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***DIGITAL DECISION-MAKING AND DIGITAL ENFORCEMENT OF LAW***

***by the Honourable Mr. Justice Myron Michael Nicolatos***

***President of the Supreme Court of Cyprus***

Distinguished Justices and Jurists

Dear colleagues

In today’s era of e-government, it comes as no surprise that the language of Government has quickly changed. Rapid technological advances, accelerated automated processes utilised by many Governments. Nowadays, computer systems can be used to assist, guide or even replace a human decision-maker and they can be integrated, at different stages of the decision-making process.

We encounter automated systems in our everyday lives. To give an example, many Tax Departments around the world, have introduced online ‘e-tax’ systems to help taxpayers in completing their annual assessment tax returns. At first glance, e-tax might not appear to fall into this category. However, with each click and based on one’s answers, the system skips options and determines, on its own, based on its coded logic and its matrix of pre-programmed pathways, which options are not relevant. Similarly, digital traffic surveillance cameras, predominant to roads where over-speeding is frequent, are used, by law enforcement authorities, to identify and prosecute offenders.

I will not attempt to argue that these automated systems do not come with benefits. Undoubtedly, they do. They have the ability to process large amounts of data, minimise costs and increase efficiencies of scale. However, their growth and application, by administrative bodies, was introduced into the public law sphere well before anyone could properly reflect on how they interrelate with administrative law principles. The use of these systems by the government has, by now, become well entrenched, but questions may be raised as to the measures needed to ensure their compatibility with the core administrative law principles that underpin a democratic society, governed by the rule of law.

Judicial review of administrative action, is a permanent feature of our judicial systems; distinguishable from all other judicial processes. The effect of judicial review was to render public law rights, justiciable, at the instance of persons, whose legitimate interests were prejudicially affected, by the administration’s actions[[1]](#footnote-1). It is an important instrument for the control of administrative power. It provides a check on administrative abuse, regulates the exercise of legal power, secures the rule of law and safeguards individual rights against unlawful encroachment by the government. It is based on a constitutional separation of powers that safeguards the role of an independent judiciary in construing and applying the law. More so, administrative justice developed, core, principles of administrative law, such as natural justice, transparency, good faith, the rule of law, legality, reasoned decision-making, equal treatment, proportionality, impartiality, abuse of power, good administration and others. Administrative bodies are duty-bound by the above administrative law principles in the performance of their functions.

Administrative decision-making is rule-guided. The administrative procedure is guided by the core administrative principles I have already mentioned. I will focus, now, upon a few key ones, in my effort to emphasise the main challenges and legal implications, to public law principles, of administrative decisions made by pre-programmed, automated systems.

First, the principle of legality. *The overriding principle of legality* is substantial and essential to a democratic state that respects the rule of law and acts primarily in the public interest. For this reason, a public body’s powers and competence are determined by the Constitution or by Statute or Statutory Instruments/Regulations, enacted in accordance with the law[[2]](#footnote-2) and are limited to the extent such a statute allows[[3]](#footnote-3). Therefore,those who purport to exercise public decision-making powers must be authorised to do so, by law.

If an automated system is utilised to make a decision in whole or in part, the use of that system must be authorised by law. A question arises; does a statutory authority vested in a public body or servant extend, by implication or ‘delegation’ to an automated system? I don’t suggest that I have an easy answer, but it cannot be assumed that such is the case. Decisions made by automated systems must be made within a lawful framework. Authority to use such systems must be expressly prescribed by law, and made through transparent procedures.

It is true, that the number of public authorities that make significant decisions about individuals, by wholly automated means, is relatively small. Usually, some human intervention is required in making the decision.

On May 25th 2018, the European Union’s General Data Protection Regulation – which replaces the [previous 1995 Data Protection Directive](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML) – is due to come into force, and will bring in, a strict set of new rules concerning privacy and data protection. The regulations have been introduced to adapt to the fast pace of a modern digital landscape. More so, they enhance transparency in the decision-making process. While the principles of transparency have previously been implied, the Regulation now elevates their significance and status.

