The application of public law values and principles in automated governance

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Introduction

In 2016, a report published by the UK Government's Chief Scientific Advisor described the "great potential" of artificial intelligence (AI) and other forms of automated decision-making (ADM) to transform government decision-making.[1] The conversation around AI at that time focused on the concept of 'big data', describing how the vast amounts of digital information generated from our daily lives could be analysed by algorithms to uncover patterns that would be impossible for any human to detect.[2] Whilst big data was already widely used in the private sector, such as in Amazon's system of customer-tailored product recommendations and high-frequency trading in the financial markets, its use in day to day government, outside the intelligence services,[3] was generally limited. However, over the last five years, the release of ChatGPT and other large language models (LLMs) has made AI more accessible and created a storm of interest in AI's potential to revolutionise society and government. These LLMs are capable of producing human-like text and reasoning in response to prompts in ordinary language and their availability through simple chatbot interfaces allows users without technical expertise to interact with them, making it far easier for non-specialists, including civil servants, to adopt AI into their work. The capability of other forms of AI has also increased, with breakthroughs in computer vision and intelligent robotics.[4]

These developments mean the automation of government is no longer solely the concern of technical experts and academics but is at the forefront of government policy around the world. The current UK Prime Minister, Keir Starmer, has described AI as the "defining opportunity of our generation" and argues it will bring a range of benefits, including speeding

* Justice of the Supreme Court of the UK. I am grateful to my Judicial Assistant, Monty Fynn, for his excellent assistance in the preparation of this lecture.

[1] Government Office for Science, 'Artificial Intelligence: Opportunities and Implications for the Future of Decision Making' (9 November 2016) 8 <https://www.gov.uk/government/publications/artificial-intelligence-an-overview-for-policy-makers> accessed 25 July 2025.

[2] Caryn Devins and others, 'The Law and Big Data' (2017) 27 Cornell Journal of Law and Public Policy 357.

[3] The bulk interception and analysis of communication data by the UK Intelligence Services appears to have begun in the 1990s: Owen Bowcott and Richard Norton-Taylor, 'UK spy agencies have collected bulk personal data since 1990s, files show' *Guardian* (21 April 2016) <. This surveillance was found unlawful by the European Court of Human Rights in *Big Brother Watch v UK* [2021] ECHR 439.

[4] Junyi Chai and others, 'Deep Learning in Computer Vision: A Critical Review of Emerging Techniques and Application Scenarios' (2021) 6 Machine Learning with Applications 100134; Josip Tomo Licardo, Mihael Domjan and Tihomir Orehovački, 'Intelligent Robotics—A Systematic Review of Emerging Technologies and Trends' (2024) 13 Electronics 542.

up government decision-making, saving money and bringing government closer to citizens.[5] A 2024 survey by the UK's National Audit Office found that although AI was not yet widely implemented in government bodies, 70% were piloting and planning to use it.[6] A similar report commissioned by the European Commission found 182 AI projects across the EU, including chatbots on government websites, predictive analytics in policing, and automated analysis of water quality. Singapore, an early mover on AI, published its second version of its *National AI Strategy* in 2023, portraying AI as a public good and a national necessity.[7] Canada and the United States published new AI action plans in 2025, declaring AI a national strategic priority and committing to accelerate AI adoption across their federal agencies.[8]

However, alongside this realisation of AI's potential benefits, there is an increasing recognition that government automation creates significant risks in terms of enhancement of state power in relation to the individual, loss of responsiveness to individual circumstances and the potential to undermine important values which the state should be striving to uphold, including human dignity and basic human rights. The emergent digital revolution in the delivery of public services therefore poses a central challenge to the values embodied in public law.

