The issue of transparence and liability for use of artificial intelligence in public administration

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I n the era of accelerating progress and modernization of everyday life, new solutions implemented increasingly eagerly at the level of state institutions and the public sector have begun to make their way into it. Changes aimed at streamlining and improving the efficiency of tasks previously relying solely on people, which included their strengths, but also their limitations, have gained momentum and have begun to be implemented ever more frequently in the operations of state administrative bodies. Forecasts from leading experts predict that in the near future, less complex tasks will be performed exclusively by artificial intelligence systems. The Polish public administration is already using artificial intelligence systems in an unsupervised manner when performing simpler and schematic tasks and this trend is noticeable in the literature[1]. This state of affairs raises concerns from the point of view of transparency, liability issues and protection of the fundamental rights of citizens for decisions made by public administration bodies. The result of this process are tools that seek to place increasing reliance on artificial intelligence solutions in the decision-making process of public administration bodies and performance of their duties. When observing such trends, one must ask whether such solutions have a chance to effectively implement the basic principles of the rule of law, of which one of key elements is the transparency of the activities of state bodies.

2   In this publication, the authors analyze the essence of transparency in a democratic state under the rule of law and its potential threats from the implementation of artificial intelligence-based solutions in the

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[1] Z. NIEWIADOMSKI, Nowe zjawiska w administracji publicznej – perspektywa teorii prawa administracyjnego, w: Nowe zjawiska w administracji publicznej, red. Z. Cieślak, A. Kosieradzka-Federczyk, Warszawa 2015, s. 46.

public sector. In their work, the authors provide a condensed analysis of the position and importance of transparency in the organization of the state, its essence from the perspective of access to public information, supervision and control over the activities of state administrative bodies. The authors address the issues of liability of authorities for decisions made with the use of artificial intelligence and the difficulties of its enforcement in view of the complexity of such systems. The authors aim to identify problem areas in the application of artificial intelligence-based solutions from the perspective of their explainability, as well as to summarize and identify spheres burdened with gaps in both the law itself and general mechanisms for viable supervision and verification of the systems used.

3 Although there are many approaches to AI[2], in this paper, the authors have adopted the definition endorsed in the Artificial Intelligence Act by the European Parliament – which was passed by the European Parliament on 13 March 2024[3] and published in the Official Journal of the European Union on 12 July 2024, which came into force on 2 August 2024 (however similar to the General Data Protection Regulation, its applicability will be delayed) - as the definition of artificial intelligence when discussed in this article[4]. This definition states that *"AI system" means a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments'*[5]. The paper analyses the problem mainly from the perspective of the Polish legal order and it is based on the legal and actual situation of the use of artificial intelligence systems by Polish public administration bodies. However, in order to provide the most reliable and comprehensive analysis, the authors verified postulated solutions and reports from various European countries. Authors for the purpose of this paper conclude public administration to be understood as a set of activities, organizational and executive undertakings carried out for the realization of the public interest by various entities, bodies and institutions on the basis of the law and in the forms prescribed by the law, or a system composed of people, organized for the purpose of continuous realization of the common good

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[2] See: for example ISO, *What is artificial intelligence (AI)?*, https://www.iso.org/artificial-intelligence/what-is-ai (access: 30/10/2024); OECD, *Artificial Intelligence in Society*, https://www.oecd.org/en/publications/artificial-intelligence-in-society_eedfee77-en.html (access: 30/10/2024) ; OECD, *Recommendation of the Council on Artificial Intelligence*, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449 (access: 30/10/2024).

[3] European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD))

[4] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), Official Journal of the European Union, L Series, 12/7/2024, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202401689 (access: 30.10.2024), hereinafter: the EU AI Act.

[5] *Ibid.*, article 3 p.1.

as a public mission consisting mainly (but not exclusively) in the day-to-day execution of law, equipped for this purpose with state authority and material and technical means[6].

4   Artificial intelligence (AI) is rapidly evolving, and its applications are deployed in many sectors, including public administration decision making. Public administration faces the ambitious task of responsible implementation of AI, as it is requiring interdisciplinary cooperation and consideration of many aspects, including legal, business, technological knowledge, as well as ethical and transparent approach. The way in which public administration develop, implement, and utilize AI will determine the situation of many citizens who will be within the scope of the implemented solution's impact. The issues around AI implementation are becoming more and more important as 28 October 2024 the Polish Minister of Digitalisation announce new (national) digitalisation strategy, which is highlighting citizens' rights in this process[7].

5   The analysis of the legal and factual state of affairs in Poland in relation to the use of artificial intelligence by public administration bodies has been carried out and presented in this article, focusing on the key areas that pose a threat to the protection of citizens' fundamental rights and to propose solutions aimed at ensuring protection against the uncontrolled and non-transparent use of AI by public administrations in Poland. Every success or failure of such an initiative may affect the level of societal trust in AI-based systems and influence the trust in public administration.

6   In the following part we will outline and summarize the technical issues arising from the use of AI within the public administration and why they pose a threat to the transparency of decision-making processes (I). Then overview of proposal and suggestions for monitoring and increasing transparency of AI systems (II) will be provided. Then transparency (III); explainability (IV); liability for a decision made by or involving AI (V) as well as current state and challenges in regulating legal liability (VI) will be discussed, followed by conclusions.

I.   TECHNICAL ASPECTS OF THE USE OF AI SYSTEMS IN PUBLIC ADMINISTRATION

7   AI systems are complex issues, hence on the EU level risk-based approach was implemented. The EU AI Act divides the risk levels for AI systems into four categories: A) unacceptable, B) high, C) limited, and D) minimal (or no) risk and sets different requirements for the AI systems depending on their risk classification.

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[6] See: H. IZDEBSKI. and M. KULESZA, *Administracja publiczna zagadnienia ogólne*, LIBER Warszawa, 1999; I. LIPOWICZ, R. MĘDRZYCKI and M. SZMIGIERO, *Prawo administracyjne w pytaniach i odpowiedziach*, LexisNexis Warszawa 2010 ; A. BŁAŚ, J. BOĆ and J. JEŻEWSKI,, *Administracja Publiczna*, Kolonia Limited 2003, J. IZDEBSKI, *Koncepcja misji administracji publicznej w nauce prawa administracyjnego*, Lublin 2012, p. 98.

[7] https://www.gov.pl/web/cyfryzacja/strategia-cyfryzacji-polski-do-2035-roku (access: 30/10/2024).

A. Unacceptable risk

8 Unacceptable risk is the highest level of risk and it is connected with the AI application types that are incompatible with EU values and fundamental rights as applications related to subliminal manipulation (influencing a person's behaviour without a person being aware of that manipulation); exploitation of the vulnerabilities of persons resulting in harmful behaviour (a toy animating children to do dangerous things); biometric categorization based on sensitive data, general purpose social scoring (AI systems rating individuals based on their personal characteristics); real-time remote biometric identification (in public spaces); assessing the emotional state of a person: at the workplace or in education (may be allowed as high-risk application, if serves a safety purpose as for example detecting a driver falling asleep); predictive policing (assessing the risk of persons for committing a future crime based on personal traits and history); scraping facial images (creating or expanding databases with scraping of facial images available on the internet). AI systems categorized as unacceptable risk will be prohibited.

