The invisible citizen in the digital state: Administrative law meets digital constitutionalism

Chapter 2
The Invisible Citizen in the Digital State: Administrative Law Meets Digital Constitutionalism

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Contents

Abstract Constitutional law and administrative law are inseparable partners in protecting fundamental rights. Yet, in the digital state, where rights are increasingly mediated by digital technology, the role of administrative law has become invisible. This invisibility is translated at two levels: first, with digitalisation, government has become invisible to citizens due to the gradual disappearance of human assistance. Second, the public sector no longer sees citizens as individuals with rights, perceiving them as data points. This invisibility is problematic because when citizens do not see what administrative law entails (and vice versa), many citizens become excluded from exercising their rights on equal terms. This chapter focuses on the interplay between the constitutional granting of rights and the administrative law procedures that operationalise them. It does so by drawing on digital constitutionalism, a scholarly trend which seeks to understand how the values of contemporary constitutionalism are being reshaped in the digital context, namely by the interaction of public and private interests. This chapter seeks to understand the 'invisibility problem' within the digital transformation of the public sector by employing a holistic approach that intertwines digital constitutionalism with administrative law.

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2.1 Introduction

Constitutional law and administrative law are inseparable partners. Yet, administrative law is often regarded as "the poor relation of public law" or the "unglamorous cousin labo[u]ring the shadow of constitutional law".[1] While many students and young scholars are passionate about constitutional law, it is rare to encounter anyone who has dreamed of becoming an administrative lawyer since childhood. I certainly did not, because I did not know what administrative law entailed. I am confident that, unless you had relatives working in the field, administrative law was an unknown and invisible field to you, too.

Administrative law is, indeed, invisible to average citizens.[2] The reasons are threefold. First, in contrast to constitutional law and criminal law, administrative law is seldom featured in media and pop culture. The approval of new medicine by regulatory agencies, eligibility for social welfare benefits and the burdensome procedures for applying for construction permits have not yet inspired Netflix or HBO screenwriters.[3] But perhaps they should. This becomes clear when we consider the other two reasons why administrative law is invisible. With the growing polarisation of our societies, there has been an increase in citizens' mistrust in technocracy, experts, governments and administrative procedures.[4] For example, during the pandemic, many citizens chose to credit conspiracy theories over complying with administrative rules on lockdowns, restricted business opening hours, and social distancing. Lastly, administrative law has also become physically 'invisible' to the average citizen with the disappearance of government service counters and the digitalisation of tax and social security paper forms.[5]

This invisibility is problematic, because when citizens do not see administrative law and what this field entails, they may not know how to exercise their rights. In

[1] Ginsburg 2017, p. 117.

[2] Note that the concept of 'average citizen'—contrary to 'average consumer'—is not a term of art.

[3] The series 'Maid' (2021) is a small exception to this as it discusses social welfare bureaucracy.

[4] For an empirical review of public trust levels in the US, see Pew Research Center (2023) Public Trust in Government: 1958-2023. https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/; The European Foundation for the Improvement of Living and Working Conditions (2022) Trust in national institutions is falling: Data behind the decline. https://www.eurofound.europa.eu/en/blog/2022/trust-national-institutions-falling-data-behind-decline#:~:text=Trust%20in%20national%20institutions%20has,positions%20%E2%80%93%20have%20become%20less%20trusting accessed 9 November 2023. On the relationship between stigmatised citizens and government and how state control can be regarded as adversarial, see Koch 2018; Damen et al. 2018, pp. 7, 12–13.

[5] Larsson 2021, p. 2.

addition, they may lose sight of how the digital transformation is reshaping their constitutional guarantees, and may not be able to contest negative decisions when their interests are disregarded. Indeed, in most jurisdictions, many citizens do not apply for the benefits they are entitled to or may commit mistakes while doing so. The latter had serious consequences in well-documented scandals such as Robodebt in Australia and the Dutch Childcare Benefits Scandal which resulted in thousands of citizens being flagged, investigated and sanctioned as potential fraudsters, even though they had never intended to commit fraud.[6]

This invisibility is also problematic for an additional reason: when you do not see administrative law, administrative law may not see you either for who you are beyond the collected and processed data: a citizen with rights and duties, an individual with variable abilities to exercise them, depending on personal and socioeconomic circumstances, a human that makes mistakes and does not always have her/his/their 'life together'. Unfortunately, this is a growing reality in the digital state. With digital government, there has been a growing disregard for the individual needs of citizens, and the inability of many to navigate digital bureaucracy without assistance.[7] Digitalisation and automation of government, with their vast datasets and 'black-box algorithms', have eroded the legal position of citizens before government and reduced the accountability of public authorities.[8] In this context, the citizens that need public services the most, are objectified and regarded primarily as data points in vast datasets and AI systems, about which correlations are established based on their belonging to a certain group (*women, immigrant, low-income*). Citizens lose their visibility as autonomous individuals who can make decisions that differ from what the historical data on *their group* suggests.

An immediate reaction to this problem could be to shift to approaches that are more focused on the *individual*, at both technological and legal level. This would entail opening the door to exceptions to existing administrative law rules (e.g. burden of proof, deadlines), more individual and casuistic decision-making, and creating more room for administrative discretion. Such a perspective would possibly enable government to consider more the *human* element of citizens and tailor administrative law to their specific needs and limits. However, such scholarly and political appeals are problematic and unrealistic since they collide with the administrative principles of consistency and efficiency as well as the rule of law and other pillars of constitutional law. Constitutional and administrative law have a strong general dimension and tailor-made solutions should remain exceptional and proportionate. Furthermore, all law, digital or not, constructs subject positions, normalises certain types of citizenship and right-holding, and it sees individuals through the filters of its own construction. While it is inevitable to exclude, to a certain extent, the individual as a unique human being or only be inclusive through the lens of certain legal constructions of subjectivity,

[6] Ranchordas and Scarcella 2021.

[7] Keizer et al. 2019, p. 4.

[8] On the increasing presence of data and algorithms in the public sector, see Auby 2020 and, more specifically on algorithmic accountability, see Busuioc 2021; for a reflection on the digitalization of public services, see Misuraca et al. 2020, p. 92, Gesk and Leyer 2022.

such exclusions should not be the result of the acritical digitalisation and automation of government.

