-person hearings where participants are physically in the same location, currently scheduled to expire on July 24, 2020, is extended indefinitely. Effective immediately, and until further notice, OALJ hearings will be conducted by telephone or video, unless the presiding ALJ grants, based on compelling reasons, a

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[56] *See* https://www.fcc.gov/coronavirus
[57] *See* https://www.ssa.gov/appeals/hearing_options.html
[58] *See* https://www.dol.gov/agencies/oalj/COVID_19_AND_HEARINGS
[59] *See* https://www.oalj.dol.gov/DECISIONS/ALJ/MIS/2020/In_re_IN_RETEMPORARY_SUSPE_2020MIS00004_(MAR_13_2020)_080641_CADEC_PD.PDF?_ga=2.34944225.1534810182.1616862614-745949789.1616862614

> party's motion for a hearing where persons are in the same physical location.[60]

DOL coupled these orders with an update to its e-filing system, as well as with an order allowing judges to issue electronic decisions and providing for the e-signing of documents.[61] The Department also encouraged all parties to file appeals electronically.[62] Similar steps were taken at the Federal Energy Regulatory Commission which authorized all employees to move to teleworking,[63] and moved all conferences online.[64]

The pandemic prompted agencies to review and compare video platforms. As one commentator noted, whereas "agencies once focused on the simple distinction between in-person, telephone, video, and written hearings, they are now eagerly comparing Zoom and WebEx, PSTN and VoIP, and asking how different technologies and software programs can affect hearings."[65]

Many agencies also allowed various types of documents to be filed online. For example, the U.S. Department of Justice's Executive Office for Immigration Review implemented an electronic case filing system which made it possible to check the status of a case online.[66] SSA allowed individuals to file online appeals of adverse determinations in disability cases.[67] The process allowed individuals to seek a variety of different

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[60] *See id.*

[61] *See* https://www.dol.gov/agencies/oalj/COVID_19_AND_HEARINGS ("The United States Department of Labor is launching a new eFile/eServe System ("EFS") on Monday, December 7, 2020. The website address for EFS is https://efile.dol.gov/.
EFS is the Department's next generation, shared system for electronic filing in proceedings before the Administrative Review Board ("ARB"), Benefits Review Board ("BRB"), Employee Compensation Appeals Board ("ECAB"), Office of Administrative Law Judges ("OALJ"), and Board of Alien Labor Certification Appeals ("BALCA").").

[62] *See id.*

[63] *See* https://www.ferc.gov/news-events/media/coronavirus ("ERC offices at 888 First Street NE, Washington, DC, are closed to the public; minimal staff are on site. All Commission employees are authorized to telework and are available via email and phone. Staff are teleconferencing, and are canceling or postponing in-person meetings.").

[64] *See id.* ("Conferences will be rescheduled or conducted via WebEx.").

[65] *See* Graboyes, *supra* note 23, at 7.

[66] *See* https://www.justice.gov/eoir/ECAS

[67] *See* https://www.ssa.gov/benefits/disability/appeal.html

things: Reconsideration; Hearing by an administrative law judge; Review by the Appeals Council; Federal Court review.[68]

Agencies even developed processes that allowed the parties to privately consult with the adjudicator or their counsel in breakout rooms during online hearings (as did the Civilian Board of Contract Appeals (CBCA)) or exchange privileged information by sending those who have not signed a nondisclosure agreement to the virtual lobby or waiting room (as the Federal Energy Regulatory Commission's (FERC) Office of Administrative Law Judges did).[69]

Because online hearings and social distancing limitations can restrict public access to agency proceedings, agencies like the Federal Trade Commission and FERC began providing call-in numbers, streaming live video, and posting recordings and transcripts to their websites.

In addition to prioritizing basic operational continuity during the pandemic, agencies tried to balance a range of competing considerations: due process, accuracy, consistency, fairness, access to counsel, data security, privacy, transparency, support for self-represented parties, and accessibility for those with medical, psychological, educational, linguistic, technological, or other limitations.[70]

III. The Advantages of Online Adjudication

Unquestionably, technology has created a number of efficiencies for administrative agencies.[71] For example, it has streamlined processes so that are judges are able to provide e-signatures for their orders and decisions,[72] and can use "email, file hosting services, and collaboration applications like SharePoint to accept applications, exchange documents, review evidence, and issue decisions."[73] Agencies using these techniques include the "Department of Labor's (DOL) Office of Administrative Law Judges, the National Labor Relation Board's (NLRB) Division of Judges, the Department of the Interior's Interior Board of Land Appeals, and the

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[68] *Id.*
[69] *See* Graboyes, *supra* note 23, at 6.
[70] *See id.*, at 6-7.
[71] Judge Scott U. Schlegel & Jennifer Eagan, *There is No Going Back: Innovations in Courtroom Technology Must Continue*, 37 GPSOLO 40, 42-43 (2020).
[72] *See id.*, at 42-43.
[73] *See* Graboyes, *supra* note 23, at 6.

Commodity Futures Trading Commission's Reparations Program."[74]

During the pandemic, most agencies found that video hearings were superior to telephonic hearings. Telephonic hearings can be "challenging" because neither the court nor the parties can observe the judges' "facial expressions" or know when to pause for a question.[75] Indeed, counsel sometimes interrupted each other during telephonic hearings, and judges sometimes found it difficult to know when to speak.[76] In traditional courts, when multi-member appellate panels were involved, questioning could be particularly difficult and judges could "trip over their colleagues' questions or perhaps (inadvertently or not) interrupt them."[77] Indeed, even at the U.S. Supreme Court, the telephonic solution was not perfect: "As veteran Supreme Court advocate Carter Phillips observed, the telephonic arguments 'seemed stilted to me because there was no real interaction among the justices in the questions they asked beyond the frequent comment that a question was a follow-up to a previous question by one of the other justices.' "[78]

By contract, online adjudicatory hearings offered both agencies and the parties significant benefits: "they saved attorneys and participants time by not having to travel to or wait in courtrooms."[79] As one commentator noted regarding traditional judicial proceedings: "Why are lawyers and litigants still required to drive countless miles back and forth to the courthouse, burn gas, pay for parking, and suffer through an often-complex screening process when a status conference or simple motion hearing may be handled by video from a home or office in 15 minutes?"[80] As a result, many lawyers were "elated" at the idea of "appearing in court" from their home or office.[81]

Online hearings were also beneficial because they produced more reliable scheduling, and help provide for the prompt resolution of cases."[82] As in traditional courts, "expert witnesses can schedule their participation in

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[74] *See id.*, at 6.
[75] Bergeron, *supra* note 25, at 201.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *See* Turner, *supra* note 13, at 199; *see also* Bergeron, *supra* note 25, at 203.
[80] Schlegel & Eagan, *supra* note 71, at 42.
[81] *Id.*
[82] *See* Turner, *supra* note 13, at 199.

advance and are not burdened by having to travel to a hearing."[83] In addition, witnesses "who live far from the courthouse or who have demanding work or child care schedules are also more likely to take part via video."[84]

As one might have guessed, most judges preferred online hearings to telephonic hearings. In a study of appellate judges in traditional courts, there was a clear preference for in-person arguments.[85] However, when in-person arguments weren't possible, the judges stated a clear preference for Zoom arguments, presumably because they viewed telephonic arguments as inadequate.[86] Most appellate judges found "found the Zoom technology relatively easy to use and a reasonably adequate substitute for in-person oral arguments."[87] As one state justice remarked, "The video oral arguments have worked well. I'm looking forward to returning to live oral arguments, but I think there may be a place for video oral arguments in the future."[88] Another justice remarked: "Zoom has been fantastic."[89]

Some believe that video hearings tend to "expedite the resolution of cases,"[90] but the evidence is far from clear. Some have argued that online hearings are less expeditious because they give the parties fewer opportunities for in-person discussions and negotiations, and thereby hinder the resolution of cases.[91] However, online adjudications can actually require more time "because of technological problems and in part because the remote setting makes it easier to adjourn the hearing and reconvene on another date."[92]

Some lawyers like online hearings because they have easy access to their "case files, relevant precedent, and exhibits" at their desks without having to "lug" those materials to court.[93] Some lawyers believe that Zoom hearings are less formal; something which can be comforting to "less-

[83] *See id.*, at 213-214.
[84] *See id.*, at 213-214.
[85] Bergeron, *supra* note 25, at 203.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See* Turner, *supra* note 13, at 214.
[91] *See id.*, at 245.
[92] *See id.*, at 214.
[93] Bergeron, *supra* note 25, at 205.

experienced lawyers who might find the courtroom imposing."[94]

Some also believe that online proceedings help increase public access to adjudicative proceedings.[95] To the extent that online proceedings are public, rather than confidential, many different constituencies can easily view them online from distance.[96]

IV. The Challenges of Moving Online

Despite the obvious advantages of online hearings, some believe that "trials and contested evidentiary hearings" are "ill-suited to the remote format."[97] Online proceedings can make it difficult for attorney and clients to communicate with each other when they are located in different places.[98] Online proceedings can also make it more difficult for parties to present evidence, as well as to cross-examine opposing witnesses.[99]

In addition, online hearings require that both the agency and the parties have adequate technologies available.[100] SSA's website provides as follows:

> You, and your representative if you have appointed one, have two remote options to have your hearing: by telephone or by online video using Microsoft Teams. Online video hearings allow hearing participants to easily and safely attend their hearing through live video on a computer, an Apple or Android tablet, or a mobile device equipped with: Speakers and a microphone; Camera; Internet connection.[101]

The difficulty is that not everyone has access adequate technologies, particularly those who live in rural areas.[102] Thus, there is a so-called "digital divide."[103] As one commentator noted:

> High-speed internet access is obviously critical to accessing online courts, self-help resources, and other technological innovations. According to the

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[94] *Id.*
[95] Bergeron, *supra* note 25, at 203.
[96] *Id.*
[97] *See* Turner, *supra* note 13, at 201.
[98] *See id.*, at 199.
[99] *See id.*
[100] *See id.*, at 215.
[101] https://www.ssa.gov/appeals/hearing_video.html
[102] See Cooper, *supra* note 15, at 239.
[103] *Id.*

> Federal Communications Commission, 25 million people live in areas with no high-speed internet service providers (19 million of which are in rural America). This statistic could be understating the problem. A recent analysis conducted by Microsoft using its own signal data shows that 162.8 million Americans were not using the internet at broadband speeds.[104]

Another commentator noted that reliable internet access does not exist in all parts of the country,[105] emphasizing that some rural counties lack reliable broadband Internet.[106]

Online hearings can also be subject to various problems, including difficulties with sound quality, making sure that remote observers do not interrupt the proceedings, and making sure that the parties have adequate technical support.[107] For example, an online criminal jury trial conducted in Texas was subject to "numerous audio glitches that caused jurors to ask the prosecutor to repeat herself."[108] Similarly, a study of online plea hearings found connectivity problems in about 20% of cases.[109] A study of online family court proceedings concluded that 50% of the proceedings "had some kind of problem with technology, although many were minor and quickly resolved (e.g. problems logging in, audio quality)."[110]

Technological difficulties create the risk that the parties may be unwillingly absent during "important parts of a proceeding."[111] For example, in a criminal case in state court, a "defense attorney related a story regarding a technology glitch that precluded him from participating in part of a proceeding: "I was kicked off a proceeding that continued without me. When I logged back on, it was over and no one had noticed I had not been present. Very disconcerting."[112]

Online hearings can also make it difficult for the factfinder to evaluate the veracity of witnesses.[113] As one commentator noted: "While judges and juries are generally not very accurate in evaluating the credibility of

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[104] *See id*., at 239-240.
[105] Bergeron, *supra* note 25, at 207; Turner, *supra* note 13, at 255.
[106] *See* Turner, *supra* note, at 244.
[107] Bergeron, *supra* note 25, at 210.
[108] *See* Turner, *supra* note 13, at 255.
[109] *Id.*, at 255-256.
[110] *Id.*, at 256.
[111] *See id.*, at 255.
[112] *See id.*
[113] *See id.*, at 199 & 218-219.

witnesses based on demeanor, when the testimony occurs via video, the technology can further mar such assessments."[114] In video proceedings, there can be lighting problems, difficulties in viewing a defendant's body language, and audio difficulties, all of which may encourage the factfinder to view a witness as less credible."[115] In one study of traditional courts "mock jurors evaluated the in-person witnesses as more accurate and honest, and this assessment affected the verdict of the mock jurors."[116] Studies from the criminal arena suggest that even video size can affect the factfinder's perceptions in a negative way.[117]

In some instances, it can also be difficult to cross-examine witnesses in video proceedings.[118] Some commentators suggest that "witnesses are less likely to be forthcoming when they are not being directly watched by the judge and the defendant, and are not in the solemn atmosphere of the courtroom."[119] In addition, "remote witnesses may be coached off-camera, distracted, or influenced by the testimony of other witnesses because it is difficult to police such behaviors on video."[120] In addition: "Lawyers, judges, and jurors can likewise be distracted by events occurring on their computers or in the background."[121]

There can also be security concerns, especially in confidential proceedings and in agencies with aging technologies.[122] "For example, Zoom users have experienced 'Zoombombing,' whereby intruders interrupt a call, often armed with inappropriate material, and these interruptions have invaded judicial proceedings."[123] In addition, recordings of "sensitive conversations conducted through Zoom and which include personally

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[114] *See id.*, at 219-220.
[115] *See id.*, at 218.
[116] *See id.*, at 220-221.
[117] *See id.*, at 220-221 ("Likewise, a recent study found that the size of a video image strongly influences mock jurors' evaluation of the evidence and the size of punishment imposed on the defendant by the mock jurors upon conviction. This suggests that certain video conference arrangements, which are not large enough or do not display a full body picture of the defendant or witnesses, may negatively affect the perceptions of the factfinder.").
[118] *See id.*, at 218-219.
[119] *See id.*.
[120] *See id.*
[121] *See id.*, at 219.
[122] Bergeron, *supra* note 25, at 208-209.
[123] *Id.*, at 209.

identifiable information have also been found scattered online."[124] One court actually suspended Zoom arguments until security protocols could be implemented.[125]

Conclusion

The Covid-19 pandemic forced administrative agencies into a crash course on how to conduct online proceedings. During that process, it became clear that both traditional courts and administrative courses were not constructed with a pandemic in mind. As one commentator noted, "courts--like most brick-and-mortar businesses--are not equipped to handle a crisis of such magnitude. . . . [J]udges require large amounts of physical space to conduct most of their business. Many of the buildings providing that physical space were constructed decades, if not centuries, ago when paper and pen, sheathed tomes, and bound catalogs ruled the day."[126]

One of the refreshing things about the pandemic is that many agencies were able to adapt to the pandemic by converting to online proceedings. Although there were occasional problems with these proceedings, including technological glitches, online systems made it possible for agencies to continue conducting essential adjudications.