There has been a divergence in regulatory responses to this challenge. Countries like the UK, Canada and Singapore have taken a "pro-innovation approach to AI regulation", using 'soft law' regulation such as policies, frameworks and the establishment of research bodies to investigate AI safety. These countries have not enacted AI specific legislation. They will rely instead on existing law and regulators, such as those in data protection, to meet the risks posed by AI. In contrast, the EU has adopted a comprehensive, binding regulatory framework through the AI Act. Alongside these regimes, the courts have also started to grapple with interaction between automated governance and public law principles through the first judicial review cases.[9]

In this lecture I aim to assess the extent to which different regulatory mechanisms are capable of putting public law values into practice. I will argue that no single mechanism is sufficient on its own and each has an important role to play. However, given the absence of a comprehensive framework regulating AI in many common law jurisdictions, judicial review of ADM will likely become a means of filling in gaps between regulatory regimes, not only as an ex post remedy in individual cases but also potentially in providing a form of ex ante guidance

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[5] Keir Starmer, 'PM Speech on AI Opportunities Action Plan: 13 January 2025' (*GOV.UK*, 13 January 2025) <https://www.gov.uk/government/speeches/pm-speech-on-ai-opportunities-action-plan-13-january-2025> accessed 25 July 2025.

[6] National Audit Office, 'Use of Artificial Intelligence in Government' (2024) HC 612 <https://www.nao.org.uk/reports/use-of-artificial-intelligence-in-government/> accessed 18 July 2025.

[7] Government of the Republic of Singapore, 'National AI Strategy 2.0' (2023) <https://file.go.gov.sg/nais2023.pdf>; Jason Grant Allen, Jane Loo and Jose Luis Luna Campoverde, 'Governing Intelligence: Singapore's Evolving AI Governance Framework' (2025) 1 Cambridge Forum on AI: Law and Governance e12.

[8] Treasury Board of Canada Secretariat, 'AI Strategy for the Federal Public Service 2025-2027: Priority' (4 March 2025) <https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/gc-ai-strategy-priority-areas.html> accessed 25 July 2025; Executive Office of the US President, 'AI Action Plan' (July 2025) <https://www.ai.gov/action-plan> accessed 26 July 2025.

[9] In the UK: *R (Johnson & Ors) v Secretary of State for Work And Pensions* [2020] EWCA Civ 778, [2020] PTSR 1872; *R (Bridges) v The Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2021] 2 All ER 1121.

that shapes administrative behaviour and supports good governance. It is helpful to begin by defining more precisely what we mean by automated governance and public law principles and values.

What is automated governance?

The technologies which are contributing to the automation of government are not limited to AI and are often far simpler than the highly sophisticated LLMs with which people have become most familiar. At its most basic, government automation can occur through the use of a simple algorithm, by which I mean a set of defined, step-by-step instructions that a computer follows to perform a task. For example, a government grant to assist pensioners with their electricity bills might apply "if A, then B" logic that automates eligibility checks without requiring human input. These kinds of systems are often referred to as robotic process automation (RPA) and are not properly considered to be AI at all.[10] In contrast, AI is data-driven and is typically used to refer to programs which are not only automated but where the program itself learns to take actions by parsing huge amounts of data. AI models use sophisticated statistical methods and mathematics to identify patterns, correlations, and trends within this data. AI ranges in levels of sophistication, from small, simple models that have been trained for a specific task, to large neural networks, trained on hundreds of gigabytes of data and with millions of parameters. Some of these models are able to perform more complex tasks which previously required human intelligence and the application of on-the-spot judgment. Both AI and RPA are starting to be deployed more frequently in government, and I therefore use 'automated decision-making' (ADM) to cover both.

Public law principles and values

English public law has developed in the context of human governance, imposing an onus on human officials to be accountable to the courts to explain their decisions and be scrutinised by reference to substantive legal principles. Furthermore, for historical reasons English public law developed without the concept of the state as legal actor, but by reference to decision-making by individual human administrators. The remedial solution was the prerogative writ directed to keeping inferior courts (which was once the paradigm case) and administrators (the paradigm case now) within their jurisdiction. As Janet McLean writes, 'the common law form of action still did not recognise a politically directed bureaucratic machine but continued to be based on a diffuse eighteenth-century version of governance under which administrative functions are exercised by dispersed officials and bodies'.[11] This made control of the administration 'more readily acceptable to common law judges familiar with Diceyan constitutionalism. The Diceyan tradition [- which, I interpose, remains strong -] founded the rule of law in the control of individual officials rather than of the Crown or the state itself

[10] Brendan McGurk KC and Joe Tomlinson, *Artificial Intelligence and Public Law* (Hart Publishing 2025) 4.
[11] Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (2012), 199.