Therefore, it is not argued here that the citizen will become more visible to administrative law (and vice-versa), if we simply work on more *humane* or *individual* approaches to administrative law (for example, by granting a large number of exceptions or extending deadlines). Instead, I advocate for a better understanding of the dynamics between constitutional and administrative law in the digital state and a critical understanding of digital government and the automation of administrative decision-making. This entails comprehending first the role of digital technology in the interactions between citizen and government. This chapter calls for a holistic public law perspective that will help us understand these dynamics through the lens of rights and brings administrative law, in the digital state, back to its mission as an 'operationalising' partner of constitutional law. This chapter does so by drawing on a new academic trend in constitutional law: digital constitutionalism, a strand of scholarship which seeks to understand how the values of contemporary constitutionalism (democracy, the rule of law, and the protection of human rights) are being reshaped into the digital context, namely by Big Tech firms.[9]

This chapter is organised as follows. Section 2.2 discusses how the digital government and the automation of public services and administrative decision-making are reshaping citizens' ability to exercise their rights before government. Section 2.3 introduces digital constitutionalism, a field of research that studies the impact of digital technology on citizens' rights and how technology (both public and private) is intermediating the interaction between citizens and the state. Digital constitutionalism does not aim to revolutionise those two pillars of modern constitutionalism. Digital constitutionalism is more than a *buzzword* and it cannot be reduced to the exercise of freedom of speech online and platform governance. Instead, as De Abreu Duarte et al. (2023) explain, digital constitutionalism "aims to understand how to interpret the (still hidden) role of constitutionalism in the digital age where powers tend to relocate from public to private, from local to global, from unity to pluralism."[10] Both constitutional and administrative law are currently experiencing the digital transformation as a source of pluralist challenges that are not yet absorbed by traditional legal concepts and procedures. However, when rights and duties are operationalised by the latter (e.g. evidence gathering rules that give vast powers to public authorities) but mediated by technology that follows a different rationale (e.g. predictive risk assessment drawing on vast datasets and opaque algorithms, profiling certain groups of citizens as a result), mismatches occur and many citizens are excluded.

Drawing on digital constitutionalism, this chapter proposes in Sect. 2.4 a holistic approach to public law in the digital state, bringing together the study of the impact of digital intermediation on fundamental rights and power imbalances with the more

[9] Kennedy 2016, p. 96. See the DigiCon project which focuses on this trend, Celeste (2022) What is Digital Constitutionalism? The Digital Constitutionalist, https://digi-con.org/what-is-digital-constitutionalism/ (21 February 2022).

[10] De Abreu Duarte et al. 2023, p.1-3.

technical dimension of administrative law. The term *digital state* refers to a state where governments employ digital technologies to transform the way they interact with citizens at the levels of public service provision, administrative decision-making and public procurement. In doing so, this chapter offers suggestions on the design of digital government for greater digital inclusion, respect for fundamental rights, and rule of law principles.[11]

2.2 How the Digital State is Reshaping Administrative Law

This section explores how the digitalisation and automation of government are changing the nature of administrative law, especially in highly digitalized jurisdictions such as the Netherlands, where most government-citizen transactions are nowadays mediated by digital technology.[12] This section does not aim to be comparative in its nature or offer an analysis that can be applied to all public law systems.

I will discuss first the original functions of administrative law and then I shall delve into some of the shifts this field of law is going through. This analysis is selective and does not include other relevant challenges (e.g. reliance on private technology by public authorities and the potential misalignment of private and public interests).[13]

2.2.1 Administrative Law: Functions

What do we talk about when we talk about administrative law in the digital age? In the first class of Administrative Law, many students define this field by reference to bureaucracy, 'paperwork', or derogative stereotypes about civil servants.[14] When asked to elaborate on this definition, students offer a few examples, limited to their personal experience with student visa or scholarship applications. There is no reference to digitalization, even though these students most likely submitted their applications online, have seldom had personal contact with a civil servant, and received administrative decisions that were partially automated. Outside the classroom, other citizens would not associate administrative law either with the image of a dynamic and digitalized field of law. Instead, it is seen as a synonym of bureaucracy. Legal scholars distinguish, nonetheless, administrative law from bureaucracy:

[11] Ranchordas and Iaione 2021.

[12] Tangi et al. 2022, p. 37; European Commission (2022) Digital Economy and Society Index (DESI) 2022 – The Netherlands. https://digital-strategy.ec.europa.eu/en/policies/desi-netherlands accessed 8 October 2023.

[13] Freeman 2003.

[14] For an empirical analysis of stereotypical associations regarding public servants, see Willems 2020; on traditional definitions of administrative law, see Bishop 1990.

the first is the laws and principles that govern the public administration and individuals' right before government; the second refers to executive formalities and the legal institutions affecting government agencies as they implement legislation and administer public programs.[15] Administrative law implicates important political and social values, including democracy, fairness, and efficiency. Therefore, administrative law research is characterized in part by prescriptive efforts to design rules that better promote these values while organising government and safeguarding citizens' rights.

Administrative law aims to control administrative discretion, protect citizens against the potential governmental misuse of power and unjustified interferences with fundamental rights, help citizens in need, and sometimes, punish them when they infringe the law.[16] Administrative law and constitutional law are closely connected and, in simplistic terms, the former can be seen as the operational arm of constitutional provisions and principles. Metaphorically speaking, constitutional law lays the architectural foundations of the rule of law, while administrative law designs its 'interior', making it liveable and operational. But similar to architecture and interior design, there are many different tastes and flavours and some tend to work better together than others.

One of the historical questions underlying administrative law is whether this body of rules and procedures should focus on organising public administration, and thus serving the state, or focus on the protection of the rights of citizens against the state's abuse of power. The answer depends on the history, functions, and design of administrative law as well as the subfields, mechanisms, and instruments of administrative law. Also, nowadays many administrative systems combine both organisational and right-protection features. Sociolegal studies' approach to administrative justice has helped us understand this question through the lens of access to justice, fairness, and individualism. Drawing on this scholarship, it could be argued that, from a legal perspective, the focus of administrative law should be the protection of individual justice, fairness, and providing effective remedies.[17] However, from the perspective of government, available resources, policy consistency, efficiency concerns, and political constraints inform the mission of how administrative justice can be administered.