The future of online judicial proceedings is far from clear. One commentator observed that "once citizen litigants see the benefits of virtual courtroom proceedings in cost, efficiency, and time savings, they . . . will demand more."[127] Another commentator agreed: for in-person arguments, many courts by then will have at least six months or more of experience with Zoom. My prediction is that as judges and lawyers alike grow more comfortable with this medium, it will be here to stay in some manner.[128] As another commentator noted, "In this day and age where mistrust for most governmental institutions runs deep, . . . transparency can prove vital in protecting the integrity of the judiciary in the public's mind."[129]

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[124] *Id.*
[125] *Id.*
[126] Schlegel & Eagan, *supra* note 71, at 40.
[127] Patrick Palace & Jordan L. Couch, "Ten Predictions: How Covid-19 Will Change the Legal Industry Forever", *GPSOLO* 6, no. 37 (2020).
[128] Bergeron, *supra* note 25, at 218-219.
[129] *Id.*, at 219.

However, there is hardly agreement about the future. A survey of judges in traditional courts suggests mixed views regarding the future of online proceedings. Some judges suggested that they were open to "a future in which video arguments will continue to play an on-going role."[130] That study quotes one state supreme court justice who stated: "I think they [video arguments] will continue to be part of what we do."[131] Another judge recognized that video arguments would continue after the pandemic ended, but suggested that they should be limited to "special circumstances."[132] One judge was more critical, suggesting that "Zoom provided a useful tool to navigate these uncharted waters, but observed 'a different level of advocacy by the parties, and while the judges are engaged, it is simply not as intense and focused as in the courtroom.' "[133] Several judges "unequivocally checked 'no' when asked if they envisioned any future for video arguments in their courts.[134]

Undoubtedly, some online aspects will continue. For example, new electronic processes for submitting, exchanging, and reviewing applications, evidence, and other documents will almost certainly outlast the pandemic in some form."[135]

Bibliography

Bergeron, Pierre, "Covid-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?", *J. App. Prac. & Process*, 193, no. 21, 194 (2021).

Cohen, Roger, "Paris, Shuttered, Must be Imagined", *International New York Times*, January 30, 2021. https://www.nytimes.com/2021/01/30/world/europe/covid-france-paris.html

Cooper, Benjamin, "Preliminary Thoughts on Access to Justice in the Age of Covid-19", *Gonz. L. Rev.* 227, no. 56, 228 (2021).

Dias, Elizabeth, "After Weeks on Zoom, Churches Consider Plans to Reopen," *International New York Times*, May 9, 2020. https://www.nytimes.com/2020/05/07/us/church-reopening-coronavirus.html

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[130] *Id.*, at 204.
[131] *Id.*
[132] *Id.*
[133] *Id.*, at 204-205.
[134] *Id.*, at 205.
[135] *See* Graboyes, *supra* note 23, at 6.

Ewing, Jack, "Europe Risks a New Economic Downturn as Lockdowns Return", *International New York Times*, November 2, 2020. https://www.nytimes.com/2020/10/30/business/european-economy.html

Graboyes, Jeremy, "How Agency Adjudication is Evolving During the Covid-19 Pandemic", 46 *Admin. & Regul. Law News*, 7, no. 46, 2020.

Inskeep, Steve, "Courts Try To Resume In-Person Proceedings As Safely As Possible", National Public Radio, Morning Edition, September 10, 2020 https://www.npr.org/2020/09/10/911349856/courts-try-to-resume-in-person-proceedings-as-safely-as-possible

Katsh, Ethan, "The New New Courts", *Am. U. L. Rev.*, 165, no. 67, 166 (2017).

Leung, Gabriel, "Lockdown Can't Last Forever, Here's How to Lift It," *International New York Times,* April 8, 2020. https://www.nytimes.com/2020/04/06/opinion/coronavirus-end-social-distancing.html

Lubbers, Jeffrey S., "A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking", *Admin. L. Rev.,* 451, no. 62 451 (2019), 452-453.

Moxley, Laura, "E-Rulemaking and Democracy", *Admin. L. Rev.* 661, no. 68, 2016.

Nossiter, Adam, "Will a Half-Step by Macron be Enough to Blunt France's Second Wave?", *International New York Times*, Oct. 17, 2020. https://www.nytimes.com/2020/10/15/world/europe/france-coronavirus-second-wave.html

Palace, Patrick, & Couch, Jordan L., "Ten Predictions: How Covid-19 Will Change the Legal Industry Forever", *GPSOLO* 6, no. 37 (2020).

Simon, Scott, "How Students At A North Carolina Elementary School Are Faring With Remote Learning", National Public Radio, Weekend Edition Saturday (Jan. 30, 2021). https://www.npr.org/2021/01/30/962357982/how-students-at-a-north-carolina-elementary-school-are-faring-with-remote-learni

Turner, Jenia I., "Remote Criminal Justice", *Tex. Tech. L. Rev.* 197, no. 53, 198 (2021).

Weaver, Russell L., "Rulemaking in an Internet Era: Dealing with Bots, Trolls & 'Form Letters'", *George Mason L. Rev.* 553, no. 27, 554-569 (2020).

Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, § 15002 (2020).

https://www.federalregister.gov/

https://www.ecfr.gov/cgi-bin/ECFR?page=browse

https://www.usgovernmentmanual.gov/
https://libraryguides.law.pace.edu/c.php?g=319332&p=2134043
https://www.doi.gov/oha/searchdecisions
https://www.sec.gov/sec-coronavirus-covid-19-response
https://www.justice.gov/eoir-operational-status
https://www.justice.gov/eoir/public-health-notice
https://www.gov/coronavirus/virtual-public-meetings-during-covid
https://www.epa.gov/sites/production/files/2020-04/documents/ogc_virtual_hearing_memo_4-16-2020.pdf
https://louisvilleky.gov/government/air-pollution-control-district/covid-19-information
https://www.fcc.gov/coronavirus
https://www.ssa.gov/appeals/hearing_options.html
https://www.dol.gov/agencies/oalj/COVID_19_AND_HEARINGS
https://www.oalj.dol.gov/DECISIONS/ALJ/MIS/2020/In_re_IN_RETEMPORARY_SUSPE_2020MIS00004_(MAR_13_2020)_080641_CADEC_PD.PDF?_ga=2.34944225.1534810182.1616862614-745949789.1616862614
https://www.ferc.gov/news-events/media/coronavirus
https://www.justice.gov/eoir/ECAS
https://www.federalregister.gov/documents/2020/10/20/2020-23173/public-hearing
https://www.ssa.gov/appeals/hearing_video.html

CHAPTER SIX

AUTOMATED DECISION-MAKING AND DELEGATION: DISCUSSING IMPLICATIONS FOR EU PUBLIC LAW

HERWIG C.H. HOFMANN[1]

Technological advances allow for an ever-greater autonomy of automated decision making (ADM) systems in public law. But how can these be held accountable? This paper looks at the question by reviewing some basic concepts of public law, especially legal concepts concerning the delegation of powers. The paper takes into account that ADM systems are software based, are often developed, and deployed with public-private cooperation and are based on large scale data collections. These characteristics need to be considered in developing models of accountability, looking at the relation between law and software (2), asking for procedural requirements for increasingly autonomous ADM (3), analyzing the role of private actors (4) and gives an outlook on cyber-delegation in the EU.

1. Background

The use of automated decision-making (ADM) technology is spreading in public administrations. This influences procedural rules and the possibility to comply with legal principles structuring procedures. changes individual decision-making procedures – both with respect to individual decision-making (adjudication) as well as concerning administrative rule making procedures. In fact, software underlying ADM systems may be considered

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in some situations as capable of fulfilling the same functions as administrative rule-making procedures. But when considering ADM systems in public law, it is also important to understand that they are often programmed in the context of specific data basis and usually address a certain phase of a procedure only. For example, ADM based searches of data sets may be used in order to select cases which call for the initiation of an investigation. They may also be used in support of the analysis of data during an ongoing administrative procedure. Such far reaching use of technology for decision making can be referred to as cyber-delegation, in the sense that ADM systems are granted ever more autonomy in decision making. In this sense, cyber-delegation could be described as the delegation of fully defined procedural phases or even entire decision-making procedures.

Cyber delegation under this definition seems like a rather distant possibility in that it is an issue for which very few real-life examples seem to currently exist in public law. The matter will maybe only become relevant in view of further technical advances allowing for automation of full decision-making procedures from initiation to implementation.

Upon closer inspection, however the trajectory is clear. One reason is that many automation processes in EU public law are linked to large data sets, jointly developed, and maintained by Member States and the EU, the analysis of which is automated. The conclusions of that analysis often pre-define the final decisions. In the EU, data bases of EU Member States, for example exist in the field of the Area of Freedom Security and Justice (AFSJ) in its Schengen Information System II. But ongoing automation of decision making also comes from a different angle in that the decision making in the implementation of EU policies is given to private parties. There is also a tendency to delegate public enforcement obligations to private parties, who can discharge their duties in a cost-effective way only by automation.[2] Such delegation of public duties thus leads to additional issues of delegation and of control and supervision of powers.

[2] For example, see Article 17(4) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130/92 under which "online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works". Internet service providers facing such potential liability undertake searches for IP protected content by ADM systems, thereby potentially affecting artistic freedoms, freedom of expression and other

Therefore, the issues of cyber-delegation in EU public law which is rising in prominence in EU public law and will sooner or later become very relevant in view of technical advances. The growing autonomy of automated decision-making systems would importantly indicate a transformation of ADM from being a 'tool' to becoming an 'agent'. Such step would be reached when the outcomes of procedures predominantly relying on ADM are, in principle, binding. No meaningful human input would be necessary to adopt binding decisions. The reason for this status as having been referred to in the literature as cyber-delegation,[3] is that both the enabling decision and the modes of control of ADM in public law will change in the context of further reaching autonomy of decision making. Any regulatory approaches, in general administrative law or specific policy-area related regulation should be oriented towards being capable of addressing ever more autonomous forms of decision-making. This paper argues, that much of the underlying conceptual work is to re-consider how general principles of public law function in the context of a world of more autonomous agents of automated decision making.[4]

This paper outlines some key elements thereof in order to set out an agenda for further research considerations. It uses EU public law as the example area on the basis of which these questions are discussed. A comparative view will show that many of these considerations are also of a more general relevance applicable to other legal systems.

2. Limits to Delegation and the Notion of 'Law'

Using a delegation-based framework to study modes of accountability of increasingly autonomous decision-making systems raises a series of questions. The possibilities of delegation and sub-delegation of powers are circumscribed by both by substantive and procedural limits.

individual rights. Questions about the legality of Article 17 are currently pending before the CJEU.

[3] Garry Coglianese, David Lehr, Regulating by Robot: Administrative Decision Making in the Machine-Learning Era, 105 *The Georgetown Law Journal* (2017) 1179-83.

[4] Tobias D. Kraft, Katharina A. Zweig, Pascal D. König, How to regulate algorithmic decision-making: A framework of regulatory requirements for different applications, (2020) *Regulation and Governance* (doi:10.1111/rego.12369), 14.

a) Essential elements and human normative obligations

First, in EU constitutional law, limits to delegation of powers are for example formulated in Article 290 of the Treaty on the Functioning of the European Union (TFEU). This reserves certain elements of decision making to the legislature and does not allow the delegation thereof to the executive branch of power in so called delegated acts. The scope of non-delegable content includes the "objectives, content, scope and duration of the delegation". Delegating these "essential elements of an area" is not permitted.

The latter term is linked to limits to delegation of powers to ADM technology where decisions concerning the exercise of fundamental rights are concerned. Article 52(1) of the EU's Charter of Fundamental Rights (Charter) requires that any limitation on the exercise of the rights and freedoms to "be provided for by law" and, be defined therein.[5] 'Law' in this sense is legal code derived from pre-defined decision-making procedures in conformity with legislative procedures.[6] Any limitations of fundamental rights which might result from the application of computer-code based ADM-systems must therefore be pre-determined by in what is recognizable as law under Article 52(1) CFR.

The notion of 'law' is conceptually linked to its accessibility. Individuals must be able to discern from freely available and officially published texts which limitations to their rights and freedoms they might be asked to endure. This requirement raises fundamental questions as to the nature of law in relation to software codes in a computer programme.

Accordingly, although an ADM-system itself, identifying criteria for the implementation of a legislative act towards individual decision-making, might de-facto have the effect of executive rulemaking, it will not qualify as 'law' under Article 52(1) CFR. Computer code, well hidden in sometimes proprietary software, is interpretable, if at all, only to experts trained in specific specialist areas of computer science. Where the code contains machine learning technology even that may be difficult. After all, machine learning technology is made to experiment and to refine its own approach

[5] The notion of a limitation of a fundamental right is broad. It pertains to limitations of the exercise of rights due to public policy concerns but also due to balancing of various rights. It also pertains to rights and freedoms protected as general principles of EU law, to which, under the CJEU's ERT case law, the same criteria of limitation arise as to fundamental rights.

[6] In EU law, this comes in forms recognized under Article 288 TFEU.

to suggesting decisional outcome from its calculations varying input. Machine learning technology, which may amend the criteria of decision-making in a dynamic fashion by adjusting future output to results of past calculations, will not necessarily be possible for an expert to deduct in a linear fashion from the code the potential output. Often programmers themselves do not fully understand how the system will reach its output, and possibly similar to the development of a medicine in medical research, resort to a certain degree of trial-and-error approach to finding the right 'formula' by which more often than not a good outcome is achieved.

This approach however does not comply with a traditional concept of legal programming by law, especially not when it concerns limitations of (broadly defined scopes of) fundamental rights. At least it might be concluded that such approach could not be considered to comply with the requirements of accessibility and intelligibility associated with the notion of law in Article 52(1) Charter. Accordingly, in the context of limitations of the right to the protection of privacy and personal data (Articles 7 and 8 Charter), the Court of Justice of the European Union (CJEU) has requested that

> "the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned.[…] In order to satisfy that requirement, the legislation in question which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards…"[7]

The CJEU in this context speaks explicitly of a legislative act to undertake the clear and predictable limitations of fundamental rights. The notion of 'minimum safeguards' refers to the realisation of procedural principles, the notion of the 'scope of application' refers to the degree and extent of ADM possibilities in data processing. The court continued in finding that the extent of the interference with fundamental rights by automated analyses of data,

> "essentially depends on the pre-established models and criteria and on the databases on which that type of data processing is based."[8]

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[7] Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paras 139-141.
[8] Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, para 172.