B. High risk

9 High-risk AI systems are systems that can potentially cause significant harm if they fail or are misused. In essence, this category includes safety components of already regulated products and stand-alone AI systems in specific areas (enlisted in Annex III of the EU AI Act as for example: biometric systems, management and operation of critical infrastructure), which could negatively affect the health and safety of people, their fundamental rights or the environment. This will be the most regulated AI systems allowed in the EU market, which will need to fulfil a lot of requirements set in AI Act.

C. Limited risk

10 Limited risk includes AI systems that pose a risk of manipulation or deceit (for example deep fakes). AI systems falling under this category must be transparent, meaning humans must be informed about their interaction with the AI (unless this is obvious). An example of a limited risk AI system is chatbot (what is relevant for the use of generative AI systems).

D. Minimal risk (no risk)

11 This is the lowest level of risk described in the AI Act and it includes any AI system that does not fall under the unacceptable, high or limited risk category. A practical example of minimal risk AI system is a spam filter. AI systems under minimal risk do not have any restrictions or mandatory obligations. However, it is suggested to follow general principles such as human oversight, non-discrimination, and fairness.

12 As AI systems – in the light of the most recent definition included in the AI Act – have the capacity of influencing physical or virtual world, is it important to determine how their use is explained to the citizens and if there is any decision taken with the use of AI – how such decision can be verified? That leads to the black box problem - the lack of transparency and interpretability of AI algorithms. It is difficult to

understand how an AI system arrives at its conclusions or predictions, what poses a significant challenge – especially for AI systems used in public administration.

13   Another important question is how a citizen can keep track of use of AI systems in public administration? For acquisition of services, goods in public administration, the Polish Public Procurement Law must be applied where specific rules are determined (the Public Procurement Law aspects are beyond the scope of this article). Such acquisition is a public process, but once it is concluded – details are no longer posted on the relevant website and if a citizen wants to know more about requirements for specific acquisition (AI systems) then in practice they must submit a motion for the disclosure of public information (what can last 14 days and it might be denied on certain grounds). Any information about the use of AI systems in public administration is fragmented, there is no central evidence of such systems nor evidence of AI systems that are used within the decision-making process.

II. Overview of proposals and suggestions for monitoring and increasing transparency of AI systems

14   An AI impact assessment seems to be a tool that allows to determine how technology will be influencing on people lives – and in the context of public administration, it seems to be an indispensable step for AI or any advanced technology tools.

15   In order to verify the decision-making process by AI, model rules on impact assessment could be used – as for example: Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration Report of the European Law Institute (from 2022)[8]. And as it is focused on "Algorithmic Decision-Making System" defined as computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that makes a decision, or supports human decision-making used by a public authority, which is widely used by public administration in EU (serves better the purpose as the one dedicated to AI, as AI systems are more refined). Also, for the purpose of the Model Rules, there is a wide definition of "Public Authority": A) any government or other public administration, including public advisory bodies, at European Union, national, regional or local level; B) any natural or legal person performing public administrative functions under European Union or national law; and C) any natural or legal person having public responsibilities or functions. The Model Rules are also clearly determining how "decision" shall be understood: any determination by a public authority to take or not to take action. The Model Rules are introducing standard impact assessment procedure and additional provisions for high-risk systems, as well as the publication of the assessment and its periodic review. Without a doubt, use of such model rules could

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[8] Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration Report of the European Law Institute, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Impact_Assessment_of _ADMSs_Used_by_Public_Administration.pdf (access: 30/10/2024).

lead to the reduction of risk for rights of citizens, which are many[9] – and as transparency is one of them and on this aspect this article is focusing, its use could lead to increasing transparency around AI in public administration.

16 There is also the Fundamental Rights and Algorithm Impact Assessment (FRAIA), prepared by the Dutch Government (issued in July 2021), which helps to map the risks to human rights in the use of algorithms and to take measures to address these risks. FRAIA creates a dialogue between professionals who are working on the development or deployment of an algorithmic system[10].

17 There is also another example of AI impact assessment prepared by the Dutch Information Policy Directorate in cooperation with the Human Environment and Transport Inspectorate (ILT; IDlab and Analysis Department), and the Directorate - General for Public Works and Water Management[11] - endorsed in July 2022, which also highlights the importance of completing it before AI system deployment and recommends its periodic revision.

18 From Polish perspective, at this point the AI impact assessment – proposal for the public sector, a document prepared by one of the Polish NGO[12] from February 2023 shall be also mentioned. Without a doubt, adoption of such model rules or AI impact assessment template for Polish public administration, including guidelines and training for public officials, could lead a way to foster more transparency around use of AI in public administration.

A. *AI in public administration in Europe*

19 As part of the research for the AI systems used in public administration a report from 2020, dedicated to the use of Artificial Intelligence in public services in the EU[13], was analysed. The Report was published by the European Commission knowledge service to monitor the development, uptake and impact of Artificial Intelligence for Europe - AI Watch[14].

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[9] See: M. BALCERZAK and J. KAPELAŃSKA-PRĘGOWSKA, AI and international human rights law. Developing Standards for a Changing World, Elgar 2024, p. 69 -87.

[10] https://www.government.nl/documents/reports/2021/07/31/impact-assessment-fundamental-rights-and-algorithms (access 30/10/2024).

[11] https://www.government.nl/documents/publications/2023/03/02/ai-impact-assessment (access: 09/06/2025)

[12] Ocena wpływu algorytmów systemów sztucznej inteligencji i systemów automatycznego podejmowania decyzji – propozycja dla sektora publicznego, Fundacja Moje Państwo, https://mojepanstwo.pl/pliki/ocena-wplywu-algorytmow-ai-adm.pdf, (access: 30/10/2024), hereinafter: Ocena wpływu algorytmów systemów sztucznej inteligencji i systemów automatycznego podejmowania decyzji – propozycja dla sektora publicznego.

[13] G. MISURACA and C. VAN NOORDT, Overview of the use and impact of AI in public services in the EU, EUR 30255 EN, Publications Office of the European Union, Luxembourg, 2020, ISBN 978-92-76-19540-5, doi:10.2760/039619, JRC120399, available at: https://joinup.ec.europa.eu/sites/default/files/document/2020-07/jrc120399_Misuraca-AI-Watch_Public-Services_30062020_DEF_0.pdf (access: 30/10/2024), hereinafter: the Report.

[14] https://ec.europa.eu/knowledge4policy/ai-watch_en (access: 30/10/2024).

20   The Report is dedicated to the results of the first exploratory mapping of the use of AI in public services in the EU, which contributes to landscaping the current state of the art in the field, and provides an overview of Member States efforts to adopt AI-enabled innovations in their government operations. The Report highlights the strategic importance of AI and its potential to drive the economic development.

21   In the Report there was information about 230 initiatives in EU Member States (status for 2019 included UK) that are using AI, and an analysis of their main characteristics, technological dimensions and value drivers[15]. The Report analysed the state of the art with regard to possible approaches to assess impact of AI, what included a literature and policy review, and the identification of main research gaps, theoretical frameworks and practical use cases[16].