Different legal traditions give rise to distinct conceptions of administrative law. Some systems (e.g. France) are more focused on organizing the public administrations, while others focus on protecting citizens against potential abuse of power and violation of fundamental rights (e.g. Germany). Common to both systems is the aim to regulate the asymmetric relationship between citizens and governments. In France, although the term '*droit administratif*' only emerged during the French Revolution, the *ancien régime* already knew different rules on the grounds of the public interest.[18] These original rules on administrative law granted prerogatives to public authorities.

[15] Mashaw 1983; Melnick 1992.

[16] Handler 1986.

[17] Thomas and Tomlinson 2017.

[18] Mestre 2020, pp. 23–24.

Following the French Revolution, the system was maintained and the principle of separation of powers was designed in favour of the executive. Administrative disputes were regarded as organisational and management matters. Later on, administrative law was defined as the field that comprised "all legal rules regarding the organization and functioning of administration as well as those determining its relations with citizens".[19] This definition was opposed to the term *sciences of administration* which aimed to study and improve *the public service in tune with the needs of society.*

More recently, administrative law has also been defined as the 'law governing administrative procedure [which] includes mechanisms used (1) "to redress harm to individuals inflicted by government in the pursuit of government objectives, and (2) for positive control of government agencies by branches of government with sovereign authority in law-making".[20] The functions of administrative procedures include the protection of citizens from arbitrary exercises of power and implementing public policy.[21]

Administrative law can be seen as a governance structure which offers either constraining or enabling mechanisms to administrative officials when engaging with citizens.[22] Even in common law systems and particularly in the United States where administrative law has a narrower scope and is focused on federal regulation, we find definitions that focus on the similar core. In the United States, Cary Coglianese has argued that this field has been designed to "guide the use of government authority in ways that promote values such as democracy, fairness, effectiveness, and efficiency."[23]

The functions of administrative law can be distinguished by the politics they are focused on: the universal interests or those shared by a broad constituency such as the elderly vs. particularistic interests or narrow interests of interest groups.[24] In the context of universal interests, administrative law can be perceived as enabling or empowering and its rules aim to promote values such as participation, equality, transparency, openness, and accountability. In addition, it also allows unorganized individuals to be able to demand before an administrative court to protect their rights.

As Cary Coglianese, a pioneer of the interdisciplinary study of administrative law, explains: "administrative law is constructed and reconstructed on the basis of assumptions about how particular procedural arrangements will affect the behaviour and performance of government officials and organizations".[25] Comparative administrative law studies have showed not only the differences between the different systems but also the similarities and convergence in European administrative law and potentially, the existence of a common core of administration law values.

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[19] Mestre 2020, p. 25.

[20] Bertelli 2005.

[21] Della Cananea 2016, p. 27.

[22] Lynn et al. 2000; Bertelli and Cece 2020, p. 176.

[23] Coglianese 2002, p. 1114.

[24] Bertelli and Cece 2020, p. 177.

[25] Coglianese 2002, p. 1113.

Administrative law has, nonetheless, evolved significantly over the last decades. It has benefited from empirical studies and the interdisciplinary studies of administrative law and bureaucracy. Administrative law, in many European countries, has also been affected by the so-called constitutionalisation of the field with constitutional case law increasingly permeating and reshaping the field.[26] The next section focuses on the shifts caused by the digital transformation in the public sector.

2.2.2 Shifts

Digital technology is transforming administrative law at many levels, both in arguably positive and negative ways. This section lists three central changes: first, the ability to control for bureaucratic inconsistencies and mistakes in contexts where there is little need for administrative discretion; second, administrative law is being transformed into a data management and risk assessment system; third, the shift from responsiveness to prediction. It could be objected that data processing is also reshaping other fields of law and this is a natural consequence of digitalization. However, administrative law, given its instrumental connection to bureaucracy and its need for reliable information on citizens to function, is inherently data-driven.

Administrative law in the digital state still aims to help, monitor, gather information, and sometimes, punish citizens.[27] Even though administrative law systems are populated by standards and guidelines that aim to promote consistency and fairness in decision-making, administrative law is also a field of discretion and exceptions. Administrative law seeks to control administrative discretion by ensuring that public authorities exercise discretion within legal boundaries and in strict pursuit of the public interest. While administrative discretion is essential to the implementation of public policy and ensure that citizens' individual circumstances and needs are considered, it also creates the potential for bureaucratic drift. Discretion is hard to control by legislators (and later by judges in the context of judicial review) and it gives rise to choices that may not be acceptable to others.[28] A decision-maker should typically listen to a citizen who is experiencing extraordinary circumstances and asks for an exception to be made.[29] Nowadays, these functions are performed with reliance on digital technology. With the use of automation, administrative procedures are changing, sometimes in a positive way as the risks of inconsistencies, mistakes, and bureaucratic drift are reduced. In this context, digital technology addresses many human flaws.[30] However, in spaces where administrative discretion requires a clear

[26] Wollenschläger 2017.

[27] Handler 1986.

[28] Coglianese 2002, p. 1114.

[29] Daly et al. 2023, pp. 257–258.

[30] Coglianese and Hefter 2022 anticipate that, as technology improves, a positive right to an algorithm could be imaginable, given the superiority of technology to assert several measurable facts that underpin administrative decisions.

interpretation of individual cases, the value of automation may be more difficult to assess and result in the opacity of decision-making or the conversion of discretion into categories from which little to no discretion is allowed.

Second, administrative law is gradually becoming a field of data management in countries with a high level of digitalization and automation. Administrative law follows, in many cases, the rationale of data protection law, verifying how data was collected, shared, and processed. Although the General Data Protection Regulation (GDPR) aimed to safeguard the role of 'the human in the loop', in the administrative context, this objective is, at times, endangered by the lack of resources such as the limited training of civil servants, and automation bias, the tendency to trust technology and the seemingly scientific analysis it offers. Due to the lack of human and financial resources, the existing system tendentially helps confirm—rather than challenge—decisions prepared by automated systems. Should objections arise, administrative law dictates the protocols for civil servants to ensure procedural adherence. However, the 'human element' of the system is often introduced too late in the process, if at all.[31]

While automated systems evolve rapidly, underlying rules and principles regarding their implementation, the rights of citizens before automated systems, have remained unchanged. However, reliance on large datasets, automation and AI systems does more than simply automating human processes.[32] First, digitalisation and automation are transforming the nature of administrative processes because technological intermediation changes fundamentally the interaction between citizens and public authorities at many levels such as access to digital government platforms, transfer and analysis of information, and evidence gathering.[33] Second, the rationale and politics of decision-making are changing. It is well known that general-purpose technology does not simply confer a neutral and automated character to government transactions, even if in most cases in the public sector, simple rule-based systems are preferred to complex machine learning.