An additional requirement of a detailed legislative basis arises from Article 22 of the EU's General Data Protection Regulation (GDPR).[9] This requires that where a fully automated decision making will take place, which creates binding legal effects or significantly effects individual interests, that must be undertaken with a clear legal basis. Consent will not suffice as legal basis (although provided for in Article 22(2)c) GDPR) because where the data controller is a public body, recital 43 of the GDPR finds, it is "…unlikely that consent was freely given in all the circumstances of that specific situation." Therefore, ADM will have to rely on Article 22(2)(b) GDPR, which requires a legal basis that "… lays down suitable measures to safeguard the data subject's rights, freedoms and legitimate interests". Where a matter is particularly sensitive to fundamental rights, delegation of decision-making to an ADM system and the processing of data necessary for this purpose will only be permissible for a "substantial public interest" and proportionality must be ensured by means of specific suitable measures provided for in the enabling legislation (Article 22(4) GDPR).

b) The relevance of pre-established models and criteria

The Court requests that such "pre-established models and criteria (…) should be specific and reliable."[10] That means that the normative legal programming of limitations must be represented in the computer programming code underlying ADM systems. Any machine-learning based systems must be able to demonstrate how they specifically and reliably comply with the pre-established models defined in the legal basis.[11]

Problems arise with some machine-learning ADM technology, designed to find solutions rather than containing pre-designed steps to do so, since the latter are not always *ex ante* predictable in their output calculations. But the very idea of machine learning "to identify and, if necessary, automatically

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[9] Regulation 2016/697 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1 – in force since May 2018.

[10] Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, para 172.

[11] These requirements exist irrespective of which legal basis a delegation is based on. After all, delegation of rule-making powers to the Commission must be based on Articles 290 or 291 TFEU, whereas the most common legal basis for delegation of rule-making powers to agencies is Article 114 TFEU allowing for the empowerment to adopt 'measures' for harmonisation of the single market.

refine (or prompt refinement of) the system's operations to attain a pre-specified goal",[12] needs to be carefully linked to normative programming.

Where, machine learning is based on advanced statistical methods to pick out patterns and correlations to infer from the data analyzed complex, nonlinear relationships that they were not specifically programmed to find, this must, in the context of the current approach to fundamental rights, take place in a normatively pre-defined framework of possible considerations.

But is the same true in areas which are not as individual rights sensitive as the protection of privacy and personal data? If one approaches the issue of regulatory limitations in the same way as the CJEU, the answer might be necessarily positive. For example, in the context of the protection of the right to an effective judicial remedy, the CJEU has held that regulatory limitations of individual freedoms are limitations of rights and freedoms in the context of Article 47 Charter. This was established by the CJEU in the development of a general defence right, protected as general principle of EU law giving "protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person."[13] This fundamental right under EU law that can be limited only under the conditions restated for Charter rights in Article 52(1) Charter, i.e. on the basis of law, respecting the essence of the right and complying with the principle of proportionality.[14]

In turn, this raises fundamental questions for a system developing with the help of machine learning tools or otherwise a genuine path to decision making. How to ensure that the approach will not be regarded as arbitrary or disproportionately limiting the right to freedom from regulatory intervention. The problem with discretion is that certain counter-factual considerations must be developed by a decision-maker. Especially when decision making must weigh various possible approaches to achieving a regulatory goal. Computer programming is to date not very advanced when

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[12] Karen Yeung, *TLI think!* Paper 62/2017, 1 (SSRN abstract=2972505).

[13] Joined cases C-245/19 and 246/19 *Etat Luxembourgeoise v B and others* ECLI:EU:C:2020:795, para 100; C-682/15 *Berlioz Investment Fund SA* ECLI:EU:C:2017:373, para 51; C-121/04 P *Minoan Lines* v *Commission* ECLI:EU:C:2005:695, para 30; C-94/00 *Roquette Frères* ECLI:EU:C:2002:603, para 27; Joined cases 46/87 and 227/88 *Roquette Frères* EU:C:1989:337, para 19.

[14] C-59/17 *Chateau du Grand Bois* ECLI:EU:C:2018:641, para 30; Opinon of Advocate General Kokott of 2 July 2020, *Etat Luxembourgeoise v B and others*, in: joined cases C-245/19 and C-246/19, ECLI:EU:C:2020:516, paras 52-57.

it comes to documenting counter-factual considerations in a decision-making path.

3. Procedural Requirements for Autonomous ADM

Procedural limitations to delegation of powers are, as public policy studies on principle-agent theories have demonstrated, strongly related to information and information asymmetries. Legal principles in this respect include such requirements as compliance with the principle of transparency.

Transparency is a big topic and a key word in the regulation of technology. This is not surprising when thinking of ADM in terms of remedies and possibilities of independent judicial review. In this context, mainly the aspect of explainability is central to the debate.

a) Transparency and information

The notion of transparency has many facets including those relevant in the context of delegation of powers. With respect to ADM, one important element of transparency in this context is the requirement to make understandable the details of the pre-programming of decision-making procedures and considerations.[15] This is relevant since in cases of ADM, computer programming works like internal administrative rule-making or inner-administrative guidelines. Transparency is thus not only a question of explainability of the basic functioning and functionalities of a computer programme used for ADM,[16] it is also a question of making understandable how decision making about whether to submit a person to a measure which will limit fundamental rights including the far reaching right of being free of regulatory intervention.

But the nature of ADM programming to be often directly linked to data bases requires that transparency be ensured both with respect to the access and use of data as well as its processing in the ADM system. Factors

[15] Bruno Lepri, Fair, Transparent, and Accountable Algorithmic Decision-Making Processes (2018) 31 *Philosophy & Technology,* 611.

[16] For an overview of the diverse approaches to the requirement of transparency in ADM see e.g. Deven R Desai, Joshua A Kroll, Trust but Verify: A Guide to Algorithms and the Law, 31 *Harvard Journal of Law & Technology* (2017), 1; Tobias D Krafft, Katharina A Zweig and Pascal D König, How to Regulate Algorithmic Decision-Making: A Framework of Regulatory Requirements for Different Applications, (2020) *Regulation & Governance,* 18.

necessary for transparency therefore include information related aspects. This covers the sources of input of information for decision making to be used by the ADM programme. It then also extends to the criteria used for weighting and balancing of such input taken into account in a decision-making procedure. The procedural steps and phases that the ADM programme is designed to assist or replace must illustrate the chosen criteria for decision-making. Therefore, transparency is necessary as to both the informational input, that is the selection of information going into a specific decision-making process. Transparency is then necessary as to the further processing of this information, the weight which is given to specific information points and the choices made as to their use.

b) Transparency and responsibility

There is another element to transparency in ADM systems: Transparency is also necessary regarding the responsibility of different actors. This is key not only in the specific EU context, in which databases used for ADM, for example in the field of immigration and security are multi-layered in that they exist both on the Member State and the EU levels and each feed into the system. It is also necessary for questions of the distribution of responsibility in joint or composite multi-jurisdictional decision-making procedures. Just like in purely human decision-making, transparency is thus a pre-requisite for allocation of responsibilities and thus of accountability mechanisms.

This form of upfront transparency can be supported by systemic quality checks through "conformity assessment procedures" - a requirement layed down for example in the Commission's draft AI Act when putting a 'high-risk' AI system into service.[17] Accordingly the European Law Institute has developed model rules in impact assessment of algorithmic decision-making systems used by public administration.[18] On this basis, transparency

[17] Articles 19, 43 of European Commission, Proposal for a Regulation of the EP and the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) of 21.4.2021, COM(2021) 206 final, 2021/0106 (COD).
[18] https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/ai-and-public-administration/

requirements must also make continuous monitoring of the working of such programmes possible in order to take corrective actions where necessary.[19]

Therefore, focus should be on both the *ex-ante* control and review anticipating potential issues as well as an *ex-post*, regular subsequent control as to how the ADM system is performing and whether there is any concern as to the necessary adjustments. This necessity of continuous control and review is well-anchored in public law. For example, generally applicable administrative law decisions, which have an effect similar to rulemaking must be subject to continuous and regular review and to periodic checks as a pre-condition for its continuous validity.[20] The CJEU states that such checks are required whenever evidence gives rise to a doubt in that regard.[21] This same approach should become applicable to the decisions to set up decision making procedures with the help of automated systems.

c) Oversight and accountability

The CJEU has developed this general request for continuous oversight of abstract-general decisions with an effect to the future specifically with respect to data intensive uses in the context of deploying an ADM system. This is in line with requests for continuous control in the context of delegation of powers. To illustrate this factor, it is good to go back to basics as discussed, for example, in *La Quadrature du Net.* There, the CJEU stated that in order to ensure that in practice ADM technology (in the form of "pre-established models and criteria") and the "databases used" comply with the conditions under which fundamental rights may be limited (Article 52(1) CFR), "a regular re-examination should be undertaken to ensure that those pre-established models and criteria and the databases used are reliable and up to date."[22]

This is in line with the limitations to delegation which arise from the CJEU's delegation doctrine based on principles listed and discussed in the seminal

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[19] Article 21 of European Commission, Proposal for a Regulation of the EP and the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) of 21.4.2021, COM(2021) 206 final, 2021/0106 (COD).

[20] See as to this obligation periodic review as pre-condition of validity and whether a decision once taken in the past is "still factually and legally justified". See: C-362/14 *Schrems v DPC* ECLI:EU:C:2015:650, para 76.

[21] C-362/14 *Schrems v DPC* ECLI:EU:C:2015:650, para 76.

[22] C-511-520/18 *La Quadrature du Net* ECLI:EU:C:2020:791, para 182 with reference to Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paras 173, 174.

EU delegation case *Meroni* – a case concerning delegation of powers to a legal person created outside of EU law and establishing the basic cornerstones of the EU's doctrine on delegation of powers.[23]

In this context, for ADM technology to act within the limits set by law, must be programmed to ensure that delegation of powers is subject to criteria summarized in the *Meroni* doctrine. Chief amongst these criteria is that that it allows for independent judicial review (see Article 47(1) CFR). In *La Quadrature du Net* and without mentioning criteria of delegation, the CJEU built its approach on reviewability and held that

> "it is essential that the decision authorising automated analysis be subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that a situation justifying that measure exists and that the conditions and safeguards that must be laid down are observed."[24]

Linking the requirements of pre- and post-deployment review and monitoring requirements with the demand of allowing for judicial review thereof does two things: First it imposes on the executive branch of powers using ADM systems to carefully select and supervise their use. Therefore, it is irrelevant whether the actual programming of such ADM systems takes place by private or public bodies. Second, the case law requires that there be not only a possibility of submitting the actual individual decision making based on ADM to judicial review but to incidentally also submit the criteria for such decision making and the procedure to judicial review. In the case of ADM based decision-making, this will be the context of the computer system.

4. Cyber-Delegation, the Role of Private Actors

The criteria arising from the seminal *Meroni* delegation case have particular weight when it comes to the review of fairly autonomous ADM systems – the situation of cyber delegation. A look at the original facts underlying *Meroni,* reveals that it was in fact concerned with an instance of sub-delegation of powers conferred on the public administration (in that case the European Coal and Steel Community's so-called High Authority, the later EU Commission) to private parties.

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[23] Cases 9 & 10/56 *Meroni v ECSC High Authority* [1957/58] EU:C:1958:7.
[24] C-511-520/18 *La Quadrature du Net* ECLI:EU:C:2020:79, para 179.

De facto, ADM-systems are rarely fully developed and maintained by the public bodies using them. More often than not, they are either purchased 'ready-made' or are produced to order by a private company. In certain cases, a public-private-partnership model will be sought to either provide and maintain the software for the data basis. Alternatively, public and private cooperation will exist with respect to the provision of the data used to maintain decision-making. Accordingly, it should be studied whether the use of private proprietary software in ADM should be considered as a form of *de-facto* delegation of powers to external actors, requiring effective oversight and control of the details of programming. The use of private data collections equally raises many questions as to the quality of the data, the maintenance of the sources and their reliability for public decision making. The following considerations explore some of the factors relevant in the context of this public-private cooperation.

a) The concept of 'delegation' in cyber-delegation

EU law has established some basic limits to sub-delegation to private parties. These were developed in the early days of EU integration in the context of the European Commission (then under the name of the High Authority) had sub-delegated some regulatory powers conferred on it in the context of the Treaty establishing the European Coal and Steel Community (ECSC) to private parties. The standards of sub-delegation from a Union body to private parties developed in *Meroni*[25] have remained applicable to date and need to be complied with irrespective whether the delegation of powers goes to a private body to undertake full scale decision-making or whether a private body develops and, in some instances, maintains a software for decision making.

Considering the role of delegation doctrines in EU law to understand the accountability of private parties involved in ADM system, requires going back to some basic considerations about the fact that delegation is a scalable approach, it is not an all-or-nothing approach. Scalability exists as to the extent of powers conferred. Therefore, in ADM as well as in human-based decision-making procedures, delegation can concern more or less well circumscribed duties and powers. It can provide for precise procedural steps to comply with or it can delegate a certain leeway to develop the approach to decision-making. Also, delegation can be precise about the source and the use of data input into decision-making or, alternatively, leave a lot of

[25] Cases 9 and 10/56 *Meroni v. High Authority* ECLI:EU:C:1958:7.

leeway to the recipient of the delegation about which data to use, where to sources these from and how to process the input-data in decision-making.

Generally, in public law, the doctrines referred to as 'non-delegation' doctrines are circumscribing under which conditions delegation of powers should be possible. This is certainly the case in the EU under the *Meroni*-doctrine concerning the delegation of rule-making and decision-making powers to private parties. Under this doctrine, delegation is generally possible, if certain basic pre-conditions are met.

Key to the *Meroni* doctrine is that delegation may not distort the 'institutional balance', i.e., the distribution and separation of powers to the institutions as defined in the EU's basic constitutional documents in the Treaties.[26] This includes that, for example, the delegator may not delegate powers it does not have. Only powers conferred on the Commission, may thus be further delegated to private parties or EU executive agencies.[27] Other conditions recalled under the *Meroni* doctrine are equally unsurprising. Delegation may not endanger the possibilities of judicial review of decision-making (Article 47 Charter) and by delegation therefore the public body may not shirk responsibility and accountability. According to the *Meroni* doctrine no broad discretionary powers in the sense of 'legislative' discretion setting the basic decisions on balancing of values may be delegated. This notion of discretion in *Meroni* requires further exploration since it is not self-explanatory. In my view, in today's fundamental rights-oriented legal system, the notion of discretion the Court had in mind in *Meroni* a case of the 1950ies coal and steel industry regulation, in today's terms would be best understood as banning the right to undertake genuine decisions balancing rights and freedoms in the sense of Article 52(1) of the Charter. This is in today's legal system a matter

[26] It has been disputed whether the *Meroni* doctrine should be applied outside the framework of the previous ECSC Treaty at all. *Dehousse*, eg (Renaud Dehousse, Misfits: EU Law and the Transformation of European Governance in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford: Oxford University Press, 2002) 207–31 at 221), argues that its general framework sufficiently distinguished the EC Treaty (now the TFEU) from the regime prevalent under the previous ECSC Treaty, in which the High Authority exercised important regulatory powers. In particular, in contrast to the enforcement of EU law by national authorities, Art 53 ECSC entrusted its application to the High Authority itself. On the other hand, the CJEU's general reference to the principle of institutional balance makes it unlikely that the ruling ought to be limited to the specific context of the ECSC Treaty.