The General Data Protection Regulation has provisions on:

* + automated individual decision-making; and
  + profiling which can be part of an automated decision-making process.

Article 22 has additional rules to protect individuals when a public body is carrying out, solely, automated decisions that have legal or other significant effects on them.

For public bodies, this means, inter alia, that they must identify whether any of their processing falls under Article 22 and, if so, make sure that they:

* + give individuals, information about the processing;
  + introduce simple ways for them to request human intervention or challenge a decision; and
  + carry out regular checks to make sure that their automated systems are functioning properly and as intended.

In order to avoid falling within this provision, the data controller must provide for human intervention that allows for meaningful oversight. This means that the person tasked with overseeing the decisions, made through the automated decision-making process, must have the authority to change the decision, but also, the expertise to consider the available input and output data, and assess whether the decision made through the automated decision-making process should stand or be reversed. In other words, human intervention must be meaningful and not isignificant. Most importantly, the Regulation acknowledges the significance of human intervention, as a key element in the decision-making process.

This brings me to my second main point – the due reasoning of administrative decisions. An administrative decision must be made after due inquiry into the material facts of the case has been conducted, held in the context of the applicable law and be supported by adequate reasoning. In other words, an administrative decision must be the result of due inquiry and proper application of the law, and must be duly reasoned[[4]](#footnote-4). The reasoning of a decision is very important for testing the legality of the decision and it is therefore, an indispensable element for the decision’s validity[[5]](#footnote-5). In order for the court to effectively review the decision, its reasoning must be clear and unambiguous and not general or vague[[6]](#footnote-6). Otherwise, judicial review is hindered or even obstructed. A decision, lacking in due reasoning, cannot stand judicial scrutiny and will be annulled as a matter of course[[7]](#footnote-7). If an automated system has been utilised to make a decision in whole or in part, due reasoning is diminished, depending on the degree of automation used. Automated decision-making is an opaque process, invisible to the individual. It is obviously important to safeguard the transparency of administrative decisions by the provision of reasons in order to secure an effective judicial review.

Equally, acts and decisions of administrative bodies acting in the public domain spring, as a rule, from the exercise of discretionary powers vested in them, for the due enforcement or application of the law. How these powers are exercised is of great importance to the public. Discretionary decision-making is ultimately a process of isolating factors, evaluating each one of them and drawing a conclusion after a process of final evaluation and balancing of interests. The exercise of discretionary powers is governed, inter alia, by the principles of good faith, proportionality, impartiality and equal treatment[[8]](#footnote-8). It is these principles, amongst others, that the Administrative Judge is honoured to safeguard. Automated, computer generated decisions have transformed, the discretion-based decision-making process, to data exchange and big data analytics. Allow me to be sceptical about it. How can an Administrative Judge safeguard the legality, when discretionary powers have been diminished to a minimum by the employment of automated systems? Facilitation of automation by the legislature should only be considered, after careful scrutiny, in order to safeguard the legality, against the risk posed by the removal of duly reasoned exercise of discretion, which may lead to arbitrariness.

Thirdly, the weaknesses of such systems must also be borne in mind. Typically, government departments do not write their own algorithms, they buy them from private companies. It is the responsibility of computer programmers, who seldom have any legal training, to make decision-making systems, by transferring the law into code. One of the greatest challenges is to ensure accuracy, since the potential for coding errors is real. Errors in computer programming can result in wrong decisions potentially on a great scale, if undetected. For example, if a statutory test is misconstrued when the technology is developed, that misconstruction could taint with illegality, any decision made with the assistance of that technology. Moreover, we ought to recognise and acknowledge the limitations and deficiencies of such systems. For example, would such systems be able to accommodate concepts like ‘fit and proper’, ‘good faith’, ‘proportionality’ and ‘reasonableness’? These are complex human concepts, incapable of being transcribed into rigid criteria, and go beyond the capacity of an automated system. They require different factors to be weighed against each other and be finely balanced. If automated systems were used to determine such concepts, they would lead to failure to exercise discretionary powers.