Third, in both civil and common law, rules and principles of administrative law were forged in response to human-operated systems of government, not digital and automated ones.[34] Administrative law was designed as a human-to-human system with paper-based interactions with all their imperfections (e.g. nepotism, limited memory, inconsistencies, fatigue). Digitalisation is changing the interface that mediates relationships between government and citizens: Once government transactions are digitalized, previously analogue interfaces become simultaneously *virtual* and difficult to alter.[35] Analogue technology such as phone trees, risk matrices, and hard-copy checklists as well as face-to-face interactions have largely determined how administrative decisions are made and how they should be contested by citizens. Furthermore, the technology that mediates the interaction between government and

[31] Galetta 2019, p. 173.

[32] Henman 2022, pp. 463–464.

[33] Harlow and Rawlings 2020, pp. 19–20; Bovens and Zouridis 2002, p. 174.

[34] Daly et al. 2023, pp. 256–257.

[35] Raso 2022, p. 526.

citizens inevitably changes how citizens experience the legal decisions of government.[36] People have politics, but so do artifacts.[37] Writing on parchment paper is certainly different from typing on a computer or allowing an algorithm to prefill a form; conducting an analogue social welfare fraud enforcement investigation cannot be compared to the impact of drawing on large datasets using algorithms. Therefore, whether a decision is automated or not makes a significant difference.

When much of the preliminary work behind administrative decisions is automated, administrative law becomes reduced to a verification of risk assessments and other predictions, whether someone fulfils the eligibility criteria for a benefit or not. This is crucial given the current debate on the proposed AI Act which regulates AI according to this risk-based perspective, including fraud-prediction risk assessments based on profiling.[38] The use of risk assessments, for example, in welfare fraud policies and other predictive algorithms engage with uncertain futures as problems of risk, making them more tangible through risk profiles and scores (e.g. likelihood that someone will commit fraud or a crime). However, predictive algorithms and other risk-based instruments go beyond the absorption of uncertainty about the future: they are also performative and shape ideas about managing risk, they reimagine the present and replan the future by reorganizing populations, risk categories, institutions, data infrastructures, and administrative procedures as well as by promising to know uncertain futures.[39]

In other words, automation is typically not focused on establishing behaviour (i.e., whether an individual abuses the system) but on predicting it.[40] This means that selected citizens will be closely watched because their personal characteristics (e.g., age group, gender, ethnicity) place them in a category of people (e.g., middle-aged women) that according to the data in the system, is, for example, more likely to commit fraud. On the grounds of these probabilistic models and historical data, these individuals will then be more intensely scrutinized and often marginalised under the guise of objective evidence-based analyses.[41] Probabilistic models that act on group characteristics rather than an individual's characteristics may contravene

[36] Ibid.

[37] Winner 1980.

[38] Following the debate of the Dutch Childcare Benefits Scandal at European level, Amendment 50 (text of the AI Act approved in June 2023) established that 'AI systems used by law enforcement authorities or on their behalf to make predictions, profiles or risk assessments based on profiling of natural persons or data analysis based on personality traits and characteristics, including the person's location, or past criminal behaviour of natural persons or groups of persons for the purpose of predicting the occurrence or reoccurrence of an actual or potential criminal offence(s) or other criminalised social behaviour or administrative offences, including fraud-predicition systems, hold a particular risk of discrimination against certain persons or groups of persons, as they violate human dignity as well as the key legal principle of presumption of innocence. Such AI systems should therefore be prohibited.'

[39] Ratner and Elmholdt 2023; Amoore 2023, p. 22.

[40] Peeters and Schuilenberg 2018, p. 268.

[41] Prins and Reich 2018, p 259; Hamilton 2018, p. 1559.

the European Convention of Human Rights.[42] Administrative law's partial inability to respond to the challenges of digitalisation and automation of government is partly explained by the choice to use digital technology to optimize the public administration and cut government costs rather than to help further fundamental rights.[43]

If and when administrative law is reduced to a factory of administrative decisions and predictions, there is a higher risk of stigmatising groups in a way that no legal procedure afterwards might be able to rehabilitate or heal.[44] In the context of the Dutch Childcare Benefits Scandal, administrative law operated as an informational system guided by policy with 'tough' and inflexible goals of fraud prevention and sanctioning.[45] Data was expected to be processed accurately and there was no room for complacency or empathy.[46] Mistakes or any other deviations from the standard 'average' or 'good citizen model' (e.g., employed, middle-income citizen with no immigrant background) triggered the algorithms, thus stigmatizing ethnic minorities and underrepresented groups. The civil servants ('the humans in the loop') involved in this case (and also in many others), were reduced to gatekeepers who did not have the policy instructions or resources to adequately provide for meaningful interactions between citizens and government or were asked to follow strict policy guidelines. The judiciary system was unable to respond timely to the mistakes made by the public administration and promised reforms are being awaited.

The position of the citizen vis-à-vis the government as an individual, a *human with fundamental rights and duties,* is increasingly being disregarded. This is particularly problematic given the strong power asymmetries that are inherent to government transactions and which historically precede digitalisation and automation.[47] While different jurisdictions may have their own approach to administrative law, the transformation of administrative law into *a predictive, punitive, and informational system* with growing power asymmetries is not limited to the Netherlands but it is a more general phenomenon in Western countries.[48] At its outset, administrative law aimed to protect citizens' rights, regulate individual citizen-government relations, limit the boundaries of administrative discretion, prevent abuses of power, correct the power

[42] Dornan and Hudson 2003, p. 473.

[43] Wirtz et al. 2019, p. 599; for the growing use of automation in the public sector and its legal implications, see generally Hogan-Doran 2017. See Eubanks 2018 for a thorough account of how automation is being used to reduce spending on social welfare.

[44] On the impact of innovation and optimisation on the delivery of public services, see generally Gieske et al. 2019; Collington and Mazzucato 2022; Newman et al. 2022.