[27] Under Regulation 58/2003.

reserved to the legislature and may thus neither be delegated to the Commission, and by consequence also not sub-delegated to private bodies and decision-making procedures not directly regulated by EU law.

Finally, under the *Meroni* doctrine, the delegating public body must supervise the exercise of powers by the recipient of the delegation. This requirement is linked to the requirement of ensuring anticipatory impact assessments prior to the deployment of autonomous ADM systems and the obligation on the administration of subsequent review of the workings of such ADM systems.

Within the limits recognised by *Meroni,* the recognition of private rule making, with other words the delegation of powers to create binding rules, is quite frequent in EU law. Examples arise from very diverse policy fields - for instance from the implementation of EU legislation in the field of social policy,[28] environment,[29] as well as in data protection.[30] Privately set standards in the forms of 'codes of conduct' also play an increasingly important role in commercial practices,[31] and professional activities,[32] as well as in corporate governance.[33]

Privately set standards are further becoming part of EU institution's decision-making procedure where data collections or data processing is undertaken with the help of software provided for by private actors. For this reason, the EU has established an agency for EU large scale data basis, eu-

[28] See Article 153(3) TFEU, which allows Member States to entrust to management and labour the implementation of social policy directives.
[29] See Article 17(3) of Directive 2002/96/EC of the European Parliament and the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), OJ 2003 L 37/24, which provides that Member States may transpose certain provisions of the directive 'by means of agreements between the competent authorities and the economic sectors concerned'.
[30] See for example in Article 46 of the GDPR, which envisages the drawing up of codes of conduct and binding corporate agreements.
[31] Dagmar Schiek, Private rule-making and European governance – issue of legitimacy, 32 *European Law Review* (2007), 443-466, 461-462.
[32] Dagmar Schiek, Private rule-making and European governance – issue of legitimacy, 32 *European Law Review* (2007), 462-463.
[33] Søren Friis Hansen, 'Codes of Conduct', in: Birgitte Egelund Olsen, Karsten Engsig Sørensen (eds.), *Regulation in the EU*, (Copenhagen, Thomson: 2006), Chapter 8.

LISA, to ensure EU standards being applied in some of the most critical areas of EU data infrastructure.[34]

b) Delegation and standardisation

In view of a lively practice in various EU policy areas to rely on privately set standards, this leads to the question whether procedural requirements for such standardisation and normatisation could serve as an example.

The issue is the essentially the following: If we accept the premise that delegation of powers in the context of applying ADM systems leads to ADM software being used as formulating a set of generally applicable rules preparing individual decision-making, then this should also make us search for examples in the legal system where similar situations exist. That allows us to study the legal system's reply to challenges posed by the specific difficulties. Standardisation and normatisation appears to be such an example, where in EU law it is accepted that general rules of various nature set outside of the decision-making bodies created by EU law, will influence individual decision making.

Standards applied in the EU have result from international standardisation bodies, private or semi-private bodies and scientific bodies. Accordingly, their integration and use are their source and their use as well as their legality are a complex issue in EU law. There are various sources of standards applicable within the EU legal system. They are set by national and European standard setting bodies as well as a great diversity of 'externally' produced standards.[35] On the spectrum of standards not directly produced by EU institutions are those arising from intergovernmental arrangements and cooperation (e.g. the Eurogroup Working Party discussed below) but also those arising from international organisations (such as the WHO, the ILO or others) as well as arising from private or semi-private standardisation bodies on the international (e.g. ISO), the European (e.g.

[34] Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Agency for the operational management of large-scale IT systems in the [AFSJ], and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011, *OJ 2018 L 295/99–137* [the 'eu-LISA Regulation'].

[35] Mariolina Eliantonio, Caroline Cauffman, The Legitimacy of Standarsiation as a Regulatory Technique in the EU, in: Mariolina Eliantonio, Caroline Cauffman (eds.) The Legitimacy of Standarsiation as a Regulatory Technique in the EU (Cheltenham, Elgar Publishing: 2020), 1-19, at p. 5.

CEN, CENELEC, ETSI) or the national levels (e.g. DIN). Standards may further arise from informal cooperation (e.g., the Basel Committee) or private research associations publishing their findings.

The great diversity of standards applied in EU law, and the different approaches to using them in EU decision making procedures, however, complicates the understanding of their effect in EU law and whether we could learn from the solutions found with respect to standardisation for the question of accountability of certain delegations of powers to ADM systems.

Both the potential integration of standards into the canon of sources of law within the EU, as well as the role ADM software plays in the notion of decision making in EU public law raises many questions. Especially, these include their possibility to normatively shape real-life situations as well as the conditions – procedural and substantive – for the recognition of decision-making produced in the context of their rules in EU law. Questions remain especially since standards are not part of the types of acts outlined in the Treaty on the Functioning of the European Union (TFEU), especially Article 288 TFEU. The plethora of organisations and procedural conditions within which the diverse types of standards arise, makes for a complex environment for understanding the legitimacy of such law.

The issue is of high political relevance. Questions arise as to who assesses the criteria of acceptable risk in society and according to which norms are highly political value choices – and this not only in the general sense that any administrative action that can go wrong, can become an issue for political oversight over administrative action and political responsibility for action. Yet, standards as well as ADM software-design are not always the result of well-established regulatory procedures, they can also arise from expertise forming best practices or private bodies and public-private cooperation. This has an effect also on barriers between public and private regulatory activity and with it the criteria for legitimacy of normative pronouncements.

This becomes quite important when looking at instances of private rulemaking, which can also be employed for implementing Union legislation. Examples exist in the fields of social policy[36] or in the

[36] See Article 153(3) TFEU (amending Art. 137(3) EC by the reference to Art. 155 TFEU), which allows Member States to entrust to management and labour the implementation of social policy directives.

environment,[37] as well as in data protection.[38] Privately set codes of conduct play an increasingly important role in commercial practices, and professional activities,[39] as well as in corporate governance.[40] Equally, as this paper is discussing, privately set standards are also becoming part of EU institution's decision making procedure where data collections or data processing is undertaken with the help of software provided for by private actors. For this reason, the EU has established an agency for EU large scale data basis, eu-LISA, in order to ensure EU standards being applied in some of the most critical areas of EU data infrastructure.[41]

The matter of standard setting is only fully regulated where the use of standards by European standardisation bodies (ESO) is foreseen. For this, an EU regulation exists under the EU's standardization regulation.[42] That regulation sets out basic principles for the adoption of standardization

[37] See Article 17(3) of Directive 2002/96/EC of the European Parliament and the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), OJ 2003 L 37/24, which provides that Member States may transpose certain provisions of the directive 'by means of agreements between the competent authorities and the economic sectors concerned'.

[38] See for example in Article 46 of the GDPR, which envisages the drawing up of codes of conduct and binding corporate agreements.

[39] Dagmar Schiek, Private rule-making and European governance – issue of legitimacy, 32 *European Law Review* (2007), 462-463.

[40] Søren Friis Hansen, Codes of Conduct, in: Birgitte Egelund Olsen, Karsten Engsig Sørensen (eds.), *Regulation in the EU*, (Copenhagen, Thomson: 2006), Chapter 8.

[41] Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Agency for the operational management of large-scale IT systems in the [AFSJ], and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011, *OJ 2018 L 295/99–137.* [Hereafter, the 'eu-LISA Regulation']. With respect to the SIS specifically, eu-LISA's tasks are listed under Chapter III of the SIS-recast, involving responsibilities of operational management (Article 15); security (Article 16); confidentiality (Article 17).

[42] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council Text with EEA relevance; OJ 2012 L 316/12; a consolidated version with changes was published in 2015: http://data.europa.eu/eli/reg/2012/1025/2015-10-07.

procedures by the European Standardisation Organisations (ESOs)[43] requiring for example the establishment and publication of work programmes (Articles 3, 8), rules on participation of stakeholders and national bodies in developing standards (Articles 5, 7), transparency and accessibility rules regarding the standards (Articles 4, 6) as well as the process of formal standardisation requests (Article 10). Although organized as private organizations, the ESOs are financed by public funds and exercise, when acting in the context of formal standardisation requests, public functions. Their action should arguably thus also be held to comply with general principles of EU administrative law such as the principles of good administration and the duty of care and the standardization process as regulated in EU law arguably must be interpreted in the context of compliance with these principles.

ESO standardization as circumscribed in the standards regulation appears aligned with criteria summarized in the *Meroni* principles.[44] Applying, by analogy, the standards of the EU's limitations of delegation of powers established by the *Meroni* doctrine to standardization suggested that entrusting functions to ESOs is possible only if the powers received are the result of an express delegation and are of a clearly defined executive nature. Moreover, the exercise of such powers must be subject to strict review and the same obligations which the delegating authority would have had to observe, had it adopted the measures itself.

Therefore, looking at these examples of private rulemaking which have an effect in EU law, the question arises how much could be learnt procedurally for delegation from quasi administrative rule-making powers. This lesson is to basked also specifically to the delegation of rule-making powers by delegation of powers to develop automated decision-making procedures. In the field of delegation of rule-making powers to standardization bodies, the standardization regulation is based on transparency in the process of the development of rules. Further legitimizing elements include participatory possibilities.

[43] These are mainly CEN, CENELEC and ETSI as organisations under private law whose members are the national public, private or semi-private standardisation or normatisation bodies.
[44] Cases 9 and 10/56 *Meroni v High Authority* [1957/58] ECR 133.

c) Limits to the ESO standardisation model – a broader look

Whether such approaches could be considered feasible in the development of private programming of ADM systems, however, is an open question. IP issues and limitations arising from proprietary software not allowing for transparency are to be taken seriously. However, at the end of the day, they are a matter of cost. How much does the private software developer charge if confronted with the requirement to allow for a certain transparency regarding the programme used and how much transparency will be allowed to ensure testing, monitoring and participation of stakeholders in such activities?

Drawing inspiration from the approach to regulation of standardization through ESOs also has other limits which lie in the nature of the 'business' of creating ADM systems. Software engineering for ADM systems will be undertaken by an array of private companies acting as contractors to supply or to supply and service certain systems. The diversity of actors is thus much larger than ESOs. Also, these actors are directly private companies and not semi-public organizations well acquainted with channeling diverse input. Finally, private companies engaging in (sub-)contracting will not have a network and a visibility sufficient enough to ensure that participation and review can be undertaken. In this sense, such procedural steps, if required, would have to be undertaken by the institution, body, or agency of the EU, which is in charge of developing or employing the ADM technology.

d) Private party norm-setting as pre-established models?

However, on a more general note, lessons to be learnt from the limits of delegation to privately standard setters illustrate some of the types of issues that might give reason for concerns. Where the Union institutions retreat and leave it to private and semi-private bodies to fill a legal void, the procedural legitimacy of such standard setting becomes an issue of public interest. The same is true for the encoding of criteria for decision making in computer systems. This might be all the more relevant in the case of standards created not within the EU under known but imperfect procedures, but by private software engineers and companies, not familiar with the legal requirements and intricacies in legislative steering of administrative behavior.

But questions arise how to enforce procedural standards such as transparency and reasoning? How to ensure that all relevant actors are present is not evident in typical administrative rule-making procedures, let

alone in private standard setting and much less still in private computer programming activities?

In answering these questions, it was already discussed above that any limitation of individual rights must be provided by 'law' recognized as such under the standards set by EU law. Law must be recognizable as such in the sense that legal code is derived from pre-defined decision-making procedures in conformity with legislative procedures. In EU law, this comes in forms recognized under Article 288 TFEU. A computer-based code does not fulfil these requirements. Individuals will not be able to orient their behavior according to the code which is in a way inaccessible to make it a secret norm. These limitations are particularly relevant to what must be defined in human legal writing prior to the delegation of programming duties to create ADM systems. Also, it constitutes a limit to what a self-learning system may be allowed to achieve. The manipulation of criteria of decision making in a machine learning system is limited specifically by these criteria of law.

Here again, the notion of 'law' is at question. Standards are conceptually linked to accessibility. Individuals must be able to discern from freely available and officially published texts which limitations to their rights and freedoms they might be asked to endure. Not all standards are publicly accessible, and it is not clear whether all standards applied are existent at the time of decision-making. The Apple Ireland cases offer an ample discussion about this. There, the Commission had been accused of applying OCED tax guidelines retroactively to assess whether Ireland had granted state aid in the form of allowing specific calculations of profit and loss.

Accordingly, in a case of the use of foreign standards for the processing of air-passenger data arising from the EU, the CJEU has requested that

> "the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned.[…] In order to satisfy that requirement, the legislation in question which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards…".[45]

[45] Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paras 139-141.

The CJEU requests that such "pre-established models and criteria (…) should be specific and reliable."[46] That means that the normative legal programming of limitations must be represented in the standards applied. Increasingly this is becoming relevant with respect to computer assisted ADM procedures where standards might be contained in computer programming code.

In that context, also, it is important to recall basic understandings of delegation of powers. For example, with respect to the recognition of international standards, the most common way they may become sources of EU administrative law is through reference to such a measure in a Union legal act. This approach was well developed in various EU policy fields, which provide for this mechanism of incorporation of *initially* non-binding standards, by reference or explicit incorporation into EU legislation and thus give them binding nature.[47] The latter bears upon legislative and non-legislative acts across various fields.[48]

In the context of delegation of privately created software having regulatory effects in the EU by preparing decision-making in individual cases, also the CJEU has created a model for judicial review. In the context of the review of standards applied in EU law, the CJEU has held in *James Elliot* that standards, also privately set standards which form part of EU law because EU law explicitly or implicitly refers to them, may be subject to judicial review in the context of a preliminary reference procedure under Art 267

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[46] Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, para 172.

[47] See for an overview e.g. Andreas Follesdal, Rames A. Wessel, Jan Wouters (eds.), *Multilevel Regulation and the EU*, (Leiden-Boston, Marinus Nijhoff Publishers: 2008).

[48] See e.g. for food standards Recital 15 and Articles 21, 22 of Regulation (EC) no 183/2005 of the EP and of the Council of 12 January 2005 laying down requirements for feed hygene, OJ 2005 L 35/1 referring to the WHO's and the FAO's Codex Alimentarius. For labour standards e.g. Article 31 of Regulation (EC) No 1995/2006 of the EP and the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ 2006 L 378/41, making reference to ILO labour standards for public procurement contracts. For data protection standards see e.g. references to Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ETS No 108 of 1981, ratified by all EU Member States, in Article 27 of Regulation EU 2016/794 of the EP and of the Counciol of 11 May 2016 on the EU Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Cocunil Decisions 2009/317/JHA, 2009/934/JHA, 2009/936/JHA and 2009/968/JHA, OJ 2016 L134/53.