22   As per data provided in the Report, there were 10 AI initiatives in Poland (8 national and 2 local). The Netherlands are leading with the AI initiatives – with 19 projects, then Portugal – with 18 projects, and then *ex equo* Spain, France, Switzerland – with 12 projects[17].

23   The Report mentioned as one of the AI use projects in Poland an initiative dedicated to profiling of unemployed persons which was initiated in 2012 by the Polish Ministry of Labour and Social Policy, with the aim to improve the efficiency of 340 district labour offices (Powiatowe Urzędy Pracy) responsible for analysing labour market trends and supporting development. These offices were perceived as inefficient, understaffed, and inadequate for modern labour market challenges. Without significant increases in public spending, the ministry sought cost-effective solutions for more efficient budget allocation. Consequently, an automated profiling system for unemployment emerged as a modern, personalized, and cost-efficient method of service delivery. The automated profiling process categorized unemployed individuals into three groups based on various personal characteristics. This categorization determined eligibility for programs such as job placement, vocational training, apprenticeships, or activation allowances. Data collected during initial interviews with unemployed (e.g., age, gender, disability, duration of unemployment) and subsequent computer-based tests scoring 24 dimensions led to the assignment to a profile group indicates the level of support and resource allocation needed. Importantly, in some cases, this categorization led to life-changing decisions, determining whether individuals receive state support or not[18]. As the profiling was categorized in the Report as the use of AI, if this case of use of AI system will be verified against the AI system criteria mentioned earlier, it shall be noted that it was a machine-based system characterized by autonomy, generated results, that influenced physical environment (being categorized was influencing the fact of receiving or not unemployment benefits, at this point it shall be noted that profiling is defined in the art. 4 of the General Data Protection Regulation and it is beyond the scope of this article). The Report failed to mention that the use of profiling in the district labour offices is no longer happening as on 6 of June 2018 the Polish Constitutional Tribunal in its judgement

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[15]   The Report, p. 9, available at: https://interoperable-europe.ec.europa.eu/sites/default/files/document/2020-07/jrc120399_Misuraca-AI-Watch_Public-Services_30062020_DEF_0.pdf

[16]   *Ibid.*, p. 18.

[17]   *Ibid.*

[18]   *Ibid.*, p. 46.

declared that legal act which served as a basis for the introduction of the profiling system was unconstitutional[19].

24   In another report from September 2023, dedicated to the analysis of the use of AI in the polish public sector, a case of virtual assistants used in Contact Centre in Gdynia was analysed. Virtual assistants were deployed in order to assist in providing information – to reduce questions analysed by humans[20]. While virtual assistants are example of deployment of new technology, and are classified as limited risk system in accordance with the EU AI Act, implementation of any AI systems in public administration shall be made in transparent manner – also with regards of the consequences of its use.

25   From another report from October 2023, prepared by the Polish Ministry of Digitalization[21], it results that the 47% of the local government unit (in Polish: *jednostki samorządu terytorialnego*) use at least one of the new technologies (AI, Internet of Things) or includes them in e-services. While use of AI is an important step for embracing technological advancement by the public administration, it also leads to challenges around liability (which are addressed in point VI of this article).

B. Verification of the use of AI in Poland

26   In the AI impact assessment prepared by the Polish NGO[22], impact assessment is indicated as one of the components of good AI governance in the public sector. Without a doubt, well designed impact assessment can help with the transparency, explainability and risk assessment of any AI system. This is extremely relevant in public administration – where any use of AI system can influence the rights of the citizens. However, it is highlighted as one of many components, which include: adequacy assessment, education and training focused on AI competences for public administration clerks and audits of AI systems.

27   This impact assessment, which was inspired by the Dutch FRAIA, can form a starting point for the discussion around the AI impact assessment in public administration in Poland. This assessment is

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[19] Judgement of the Polish Constitutional Tribunal from 6 June 2018, case: K 53/16 (in Polish: Wyrok Trybunału Konstytucyjnego z dnia 6 czerwca 2018 r. w sprawie K 53/16, https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10168-zarzadzanie-pomoca-kierowana-do-osob-bezrobotnych access: 30/10/2024).

[20] Raport Grupy Badawczej SoDA AI Research Group, *Współpraca Człowieka z AI: Perspektywy dla Polskiego Sektora Publicznego*, https://sodapl.com/wp-content/uploads/2023/10/Raport-SoDA-AI-Research-Group.pdf, p. 35-36 (access: 30/10/2024).

[21] Raport Ministerstwa Cyfryzacji: W drodze ku doskonałości cyfrowej. Raport końcowy z badania rynku na temat gotowości wdrożenia, poziomu wiedzy i wykorzystania nowych technologii cyfrowych w jednostkach samorządu terytorialnego (eng. Ministry of Digitalisation Report: On the road to digital excellence Final report of the market survey on the readiness to implement, level of knowledge and use of new digital technologies in local government units,), https://www.gov.pl/attachment/bc4ad4fd-10a9-40de-a8b1-02a599e82ba6 (access: 30/10/2024), p. 8.

[22] Ocena wpływu algorytmów systemów sztucznej inteligencji i systemów automatycznego podejmowania decyzji – propozycja dla sektora publicznego (eng. Assessing the impact of artificial intelligence and automated decision-making systems algorithms - a proposal for the public sector), p. 8.

divided into two parts: first is focused on the AI (and automated decision model); the second part is focused on the impact of the model and application of the recommendations.

28   The use of impact assessment for the use of AI systems in public administration in Poland shall be encouraged – as well as the creation of a central repository of such assessments as it would foster the trust.

29   In the Polish literature is highlighted a need of introducing impact assessment for the AI systems in the public sector to ensure that the law and values are respected[23]. The use of AI in the public administration requires proper supervision and mechanisms. The digitalization of the public administration cannot lead to errors, breaches of legislation, lack of transparency or reduction of the individual rights and freedoms. Hence, the impact assessment launched *a priori* could be an instrument which is supporting the use of technology and mitigates any detected risks connected with the use of technology[24]. What is necessary for the proper AI deployment – is the obligation to use such assessment and publication of such assessments in public repository available to the citizens. In this regard, the solution applied by the city of Amsterdam[25] and Helsinki[26]: city AI registers, shall be duplicated by the public administration in Poland. Such solution enhances the trust and transparency.

30   However, launching one public repository could be a better solution – a Polish supervisory AI office, which could provide an official template for AI impact assessment, oversee all the assessments and perform audits of selected systems, would be a better step. It could create a better visibility and understanding of AI systems used in public administration for the citizens.

31   What is also needed, is training and education when it comes to technology for public administration clerks and creation of teams focused on AI governance within public administration.

32   Another gap which needs to be addressed in the verification of the decision-making process of AI is the lack of regulations focused on the liability for AI systems.

33   In the next part we will dissect the role of transparency within the democratic state as well as its manifestation in the fundamental rules. The issue of explainability in relation to AI and its use in decision-making processes will be discussed, as well as the impact of such solutions on maintaining full transparency in the activities of public administration bodies.