[45] See the report by the Venice Commission, Opinion on the Legal Protection of Citizens, 18 October 2021, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)031-e accessed 12 February 2024.

[46] Ranchordas 2022, p. 1348; for accounts of the victims of the Childcare Benefits Scandal, see Boztas (2021) The Childcare Benefits Scandal: Voices of the Victims, DUTCHNEWS. https://www.dutchnews.nl/news/2021/01/the-childcare-benefits-scandal-voices-of-the- victims accessed 11 November 2023.

[47] Toelstede 2020, p. 337; Kuziemski and Misuraca 2020.

[48] Henman 2022, p. 464.

asymmetries between state and citizens, and account for special circumstances.[49] But there is a growing disconnect that is sentencing many citizens to, on the one hand, the spotlight when it comes to certain risk assessments and, on the other, invisibility when it comes to protection of their rights.

2.2.3 Invisible Citizens in the Digital State

When designing public services and the interaction between citizens and government, it is essential to consider who the citizen is. Research shows that in digital government, which relies on *do-it-yourself* notions, the *citizen in mind* is the average, digitally literate citizen who can engage independently with digital technology.[50] This excludes nonetheless thousands to millions of citizens, depending on the country at stake. For the average citizen, digitalisation and automation may be experienced as positive improvements of their interaction with government since they typically have limited interaction with public authorities, can submit requests any time of the day, and receive faster decisions. Furthermore, the average citizen has adequate literacy, technological skills, education, and mental capacity to engage with complex bureaucracy online. We know, however, that many individuals are excluded by this approach that favours *average citizens* and even those who fall within this category may not remain *average citizens* all their lives. A tragic life event such as the death of a loved one or a serious health condition may place an *average citizen* into challenging circumstances. When bureaucracy and administrative legal systems do not consider the need to account for these challenges, citizens may face vulnerable circumstances.

Vulnerability theories have sought to demonstrate that, at some point in life, any citizen can be vulnerable and unable to engage independently with public services.[51] While the concept of *vulnerability* is highly nuanced, this chapter adopts an all-encompassing notion: vulnerability is primarily a social construct which can be seen as a layered reality that results from the fact that law or bureaucracy do not account for the cumulation of different endogenous or exogenous factors (e.g. gender, age, socioeconomic conditions). Vulnerability is primarily the result of a power imbalance. As a social construct, vulnerability is caused by complex regulation or bureaucracy which has to be complied with without assistance.[52] While this chapter does not delve into the concept of vulnerability, it acknowledges its complexity

[49] For an account on how organisational and bureaucratic accountabilities have displaced personal and professional values among social workers, see Burton and van den Broek 2009, p. 1329; on the use of data analysis for the delivery of public services, see Veale and Brass 2019.

[50] Grönlund et al. 2007; Lozanova-Belcheva 2013; Sander 2020, p. e5-3.

[51] Fineman 2008.

[52] Coeckelbergh 2013, p. 46; on helping governments identify varying levels of self-sufficiency among their population as signals of vulnerability, see Fluit et al. 2023; Fineman 2008, pp. 1, 12–18.

and refers to the literature, including our previous work.[53] AI systems are regularly employed to optimize digital government without taking into account the rights, needs, and limitations of vulnerable citizens.[54]

These developments are gradually undermining the legal position of citizens before government. The extent of this erosion varies by jurisdiction and the approach taken to digital governance and automation. However, it consistently impacts crucial aspects of autonomy and dignity, which are fundamental in states governed by the democratic rule of law.[55] This occurs partly because public authorities employ AI systems to make decisions about individuals based on aggregate patterns and risk assessments.[56] When this happens, citizens lose the individual ability to control their future: citizens are placed in groups and the aggregate behaviour of this group determines to a great extent how these citizens will be assessed by the government.[57] The citizen is assimilated within a specific group *(low-income, single-parents, neighbourhood*). In addition, this can give rise to administrative vulnerabilities as citizens are not able to exercise their rights on equal terms because on the one hand, they face a wide array of access and bureaucratic barriers such as the required digital literacy; on the other hand, the systems are focused on group categories, which may stigmatize certain citizens, placing them at risk of being discriminated against when they make a mistake online and are *flagged* by risk assessment systems.

The disappearance of human assistance and automation of public services are often justified by the need to guarantee consistency, reduce arbitrariness, optimize public services, and cut down on public expenditure.[58] Citizens that need government's assistance more regularly than the 'average citizen' may experience administrative law and the government differently. This is particularly true when they become targets of algorithmic discrimination in social welfare fraud enforcement policies that targets ethnic minorities. Furthermore, research shows that welfare recipients often see government as an adversarial actor that is standing between them and the exercise of their rights.[59]

To sum up, administrative law is becoming increasingly digitalized and automated drawing on models of self-reliance, average skills and needs. The position of the citizen vis-à-vis the government as a human with fundamental rights and duties is increasingly being disregarded. This is particularly problematic given the strong power asymmetries that are inherent to government transactions and administrative law's constitutional mission of operationalising constitutional law provisions and principles.[60] In the next section, we turn to digital constitutionalism to understand how the digital transformation in the public sector should be understood from a

[53] Ranchordas and Beck 2023.

[54] Ranchordas and Scarcella 2021.

[55] Nemitz 2018.

[56] Naarttijärvi 2023, p. 24.

[57] On dignity and autonomy, see Raz 2009.

[58] Coglianese 2021.

[59] Koch 2018.

[60] Toelstede 2020, p. 337; Kuziemski and Misuraca 2020.

constitutional perspective and what the digitalization of government can learn from digital constitutionalism.

2.3 Lessons from Digital Constitutionalism

In the last years, 'digital constitutionalism' and 'the algorithmic state' have emerged as new strands of scholarship that aim to reflect the impact of digital technology on constitutional values.[61] Digital constitutionalism acknowledges the need to develop new ways of limiting abuses of power in a complex system that includes many different governments at the national and international level, businesses including the technology industry and civil society organizations.[62]

Digital constitutionalism has been defined as "a shield against the discretionary exercise of power in the digital environment" which articulates "the limits to the exercise of power in a networked society."[63] Administrative law scholarship has also had similar but separate debates on how to adapt this field of law to new technological challenges.[64] However, the debate in administrative law and digital technology has been primarily focused on automated decision-making, namely the opacity of decisions, reason giving, and transparency.[65] A 'bigger picture dimension' is missing from the current debate. This section highlights the key contribution of digital constitutionalism to our understanding of how digital technology is reshaping constitutional values and principles.