TFEU.[49] The result could be an invalidation not only of the individual decision but also an invalidation of the decision-making method and the standards used to conduct such decision-making.

In the *James Elliot* case, the CJEU had held broadly, that review of such standards could be undertaken in the context of compliance with obligations under the standardisation regulation in their creation.[50] According to this line of thought compliance of decision-making standards could also be reviewed against general principles of EU law and any other legislative requirements under EU law setting up procedural and substantive criteria for the legality of decision-making.

It thus falls to the Union legislator to frame the relationship between the Union interest and the participation of private actors, and to the Commission to supervise this relationship.

e) Delegation of regulatory tasks undertaken with ADM

A quite different consideration arising from the standardization experience concerns the transferal of regulatory tasks entirely to private parties. This means that the public then transfers to private parties the power to adopt, what is essentially regulatory decision making since the authorized private parties are granted the powers to take decisions having an impact on the balancing of individual rights. For example, private parties are expected to develop regulatory tools for supervision and enforcement of certain EU instructed objectives such as IP protection or the fight against certain illegal content online. The regulatory technology applied being in the hands of private entities, challenges arise concerning decision making balancing

[49] Case C-613/14 *James Elliot Construction v Irish Asphalt* ECLI:EU:C:2016:821, paras 34-36, 41.

[50] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council Text with EEA relevance; OJ 2012 L 316/12; a consolidated version with changes was published in 2015: http://data.europa.eu/eli/reg/2012/1025/2015-10-07.

individual rights and establishing proper standards and possibilities of review.[51]

The likelihood that a full-scale delegation of regulatory tasks to private parties would result in these tasks being undertaken with the help of automated decision-making using machine learning technology is quite high. The example of internet service providers being obliged by legislation to review uploaded material to discover such potential violations of IP rights is a telling example.[52]

5. An Outlook on Cyber-Delegation in the EU Regulatory Reality

Cyber-delegation occurs where ADM gains autonomy especially in cases with reduced human input into decision-making or in cases where ADM takes over several decision-making phases. This is the moment where ADM evolves from a mere 'tool' supporting agency or institution in decision-making, to becoming more of an 'actor'.[53]

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[51] For example, see Article 17(4) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130/92 under which "online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works". Internet service providers facing such potential liability undertake searches for IP protected content by ADM systems, thereby potentially affecting artistic freedoms, freedom of expression and other individual rights. Questions about the legality of Article 17 are currently pending before the CJEU.

[52] For example, see Article 17(4) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130/92 under which "online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works". Internet service providers facing such potential liability undertake searches for IP protected content by ADM systems, thereby potentially affecting artistic freedoms, freedom of expression and other individual rights. Questions about the legality of Article 17 are currently pending before the CJEU.

[53] See also Simona Demková, The Decisional Value of Information in European Semi-Automated Decision Making, (2021) *Review of European Administrative Law,* 29-50.

This chapter has discussed how the rising autonomy of ADM systems can be assessed from the point of view of EU delegation doctrines. CJEU case law has begun to specify these conditions but several factors complicate this process.

One is managing the various interfaces – i.e., between human and ADM technology. Additionally, in a multi-level system such as that of the EU, issues also arise from the integrated nature of administrative procedures spanning Member State and EU levels. The linkage between various levels often takes place by creating joint data bases on which automated administrative procedures are built upon. This requires careful design not just of the software for the automated decision-making but also of the information bases. ADM technology intervenes in various phases of decision-making procedures implementing EU law. ADM might be used to link various actors through granting access and processing data from large scale databases. Questions of accountability are often linked to the identification of responsibility,[54] which then may define the steps of decision-making procedures, including which actor takes a decision.

A second factor is that of guaranteeing normative steering of decision-making processes - i.e., of ensuring that rights, principles, and values of EU public law are complied with also in procedures using ADM systems. Various values central to the legal system including questions of separation of powers are relevant here. It is also a question of the share of 'law' in the decision as to limitations of fundamental rights.

A third factor is inextricably linked to informational asymmetries, which make the control of sophisticated ADM systems very difficult, especially "if the logic underpinning a machine-generated decision is based on dynamic learning processes employed by various forms of machine learning algorithms."[55] The reason for the impediment of meaningful human oversight and intervention then results from the "major informational

[54] Simona Demková, Teresa Quintel, Allocation of Responsibilities in Interoperable Information Exchanges: Effective Review Compromised? (2020) 1 *Cahiers Jean Monnet* 589.

[55] Karen Yeung, 'Why Worry about Decision-Making by Machine?' in: Karen Yeung and Martin Lodge (eds), *Algorithmic Regulation* (Oxford, Oxford University Press: 2019) 41 (https://www-oxfordscholarship-com.eui.idm.oclc.org/view/10.1093/oso/9780198838494.001.0001/oso-9780198838494-chapter-2) 24; Emre Bayamlioglu, Contesting Automated Decisions: A View of Transparency Implications (2018) *European Data Protection Law Review,* 434.

advantages" the machine has over a human operator.[56] This is particularly relevant in the discussion of possibilities of human oversight and review.

[56] Karen Yeung, 'Why Worry about Decision-Making by Machine?' in: Karen Yeung and Martin Lodge (eds), *Algorithmic Regulation* (Oxford, Oxford University Press: 2019) 41 (https://www-oxfordscholarship-com.eui.idm.oclc.org/view/10.1093/oso/9780198838494.001.0001/oso-9780198838494-chapter-2)
24; Emre Bayamlioglu, Contesting Automated Decisions: A View of Transparency Implications (2018) *European Data Protection Law Review,* 434.

CHAPTER SEVEN

ARTIFICIAL INTELLIGENCE AS AN AID TO CHECKS ON THE ADMINISTRATIVE STATE

ANNE MEUWESE[1]

Introduction

The idea that we can use Artificial Intelligence (AI) technology to keep tabs on decision-makers on occasion is taken in a very literal manner. Belgian artist Dries Depoorter has used machine learning to monitor online video streams of Flemish government meetings. With the help of AI-empowered software using facial recognition and imaging techniques politicians who are looking at their phones during meetings are being "caught". Videos of this activity are then automatically posted to the social media accounts of the project, captioned with warnings such as "Dear distracted @JanJambon, pls stay focused". Of course, this is a work of art, not a constitutional control mechanism. The project is widely assumed to carry a political message, namely to call lawmakers' attention to AI surveillance creep, the idea being that if they "become the targets, they may be more eager to regulate the weapons".[2]

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[2] Thomas Macauley, "This AI publicly shames politicians, but don't laugh just yet," *TNW*, 6 July, 2021, https://thenextweb.com/news/ai-automatically-publicly-shames-distracted-belgian-politicians-the-flemish-scrollers-surveillance-creep.

Although Depoorter's project serves nicely to illustrate the variety of ways in which AI can help "control" governmental actors, it is mainly an example of how *not* to do it. It employs one of the more intrusive AI technologies – facial recognition – to target and even shame individuals. Although it is true that these individuals hold power, obviously, checking one's phone is not high on the list of types of behavior by public officials or politicians warranting constitutional control. This chapter presents ideas as to how AI may operate as an aid to constitutional checks on administrative actors, in every respect doing almost exactly the opposite from the Flemish phone example. As AI technologies involving personal data come with well-documented risks of violations of privacy rules and data security standards,[3] the focus is on AI techniques that use non-personal, often textual, data and performance statistics as input. The aim would be to find patterns that are relevant for the assessment of tasks and behavior clearly within the mandate of those the AI serves. Also, the AI-based controls would be used at the level of institutions – in the American context mainly agencies – rather than at the level of individual agency employees. The very things considered dangerous about AI technology when used for surveillance of citizens, could align in a legitimate manner with the aims of traditional constitutional controls.

The question the chapter addresses is: why and how could AI be used to improve constitutional checks on the behavior of administrative actors? In doing so the chapter adopts a cross-jurisdictional approach: rather than focusing on one legal system or engaging in full-fledged comparative analysis, it borrows from a variety of jurisdictions, arguing that – whereas of course institutional arrangements differ in important respects – constitutional checks across jurisdictions run into similar difficulties. After an introductory first section (what is meant by "constitutional checks" and what is meant by "AI"?), those difficulties are identified and aligned with the "promises" of AI technologies. The subsequent sections make the possibilities more tangible and delve into the risks and pitfalls associated with the various ideas presented. The final section summarizes and concludes.

[3] Taina Bucher, *If…Then: Algorithmic Power and Politics* (Oxford: Oxford University Press, 2018).

Definitions and concepts

"Constitutional checks"

Terms like "checks and balances" and "constitutional oversight" and expressions such as "parliament exercising control over the government" are familiar in public law scholarship, but "constitutional checks" as such is not necessarily a term of art. Still, despite not being a clearly delineated category of concepts and practices in constitutional law, the term is useful in a transnational legal debate such as the one this volume aims to contribute to. The core idea in public law that "constitutional checks" respond to is that (far-reaching) delegation of powers to administrative agencies (or the government in systems where the establishment of agencies is discouraged by the dominance of the concept of ministerial responsibility) must be compensated. This can be done in a variety of ways. From ex ante controls such as mandatory impact assessments of intended decisions to ex post controls such as intensive judicial review. This chapter looks at controls that are not judicial in nature, although some of the findings can be extended to the litigation context. The focus is on systematic oversight mechanisms such as checks by audit institutions and other "specialized" oversight bodies such as the Regulatory Scrutiny Board (RSB) at the European Commission or the Office of Information and Regulatory Affairs (OIRA) in the United States as well as on mechanisms that can either be triggered ad hoc or are carried out on a systematic basis such as those by ombuds institutions and integrity watchdogs. "Constitutional checks" as used in this chapter also extend to the generic control function of parliaments and "self-oversight" or "internal accountability mechanisms" by agencies. The competences underlying such checks tend to be derived from constitutions or generic public law statutes; their substantive focus can either come from such generic statutes or from specific statutes governing the activities of specific agencies.

"Artificial Intelligence"

A much-used definition is that AI refers to systems that display intelligent conduct by analyzing their environment and – with a certain degree of independence - undertake action in order to achieve specific goals.[4]

[4] This definition is based on the one proposed by the European Commission's High-Level Expert Group on Artificial Intelligence. European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, February 19, 2020, COM(2020)65 def.

Although the European Commission in its proposal for an AI Regulation[5] uses a much broader definition, encompassing all manner of statistical methods[6], it is proposed to adhere to the narrower definition which emphasizes the presence of a degree of independent learning. This is to distinguish AI – for the sake of clarity of argument – from "regular" or "static" techniques of data analysis.[7]

One important subset of AI techniques has come to be known as "machine learning" (ML). "Learning" takes place through the iterative adjustment of the algorithm's decision-making rules, data retention, and error correction techniques. Within this category there are degrees of complexity, with techniques such as "deep learning" and "neural networks" attracting a lot of attention lately. But even the "simpler" machine learning based algorithms allow humans to present and predict information in ways that are out of reach otherwise. This is partly a matter of the sheer number of data points that algorithms of this kind process and partly because of its autonomous learning abilities. "Autonomous" is a relative concept here: in the developmental stages of the ML algorithm, they still need to be "trained" by humans, who need to supply them with learning rules that need to be tested on training data. Subsequently, the ML algorithm independently adapts its decision-making rules in an iterative manner by incorporating fresh data.[8]

In regular analytical processes, someone asks a question and the method follows from there. In machine learning processes of course the choice of task and the training of the algorithm still steers and frames the outcome to a great extent, causing the infamous "biases" (see Section 4) but chances

[5] European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act), April 22, 2021, COM(2021)206 def.

[6] Annex I of the European Commission's proposal for an Artificial Intelligence Act is adhered to: "(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning; (b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems; (c) Statistical approaches, Bayesian estimation, search and optimization methods".

[7] Nils Köbis, Christopher Starke, and Iyad Rahwan, "Artificial intelligence as an anti-corruption tool (AI-ACT): Potentials and pitfalls for top-down and bottom-up approaches" (2021).

[8] Pedro Domingos, *The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World* (New York: Basic Books, 2015).

are that the "machine" will produce answers to questions nobody had thought to ask. Apart from the breadth of the analysis, the time and resources saved are an important advantage. More in general, machine learning is known for improving "performance at various classification, prediction, and decision-making tasks". For instance, in the advertising industry AI is often touted as being capable of making a company's advertising budget go further because it can help target "micro-audiences" (e.g. men over 45 who would like to buy a Porsche but do not have the funds). AI developers sell their services as allowing companies to anticipate customer needs.

In debates on public law and AI we tend to look at governments and agencies as the "clients" of the AI industry who would like to use these techniques to better "control" citizens and regulatees, who thus can be seen as "customers".[9] In this chapter, this perspective is reversed. The clients employing AI techniques would be parliaments, audit institutions and other integrity watchdogs, civil society organizations and – possibly, eventually – citizens. To see governments and agencies as customers that they want to "target" is not an analogy that works well; instead, the focus (see next Section) is on AI techniques that can offer insights into various aspects of agency performance. In the same vein, the standard rationale for using AI in decision-making, namely "the belief they will offer quicker, cheaper, and more reliable decisions untainted by human shortcomings" does not apply squarely, although the time saved certainly matters (see Section 2).

A final remark before elaborating on the ways in which the shortcomings of constitutional checks on the processes and actions of administrative agencies and AI techniques may align. In the literature there are worries that AI as a field, or as an industry, "is explicitly attempting to capture the planet in a computationally legible form"[10] and not in a metaphorical sense but as a matter of direct ambition. Indeed, the role of what is loosely referred to as "the AI industry" above is important but largely beyond the scope of this chapter. One important aspect in avoiding a further imbalance of power, maintaining control over the AI applications used, is briefly touched upon in Section 4.

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[9] Mark Bovens, and Stavros Zouridis, "From Street-Level to System-Level Bureaucracies: How Information and Communication Technology is Transforming Administrative Discretion and Constitutional Control," *Public Administration Review* 62, no. 2 (2002): 174-84.

[10] Kate Crawford, *Atlas of AI,* (New Haven: Yale University Press, 2021), 9.

Constitutional checks as informational systems

Strengthening checks and balances

The administrative state is problematic as a matter of principle and as a matter of practice.[11] For agencies, performing well at their statutory tasks can be a challenge and, overall, they "regularly fail to act in a manner that promotes 'constitutional values'".[12] Proponents and opponents of the administrative state tend to agree that, for as long as it is also a necessary evil, strengthening the checks and balances aimed at assuring legitimacy, responsiveness and accountability as well as substantive values such as effectiveness matters.