(viewed as a collective whole). Remedies would not be available against the sovereign or the state as a unified whole but against an official or body of officials'.[12] Common law principles of judicial review have emerged against this background, and have already demonstrated a capacity to adapt to the modern bureaucratic administrative state. Aspects of the move to ADM can be seen as an extension of the development to bureaucratic governance, and some of the challenges presented display certain similarities. I think this is a source of some hope when considering whether the legal system is capable of adapting while continuing to respect important underlying values. But the conceptual and practical hurdles to be overcome are more acute.

Public law principles have been developed by the courts under the common law and through the development of principles of statutory construction infused with common law values. Pursuant to these principles, the general position is that a court will not consider the merits of a decision. Instead, it will consider whether there has been some error in the decision-making process (procedural impropriety), whether the decision was made within the legal limits of the power that the decision-maker held (illegality),[13] and/or whether the decision was outside the range of reasonable responses open to the decision-maker (irrationality)[14] (and in some cases, whether the decision was proportionate).[15] However, the legislature has also made significant contributions to public law. Legislation has embedded human rights law through the Human Rights Act 1998, created substantive requirements of non-discrimination under Equality Act 2010, protected personal privacy via the data protection legislation, and enhanced transparency and openness through the Freedom of Information Act 2000. I take public law principles to include these legislative requirements as well as those imposed by the common law.

Sitting behind these principles are what I refer to as public law 'values'.[16] These are normative ideals which motivate and are given effect by the legal principles to which I have referred. For example, in *Osborne v Parole Board*[17] Lord Reed explained that procedural fairness gives effect to the dignitary idea that human beings regard themselves as responsible agents that should be given an opportunity to participate in the decision being made in relation to them. It is not possible exhaustively to outline every value of public law, but others include fairness,[18] accountability,[19] proportionality (in some contexts),[20] access to justice,[21]

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[12] Ibid, 200.
[13] *Pendragon Plc v Revenue and Customs Commissioners* [2015] UKSC 37, [2015] 1 WLR 2838, [49]-[51].
[14] *Associated Provincial Picture Houses v. Wednesbury* Corporation [1948] 1 KB 223; *Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374.
[15] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355.
[16] Justice James Allsop, 'Values in Public Law' [2015] Federal Judicial Scholarship <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2015/21.html> accessed 26 July 2025.
[17] [2013] UKSC 61, [2014] AC 1115.
[18] *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531.
[19] *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, [55] (Lord Mance, referring to "principles of accountability and transparency" in statute and the common law), cited in Fordham (n *) 39.2.13.
[20] *Attorney General's Reference No 2 of 2001* [2003] UKHL 68. [2004] 2 AC 72, [120] (Lord Hobhouse: "a basic principle of human rights law is the principle of proportionality").
[21] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [2017] ICR 1037, 65 (Lord Reed, describing "the constitutional principles which underlie the text" of primary legislation, as including "the constitutional right of access to justice).

transparency,[22] equality and non-discrimination,[23] consistency,[24] certainty,[25] democratic participation[26] and the rule of law.[27] I will discuss in more detail how these values interact with automated governance, but it should already be clear how automation is readily compatible with some (such as consistency) and in tension with others (non-discrimination and transparency).

The difference between these background values and the principles of public law is that the latter provide determinate legal standards that are capable of being concretely identified, applied, and enforced by the courts. While values serve as the normative foundations that inform and inspire the development of the law, principles are the doctrinal expressions of those values, providing structured tests that courts use to assess the legality of public action. In this way, legal principles give effect to public law values by translating them into operational criteria that guide judicial reasoning and constrain executive power. As John Nay has argued, a particular advantage of using public law to regulate AI is that it gives concrete expressions to the values that are often discussed in purely abstract terms in the literature on aligning AI with humanity; without this concrete expression values like 'fairness' and 'transparency' are too vague to give practical guidance to AI developers.

The benefits and risks of automated governance

The benefits

There are a number of potential benefits that ADM may bring to government. The first is efficiency. Automation increases the speed of decision-making while at the same time reducing labour costs. This supports the public law values of consistency and access to administrative justice.

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[22] *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 [2012] 1 AC 245, [34] (Lord Dyson: "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised"), [302] (Lord Phillips: "under principles of public law, it was necessary for the Secretary of State to have policies in relation to the exercise of her powers of detention of immigrants and that those policies had to be published").

[23] European Convention of Human Rights, art 14 ("The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"); Equality Act 2010, s 29(6) ("A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination").