2.3.1 What is Digital Constitutionalism?

Digital constitutionalism asks broader questions that require us to rethink power asymmetries between government and citizens, the relationship between private technology companies and the pursuit of the public interest, the safeguard of fundamental rights such as freedom of speech, and the protection of public values in the digital state. Despite the burgeoning literature on digital constitutionalism, mainstream public law scholars and courts have not yet embraced this body of literature

[61] Micklitz et al. 2021; Celeste 2023; De Gregorio 2022.

[62] Suzor 2019, p. 173.

[63] De Gregorio 2021, p. 42.

[64] Daly et al. 2023.

[65] On the transparency of algorithmic and other automatic governmental decision-making, see Ahonen and Erkkilä 2020; Finck 2019; Adam and Kazim (2023) Opacity and Discrimination in Automated State Decision-making: Transparency is the First Step Towards Trust, The Digital Constitutionalist. https://digi-con.org/ai-transparency-tag-register/ accessed 10 November 2023; Jiménez 2022.

which seeks to look beyond legal disciplinary boundaries and the public-private divide.[66]

Digital constitutionalism knows multiple and contrasting definitions. It is a novel strand of scholarship that is being shaped at the time of writing by different scholars and scholarly communities. Celeste defines digital constitutionalism as an "ideology that adapts the values of contemporary constitutionalism to the digital society."[67] Digital constitutionalism does not identify the normative responses to the challenges of digital technology, but it is rather a set of principles and values that informs, guides and determines the generation of those responses. Digital constitutionalism has also been presented as "a constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet."[68] For example, at EU level, the EU Declaration on Digital Rights and Principles highlights the need to put people at the centre of the digital transformation.[69] This Declaration revolves around creating a fair, safe, and sustainable digital transformation that centres around people and upholds core EU values and fundamental rights.

These initiatives range from advocacy statements to official positions of intergovernmental organizations to proposed legislation. These initiatives seek to advance a relatively comprehensive set of rights, principles, and governance norms for the Internet, and are usefully understood as part of a broader, pre- or proto-constitutional discourse. Digital constitutionalism is currently developing as an overarching framework of values and principles of the algorithmic society.[70]

Digital constitutionalism cannot be reduced to a normative and theoretical framework that is merely being developed by legal scholarship. On the contrary, existing or proposed EU regulation on technology such as the GDPR, the DSA (Digital Services Act) and the AI Act are building a common framework for European digital constitutionalism since they are regulating private power and infringements of fundamental rights and thus consolidating a democratic constitutional approach to address the challenges of the algorithmic society.[71]

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[66] Other authors have documented the emergence and framing of digital constitutionalism in literature and the need to consider it more seriously, see Celeste 2018; Micklitz et al. 2021; Other authors have sought to understand the evolution of constitutional law in light of sweeping digitalization, see Nemitz 2018; De Gregorio and Radu 2022; Goossens 2023 Constitutional Resilience in the Algorithmic Administrative State, The Digital Constitutionalist. https://digi-con.org/constitutional-resilience-in-the-algorithmic-administrative-state-from-the-rule-of-law-to-the-rule-of-code-and-back/ accessed 9 October 2023; Calo and Citron 2021.

[67] Celeste 2019, p. 77.

[68] Gill et al. 2018, p. 303.

[69] European Commission, EU Declaration on Digital Rights and Principles, European Commission, 26 January 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_452

[70] De Gregorio 2022.

[71] De Gregorio and Dunn 2022.

2.3.2 Key Contributions of Digital Constitutionalism

First, digital constitutionalism draws attention to how private powers and digital technology interfere with the exercise of fundamental rights and argues that traditional constitutional law instruments are inadequate to address the challenges of the digital state. Constitutional law was originally designed to limit state powers and protect individuals from the state's encroachment on fundamental rights.[72] In the digital state, we observe the rise of private technological powers and the intermediation of rights by digital technology.[73] These challenges may also be directly or indirectly relevant when governments choose to develop their own systems for social welfare fraud enforcement but acquire software that is based on private technology models. Many of these systems operate based on the collection of vast data and monitoring of citizens about potential infractions following a surveillance rationale. Surveillance capitalism is not only a business model but a way of exercising power through data collection, profiling of citizens, development of risk assessments, and automated decision-making.[74]

Traditional constitutional lawyers may ask whether the use of private technology and powers are matters to be addressed by public law and in particular constitutional law. Before the term digital constitutionalism was coined, Berman, based on the state action doctrine, had already discussed the need to go beyond traditional public/private distinctions in the context of what he calls *constitutive constitutionalism*. Starting from a more U.S.-focused perspective, Berman argued that we should recognise that there is more at stake than "the substantive check on private power... We also must consider the societal benefits that arise from a broader conception of the Constitution".[75] While the traditional perspective argued that private powers should be regulated as private actors or through self-regulation, more recently a number of digital and global constitutionalism scholars have argued that the regulation of digital power (both public and private) has an important constitutional dimension. De Gregorio has highlighted that the scholarly debate in this field is no longer limited to private law and competition law but it is gradually shifting to a public law perspective through the digital constitutional angle.[76]

Furthermore, digital constitutionalism has highlighted the need to bring back the *human* and human expertise to the digital state.[77] Digital constitutionalism is not limited to understanding how constitutional democracies could inject constitutional values into the digital architecture. Instead, it also reflects upon the role of human expertise in the algorithmic state.[78] Celeste and De Gregorio (2022) argue

[72] De Gregorio 2022, pp. 3–4.

[73] Pollicino and De Gregorio 2021, p. 4.

[74] On surveillance capitalism, see Zuboff 2018.

[75] Berman 2000, p. 1269.

[76] De Gregorio 2021, p. 42.

[77] Pasquale 2019.