Constitutional checks as described in Section 1 tend to be either very open-ended and general (the "control" function of parliaments) or highly specific and limited to one discipline (e.g. audits). However, what they have in common is their proneness to "human errors such as bias, fatigue or lack of the latest knowledge." The case for enlisting the help of AI techniques in oversight mechanisms aimed at checking governmental or administrative power largely relies on the main rationale behind the development of AI: supplementing human intelligence, by doing exactly what the latter does not excel at.

Part of the reason why it is proposed that AI-driven checks could focus on agencies is that they have clearly delineated tasks. The discretionary powers they have in order to carry out these tasks are subject to a range of implicit and explicit conditions, which have to do with either their performance or their legitimacy. The oversight mechanisms that we have tend to be either very case-based, such as the feedback function of administrative litigation and Ombudsman procedures, or limited to a specific subset of conditions, such as cost-effectiveness – here one can think of financial audits for example. For a more comprehensive view of how administrative agencies perform, both in terms of "instrumental performance" and in terms of

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[11] Pierre Rosanvallon, *Good Government: Democracy beyond Elections*, trans. Malcolm DeBevoise (Cambridge (MA): Harvard University Press, 2017), 60-5, 262-66. For the US context, see Jon Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (Cambridge (MA): Harvard University Press, 2017) and Gillian Metzger, "The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131, no. 1 (2017): 4.

[12] Neomi Rao, "The Hedgehog & the Fox in Administrative Law," *Daedalus* 150, no. 3 (Summer 2021): 220-41.

legitimacy, informational problems are often insurmountable. The main category of "informational problems" involves lack of transparency, but information "overkill" and "not knowing what one does not know" are also relevant categories. AI systems can be expensive to build and we would need to regulate data collection by administrative agencies in a different way, but once running they can show patterns that the human eye does not see and help, for instance, members of parliament select information.

In summary, there often is either a lack of information or information overkill, there are not many systematic "triggers" for constitutional checks and controls and the latter tend to be retrospective and reactive only.

What is it about AI that can help change the game?

One way to think about constitutional controls is to view them as "systems involving information retention, adaptive learning, and error correction".[13] There are two main ways in which AI can help keeping tabs on agencies. First of all, algorithms can trigger a review or assessment and, second, they can help improve the overall information position of oversight bodies and parliaments. Both can help constitutional actors act from a position of 'information-based power' and carry out their review tasks more systematically and proactively.

The use of AI to improve governmental and administrative performance and legitimacy is not new. For instance, in the context of anti-corruption, some countries are experimenting with concrete AI applications.[14] Below three concrete tasks AI systems are good at in general are listed and – where relevant – illustrated through the anti-corruption example.

Patterns

ML algorithms are able to find patterns in large datasets, that already for their size alone, cannot be analyzed by humans. The inferences ML systems

[13] Simon Deakin, and Christopher Markou, "Ex Machina Lex: Exploring the Limits of Legal Computability," in *Is Law Computable?: Critical Perspectives on Law and Artificial Intelligence*, ed. Simon Deakin, and Christopher Markou (Oxford: Hart Publishing, 2020), 65.

[14] See Felix López-Iturriaga, and Ivan Pastor-Sanz, "Predicting public corruption with neural networks: An analysis of Spanish provinces," *Social indicators research* 140, no. 3 (2018): 975-98; Andre Petheram, Walter Pasquarelli, and Richard Stirling, *The Next Generation of Anti-Corruption Tools: Big Data, Open Data & Artificial Intelligence* (Oxford: Oxford Insights, 2019).

make amount to correlations, not causal relationships. One function of algorithmic pattern detection could be to get a grip on the "(un)known unknowns". For instance, whereas the Dutch childcare benefit scandal is often presented as a text book story of how automation of decision-making processes releases uncontrolled administrative power, it also sheds light on a problem we have not yet thought about sufficiently in public law: how does one make use of redress mechanisms when ignorant of the injustice being done?

The Venice Commission, an authoritative advisory body of the Council of Europe offered the following as part of an opinion on the childcare benefit scandal:

> "In the future, more sophisticated artificial intelligence algorithms are likely to be used and it will be much harder to identify which criteria were used by these algorithms due to the very nature of "unsupervised learning" of modern AI systems. Detecting bias in such system can be next to impossible as self-learning AI systems are fed with large amounts of training data. This data comes from the real world; it aggregates individual decisions made by humans. However, in part these past decisions made by humans may have already been made on a discriminatory basis. On the other hand, such bias could normally not be discovered without such aggregation. Therefore, AI also presents an occasion to review past practices, and this should be used to identify bias in administration."[15]

AI developers have already made some progress in developing techniques that could actually detect bias in algorithmic decision-making. "Bias audits", coupled with obligations to disclose them, are one concrete possible control mechanisms to also develop as a matter of legal and institutional embedding.[16]

Prediction

Closely associated with "detecting patterns" is "prediction". For instance, AI applications have been developed that predict corrupt administrative behavior by combining large number of digital governmental records with datasets from other sources. The output is an estimation of "the risk of corrupt behaviors in contexts such as government procurements, taxation,

[15] Venice Commission, "Netherlands - Opinion on the Legal Protection of Citizens," adopted at its 128th Plenary Session, October 18, 2021, CDL-AD(2021)031-e, 20.
[16] Sandra Wachter, Brent Mittelstadt, and Chris Russell, "Bias Preservation in Machine Learning: The Legality of Fairness Metrics Under EU Non-Discrimination Law," *West Virginia Law Review* 123, no. 3 (2021): 735-90.

money laundering, or the access to public services". These ML algorithms can score various (parts of) agencies and flag those at high risk of corruption. A "flag" alone should of course never be taken as evidence of corruption (or another type of behavior that runs counter to constitutional values, such as discrimination[17] and non-arbitrariness). The purpose it may serve is to prompt further investigation or review on the part of an oversight body.

Process

The role AI can play in "optimizing" administrative processes is controversial. On the one hand those processes prone to abuse of administrative discretion can benefit from automation,[18] on the other hand there are new injustices potentially introduced by using AI in decision-making processes. Still, there are ways of using AI to improve the procedural aspects of decision-making with using AI for the deciding part as such. Rather, AI systems can be used to detect bottlenecks, for instance through process mining, a category of ICT techniques aimed at the analysis of operational processes. The type of data it uses typically consists of event logs. Analysis – through ML or though "regular" methods – of these event data can generate insights into the way an organization's processes actually work. For businesses who use process mining software this means finding out where costs can be saved and where processes can be simplified and improved. For agencies the type of insights could include those closer to the concerns of constitutional control of the administrative state, such as finding out which links in the decision-making chain are most determinative for the outcome.

Other considerations

One aspect that sounds trivial but is not, is the time that can be saved. In the commercial world, ML is promoted as enabling "companies to save time and resources on a wide range of tasks while achieving better business outcomes." In the public realm, too, information can be generated through AI that would never see the light of day if it had to be produced by humans. This means that thinking of AI in processes of constitutional control also

[17] Amnesty International, "Xenophobic machines – Discrimination through unregulated use of algorithms in the Dutch childcare benefits scandal," October 25, 2021.

[18] Marcio Lima, and Dursun Delen, "Predicting and explaining corruption across countries: A machine learning approach," *Government information quarterly* 37, no. 1 (2020): 396-407.

makes it possible to consider types of information that were never available before (see Section 3).

Finally, would it have to be AI specifically, or is regular data analysis sufficient for the kind of "help" this chapter envisages? It is clear that there is much to gain from more analysis of data regarding government performance, also without the use of "learning" algorithms. Yet the lack of need for explicit instructions can be a real advantage for a generic oversight mechanism such as parliamentary control, where the people behind it may not always know exactly what they are looking for, as well as for specific mechanisms such as ombuds or audit institutions who may not always want to wait for an official "trigger" (a case, a review) in order to be able to engage with certain patterns in an agency's or government's behavior.

Concrete applications

Two contexts of administrative decision-making

The first other context in which AI could be a useful aid to improve both the performance and the legitimacy of the administrative state is the "micro context". This means letting algorithms work alongside human-led administrative decision-making to reveal potential biases in the latter. This would amount to a kind of built-in check, where the system would give feedback to the agency internally, although disclosure requirements are conceivable. It is important to note that this manner of employing AI in agency processes is not about process automation as such. It is about ML discovering deep insights that agency employee may simply not have the time to find.

The use of "behind-the-scenes" AI process mining algorithms that "analyze archived data to detect patterns and then apply them to ongoing process executions to predict issues and inefficiencies" is not only interesting for agencies self-learning purposes but also for real-time parliamentary control of what we might call the "macro-context" of administrative decision-making. This type of help from AI could be applied to specific statutory tasks, such as "supervising chemicals use in the egg production chain", but, combined with statistics about accidents for instance, also to see how well government is performing in improving food safety overall. AI could discover potential causal links that are interesting for policy-makers and policy evaluators to take into account, and could do so without making use of personal data. Here the technique of Natural Language Processing (NLP)

is of particular interest, as this allows to harvest insights from large amounts of textual data – something governments and agencies excel at.

AI as an aid, what does that look like?

AI can be integrated in regular processes of constitutional control over the executive. In a trivial sense, that is already happening when parliamentary aids use search engines to find information for members of parliament.[19] However, although parliaments across jurisdictions receive a lot of data from their governments and agencies, their information systems do not normally employ AI technology, which also means parliaments do not tend to be in charge of the use of such technology for their own democratic and constitutional purposes.

Some will fear that use of AI for parliamentary information purposes will mean a loss of democratic control and an unconstitutional fettering of parliamentary primacy. However, an important point to make is that although ML is all about "decision rules" that does not necessarily mean that its output has to appear as "decisions", at least not in the meaning that public law jargon attributes to the term. The algorithms can also churn our "flags", visual process charts (e.g. what does the decision-making within a particular agency actually look like?) or scores. Regarding the latter, the phenomenon of AI-fed credit scores tends to be a bad idea. "Terrorist credit scores" will still be acceptable to some, but "social credit scores" are widely condemned in liberal societies and even stand to be outlawed in the European Union if the European Commission's proposal is adopted. However, would "rule of law credit scores" for agencies be such a bad thing? Governments' performance in areas such as the rule of law is already being ranked, although usually at country level – although and not wholly without controversy.[20] An important reason why we do not measure the extent to which actors of the administrative state (mainly agencies) act in line with constitutional values, for example, is lack of resources. We cannot really expect the Ombudsman to systematically carry out laborious studies involving "manual" analysis of lots of cases. Nor can we expect an algorithm to churn out an authoritative ranking of agencies according to their performance on such a multi-facetted subject. However, AI can help

[19] Reijer Passchier, *Artificiële intelligentie en de rechtsstaat* (Den Haag: BoomJuridisch, 2021), 104.
[20] Walter Bartl, Christian Papilloud, and Audrey Terracher-Lipinski, ed. "Governing by Numbers - Key Indicators and the Politics of Expectations," (Special Issue) *Historical Social Research* 44*,* no. 2 (2019).

oversight bodies to strengthen the naming and shaming aspect of their role – should they wish to do so – and to engage in this practice with regard to a wider range of issues.

Downsides and pitfalls

The list of downsides to the use of AI is significant and growing. For instance, recently the environmental and social cost associated with the development of advanced AI systems has received attention.[21] For the purposes of this chapter, only the classic triad of risks associated with AI and machine learning in particular are discussed: explainability, bias and access and quality of data. How do these risks play out when it comes to using AI to help control actors of the administrative state?

Is explainability a problem for this "reverse" application of AI (*to* agencies instead of *by* agencies)? On one level "black box algorithms" are always problematic. The problems associated with it, loss of human agency first and foremost, are mildest though when AI is merely used to "flag" potential problems. Maintaining control is essential for oversight bodies and parliaments using ML and associated techniques to learn more about what agencies are actually doing and how they are doing it and meaningful control over other aspects of the AI can sometimes compensate for the explainability problem.

Bias caused by the use of historical data and the autonomous creation of decision rules does not need to be a problem, if the aim is precisely to detect bias. It is also less of a problem when AI is not used to draw conclusions about individuals. Here we encounter a tricky aspect of the central proposal of this chapter. When does AI-based monitoring of agency activity turn into monitoring of agency employees? What if the use of bias signaling technology points to specific civil servants? Here we are venturing into territory similar to the scandal of the teacher who was fired because data analysis showed her pupils systematically performed worse.[22] A link may also be made with France's decision to outlaw the analysis of court data in

[21] Crawford, *Atlas of AI*.
[22] Eva Baker et al., "Problems with the use of student test scores to evaluate teachers," Briefing Paper #278, Economic Policy Institute, August 27, 2010. https://www.epi.org/publication/bp278/.

a way that is traceable to individual judges.[23] Whereas in this age of the human interest, the growing attention for personae in the public realm, perhaps at the expense of public attention to institutions, is worth exploring, as far as AI-fed checks are concerned the initial focus should be on institutions. Being extra careful with AI that impacts people is also in line with the emerging regulatory frameworks for AI.[24] Talking about the administrative state, agencies and organizational units within agencies make good candidates for AI-driven checks in the macro-context. In certain circumstances the internal use of ML algorithms to flag problematic behavior of agency employees, along the lines of the anti-corruption example above (micro-context), can be justified, for instance when the outcomes are used for learning purposes.

The largest problem for the use of AI as an aid to constitutional checks on the administrative state is data access and quality. Now, the presence of good and abundant data is always a major issue for building AI applications,[25] but in the "traditional" situation of an agency employing AI to automate its decision-making processes, at least the data is usually there. When we reverse the situation and want to build an AI system that helps watch the agency's decision-making and overall performance that will more often than not be a different story. This is therefore the number one issue to work on when furthering the use of AI to get better information about the performance and constitutional behavior of actors of the administrative state.

Conclusion

To summarize, both in the broader (macro) context of "how do agencies actually perform" and in the narrower (micro) context of automated decision-making, there is a potential to develop AI-driven systems that could boost human decision-making intelligence to strengthen a variety of constitutional checks. The regular arguments in favor of using AI, and ML in particular ("to avoid bottlenecks, improve efficiency, and highlight possible process improvements") apply, but mainly the capacity to detect patterns in agency decision-making that go against constitutional values and

[23] Artificial Lawyer, "France Bans Judge Analytics, 5 Years In Prison For Rule Breakers," June 4, 2019. https://www.artificiallawyer.com/2019/06/04/france-bans-judge-analytics-5-years-in-prison-for-rule-breakers/.
[24] European Commission, proposal Artificial Intelligence Act 2021.
[25] Jenna Burrell, "How the machine 'thinks': Understanding opacity in machine learning algorithms," *Big Data & Society* (January–June 2016): 5.

that otherwise could go undetected would be a valuable asset. The types of uses set out above do not completely escape the criticisms AI technology has been receiving, for instance with regard to incurring bias, violating privacy and annihilating human agency. Still, applying "natural language processing" to large amounts of decisions generated by administrative agencies to detect patterns of bias, is a long way from, say, applying facial recognition techniques to harvest input for a social scoring system from security cameras (to use an extreme and hypothetical example). In order to apply such AI technologies in processes of constitutional checks of the administrative state, more thought will need to be given to their limits, as well as for ways for constitutional actors to stay in control. However, it is also likely to be in the interest of good administration to experiment with small-scale pilots involving bias audits and reverse engineering of decision-making procedures.