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[23] K. ZIÓŁKOWSKA and M. WIERZBOWSKI, Ocena wpływu wykorzystania sztucznej inteligencji w administracji publicznej (eng. Assessing the impact of using artificial intelligence in public administration), http://repozytorium.uni.wroc.pl/Content/136792/PDF/53_K_Ziolkowska_M_Wierzbowski_Ocena_wplywu_wykorzystania_sztucznej_inteligencji.pdf (access: 30/10/2024).

[24] *Ibid.*, p. 508.

[25] https://algoritmregister.amsterdam.nl/ (access: 30/10/2024).

[26] https://ai.hel.fi/en/ai-register/ (access: 30/10/2024).

III. TRANSPARENCY AS A CRUCIAL ELEMENT OF A DEMOCRATIC STATE

34 The term "transparency" is intrinsically part of the equation that delivers us a democratic state. As democracy is primarily defined as a system of government based on this belief, in which power is either held by elected representatives or directly by the people themselves[27] this sets forth the main building block of a democratic system which is the sovereignty of citizens. However, for it to be effectively implemented and thoroughly executed there has to be an underlying factor that enables the citizens to participate, albeit passively, in all of the governing procedures. This factor lies within a meticulously constructed system of checks and balances which has its roots in transparency. Thriving democracy has to uphold both the standards that were introduced to ensure a proper division of powers as well as the instruments upkeeping the sovereignty of the nation. Transparency is the common ground for both of those pillars of democratic state.

35 The rule of transparency in its fundamental importance to the idea of democracy conveys that a democratic state cannot function properly without rules and mechanisms to ensure transparency and openness in the operation of public institutions. Despite the many different manifestations and aspects of transparency, the most important, and certainly the most common and intuitive for the average citizen seeking to exercise their rights to supervise the processes of authorities seem to be access to public information and effective supervision of the activities of local government bodies. The two previously mentioned forms of supervision carried out at the micro level translate into a universally accessible opportunity to control the actions of the authorities insofar as they affect the individual and local communities, which in a broader perspective ensures transparency at the very core of the system.

A. *Access to public information and transparency*

36 Access to public information is not only a constitutional law regulated under article 61 of Polish constitution stating that a citizen has the right to obtain information about the activities of public authorities and persons performing public functions[28], but also constitutes one of the human rights under article 10 of the European Convention of Human Rights. The right to information, while fundamental and basic in its nature, can be regarded both in its very wide scope as set out in UN's Universal Declaration of Human Rights (which defines it as a right to freedom of opinion and expression which includes the freedom to hold an independent opinion, to seek it, to receive and disseminate information and opinions by any means, regardless of borders), but also in a more precise and included in a broader political definition of the right to information about the activities of public bodies. While the human-rights dimension of the right to information stresses information pertaining to the individual, the political dimension of access to information upholds not so much the person's wellbeing as the entire system, which in turn transfers to a more democratic and just state. The political right to information is subject to appropriate conditions to ensure that it is not abused. These conditions were set out in the Law on

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[27] Cambridge Dictionary: https://dictionary.cambridge.org/ (access: 30/10/2024).

[28] Article 61 of the Constitution of the Republic of Poland of May 2, 1997.

Access to Public Information from 6th of September 2001. During the discussion of the draft of this law, it was expressed that the law on access to public information will create mechanisms to guarantee the citizen's enforcement of the rights given to them under the Constitution. It will also respond to the public's growing expectations of the administration and officials by making their actions public[29]. According to the Law on Access to Public Information, any information on public matters constitutes public information and everyone has the right to access it. Very importantly, according to the Act, a person exercising the right to public information cannot be required to demonstrate a legal or factual interest. In practice, this means that any information that constitutes public information under the Act should be made available to anyone who requests it without the need to demonstrate any interest. In this way, at least in principle, any information regarding the activities of state bodies is subject to full control from the point of view of accessibility to the citizen. The right to public information includes the right to (1) obtain public information, including obtaining processed information to the extent that it is particularly relevant to the public interest, (2) inspect official documents, (3) access to meetings of collegial bodies of public authority from universal elections, and the right to promptly obtain public information containing up-to-date knowledge of public affairs[30]. The scope of the subject matter of public information specifies what shall be considered public information, and the law itself specifies the formal prerequisites for the effective provision of such information, but this effectiveness stops at the aspect of technical or physical provision of information, and not at its actual transparency, i.e. the possibility of real understanding and informed review of the provided information.

37   In its constitutional dimension, the right of access to public information, as mentioned, for example, in the Public Information Bulletin of the Polish Ombudsman, is qualified as a political right and is not limited only to representative bodies. A citizen has the right to obtain information about the activities of any organizational unit, as long as they perform tasks of public authority or manage municipal property or property of the State Treasury. The right of access to public information was formally introduced into the Polish legal by the Constitution of the Republic of Poland in 1997 although this right is widely recognized as an indispensable prerequisite for the existence of civil society and, consequently, for the realization of the democratic principles of the functioning of public authority in a legal state[31]. The right to public information has been located in the subsection of political freedoms and rights which emphasizes its close connection with public civil rights, but also with the fundamental principles of the political system of the state. The importance of the above is also confirmed by the courts. For example, the Polish Supreme Administrative Court in one of its resolutions noted that: "this right is intended to enable the citizen to participate in public life in a real way, but also serves the purpose of openness in public life, commonly referred to as transparency of the actions of public authorities and those performing

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[29] Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej, t.j. Dz.U.2022.902), (eng. Law on Access to Public Information)

[30] A. BIEŃ-KACALA and A. MŁYNARSKA-SOBACZEWSKA, Constitutional Law in Poland, Wolters Kluwer, 2021

[31] M. SAFJAN and L. BOSEK, Constitution of the Republic of Poland. Commentary, I edition, Beck 2016

the tasks of such authorities. This right also serves to exercise citizen control over the functioning of public authority"[32].

38 In an era of far-reaching and developed digitalization and the development of technology used on an ever-widening scale in both private and public domains, control over the processed information both in terms of its quantity and content is increasingly questionable. Due to the increasing sophistication and complexity of the technologies used, there is a growing tendency for a kind of exclusion from the transparency of information for the ordinary citizen, who, necessarily, is not equipped with adequate IT knowledge that would enable them to fully, or at least sufficiently, understand the processes involved in the algorithms and, even more importantly, the patterns affecting the conclusions that the algorithm arrived at. The question that can and even should be asked is: can public information, in its broad sense, exist in a form that is virtually inaccessible to the average citizen to understand? Trends observed both in the academic and juridical sphere suggest that any form of exclusion is disastrous and detrimental to democracy and the realization of basic and fundamental rights of the citizen as well as their participatory rights. A phenomenon such as "citizen exclusion" that is part of digital exclusion manifests itself in a negative impact on the participatory and informational aspects of citizen participation in the political life of the state, and accelerating technological progress and the multitude of new functions available through the network will deepen the stratification of Internet users caused by differences in digital competence[33]. Noting the impact of digital exclusion in the form of such simple roadblocks as internet access or proficiency in the use of web-based tools and newer technologies, it seems a safe conclusion that the use of increasingly complex technological solutions will deepen exclusion even further, thus encroaching on the basic ability to comprehend and analyze certain elements of public bodies' activities.