[24] *Secretary of State for the Home Department v BK (Afghanistan)* [2019] EWCA Civ 1358 [2019] 4 WLR 111, [39] (Rose LJ, referring to "consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently").

[25] *Secretary of State for Defence v Percy* [1999] 1 All ER 732, 742b ("the principles of public law … include principles of legal certainty").

[26] *R (Moseley) v Haringey LBC* [2014] UKSC 56 [2014] 1 WLR 3947, [24] (Lord Wilson: "two of the purposes of procedural fairness … underlie the requirement that a consultation should be fair… But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society").

[27] *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, 67F ("There is … no principle more basic to any proper system of law than the maintenance of the rule of law itself").

Secondly, an algorithm can often read patterns and trends that humans might overlook, thereby making decisions more accurately than a human decision-maker. For example, research has shown that doctors who use AI to assess echocardiograms are more accurate and more confident in their decision-making.[28]

Thirdly, AI may be capable of making administration more responsive to individual needs, by harnessing big data to call to attention all of the salient aspects of every individual citizen. This would enable the state to "see" the citizen more clearly, moving to a system where each individual is afforded equal respect and attention according to their individual circumstances.

Fourthly, automated systems can be programmed to leave a good audit trail to allow for *ex post* review of decisions, enhancing transparency and accountability.

Fifthly, ADM can increase the availability of government services. Automated systems can be deployed at scale, ensuring that services and decisions are delivered uniformly at mass scale and across different regions. ADM can provide continuous service availability, with tools such as chatbots being able to provide 24/7 support to citizens, answering questions and giving access to services outside of normal office hours.

Sixthly, through accuracy, automated governance is capable of promoting the rule of law. One aspect of this is the elimination of capriciousness, through the consistent application of rules. Where the volume of decisions is very large, as in the immigration or social welfare contexts, a human decision-maker is not able to check their reasoning against the reasoning of all past decisions to make sure that they are being consistent, as is possible with ADM. Humans are also liable to make decisions based upon their subjective will or whim, even if only subconsciously. ADM has the potential to operate free of these limitations.

The risks

However, each of these benefits come with a corresponding risk. First, whilst ADM's efficiency means it can significantly speed up processes and reduce costs, it may also lead to overly rigid and mechanical decision-making. Automated systems, particularly those based on simple algorithms, may lack the flexibility to account for exceptional or complex individual circumstances. Similarly, government may overly simplify a policy problem to make it amenable to automation, losing the nuance required properly to attend to individual circumstances.

The second benefit – AI's ability to read patterns and trends that humans might overlook – also creates the concomitant risk that these systems are opaque and not interpretable by human officials. This is commonly referred to as the "black box" problem. This may prevent potential claimants from understanding the basis of a decision and may create barriers to challenging it. This undermines the public law principles of access to justice and accountability. Equally, government officials may be unable to explain the decision to defend it in judicial review proceedings. This will have particular implications for a government defendant's ability

[28] National Institute for Health and Care Research, "Doctors making AI-assisted decisions more accurate and confident in decision-making" (17 December 2021): https://oxfordbrc.nihr.ac.uk/doctors-making-ai-assisted-decisions-more-accurate-and-confident-in-decision-making/ (accessed on 12 July 2024).

to comply with their duty of candour, which requires them to provide the court with all relevant materials which explain how the decision was made.[29]

The third benefit of AI, of enabling the state to "see" the citizen, comes with the obvious risk of government surveillance and an authoritarian digital panopticon, where individuals are constantly monitored, profiled, and assessed. This risk arises as automated systems are able to data instantaneously from a wide range of sources – employment records, health data, education, housing, and even social media – such that decisions are made on private aspects of an individual's character, without their knowledge or meaningful consent.

The fourth benefit, of AI audit trails, is premised on an assumption that ADM systems, and any record they leave behind, are capable of being understood by human officials and made transparent to the public. This assumption does not hold true for many algorithmic systems due to their opacity, either because of intentional decisions to keep their operation confidential or due to their intrinsic complexity.[30]

The fifth benefit of ADM - providing 24/7 access to services - brings with it the risk that we will lose all human contact and oversight within government. Chatbot and other forms of virtual support can create the illusion of responsiveness while masking the absence of meaningful human oversight or thought. If ADM systems are not well-designed, they may provide misleading information, misinterpret user queries, or fail to escalate complex cases appropriately. This can lead to frustration and the denial of services, particularly for vulnerable users who may struggle to navigate digital interfaces.