Bibliography

Aarvik, Per. "Artificial Intelligence – a promising anti-corruption tool in development settings?" Bergen: U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, 2019.

Alpaydin, Ethem. *Machine Learning*. Cambridge (MA): MIT Press, 2016.

Artificial Lawyer, "France Bans Judge Analytics, 5 Years In Prison For Rule Breakers." June 4, 2019. https://www.artificiallawyer.com/2019/06/04/france-bans-judge-analytics-5-years-in-prison-for-rule-breakers/.

Baker, Eva et al. "Problems with the use of student test scores to evaluate teachers" Briefing Paper #278, Economic Policy Institute, August 27, 2010. https://www.epi.org/publication/bp278/.

Bartl, Walter, Papilloud, Christian, and Terracher-Lipinski, Audrey, ed. "Governing by Numbers - Key Indicators and the Politics of Expectations" (Special Issue) *Historical Social Research* 44, no. 2 (2019).

Bovens, Mark, and Zouridis, Stavros. "From Street-Level to System-Level Bureaucracies: How Information and Communication Technology is Transforming Administrative Discretion and Constitutional Control." *Public Administration Review* 62, no. 2 (2002): 174-84.

Bucher, Taina. *If...Then: Algorithmic Power and Politics*. Oxford: Oxford University Press, 2018.

Burrell, Jenna. "How the machine 'thinks': Understanding opacity in machine learning algorithms." *Big Data & Society* (January–June 2016): 1–12.

Busuioc, Madalina. "Accountable Artificial Intelligence: Holding Algorithms to Account." *Public Administration Review* 81, no. 5 (2020): 825–36.

Citron, Danielle. "Technological due process." *Washington University Law Review* 85, no. 6 (2008): 1249-1313

Citron, Danielle, and Pascal, Frank. "The Scored Society: Due Process for Automated Predictions." *Washington University Law Review* 89, no. 1 (2014): 1-33.

Cohen, Julie. "The Regulatory State in the Information Age." *Theoretical Inquiries in Law* 17, no. 2 (2016): 1-32.

Crawford, Kate. *Atlas of AI*. New Haven: Yale University Press, 2021.

Deakin, Simon, and Markou, Christopher. "Ex Machina Lex: Exploring the Limits of Legal Computability." In *Is Law Computable?: Critical Perspectives on Law and Artificial Intelligence*, edited by Simon Deakin, and Christopher Markou, 31-66. Oxford: Hart Publishing, 2020.

Domingos, Pedro. *The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World*. New York: Basic Books, 2015.

Fagan, Frank, and Levmore, Saul. "The Impact of Artificial Intelligence on Rules, Standards, and Judicial Discretion." *Southern California Law Review* 93, no. 1 (2019): 1-35.

Köbis, Nils, Starke, Christopher, and Rahwan Iyad. "Artificial intelligence as an anti-corruption tool (AI-ACT): Potentials and pitfalls for top-down and bottom-up approaches" (2021). https://arxiv.org/abs/2102.11567.

López-Iturriaga, Felix, and Pastor-Sanz, Ivan. "Predicting public corruption with neural networks: An analysis of Spanish provinces." *Social indicators research* 140, no. 3 (2018): 975-98.

Lima, Marcio, and Delen, Dursun. "Predicting and explaining corruption across countries: A machine learning approach." *Government information quarterly* 37, no. 1 (2020): 396-407.

Macauley, Thomas. "This AI publicly shames politicians, but don't laugh just yet." *TNW*, 6 July, 2021. https://thenextweb.com/news/ai-automatically-publicly-shames-distracted-belgian-politicians-the-flemish-scrollers-surveillance-creep.

MacKay, David. *Information Theory, Inference and Learning Algorithms*. Cambridge (UK): Cambridge University Press, 2003.

Metzger, Gilian. "The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege." *Harvard Law Review* 131, no. 1 (2017): 1-95.

Michaels, Jon. *Constitutional Coup: Privatization's Threat to the American Republic*. Cambridge (MA): Harvard University Press, 2017.

Passchier, Reijer. *Artificiële intelligentie en de rechtsstaat*. Den Haag: BoomJuridisch, 2021.

Petheram, Andre, Pasquarelli, Walter, and Stirling, Richard. *The Next Generation of Anti-Corruption Tools: Big Data, Open Data & Artificial Intelligence*. Oxford: Oxford Insights, 2019.

Rahwan, Iyad et al.. "Machine Behaviour." *Nature* 568, no. 7753 (2019): 477-86.

Rao, Neomi. "The Hedgehog & the Fox in Administrative Law." *Daedalus* 150, no. 3 (Summer 2021): 220-41.

Rosanvallon, Pierre. *Good Government: Democracy beyond Elections*. Translated by Malcolm DeBevoise. Cambridge (MA): Harvard University Press, 2017.

Sunstein, Cass. "Problems with Rules." *California Law Review* 83, no. 953 (1995): 956-1021.

Wachter, Sandra, Mittelstadt, Brent, and Russell, Chris. "Bias Preservation in Machine Learning: The Legality of Fairness Metrics Under EU Non-Discrimination Law." *West Virginia Law Review* 123, no. 3 (2021): 735-90.

CHAPTER EIGHT

DIGITALLY READY LEGISLATION IN DANISH LAW: THE STRENGTHS AND WEAKNESSES OF DIGITAL SIMPLICITY IN NEW LEGISLATION

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In Denmark, new legislation is currently designed to be digitally compatible from the very beginning. The new legislative concept has been named "digitally ready legislation" denoting legislation that is ready to be transformed into subsequent digital requirements. The catch word used by the Danish authorities is "digital ready". The pro-active digital focus at the phase of initiation of new regulation may have a price, however, as far as the rule of law is concerned reducing the flexibility and "elastic quality" of regulatory templates. This article sheds light on principles of digitally pre-born legislation and against that backdrop, I discuss various rule of law scenarios. It is a challenge to strike a fair balance between regulation with an open-end and discretionary design or with a close-end design based on regularity and objective criteria. This debate is so far missing in Danish law. Although the concept of digitally ready legislation has advantages, and although Denmark ranks in the top end of the digital class in Europe, the ongoing digital reform comprises a number of problems. Arguably, the reform may as a whole represent a drawback towards a more simplified legal geometry to the detriment of the diversity of citizens and enterprises subject to Danish law.

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1. A political push for digital reform of legislative culture

A strong current focus in Danish politics and Danish law is how to optimize the opportunities and potentials that the digitalization of the public sector arguably entail. A concrete manifestation of this is found in the parliamentary agreement from 2018 on digitally ready legislation between the Danish Government and political parties in the Danish Parliament.[2] The political agreement and the efforts in translating it into legislative practice will be high-lighted in the following.

The parliamentary agreement on "digitally ready legislation" is a new milestone in Danish legislation taking a proactive approach to subsequent digital solutions in the public sector.[3] According to the agreement, legislation must pave the way for use of digital solutions in the Danish administration. With the introduction of digitally ready legislation, the abstract debate on digitalization in Denmark – and many other European countries - is transformed making digitalization more present and a more concrete during the pre-legislation phase in the Parliament. Therefore, further elucidation and discussion of the implications of the agreement is called for although such debate – at least in Denmark – is surprisingly absent so far.

How to strike a fair balance at the legislative level between discretionary and objective regulation is one of the main challenges discussed in this article. Another is how to address the fact that digitally ready legislation has an inherent preference for binary regulation. The article further questions whether the general assumption that law is a technology-neutral phenomenon can he upheld if digitally ready legislation ends up creating a general regulatory culture based on algorithms. It is often said that legal principles and rules do not change materially by switching from analogue to digital format.[4] In my opinion, conversely, it can be emphasized with

[2] The Danish parliamentary agreement on digitally ready legislation, January 2018 ("Politisk aftale om digitaliseringsklar lovgivning" af 16. januar 2018), cp. the governmental publication "Regeringens aftale med alle øvrige partier i Folketinget: "Enkle regler, mindre bureaukrati – lovgivning i en digital virkelighed", The Danish Ministry of Finance, October 2017.

[3] See a brief introduction by the responsible Agency, the Danish Agency for Digitisation ("Digitaliseringsstyrelsen")
https://en.digst.dk/policy-and-strategy/digital-ready-legislation/

[4] The Danish Ministry of Justice claim that administrative law principles are substantially neutral to technological changes and that administrative law principles a priori are resistant to normative changes as a result of formats changes

equal justification that the consequence of the new concept of digitally ready legislation in the long term may be that technology has a normative impact in the design of regulation and the choice of structure of rules.

With regard to the chosen model of analysis in the article, it can be mentioned that my aim is to examine the possibilities and dilemmas of digitalization at a *legislative level* and thus from a primarily constitutional law perspective. In addition, many important issues in relation to the digitalization at governmental and citizen level can be raised, nevertheless these issues are not addressed within this work due to spatial reasons. In this article my focus is legislative rather than administrative.

2. Parliamentary agreement with a dual focus: more digital state and fewer digital "scandals"

Denmark is top ranked when it comes to digitalization from a macro perspective. In 2020, Denmark is ranked at the very top globally when it comes to e-Government according to the UN.[5] Within the EU, Denmark has in 2018 been ranked among the most digital societies in a broad study on various levels of digitalization.[6] The survey covers all 28 Europeans countries (in 2018) with Sweden, Finland, and the Netherlands also being among the highest ranked. At the lower end of the ranking we find countries such as Italy, Bulgaria, and Romania. The measurement of the levels of digitalization of the European countries is based on six dimensions, including digital infrastructure, the digital skills of the population, the use of digitalization by businesses, and the levels of digitalization in the public sector. From a dynamic perspective indexing may appear less positive for Denmark. In 2017 Denmark had 'only' a digital development rate of 2% while the average for the EU was 3,2%. In relation to the dimension of digitalization that concerns digital citizens, it is estimated that 71% of the Danish population in 2018 has at least the fundamental digital skills. Even here, the rate of development is slightly stagnant. But it can be noted, that it is obviously more difficult for digitally well-developed countries to maintain a high development curve than less digitally developed countries.

(e.g. from paper, electronic to purely digital administration), cp. "Justitsministeriets notat om forvaltningsretlige krav til offentlige digitale løsninger, 2015".

[5] E-Government Survey – Digital Government in the Decade of Action for Sustainable Development, United Nations, New York, 2020. www.publicadministration.un.org

[6] Digital Economy and Society Index (DESI), European Commission, May 2018.

Given this background, it is not surprising that the political parties in Denmark – from all ends of the political spectrum – give priority to digital options. The agreement on digital-ready legislation is based on the fundamental view that a proactive and agile approach is needed if digital solutions must function as intended in relation to both efficiency and the rule of law within the public sector. The underlying idea is that digital perspective is not only a practical, administrative and a matter of IT, but also a regulatory matter.[7]

The sooner digital solutions are considered, the better the possibility and potential of well-functioning digital solutions in the subsequent stages. Therefore, the agreement stipulates that the Parliament addresses the digital potentials in the administrative implementation of the law, and that the digital perspective is put on the agenda even when the political parties consider new regulation. This means – in an ideal (digital) world – that the even political compromises and political "deals" at a very early stage should be conceptualized and drafted in a simple, objectively phrased and digitally practical way making the political "deal" ready for and suitable for subsequent digital solutions.

Another, and substantively important part of political agreement is that the legislature should generally take a critical look at discretionary regulation. Digital solutions typically advocate the avoidance of discretionary and dynamic elements. According to the Danish Ministry of Justice's updated guidelines on the quality of law, new legislation should be designed in order to facilitate "a full or partial digital administration and application of new technology that support a better and far more efficient task solution'.[8]

In my opinion, the overall aspiration of the agreement to be more digitally agile is as such convincing, especially looking at past mixed experiences. However, it is also quite ambitious in many aspects. The ambition is a complete change of mindset in many ways: from digitalization being an

[7] The literature on Digital administration e.g. the usage of algorithms is rapidly growing and several European initiatives are launched, see e.g. ELI Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Impact_Assessment_of_ADMSs_Used_by_Public_Administration.pdf

[8] Cp. Guidelines on drafting new legislation by the Danish Ministry of Justice ("Justitsministeriets vejledning om lovkvalitet, opdateret december 2017, afsnit 4.2., side 172."). The guidelines can be found at www.lovprocesguide.dk .

issue that has been typically been a secondary consideration in the work of politicians and government officials in preparing legislation and administrative regulations (if it has been considered at all) to now becoming a *mandatory* and initial consideration during the phase of drafting and phrasing new regulation. This legislative culture in Denmark is thus in a fundamental transition phase. In a Danish context, the absence of academic literature with a focus on this transition and the absence of critical reflections have – so far – been quite remarkable. One might argue (as a Danish author myself), that the Danish tendency to consensus culture and to pragmatic approaches have prevailed over analysis and discussion.

Although the agreement on digitally ready legislation is not based on an expert report or on published systematic analysis or empirical research, when reading the agreement, you get the impression that the agreement has a double purpose.

It is written in clear wording that political parties with the agreement want to embrace the many opportunities offered by the digital community. If we look at the agreement from a single-case perspective, the agreement can also implicitly be read as an initiative that wants to distance itself from a number of "problem-cases" and "scandals" concerning the use of digital solutions within the Danish public sector. An example which is often referred to is the challenges of a digital tax law system, the EFI-system (one common IT system to recover tax debts). The mere cost of recovery steps to dismantle the default system made by the automated recovery tax system is estimated to amount to 200 million Euro (1,5 billion DKK). [9] In addition, a series of huge challenges of the Danish public property valuation system have a strong digital dimension. In 2013 the Danish tax authorities had to suspend the national property valuation system used for calculation of payment of property tax among other things – covering a major part of real estate in Denmark - with the consequence that the valuations are technically frozen and suspended. In that regard, it is stated, - somewhat understated - in the political agreement on digitally ready legislation that there are "several examples of public IT projects being considerably more expensive and delayed" because the legislation is framed without the necessary consideration for the subsequent digital implementation.

[9] The Danish "EFI-scandal" is briefly described by the Danish ombudsman in a report from 2014 (FO 2014-24: "Overholdelse af forvaltningsretlige krav i forbindelse med udviklingen af SKATs IT-system, EFI"). The report can be found at www.ombudsmanden.dk.