B.   Transparency within the system of supervision and control

39 Apart from the above-discussed right to public information, i.e. the citizen's access to public information, the second but no less important element of transparency in the functioning of the state apparatus, is the pillar of supervision over the activities of public bodies. This supervision can be divided into general supervision, which is carried out by the Supreme Chamber of Control, and local supervision.

40 The Supreme Chamber of Control is a constitutional body to which the provisions contained in articles 202 to 207 of the Polish Constitution and the dedicated Law on the Supreme Chamber of Control apply. According to the Constitution, the Supreme Chamber of Control is the supreme body of state control, is subject to the control of the Sejm (Polish Parliament) and operates on a collegial basis. It controls the activities of government administrative bodies, the National Bank of Poland, state legal entities and other state organizational units from the standpoint of legality, economic prudence, efficacy and diligence. In addition, it has the ability to control the activities of local government bodies, municipal legal entities and other municipal organizational units from the point of view of legality, economic prudence and

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[32] Resolution of the Supreme Administrative Court (in Polish: Uchwała Naczelnego Sądu Administracyjnego) from 11.4.2005, I OPS 1/05.

[33] M. WENZEL and M. FELIKSIAK, Political dimension of digital exclusion, New Media 2/2011 research reports, p. 145.

diligence, and it can control from the point of view of legality and economic prudence the activities of other organizational units and business entities to the extent that they use state or municipal property or funds and meet their financial obligations to the state[34].

41   The constitutional principle of supervision on the local scale is expressed in Article 171 of the Polish Constitution, which states that the activities of local government are subject to supervision from the point of view of legality, and supervision of the activities of local government units is exercised by supervisory bodies in the form of the Prime Minister and voivodes, and in terms of financial matters by regional audit chambers[35]. In the Polish legal order, local government units are divided into communes (gminy), districts (powiaty) and voivodeships (województwa), and these, in turn, are subject to supervision from the point of view of legality, economic prudence and diligence, depending on whether the tasks under review belong to the category of delegated or own tasks. Own tasks are those for which, firstly, the local government unit is responsible, and secondly, which it finances itself. In contrast, delegated tasks are the responsibility of the government administration, and it is the government administration that finances them. Both own, delegated and entrusted tasks (i.e., those for which the public administration is responsible, but assigns them by agreement to the local government unit) are among the public tasks carried out by the administration under the relevant laws. According to the Law on Communal Government, the commune's own tasks include such matters as matters of public order and safety of citizens, as well as fire and flood protection, including the equipment and maintenance of the communal flood control depot, or issues of communal roads, streets, bridges, squares and traffic organization, but also tasks in the field of public education.

42   Both in terms of supervision at the local level from the point of view of legality and supervision at a higher level from the point of view of the criteria of diligence, economic prudence and efficacy, an undoubtedly important role is played by the ability to thoroughly and fully trace the entire process of the activities of the relevant local government unit or specific body. In situations such as, for example, (1) a justification for taking some action based on data provided by AI, (2) a decision made based on an algorithm/data provided by AI (i.e. assigning a particular judge to hear a case based on an algorithm), or (3) public information provided to a citizen by AI on the basic tasks of the office (i.e. automatic answers to citizen questions by an e-officer on the commune's website), the ability to fully verify and trace the process of a given decision, certain action or recommendation by an empowered entity may prove difficult. In a situation where a state body allocates state funds to reorganize urban traffic at an intersection because of data provided to it by an algorithm or provides even basic information to a citizen in an active way through an AI-based program, the question of how to guarantee full inspections of such an action comes into play. While such an action does not seem to be contradictory from the point of view of legality, as nothing in the laws prohibits the use of new technologies to improve government operations, it remains questionable whether actions and decisions based largely on artificial intelligence algorithms are fully verifiable for entities and individuals without in-depth knowledge of their operation. For example, how can we

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[34] Articles 202 and 203 of the Constitution of the Republic of Poland of May 2, 1997.

[35] A. RYTEL-WARZOCHA, *Constitutional law of Poland*, Bruylant 2022.

conclude that such traffic reorganization was an economically prudent decision if the justification for it was mostly reliant on an algorithmic report that realistically would not be transparent and straight-forward for an average state authority personnel responsible for such supervision? Naturally such person would be able to check and confirm if all of the invoices, funds and materials were properly accounted for and spent in accordance with the intended purpose, while the underlying question will remain whether the data on the basis of which the decision itself was made was not erroneous and thus spending of those funds proven unnecessary.

IV. THE "EXPLAINABILITY" ISSUE

43   The above-mentioned questions form the basis of what we will recognize as the explainability of the algorithm and its translation into the transparency of the decision-making processes of the authorities. For the purposes of this article, we will consider explainability to be the factual state of a given action that can be reconstructed in such a way as to reproduce the cause-and-effect sequence that led to the end result, and such reconstruction does not require specialized knowledge. Failure to meet the condition of explainability in any decisions made by public authorities will translate directly into the inability to make a full and comprehensive review of the actions of such an authority, and indirectly into a reduction in citizen confidence in state institutions. Instances in which the addressee of a given decision of an authority cannot fully reconstruct the chain of events that led to a given conclusion will not be able to sufficiently understand it, effectively verify it, and thus challenge it based on a fully substantive analysis. In order for such an analysis to be carried out, the addressee or the authority reviewing and supervising the decisions of the entity in question would have to have access not only to the very chain of algorithmic activities that culminated in the decision in question, but also to the data on the basis of which the algorithm in question was created. After all, the input data of an algorithm is the basis of the mechanism on which it operates, and consequently has a significant impact on the outcomes it presents. Thus, too, the lack of access to the data on which a given algorithm was taught will translate into difficulties in assessing whether the input selected for that program was adequate and was not subject to any bias or other defects resulting in skewed assessments. Without meeting the prerequisites of sufficient explainability of the algorithm used and clear and reliable verification of the appropriateness of the data on which the algorithm learned, it will not be possible to achieve full transparency of the decisions made using it. This is because such transparency will be flawed both in terms of the possibility of comprehensive and accessible to all verification of the decision, and, as it were, the very basis of its issuance in the form of the data on the basis of which the algorithm developed its framework.

44   Taking into account, for example, the use by the Polish Office of Competition and Consumer Protection of a tool based on artificial intelligence for preliminary analysis of contractual patterns for prohibited provisions used by entrepreneurs in their dealings with consumers, we can already see the participation of AI in the process of issuing certain decisions by the authority. Although in this case we are not dealing with AI issuing a decision, it should be noted that even the use of such a program to even initially flag

certain clauses as bearing a high risk of prohibited status and let others pass results in a significant participation of AI in the very process of control exercised by the authority.