Furthermore, having already examined the challenges, automated decision-making systems pose, on the principles of legality, due reasoning and judicial exercise of discretionary powers, I would like to raise one further point relating to the new demands these technological developments have on the Administrative Judge. I will illustrate my point with special reference to Cyprus’ judicial system. Cyprus’ Administrative Courts’ powers are limited to testing the legality and not the correctness of administrative decisions. Two exceptions exist. In asylum and tax cases, the Administrative Court has jurisdiction to review both the legality and the correctness of the decision*,* and to substitute the Administration’s decision with its own*.*

When reviewing the legality of a decision, the Court examines whether the public body has exercised its discretionary powers, within lawful limits, but its jurisdiction does not extend to issues of technical nature or issues that require specialised knowledge[[9]](#footnote-9). When such issues are raised, public bodies are the sole arbiters of their decisions, and the Court will only intervene if either misconception of fact, or abuse of power or failure to conduct a due enquiry[[10]](#footnote-10), is proved. However, when the Court reviews both the legality and the correctness of the decision, as in tax cases, the Court may amend an administrative decision if the competent public authority, acting under mandatory powers, (that is non-discretionary powers), reached a decision under a misconception of fact[[11]](#footnote-11). In essence this means that, if an automated, pre-programmed system was utilised wholly or partly, by a public authority, in the process of reaching a decision, some knowledge of the underlying decision-making system will be required by the administrative judge. The point I am trying to make is that, just as the law is adapting to the fast pace of a modern digital landscape, so must the judiciary adapt to the new demands and challenges.

Lastly, judicial review also became a powerful instrument for the protection of fundamental rights and liberties duly safeguarded in the Constitution. Article 35 of the Constitution of the Republic of Cyprus, imposes a direct and positive obligation to all state authorities not only to pay close attention to human rights in the exercise of their powers, but also to secure the “efficient application” of those rights, throughout the field of their activity. The Constitution, guarantees the protection of all basic human rights protected by the European Convention of Human Rights, and, in some instances, grants even higher protection, such as in the case of the right to property. The case law of the Supreme Court emphasises that respect for human rights is “sine qua non”.

With this in mind, a public authority is under an unabating duty to protect human rights, within its domain. Regardless of the changes technological advances brought to governmental processes by accelerating automation and facilitating data collection, data storing, processing and manipulation, human rights are diachronic and inalienable. Human rights embody fundamental norms, to be given effect to in the ever-changing social context. They have a transcendental character to be upheld in the fluctuating circumstances at all times. Man is the cell of society; society should evolve around the person, not above it or independently of the individual[[12]](#footnote-12). When an administrative decision is taken, partly or wholly, through automated means or enforced through them, the affected party ought to be given the right to be heard. Public bodies should not be allowed to hide behind the opaqueness of the process. Natural justice is regarded highly in administrative law. It is enshrined in Article 30.2 of the Constitution of the Republic of Cyprus, which is identical to Article 6.1 of the European Convention of Human Rights. Natural justice denotes that a public body must act in accordance with the principle of impartiality[[13]](#footnote-13)- *Nemo judex in causa sua.* It must also allow any person who will be affected by the administrative decision the right to be heard-[[14]](#footnote-14) *audi alteram partem* and be represented, either as a litigant in person or via an attorney, either orally or in writing[[15]](#footnote-15). Similarly, respect for privacy makes the private domain of a person invulnerable to intrusion by public authorities.