[78] De Gregorio 2022, p. 3.

that this is visible in the GDPR's prohibition to be subject to fully automated decisions without human intervention (Article 22): while machines can be more accurate in many tasks than humans, full automation can be at odds with human dignity.[79] These scholars argue that the "GDPR is promoting a constitutional message deeply rooted in …'digital humanism': a conception of the digital society where the human being and her dignity should resolutely outrank machines, technology and, ultimately, economic efficiency". According to this interpretation, when "a decision affects important aspects of human life, machines, alone, do not suffice, and human intervention is needed" because "human life requires an anti-economic effort to safeguard its unicity and unrepeatability. Human beings are so unforeseeable and complex that, as a matter of principle, no machine, even the most advanced, could never fully understand them."[80] Digital humanism, as part of digital constitutionalism teaches us that when relying on automation, we should balance the protection of human dignity against efficiency arguments and ultimately ensure that, in the most significant cases, the latter prevails over any quantification attempts.

Digital constitutionalism adopts a global and pluralist perspective, departing from national constitutional law instruments that have a limited jurisdictional scope. Digital technologies, often developed with a global market in mind, are created primarily in a small number of innovation clusters and subsequently adapted for use within different national jurisdictions. This adaptation typically involves some local modifications to fit the specific legal and cultural contexts of each country. However, the core functionalities and the underlying values embedded within these technologies often reflect the constitutional principles of their country of origin. For instance, digital technologies originating in the United States may inherently carry U.S. constitutional values, such as the emphasis on a specific vision of freedom of expression. When these technologies are implemented in countries with differing constitutional frameworks, they can inadvertently influence local practices and potentially clash with local constitutional values. EU data protection is another example of a legal field developed from this constitutional prism which seeks to reverse this dynamic and ensure that digital technology aligns with European constitutional values, including privacy, data protection, and human dignity.

The GDPR has influenced data protection regulation throughout the world, generating the so-called 'Brussels effect'.[81] De Gregorio has argued that the extension of data protection rules to the global context comes with a set of drawbacks, namely to the principle of legal certainty and the rule of law.[82] This phenomenon also creates a sense of privacy universalism which may collide at times with other national constitutional values. The CJEU has recently highlighted these challenges in the Google v. CNIL decision, where the core of the preliminary questions raised by the French

[79] Celeste and De Gregorio 2022.

[80] Celeste and De Gregorio 2022.

[81] Bradford 2019, p. 132.

[82] De Gregorio 2022, p. 30.

judge aimed to clarify the territorial boundaries of the right to be forgotten online.[83] This trend could be interpreted differently. Contrary to the argument that the EU seeks to extend its regulatory power and European values to other countries and rule through regulation, extra-territorial effects could be seen as a practical way of ensuring that online platforms and technology companies in general avoid compliance with EU law.[84]

Finally, digital constitutionalism is concerned with the accountability problems connected to the use of AI systems and particularly opaque algorithms in the digital state (for example in the context of automated decision-making). As De Gregorio explains the accountability challenge is particularly significant when governments contract private global technology companies that rely on sophisticated proprietary arguments such as trade secrets and the complexity of their machine learning systems to maintain the opacity of the produced decisions.[85]

Digital constitutionalism can help administrative law to rethink the challenges posed by digitalisation and automation. This strand of scholarship draws attention to the impact of (private) technology on fundamental rights, public values, and the use of state power. The next section aims to bring together constitutional and administrative law perspectives together under the concept of 'digital public law'.

2.4 Digital Public Law

In the digital state, constitutional law alone may be insufficient to confront the complex challenges ushered in by automation; hence, a more holistic discourse within administrative law is needed. As discussed above, the proliferation of automated systems has given rise to significant concerns: the discriminatory outcomes faced by ethnic minorities, the intrusive tendencies of Big Tech entities on freedom of expression, and the growing dependency on private technological corporations for the implementation of immigration statutes are emblematic of the intricacies presented by digitalization and automation. These are intricacies with both constitutional law and administrative law implications which call for an all-encompassing approach under public law, an approach that merges the protective character of constitutional principles with the operational dimension of administrative law.

In addition, administrative law, in many Western countries, has evolved over the last decades, becoming more constitutionalized.[86] The influence of constitutional law scholarship and case law has helped to ensure that public authorities prioritise the protection of fundamental rights over technocratic arguments. This is crucial

[83] The Court of Justice of the European Union, C-507/17 *Google LLC v. Commission nationale de l'informatique et des libertés (CNIL)*, judgment of 24 September 2019, ECLI:EU:C:2019:772 (para. 14, 45-47)

[84] De Gregorio 2021, p. 69.

[85] De Gregorio 2022, pp. 2–3.

[86] Wollenschläger 2017; Poole 2007; Mortimer 2018; Vakil 2018; Dyzenhaus et al. 2001.

as administrative legal systems are tainted with paradoxes: They must protect and regulate rights in abstract but they must also take into account specific circumstances. They must be efficient but they must also be fair and equitable. The growing digitalisation and automation of the administrative state has exacerbated these paradoxes and revealed that administrative law and bureaucracies are deeply disconnected from many citizens' everyday realities. Ford (2023) proposes a new perspective that she calls 'regulation as respect' where public authorities depart from technocratic managerialism and focus, instead, on engaging with real peoples' lived experiences of regulation, including their anger and alienation.[87] Ford also suggests that the state reconnects with citizens in a more relational and empathetic fashion.[88]

If we wish to harness the potential benefits of digital technology in the public sector, while ensuring that they are operated fairly, we should work on developing a new vision of public law. This perspective on digital public law recognises the technologies underlying digitalization and automation of government as inherently political, rather than neutral tools, thereby requiring the deployment of sophisticated methods to align these systems appropriately with their respective contexts. This highlights the need for a nuanced understanding of how such technologies can reflect and shape policy objectives and societal norms. Consequently, this calls for an advanced legal framework that not only governs the use of digital and automated systems but also ensures their congruence with the ethical and cultural fabric of each unique jurisdiction. This approach advocates for the development of regulatory mechanisms that are both context-sensitive and responsive to the dynamic nature of digital technologies, ensuring that they serve the public interest and enhance democratic values.[89]

In addition, a holistic perspective of public law should ensure that fundamental rights and public values are considered more closely in national digitalisation strategies. Public values represent the foundational ideals, ethical standards, and principles that constitute the bedrock of a society's collective conscience. These values act as benchmarks for action, guiding public administration in the exercise of their functions and pursuit of the public interest. Public values shape not only the mindset of civil servants but also the objectives towards which governmental institutions should strive. Public values do not stem from collective but individual needs. Government, ideally positioned to cater to individual requirements, advances these needs by defending public values. However, public service values, while organized hierarchically and interrelated causally, cannot be reduced to a singular, preeminent value that governs a state's actions. While the concept of public values varies from country to country, certain values are shared by many countries. A central example is accountability, which can manifest both as a moral obligation and as an instrument to hold public officials answerable for their conduct. Other prevalent public values include autonomy, privacy, transparency, fairness, and efficiency.