45 In turn, bearing in mind the Policy for the Development of Artificial Intelligence in Poland from 2020, we should expect to see an increased use of AI in public institutions and public administration bodies. Among other things, the policy aims to introduce a mandatory ex-ante self-assessment, identifying the problem, the distribution of responsibility for the operation of the system, potential errors (including algorithmic bias) and countermeasures taken, as well as to develop a model explanation of the decision made with the support of AI and the possibility of appealing against such decisions, especially if they directly affect civil rights and freedoms[36]. The aforementioned goals imply a certain awareness of the importance of the explainability of AI decisions in the perspective of the proper functioning of the state and the citizen's trust in the authorities and their decisions. The same postulates are also admitted by the Office of Competition and Consumer Protection, which points out that the use of AI requires precautionary measures, such as ensuring the transparency of the algorithms or the protection of personal data and the prevention of discrimination. However, taking into account the fact that currently such mechanisms have not been developed, and AI is increasingly applied in various spheres of public administration bodies, we are dealing with a notion of the law to keep up with progress. The state's efforts to increasingly digitalize and modernize the public sector, in a situation where legislation has not yet developed appropriate solutions to supervise and examine the systems being implemented, causes a noticeable threat to the basic principles of the rule of law, which are supervision and control of public authorities as well as the principle of protecting the citizen's trust in the state.

46 Taking into account both the unquestionably fundamental dimension of the transparency as the basis of a democratic state of law, as well as its essence from the point of view of the citizen's confidence in the democratic system and, consequently, in the state authorities as well, one should come to the conclusion that the incorporation of changes that may realistically interfere with the sense of certainty of the law in the form of decisions taken by authorities and the principles on which it is applied should be approached with very great caution. If the reasoning and decisional process of any given administrative body would be incomprehensible to any person wanting to conduct a review of such decision, then the entire democratic system will inevitably suffer. A democratic state cannot function well if one of its fundamental pillars weakens, and, undoubtedly, by lowering confidence in the transparency within the decision-making process of state authorities in its broadest sense, then the stabilizing core of the principles on which the whole society is organized will also be severed in the process.

47 In the following part the challenges, uncertainties and gaps in relation to ensuring that authorities are held accountable for decisions taken on their behalf will be characterized. Firstly, a summary of the state of liability regulations in Poland with the focus on their applicability to the decisions issued with the help from AI will be provided. Secondly, the authors will determine how those regulations could (or would

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[36] Policy for the development of artificial intelligence in Poland from 2020, annex to Resolution N°196 of the Council of Ministers of December 28, 2020.

not) work with decisions made with the help of AI in public administration as well as what challenges such solutions pose.

V. LIABILITY FOR A DECISION MADE BY OR INVOLVING AI

48 During this analysis, we would like to distinguish two types of situations in which legal liability for the wrong results of artificial intelligence may be considered. The first possibility for AI systems to function is reduced to the role of a tool in the hands of public officials, where the AI system is characterised by a lack of free action and only functions within the limits given to it by the operator or user. The second case we identify is where the AI system is supervised by a human, but operates without the human's active participation, although the human has the possibility to e.g. interrupt the system. The damage can occur without the action of the user or operator[37].

49 In polish legal order the legal liability for wrong decisions made with the use of artificial intelligence can be determined by criminal, civil and administrative law. In this part of the article, we would like to focus on the liability of public authorities in relation to the use of AI systems in decision-making processes. In the field of our interest as a bodies responsible for wrong decisions made by AI will be public officers, officials and public entities such local government units or the State Treasury as well as the developers of such systems.

A. Legal protection under the Polish Constitution

50 In the light of the Polish Constitution, in the chapter entitled "measures for the protection of freedoms and rights" in article 77, everyone (whether an individual, citizen, foreigner, stateless person or legal entity) is entitled to two subjective rights: namely, the right to compensation for the unlawful action of a public authority, and the right to a judicial path to pursue violated freedoms or rights[38]. At the same time, the regulations do not provide protection for the individuals from the damage caused as a result of the lawful action of the public authority. The prerequisites for liability for damages are set forth in paragraph 1 of the above-mentioned article, which states that there must be damage, the action of the public authority, the unlawfulness of this action and a causal link between this unlawful action and the damage caused[39]. The concept of damage includes both material and immaterial losses[40], and therefore damnum emergens and lucrum cessans[41]. The action of a public authority is understood both as the active behavior of this

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[37] K. STATUCH, Odpowiedzialność za działania sztucznej inteligencji w Europie, Automatyka, numer 6, 2023.

[38] Constitution of the Republic of Poland from 2 April 1997 r. (Dz. U. Nr 78, poz. 483 z późn. zm.).

[39] M. ZIÓŁKOWSKI, Odpowiedzialność odszkodowawcza za niezgodne z prawem działanie władzy publicznej, Wolters Kluwers, 2021.

[40] Judgement of the Polish Constitutional Tribunal from 4 December 2001, case: SK 18/00 (in Polish: Wyrok Trybunału Konstytucyjnego z dnia 4 grudnia 2001 r. SK 18/00).

[41] Judgement of the Polish Constitutional Tribunal from 23 Septemeber 2003, case: K 20/02 (in Polish: Wyrok Trybunału Konstytucyjnego z dnia 23 września 2003 r. K 20/02).

authority (issuance of a legal act, ruling or decision) and its omission (failure to act despite the obligation concretized in the law and actualized in a given situation)[42]. It is important to emphasize that the constitutional regulations provide for stricter prerequisites for liability for damages compared to the general rules based on the premise of fault. They rely on tying liability to an objective premise, which is the illegality of the public authority's action[43]. On the basis of Article 77 (1) of the Polish Constitution, the legal prerequisite causing liability of public authorities, in terms of compensation for damage, is its action, which is unlawful, whether it was culpable or not[44]. The Constitutional Court also clarifies the term of public authority and the body that is responsible for causing damage. The Court points out that they are accordingly any authority in the constitutional sense as well as the institutions, organisational structures, units of authority to whose activities the damage is linked[45].

B. *Compensatory liability of public authorities under the provisions of the Polish Civil Code*

51   The 2004 amendment to the Polish Civil Code introduced a regulation of the public authorities' tort adapted to the aforementioned constitutional norms, which is based on the principle of unlawfulness[46]. The core of this principle is that the liability for damages of a public authority is based solely on the prerequisite of unlawfulness and is not linked to the activity of a particular public officer, but to the unlawful action of a particular organisational structure that holds public authority[47]. Nevertheless, establishing the person of the public officer is crucial in identifying which organisational structure is responsible for causing the damage.

52   According to the regulations from articles 417 to 421 of the Polish Civil Code, the State Treasury or a local government unit or another legal person exercising this authority by law is liable for damages related to an unlawful act or omission in the exercise of public authority[48]. It is worth to clarify the concept of an unlawful act or omission. The doctrine states that this term should be understood as acts or omissions contrary to the applicable legal order sensu stricto, i.e. with specific orders and prohibitions arising from a legal norm[49]. Adopting this meaning of the terms is crucial in a case of omission that may lead the public authority to liability for damages. Thus, the narrow understanding only applies to situations in which the duty to act in a certain way is specified in a legal provision and it is possible to find out, on what, specifically, the action of the public authority would have to be in order for the damage not to occur. The

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[42] M. FLORCZAK-WATOR [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz, wyd. II, red. P. Tuleja, Warszawa 2023, art. 77.