In conclusion, public authorities are duty-bound to act in accordance with European Union law, the Constitution, applicable laws and the general principles of administrative law. Judicial review*,* is an important instrument in the control of administrative power. It provides a check on administrative abuse, regulates the exercise of legal power, secures the rule of law and safeguards individual rights against unlawful encroachment by the government or the administration. When administrative courts deal with cases, they are engaged in a process that determines and declares the law. Administrative justice developed, core, principles in order to safeguard the correct procedure. These principles are a central feature of our systems. Our existing systems have these checks and balances built into them, that they would need to be integrated, or even replicated, in any new system. If human reasoning and the exercise of discretionary powers were automated, it must be safeguarded that the cardinal principles of our administrative law would not be lost or compromised. Before embracing the new world of automation, we must make sure not to lose things, hard fought to establish and protect.

A situation where the Courts will lose the power or the capacity to review administrative decisions, will seriously undermine the independence of the judiciary, it will water down the doctrine of separation of powers, and it will drift away from a democratic society governed by the rule of law.

1. Constitutionalism-Human Rights-Separation of Powers, Georghios M. Pikis, 2006, Page 114 [↑](#footnote-ref-1)
2. Sections 15 and 17, ibid [↑](#footnote-ref-2)
3. Section 8 of General Principles of Administrative Law Act of 1999 [↑](#footnote-ref-3)
4. Constitutionalism-Human Rights-Separation of Powers, Georghios M. Pikis, 2006, Page 119 and Section 26(1), ibid [↑](#footnote-ref-4)
5. Constitutionalism-Human Rights-Separation of Powers, Georghios M. Pikis, 2006, Page 118 [↑](#footnote-ref-5)
6. Kounounas v. Republic (2001), 3 C.L.R. 1163, Marina Neofytou v. Council of Ministers and others (2006) 3 C.L.R. 768 [↑](#footnote-ref-6)
7. P.E.O. v. Republic (1965) 3 C.L.R. 27, Maratheftou a.o. v. Republic (1982) 3 C.L.R. 1088 [↑](#footnote-ref-7)
8. General Administrative Law, P.D. Dagtoglou, 6th Edition, Page 173, Para. 384 [↑](#footnote-ref-8)
9. Storey v. Republic (2008) 3 C.L.R. 113, Republic v. C. Kassinos Constructions Ltd (1990) 3 (E) C.L.R. 3835, Lambrou v. Republic (2009) 3 C.L.R. 79, Georghiou v. SALA (2002) 3 C.L.R. 475, Eva Ttousouna v. Republic (2013) 3 C.L.R. 151 [↑](#footnote-ref-9)
10. Republic v. Lefkou Georgiade (1972) 3 C.L.R. 594, 692-693, Nicolas v. Republic and others (1989) 3 C.L.R. 228, 236, Republic v. Matthew (1990) 3 C.L.R. 2452, Westpark v. Republic (1990) 3 C.L.R. 915, 921, Holy Archbishop of Cyprus and others v. Republic (1990) 3 C.L.R. 1175, 1185, Civil Servants Commission v. Andreas Anastasiades (1991) 3 C.L.R. 1, 10, Cyprus Broadcasting Corporation and others v. Sisel Holdings Ltd and others (2013) 3 C.L.R. 326, Podium engineering Ltd v. Republic (2008) 3 C.L.R. 430, Charalambos Christou Chomatenos v. Republic (2009) 3 C.L.R. 120, Logicom Public Ltd v. Tenders Review Authority and others, A.E. 153/2009, 14/1/2014 [↑](#footnote-ref-10)
11. Section 11(4) of Administrative Court’s Act of 2015 [↑](#footnote-ref-11)
12. Constitutionalism-Human Rights-Separation of Powers, Georghios M. Pikis, 2006, Page 66 [↑](#footnote-ref-12)
13. Section 42 of General Principles of Administrative Law Act of 1999 [↑](#footnote-ref-13)
14. Section 43, ibid [↑](#footnote-ref-14)
15. Section 43, ibid [↑](#footnote-ref-15)