The sixth benefit, of AI promoting the rule of law by being consistent and unbiased with very-large volumes of decisions, has the corresponding risk that AI may entrench and obscure systemic bias or illegality on massive scales. This risk has unfortunately become reality in several jurisdictions. For example, in Australia, the Robodebt recovery programme used to claw back overpayments to welfare recipients wrongly assumed that a claimant's income was evenly distributed across reporting periods.[31] A scandal ensured. The Government later refunded AUS $740 million to over 381,000 individuals.[32]

Given the profound risks associated with automated decision-making systems, it is essential that we develop robust mechanisms to safeguard and embed public law values within their design and implementation. Without such safeguards, the deployment of these technologies risks undermining trust in the state institutions they are meant to support.

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[29] Administrative Court, 'Administrative Court Judicial Review Guide 2024' (*Courts and Tribunals Judiciary*) 7.5 <https://www.judiciary.uk/courts-and-tribunals/high-court/administrative-court/administrative-court-judicial-review-guide-2024/> accessed 28 July 2025. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35; [2017] AC 300, [192] (Lady Hale: "It is a proud feature of the law of judicial review of administrative action … that the public authority whose actions or decisions are under challenge has a duty to make full and fair disclosure of all the relevant material. Only if this is done can the court perform its vital role of deciding whether or not those actions were lawful".

[30] Modified from Jenna Burrell "How the machine 'thinks': understanding opacity in machine learning algorithms" (2016) 3(1) Big Data & Society 1.

[31] McGurk KC and Tomlinson (n 10) 13.

[32] ibid.

The methods of applying public law principles and values

Soft law

The UK has focused on regulating ADM through soft law, by which I mean rules and standards which have no legally binding force but which are intended to influence conduct.[33] In doing so, it appears to be following the lead of Singapore, which in my understanding has adopted a model characterised by voluntary frameworks and collaborative development between government, industry and civil society.[34] The approach of the UK Government to date has focused on an "innovative approach" to AI. The previous Government published five principles to guide and inform AI's responsible development: safety, security and robustness; appropriate transparency and explainability; fairness; accountability and governance; and contestability and redress.[35] These principles reflect the values of public law and were put into practice through a suite of policy documents, many of them focusing on procurement, given its critical role in the automation of government.[36] For example, the previous Government published 'Guidelines for AI Procurement' together with a 'Data Ethics Framework' to help public authorities procure AI responsibly. The guidance states that public authorities should first consider whether AI is right for the task at hand, noting that it is "important to remember that AI is not an all-purpose solution" and that AI should only be used where it is ethical and safe to do so.[37] The procurement guidelines also recommend that public authorities should conduct an 'AI Impact Assessment' which should identify any potential risks, such as bias and unintended consequences, and devise mitigation strategies, including consideration of criteria which, if not met, mean an ADM should no longer be used.[38]

This soft law approach to realising public law values has the advantage of flexibility, allowing public authorities to be the judge of the particular risks raised within their areas. This may lead to AI solutions better tailored to individual public authorities, rather than a top-down regulatory approach which may hinder appropriate sector-specific responses. However, it has been subjected to criticism by some academics.[39] The principal criticism made is that without a proper mechanism of enforcement there is nothing to ensure that public authorities will actually follow this guidance. With public budgets under significant pressure, the key driver

[33] Allen, Loo and Campoverde (n 7) 6.
[34] Allen, Loo and Campoverde (n 7).
[35] 'A Pro-Innovation Approach to AI Regulation: Government Response' <https://www.gov.uk/government/consultations/ai-regulation-a-pro-innovation-approach-policy-proposals/outcome/a-pro-innovation-approach-to-ai-regulation-government-response> accessed 18 July 2025.
[36] McGurk KC and Tomlinson (n 10) 102.
[37] Department for Science, Innovation and Technology and Office for Artificial Intelligence, 'Assessing If Artificial Intelligence Is the Right Solution' (*GOV.UK*, 10 June 2019) <https://www.gov.uk/guidance/assessing-if-artificial-intelligence-is-the-right-solution> accessed 29 July 2025.
[38] Department for Science, Innovation and Technology and others, 'Guidelines for AI Procurement' (8 June 2020) <https://www.gov.uk/government/publications/guidelines-for-ai-procurement/guidelines-for-ai-procurement> accessed 29 July 2025.
[39] Whilst these criticisms are directed principally at the reliance on procurement they apply equally to an approach relying on soft law.