[43] Judgement of the Polish Constitutional Tribunal from 21 July 2010, case: SK 21/08 (in Polish: Wyrok TK z 21.07.2010 r., SK 21/08, OTK-A 2010, nr 6, poz. 62).

[44] M. KARPIUK, Glosa do uchwały SN z dnia 31 marca 2011 r., III CZP 112/10, LEX/el. 2011.

[45] *Ibid.*

[46] G. KARASZEWSKI [w:] Kodeks cywilny. Komentarz aktualizowany, red. J. Ciszewski, P. Nazaruk, LEX/el. 2023, art. 417.

[47] *Ibid.*

[48] Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (t.j. Dz. U. z 2023 r. poz. 1610 z późn. zm.) – Polish Civil Code, art. 417.

[49] G. KARASZEWSKI [w:] Kodeks cywilny. Komentarz aktualizowany, red. J. CISZEWSKI and P. NAZARUK, LEX/el. 2023, art. 417.

lack of specification in the legal norm the details of the duty to act may lead to a statement that the omission is not unlawful and, therefore, that there is no legal basis for the assignment of liability for damages of the omission[50].

53 At this point, it shall be mentioned that there are other acts determining principles for financial liability of public officials as the Act of 20 January 2011 on Financial Liability of Public Officials for Gross Violations of Law and also by the Act of 21 November 2008 on the Civil Service and the Polish Labour Code, but those issues are beyond the scope of this article.

C. *Criminal Liability*

54 One of the most distinguishing features of AI systems are that they operate with a certain level of autonomy which results in that certain actions are unrelated to human activity, the second feature is their adaptability which means the ability to learn and allowing the system to change during use, third one – is that AI systems derive certain conclusions on the basis of the data it has been trained. This raises legal liability issues and complicates the revealing of the casual chain of actions taken, which is crucial in terms of the individual's criminal responsibility and the transparency and explainability of decisions taken. Depending on the position of the perpetrator in the value chain (producer or official using AI system) the criminal liability might or might not arise.

55 The legal definition of a public official can be found in the Statutory Glossary of the Polish Penal Code in Article 115 § 13. In the literature is highlighted that any other person who does not belong to any of the groups listed in 51§ 13 of the above-mentioned article, even someone who is afforded the same legal protection under a separate legislation, is not a public official within the meaning of the Polish Penal Code[52]. The article 231 of the Polish Penal Code defines the crime of abuse of powers by a public official. The object of its protection is primarily the proper functioning of state and local government institutions[53]. A secondary object of protection is the public or private interest to the detriment of which the official acts[54]. The offence under Article 231 relates only to a public official and is a formal offence, i.e. causing damage is not required for it to happen, the mere threat of such an effect by exceeding powers or failing to fulfil duties is sufficient. It is therefore not necessary to prove the chain of actions in this situation. The situation is different if the liability is incurred by the system provider, who is not a public official and will be liable on a different legal basis.

56 As liability for damages on the basis of the provisions of the Polish Constitution or the Polish Civil Code is not grounded on the public official's guilt but on the unlawfulness of the act or omission itself, for the

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[50] *Ibid.*

[51] Ustawa z dnia 6 czerwca 1997 r. Kodeks Karny, t.j. Dz. U. z 2024, poz. 17, 1228 – Polish Penal Code.

[52] M. MOZGAWA, M. BUDYN-KULIK, P. KOZŁOWSKA-KALISZ and M. KULIK [w:] M. MOZGAWA, M. BUDYN-KULIK, P. KOZŁOWSKA-KALISZ and M. KULIK, Kodeks karny. Komentarz aktualizowany, LEX/el. 2024, art. 115.

[53] P. ZAKRZEWSKI [w:] Kodeks karny. Komentarz, red. J. MAJEWSKI, Warszawa 2024, art. 231.

[54] J. IZDEBSKI M. Kulik [w:] Kodeks karny. Komentarz aktualizowany, red. M. MOZGAWA, LEX/el. 2024, art. 231.

criminal liability to arise it is necessary to prove the guilt of the perpetrator of the criminal act. In the case of offences of consequence by omission, only the person who was under a specific legal obligation to prevent the consequence is subject to criminal liability. The producent (supplier) of the technology or the operator or the user/deployer (public officer using the AI) can be responsible for making a wrong decision based on the performance of AI systems. Where the system was poorly designed and the reason for the decision was the faulty design of the system itself, it seems a reasonable view to attribute sole criminal liability to the producent of such a system. It is difficult to blame a public official who made a wrong decision using a malfunctioning tool. The challenge is when the AI system learns on its own in the scope of its work and the producent was not able, even with due diligence, to foresee the errors that appeared. It is also difficult to point to a causal link between the behaviour of a producer and the occurrence of the damage[55]. In such a case, a problem arises, as it may turn out that no one is criminally liable for the damage caused, because the producer was not able to foresee and thus to prevent the negative consequences, while the official, even with due diligence, was not able to make the right decision because the tool generated wrong data.

D. Liability of the providers according to the EU AI Act and the work on AI Liability Directive

57   The newly adopted EU AI Act also raises the issue of liability of providers which are defined as a natural or legal person, public authority, agency or other body that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge[56]. However, the EU AI Act focuses on the providers liability for the experimentation taking place in the sandbox (art. 57 p. 12 of the EU AI Act) – controlled environment for development and pre-marketing of the AI systems and does not address AI liability besides that. It shall be mentioned that the European Parliament is also working on the AI Liability Directive[57], which aims to introduce harmonised rules on the non-contractual liability for damage caused by artificial intelligence. The basis of the liability will be arising out of the provider failure to comply with an applicable duty of care (which is connected with the risk posed by AI system). The study focused on this proposal highlights however the need for broader liability[58]. As the work on AI Liability Directive is still in progress. Its analysis is beyond the focus

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[55] P. REJMANIAK, Autonomiczność systemów sztucznej inteligencji jako wyzwanie dla prawa karnego, Roczniki Nauk Prawnych, Tom XXXI, numer 3, 2021, s. 104.

[56] Article 3 p. (3) of the EU AI Act.

[57] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0496 (access: 30/10/2024).

[58] Study - Proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence https://www.europarl.europa.eu/RegData/etudes/STUD/2024/762861/EPRS_STU(2024)762861_EN.pdf (access: 30/10/2024).

of this article, however this legislative effort is making the need for determination of AI liability rules more visible and it was necessary to mention it.

VI. CURRENT STATE AND CHALLENGES IN REGULATING LEGAL LIABILITY

58   The use of AI in the activities of public authorities is associated with encroachment into a sphere regulated by various areas of law. Infringement of these regulations may result in legal liability, both for the individuals representing the authority and for the authority as a whole. Currently we are able to observe a trend, in which AI is taking over more and more of the tasks of public administration or the judiciary (e.g. the algorithm that is used to determine the composition of the court).

59   The problem arises when a mistake in AI system leads to a situation in which a wrong decision or ruling can cause harm. AI by its very nature cannot be held responsible for its wrong results. It is difficult to imagine a situation in which we hold an algorithm or a machine legally responsible, since they do not bear legal personality and therefore cannot be legally liable. Therefore, the circle of potential liability for the unwanted operations of AI includes the developer of the intelligent system or the user (operator/deployer).