The well-known 'problem-cases' - despite illustrating the challenges rather than benefits of digitalization of the public sector – thus seem to have added momentum to the concept of digitally ready legislation.

3. The broad embrace by the aspiration of digitally ready legislation

The agreement on digital-ready legislation has a wide scope, and it targets not only new legislation (new bills) but also administrative regulations and political agreements.

Firstly, the agreement has effect vis-à-vis new laws (new bills) that are enacted after July 1, 2018, i.e. bills that are put forward during the Danish parliamentary year 2018/2019 (October 2018 until October 2019). Secondly, the agreement has effect vis-à-vis administrative regulations ("bekendtgørelse"), that are issued from July 1, 2018 onwards. Thirdly, the agreement envisages an assessment of the consequences of digital implementation with regard to political negotiations and agreements following July 1, 2019. Fourthly and fifthly, the agreement stipulates, in the context of revision and amendment of existing laws and the revision of existing administrative regulation, that a pro-active digital perspective must be included. When it comes to significant changes to current legislation it should be considered in accordance with the agreement, whether a more fundamental revision of the legislation is needed to make it fully digitally ready.

Against this backdrop, the political agreement on digitally ready legislation is more far-reaching than its name – comprising also e.g. administrative regulations that play a very important role in Danish law – and the digital reform will have an impact on the entire body of law, or a significant part of it in the years to come. It could be added that a revision clause has been included in the agreement, and the political parties in the Danish Parliament will in 2020 assess whether the legislation passed by the Parliament as a whole is sufficiently digitally ready, and discuss further initiatives to support and enhance digitally ready legislation in the broad sense.

Generally speaking, drafting digital ready legislation will be a resource intensive activity, and the much praised overall efficiency benefits may in practice be somewhat modified It may also be noted, that no indication seems to have been made of how much of the mentioned regulatory body consists of discretionary provisions. The agreement's emphasis on

simplification of discretionary laws and regulations seems to assume that it is a large number. The agreement is supplemented by general guidelines ("vejledning") issued by the Danish Agency for Digitalization ("Digitaliseringsstyrelsen"), stating new legislative principles and various methods for impact assessment. The guidelines have public law legislation and regulation as their main focus.[10] In respect of commercial law, a political agreement has been concluded between a number of political parties with a view to digitally ready legislation that is important for business. Thus, legislation and regulation is currently – regardless of being a subject matter within public or private law - also subject to general principles digitally ready and "agile" legislation.[11]

4. The distinctively technocratic approach to digitally ready legislation

According to the guidelines from the Danish Agency for Digitization, legislation can formally be characterized as digitally ready if it meets – or at least receives sufficiently positive assessment of a list of seven principles. The approach to digitally ready legislation is highly technocratic, and as far as the Agency of Digitalization is concerned, it is primarily as a matter of "good legislative technique" rather than a matter of democracy and good administration. The seven – technocratic – principles will in future become part of a mandatory approach, in which the relevant ministry will assess a bill's implementation consequences. These consequences should always be addressed and described in the general preparatory comments of the bill (preparatory works). The seven principles are as follows:

1. Simple and clear regulations. Legislation should be simple and clear, so it is easy to understand for citizens and businesses. Simple and clear regulations are easy to manage and contribute to a more consistent administration and digital support.
2. Digital communication. The legislation must support digital communication with citizens and businesses. For those citizens and businesses that do not use digital solutions, other solutions must continue to be an option.

[10] Cp. "Justitsministeriets vejledning om lovkvalitet, op. cit., pkt. 4.2. (Digitaliseringsklar lovgivning)."
[11] Cp. "Erhvervsministeriets vejledning om principperne for agil erhvervsrettet regulering, juni 2018."

3. Automatic processing. The legislation must support that the administration of the legislation can be done in whole or in part digitally with due regard to legal security of citizens and businesses. This means among other things, that the legislation is basically designed so that the objective criteria are used when it is considered relevant and when there is no need for a discretionary professional judgment.
4. Coherence – uniform concepts and data reuse. Data and concepts should, as far as possible, be reused across authorities.
5. Safe and secure data management. High levels of digitalization require high priority on data security. Therefore, in legislative work, the focus should be on whether new legislation gives rise to special points of attention in relation to safe and secure handling of citizens' and companies' data.
6. Public infrastructure. Legislation must take into account that it is possible to use existing public infrastructure such as NemID, BankID, digital mail and other e-IDs.
7. In the drafting of legislation, the possibility of a monitoring and preventing abuse and errors should be taken into account. Legislation must allow efficient IT use for control purposes.[12]

If we take an initial analytical look at the seven principles, it can be said that they are based on the following presupposed and simplified transformation - or 'before and after'-dichotomies: (1) from unclear regulation to clear regulation, 2) from analogue/manual communication to digital communication, 3) from discretionary/open-end regulation to objective/close-end regulation**.** 4) from sectoral concepts to intersectional/coherent concepts, 5) from less secure/uncertain data management to secure data management, 6) from decentralized infrastructure to public infrastructure and 7) from less efficient/ineffective control to effective control. In time, quite significant developments are thus expected.

In addition, the Danish Agency for Digitalization's guidelines contains methods for assessing the consequences of implementation and recommendations on digital-ready legislation. This includes a description

[12] The principles are quoted as stated in the guidelines of the Danish Minsitry of Justice ("Justitsministeriets vejledning om lovkvalitet, op.cit, page 172". A somewhat more comprehensive explanation of the principles can be found in the guidelines of the Danish Agency of Digitization ("Digitaliseringsstyrelsens vejledning").

of the requirement that the ministries of 2018 should submit legislative proposals with implementation consequences in consultation with the Agency for Digitalization, as far as six weeks before consultation. The mandatory consultation with the Agency for Digitalization applies only to legislative proposals, not administrative regulations such as notices.

Looking at the organizational set-up of enhancing digitally ready legislation it is striking that the Agency for Digitization under the Ministry of Finance in the field of public law has been assigned the task of providing legal technical assistance to the different ministries. The Agency for Digitalization has to undertake screening of draft legislation and to assist the ministries with guidance on the new impact assessment and support the work on digital-ready legislation. In this way, the task of guiding is split between the Danish Ministry of Justice, as an expert in the classical legal field as to drafting new legislation, and the Agency for Digitization, as an expert in the digital field. There is some coordination of the dual efforts, but the Ministry of Justice's accumulated competence is – to my mind – relatively reduced within the new set-up which in itself represents a shift of approach to fundamental rule of law concepts.

5. The rule of law dilemmas of non-discretionary templates

We now move on to one of the inherent challenges that face the concept "digitally ready legislation", namely the basic reservation towards discretionary regulation. When legislation is to be translated into algorithms and systemic programmes, open-ended and discretionary rules are to be avoided. They cannot be transformed into binary language. Although discretion is a feature of law that is frequently considered difficult by lawyers, discretion is nonetheless often a useful and relevant way of regulating a subject matter. Discretion entails a high degree of flexibility and case-to-case readiness. However, when we turn to the concept of digitally ready legislation, the existence of discretionary and framework-based regulation is to a large degree seen as a negative and counterproductive choice.

A large part of the political agreement consists in a call for the legislature and the responsible parts of civil service preparing new legislation to if not avoid, then at least to minimize, the use of discretionary rules. As mentioned above, the Danish Agency for Digitalization has established a legislative rule of priority in favour of objective, simple and close-ended

rules and in favour of regularity because of the possible benefits that such regulation gives in relation to subsequent digital management. It is embedded into the digital paradigm that ambition of the legislature is to break down legislation in binary logic and unambiguous categories.

Conversely, the legislature should reserve the use of more discretionary, dynamic and contextual rules in as few areas as possible. However, the desire to reduce discretionary is not without exceptions. The agreement opens up the possibility that there may still be reason to legislate by means of flexible regulatory frameworks e.g. in certain welfare law areas such as coercive removal of children from the parents. However, the examples of such permitted open-ended regulatory areas are few in the agreement. The rationale behind the preference for binary legislation is that such regulation may allow professionals to spend more time on more complex cases, where an individual judgment is needed, e.g. in cases concerning the child's well-being and support for particularly vulnerable citizens.

The challenge of a significant increase in the use of close-end regulation in Danish legislation is to my mind downplayed in the concept of digitally ready legislation. This applies primarily to a digital scenario where the task of making decisions towards citizens is coded into computerized decision making systems. Looking into the crystal ball we may envisage that digitally ready legislation will create a legal landscape characterized by "squareization" and simplified legal geometry. In my opinion, this may involve a loss of eye level with the citizen and a smaller space for individual considerations compared to a multi-faceted and increasingly individualized reality. There is a risk that future administrative decisions being made on the basis of digital administration will be less suited to embracing the diversity of citizens. The emphasis in the political agreement on efficiency and equal treatment benefits is only to a certain extent justifiable and the downside is, of course, that digitally ready legislation can put pressure on regulatory instruments that involve human discretion.

Although there is some awareness in the political agreement about maintaining discretion, the agreement is not specific on this point. In addition, as already mentioned, there will be no explicit comment in the preparatory works of new legislation as to whether the Parliament has opted out of the use of a discretionary rule model. The choice of close-end regulation is thus presented as the only choice when new legislation is designed. It is my assessment that too few and too single dimension examples have been included in the agreement on digitally ready

legislation. Confidence in legislation as such may be weakened if new legislation is largely designed in templates where important decisions are not based on individualized and well-considered judgements, but on algorithms that in a largely inexplicable way calculate a result.[13]

Finally, new legislation that is not flexible can make it difficult in practice to gain experience in the regulation and then find the appropriate legal level of rights. If legislation is designed in rigid templates, there is no room for subsequent adjustments in practice. If new legislation proves to be inappropriate or erroneous, it will also take time to change the legislative structure requiring new legislation to correct and replace the original template. Although the goal of increasing the regulatory outlook for digital solutions can hopefully be a constructive opportunity to focus more on the relationship between the state and the citizen, it may seem paradoxical that the introduction of digitally ready legislation into Danish law is so far based on a highly technical discourse.

Finally, it may be pointed out that digitally ready legislation is not only about digital potentials for the sake of digitalization but also to a large extent for the sake of efficiency. It has been emphasized as a counter-idea that efficiency considerations may risk becoming the main factor. The introduction of digitally ready legislation is by some commentators seem as a camouflage exercise with a view to implementing cuts within the public sector. The new organizational set-up where responsibility for implementing new legislation is divided, between the Agency for Digitalization under the Ministry of Finance on the one hand and the Ministry of Justice on the other, the Ministry of Justice and the Agency for Digitalization under the Ministry of Finance, may itself push towards prioritizing the efficiency, thus downgrading the rule of law.

6. Waiting for Godot and the broad debate on digitally ready legislation

Up till now, the introduction to digitally ready legislation has been a matter for politicians and for various officials within the central parts of Danish administration. The project has not aroused a wide popular debate or a discussion among legal experts. It will strengthen the legitimacy of the project if it is given a higher priority to share knowledge of the concept

[13] The problem of reduced confidence has been put forward by inter alia practising lawyers (Cp. “Advokatrådets retssikkerhedsprogram”).

and to facilitate a public debate on the pros and cons of digitally ready legislation. The agreement on digitally ready legislation has made the digital theme more concrete to the readers of the agreement, but the agreement may also have put a damper on a possible debate comprising counter-arguments due to the agreement's relative blindness to obvious dilemmas and drawbacks. The guidelines of the Danish Agency of digitization were submitted to a public hearing in 2018 with a rather narrow timeframe – 2 weeks - considering the complexity of the subject matter.

Summing up, there are promising elements in the new concept of digitally ready legislation. It can pave the way for efficient digital solutions and it is obvious that using digital solutions can generate benefits in many practical respects, such as self-service solutions, case management, digital 24/7 accessibility, more uniformity in the administration's work and a shortening of case processing times etc.

On the other hand, the ongoing of Danish legislative culture also faces rule of law challenges. The positive assessments in proposals for new legislative acts as to digital potentials can be seen as manifestations that the Danish legislature has endeavoured to avoid discretionary regulation. It must be assumed that the number of discretionary rules are being reduced for the time being, illustrated by the fact that the vast majority of new legislation so far (that is in the fall of 2020) are based on a positive pro-active assessment of digital solution. This may in itself represent a problem, and the framing in new legislation for subsequent digital solutions may have a deeper impact on the regulatory culture. The use of categorical regulatory models will now become more dominant and this development may have a negative impact on the relation between the state and the citizen. The bulk of legislation, as a whole, risks losing dynamics and flexibility. A more fundamental objection to digitally ready legislation is that one of the worst-case scenarios is/would be that the legislative power becomes more concerned with digitalization than with the citizen.

To avoid this scenario, a wider range of substantive benchmarks may be needed for the choice between discretionary and binary regulation than are sketched out in the political agreement of digitally ready legislation. A limitation of discretionary regulation may, in my opinion, appear to be substantially relevant and suitable in some areas – e.g. within tax law - but the primary reason for opting for a close-end and "square" regulatory template should not be the need of digitalization in as many administrative functions as possible. With a view to this, the ongoing transformation of

Danish legislation into a digitally compatible regulatory architecture can end up being both a step forward and a step backward.

Bibliography

Consultation response as to digitally ready legislation ("Høring over vejledning om digitaliseringsklar lovgivning", by the Danish Institute for Human Rights, 13 March 2018). https://menneskeret.dk/sites/menneskeret.dk/files/03_marts_18/hoeringssvar_vedr._udkast_til_vejledning_om_digitaliseringsklar_lovgivning.pdf

Danish Parliamentary Agreement on Digitally Ready Legislation ("Politisk aftale om digitaliseringsklar lovgivning", 16 January 2018), cp. the Danish governmental publication "Regeringens aftale med alle øvrige partier i Folketinget: "Enkle regler, mindre bureaukrati – lovgivning i en digital virkelighed", The Danish Ministry of Finance, October 2017.

Digital Economy and Society Index (DESI), European Commission, May 2018

E-Government Survey – Digital Government in the Decade of Action for Sustainable Development, United Nations, New York, 2020. www.publicadministration.un.org

ELI Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Impact_Assessment_of_ADMSs_Used_by_Public_Administration.pdf

Guidelines on drafting new legislation by the Danish Ministry of Justice ("Justitsministeriets vejledning om lovkvalitet"), December 2017, www.lovprocesguide.dk

Pedersen, Morten Jarlbæk, Digitally ready legislation: Do we know what we are referring to? ("Digitaliseringsparat lovgivning: Ved vi, hvad vi taler om?"), Nordisk Administrativt Tidsskrift, 3/2017, pp. 25-30.

Plesner, Ursula and Lise Justesen, From discretion to Algorithm ("Fra skøn til algoritme, Digitaliseringsklar lovgivning og automatisering af administrativ sagsbehandling", Tidsskrift for Arbejdsliv, 2018, pp. 9-20.