[87] Ford 2023.

[88] Ford 2023.

[89] Williams 2022, p. 481.

Human rights and public values impact assessments should be passed, thus to ensure that digitalisation does not discriminate against or stigmatize citizens. These impact assessments—possibly compulsory in many situations—should also account for digital exclusion and ensure that digital government is not designed in a way that makes it impossible for citizens placed in challenging life circumstances (e.g. illness), with limited skills or simply citizens who are not able to uptake technology, to participate meaningfully in society and exercise their rights.

Third, thus far, digital governments that are well advanced into the digitalisation process (e.g. Denmark) have assumed that citizens can exercise their rights by themselves (do-it-yourself- administration) or with the assistance of relatives or volunteers. While the state in many of these countries still provides for a large number of social assistance benefits, it is up to citizens in need to navigate their way through vast amounts of bureaucracy. When there is little to no human assistance, many citizens fail to exercise these rights. However, these assumptions trump the essence of the Welfare State or the 'providing state' (or in Dutch, the '*presterende overheid'*). Welfare states were originally built around the idea of choice. However, the neoliberalisation of the welfare state changed the nature of the relationship between welfare recipients and social security institutions, cutting costs, limiting eligibility criteria, and intensifying social welfare fraud investigations. This increased inequality was detrimental to vulnerable welfare recipients who are less well-sourced.[90]

In addition, self-reliance on citizens' ability to engage with government with assistance of others also trumps individuals' autonomy and privacy. Drawing on digital constitutionalism's work on restoring the human character of the state, I make a first appeal—to be developed in future scholarship—to the right to human contact in the digital state. This right does not mean that every interaction should be personalised and 'individualised' as this would be unrealistic, and result in severe inconsistencies and inefficiencies. Instead, 'human contact', in this context, means diligent, thorough, and meaningful interaction so that citizens feel seen and experience what administrative law can offer them.

Public law (administrative law included) cannot be reduced to a 'robotic' application of the law and its procedures. The right procedures may have been followed in a semi-automated decision but this does not mean that the final decision was fair if civil servants merely 'stamped' the outcome of an investigation primarily supported by a risk assessment system. Meaningful government interactions and visibility of citizens mean that government must create a procedure within the digital state to ensure that internal and external contestation of automated results is possible. The use of triangulation methods, that is, methods to cross verify the results previously obtained by the employed drawing on another software or investigation, comes to mind as a way to balance the need for more meaningful, diligent, and 'contestable' interactions with the principle of efficiency that must remain central in administrative law. This meaningful intervention in the context of efficiency should also start early at policy level, when budgetary decisions are made regarding enforcement policies.

[90] Creutzfeldt 2022, pp. 231–232.

Rehumanising government does not mean opening up the door to endless exceptions. Instead, it means relying on digital technology with a critical perspective and without forgetting that citizens and government's relationship is one of power imbalances. These imbalances are not the same for all citizens and may be stronger for citizens that find themselves structurally in disadvantaged positions. Therefore, public law in the digital state must consider these imbalances and correct the outcomes of the digital transformation of the public sector for these inequalities, within the limits of the principle of efficiency.

Lastly, a holistic public law perspective should also require us to rethink the principles of good administration in the digital state. These principles already can help us ensure that automated decision-making complies with transparency requirements, the duty of diligence, and obtain explanations. However, in the digital age, good administration also means a meaningful administration where citizens can actively interact with government, citizens are seen and administration is more human.

2.5 Conclusion

This chapter offered a provocative exploration of how the citizen or, at least, many citizens that do not fit within the vision of digital government, are being obliterated with the optimization, digitalisation, and automation of bureaucracies. However, digital government does not have to be this way. Digital intermediation could be used to ensure that citizens are better informed in the exercise of their rights. But instead, many governments have chosen an approach where digital technology is employed primarily to reduce costs, enhance enforcement, and limit risks, keeping administrative law and citizens in the dark.[91]

Administrative law is a dynamic field of law that accompanies us from cradle to grave, which has become increasingly intertwined with constitutional law, and reshaped by globalization, privatization, and digital technology.[92] Both constitutional and administrative law have failed to adapt to the challenges of government automation. As a result, the foundations of our democratic states do not consider the growing asymmetries between citizens and the states. Digital constitutionalism seeks to understand constitutional law in light of the challenges of the digital and deserves further attention also from administrative lawyers and courts.[93] Digital constitutionalism can contribute to our understanding of administrative law in the

[91] Ratner and Elmholdt 2023.

[92] Auby 2020; Cassese 2012; Coglianese 2021; Engstrom et al. 2020; Fischman-Afori 2022; Cuéllar 2019; Mortimer 2018; Wollenschläger 2017.

[93] Other authors have sought to understand the evolution of constitutional law in light of sweeping digitalisation; see Nemitz 2018; De Gregorio and Radu 2022; Goossens (2023) Constitutional Resilience in the Algorithmic Administrative State, The Digital Constitutionalist. https://digi-con.org/constitutional-resilience-in-the-algorithmic-administrative-state-from-the-rule-of-law-to-the-rule-of-code-and-back/ accessed 9 October 2023; Calo and Citron 2021.

digital state by providing a framework that ensures the fundamental principles of constitutional law are respected within digital government. It offers a lens through which we can examine the implications of digital technologies and administrative actions on rights, freedoms, and democratic processes. However, a new and holistic perspective of public law is needed.

A holistic perspective of public law combines the key contributions of digital constitutionalism with principles and rules of administrative law in an attempt to ensure that interactions between citizens and government remain meaningful in the digital state and that citizens, regardless of what group they belong to, remain seen. Making citizens more visible in the digital age means putting the citizen back at the centre of public law, correcting inequalities, considering that not all citizens are able to exercise their rights before government without human assistance, and ensuring that the digital state regains a certain sense of empathy and humanity. All in all, a more critical perspective towards the digital transformation in the public sector is needed. Digitalisation and automation of citizens' rights cannot be done without considering the humans behind these rights and the inherently vulnerable essence of being human.

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