60   The basis for the claim for damage caused by the action made by an AI system is regulated by domestic legislation, which makes the attribution of compensation conditional on proving a series of circumstances, such as the culpable act or omission of the person causing the damage, the occurrence of damage of a certain amount and a causal link between the person's conduct and the damage. The problem arises when the act or omission is related to the use of AI, which by its nature is not fully transparent, highly complex and autonomous.

61   The issue of legal liability for the actions of artificial intelligence is also part of the debate within the European Commission, which in September 2022 published a proposal for a directive on the adaptation of civil liability rules to artificial intelligence ("Artificial Intelligence Liability Directive") The Commission proposes to supplement and modernise the EU liability framework in order to introduce new rules for damages caused by artificial intelligence systems.

62   The use of AI in decision-making by public authorities is a huge legislative challenge for both Polish and the European community. We can already see on the example of EU AI Act – the legislative process started in 2020, the definition was broadly discussed and the act entered into force in August 2024. The difficulty of classifying AI systems by legal doctrine, as a result of which, in some situations, it is practically impossible to determine who is responsible for a wrong decision, poses a serious threat to the fundamental rights and freedoms of citizens. The current polish legislation is not prepared to function smoothly in the coming reality and the practical lack of liability of public officials for their wrong decisions so far is a terrible sign both for the efficiency of the state's actions and for the protection of fundamental human and civil rights. In order to avoid the aforementioned dangers, new regulations should set out transparent rules for the marketing, commissioning and use of AI systems, should also adopt rational restrictions on the operation of AI and provisions for market monitoring, supervision and enforcement. In practice, the

lack of transparency and clarity regarding the rules applicable to the attribution of liability in the event of an unlawful or wrongful decision using AI translates into a weakening of legal certainty, effective supervision and control over decisions made by public administration bodies, and thus a weakening of citizen trust in public institutions and democracy. If the state decides to introduce certain technical solutions into its institutions, it must ensure that their use and functioning is equally transparent and that regulations are developed to guarantee the protection of citizen interests.

CONCLUSIONS

63   New solutions based on artificial intelligence are increasingly being used in the public sector by public administration bodies. Countries are outdoing each other in the rankings of the digitalization of public services and the modernization of the functioning of public institutions, including the increasingly widespread use of solutions based on artificial intelligence for issuing and making decisions that fall within the competence of government bodies. These solutions, although bringing undoubted advantages in the form of streamlining processes within institutions and increasing the efficiency of bodies and often shortening the time of waiting for a body to take a specific decision and perform its tasks, are burdened with significant risks in terms of compliance with the fundamental principles of a democratic state of law. Due to the considerable complexity and sophistication of artificial intelligence algorithms, a gap arises where the results provided by a given software programme will not be fully transparent. This is due to the difficulty in being able to reconstruct the process within the programme that led to a particular outcome, i.e. the lack of explainability of a given decision. Significant gaps in terms of real access to the entire process taking place in the algorithm resulting in a given outcome translate into a weakening of effective supervision and control over the actions and decisions taken by public authorities using AI-based solutions.

64   The problem of achieving full transparency of the processes taking place in the algorithms when they are used in the decision-making processes of public administration bodies translates into areas such as the accessibility of public information in its broad scope, the possibility of exercising real and full control and supervision over the actions and decisions of public administration bodies or clear guidelines for assigning liability when decisions are made using artificial intelligence-based solutions. The aforementioned areas are key elements for the proper functioning of a democratic state under the rule of law, which should be based on the transparency of the mechanisms guiding it and the decision-making powers of the authorities.

65   The current polish legislation is not prepared to function smoothly in the coming reality and the practical lack of liability of public officials for their wrong decisions so far is a terrible sign both for the efficiency of the state's actions and for the protection of fundamental human and civil rights. This is particularly the case in the context of criminal liability for abuse of power and illegal action by public officials. The lack of specific guidelines on the use of artificial intelligence blurs responsibility across different entities. Depending on the entity, the liability may involve proving guilt or illegality of the action. The level of autonomy and the very nature of artificial intelligence can cause great difficulties in practice in identifying

the guilty of a wrong decision made. Therefore, the current situation shows the need for the introduction of clear guidelines for the use of artificial intelligence in public administration, especially in the context of its use by public officials. In addition, situations in which the system developer, importer or user (deployer) is responsible for a wrong decision should be clearly distinguished. The EU AI Act is a very good basis for the future domestic legislation, nevertheless, national regulations covering the unique peculiarities of a given state and public authority structure are necessary. The another challenge now is the harmonisation and implementation of the AI Act regulations. The polish Ministry of Digital Affairs is already working on a law that will allow the AI Act to be applied in Poland.

66   In order to avoid the aforementioned dangers, new regulations should set out transparent rules for the marketing, commissioning and use of artificial intelligence systems, should also adopt rational restrictions on the operation of artificial intelligence and provisions for market monitoring, supervision and enforcement. A very important point that is already being made by the state bodies is to ensure that the algorithms used are fully transparent and explainable. Indeed, this aspect translates both into the trust of citizens in state institutions, but also constitutes the foundation for the proper and democratic functioning of the state through its bodies, whose actions and decisions must be verifiable.

RESUME :

Cet article analyse les conséquences de l'utilisation croissante de l'intelligence artificielle (IA) dans l'administration publique, en mettant l'accent sur la transparence, la responsabilité et la protection des droits des citoyens. En s'appuyant sur le cadre juridique polonais, l'étude explore les usages actuels de l'IA dans la prise de décision administrative ainsi que les risques qui en découlent, notamment lorsque ces décisions sont opaques ou difficiles à contester. L'article souligne l'importance fondamentale de l'accès à l'information publique, de la supervision efficace des autorités publiques, ainsi que de l'établissement de responsabilités claires dans les processus impliquant des systèmes d'IA. Il examine également les récentes évolutions réglementaires européennes, en particulier le règlement européen sur l'IA (AI Act), et met en lumière des outils tels que les évaluations d'impact algorithmique, susceptibles de renforcer la transparence. Les auteurs soutiennent qu'en l'absence de garanties solides et de législations nationales complémentaires, l'intégration de l'IA dans la gouvernance publique pourrait saper la confiance des citoyens et fragiliser les principes démocratiques fondamentaux.

SUMMARY:

This article examines the implications of the increasing use of artificial intelligence (AI) in public administration, with a particular focus on transparency, accountability, and the protection of citizens ´rights. Centered on the Polish legal framework, the study explores current applications of AI in administrative decision-making and the associated risks– especially when such decisions are opaque or difficult to contest. It underscores the critical importance of access to public information, effective oversight of public authorities, and the establishment of clear lines of accountability for AI-driven processes. The paper also evaluates recent European regulatory developments, notably the EU AI Act, and highlights mechanisms such as algorithmic impact assessments that can enhance transparency. The authors contend that, in the absence of robust safeguards and complementary national legislation, the integration of AI into public governance risks eroding public trust and undermining foundational democratic principles.