behind the current move to AI appears to be efficiency and cost savings, and there is an inevitable risk that these imperatives will override other considerations.[40]

Data protection law

Moving from soft law to legislative requirements, data protection law is likely to play a significant role regulating ADM given that the vast majority of such tools will rely on personal data. The UK's data protection regime principally comprises the UK General Data Protection Regulation (GDPR), a version of the EU GDPR retained after Brexit, and the Data Protection Act 2018. In line with its focus on encouraging technological innovation, the Government has recently reformed parts of this regime through the Data (Use and Access) Act 2025, broadly seeking to make it easier for private and public bodies to achieve compliance with their obligations. However, the core structure of the regime remains unchanged. The regime applies to the processing of personal data, meaning any information relating to an identified or identifiable natural person.[41] Most relevantly to automated governance, the UK GDPR contains a specific provision regulating ADM.

This was previously contained in article 22, taken from the EU GDPR, but it has recently been redrafted by the Data (Use and Access) Act 2025 which replaces it with new articles 22A-D. The old article 22 provided that the data subject had a right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her', unless the decision is (a) necessary for contractual purposes, (b) authorised by member state law which lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, or (c) based on the data subject's explicit consent. The new article 22A restricts this prohibition to the automated processing of special category personal data (such as medical records) rather than all personal data, as was the case previously. This allows public authorities and other organisations to rely on the full range of lawful bases to make decisions based on automated processing, subject to their providing a number of safeguards specified in article 22C. The safeguards must consist of measures that provide the data subject with information about automated decisions made about them, allow them to make representations, enable them to obtain human intervention on the part of the controller in relation to such decisions, and enable them to contest the decisions.

The Court of Justice of the European Union has interpreted article 22 in the EU GDPR expansively,[42] but these new provisions have not yet been considered by the UK courts. This points to one of the main drawbacks of data protection regime in that, overall, there is less doctrine or law in the data protection field than there is in administrative law. There are far fewer reported cases, as the first port of call is the regulator rather than the court, and much of the litigation that does take place goes before a tribunal that cannot set binding precedent.

[40] Albert Sanchez-Graells, 'Responsibly Buying Artificial Intelligence: A "Regulatory Hallucination"' (2024) 77 Current Legal Problems 81.
[41] UK GDPR, Art 4(1)
[42] Case C-634/21, SCHUFA Holding (Scoring), Judgment of 7 December 2023.

This means the area provides less concrete guidance to public authorities.[43] Also, it only applies to the processing of personal data, which means that it provides no remedy for companies, charities and other non-natural persons for use of their data by government.

The EU AI Act

The EU has taken a different approach to the regulation of AI from the UK and Singapore. In response to the limitations of the data protection regime and other mechanisms, the EU Parliament has passed the AI Act,[44] harmonizing the regulation of AI across the EU. Unlike the more soft law oriented approaches of Singapore, the UK and Canada, the AI Act provides a comprehensive and legally enforceable regime. The Act is wide-ranging and a comprehensive summary is beyond the scope of my lecture. I will therefore focus on its core provisions and those that regulate AI's deployment within the public sector.

The Act applies to the deployment of AI systems by both private and public actors[45] and is structured around a risk-based approach to AI regulation, classifying AI systems into four categories – unacceptable risk, high-risk, specific transparency risk, and minimal-risk – each subject to varying levels of regulatory oversight. Systems posing an unacceptable risk are banned entirely,[46] and include systems used to assess the risk of a person committing a criminal offence.[47] The other key part of the Act for public authorities are those on high risk systems, as this is defined to include systems that are used to facilitate access to and enjoyment of public services and benefits. Many of the obligations in relation to high-risk systems are placed on the providers, i.e. the developers, of AI systems themselves, rather than those who use them. Therefore, unlike the GDPR with its focus on data controllers, the AI Act will shift the regulatory burden onto private contractors providing AI rather than the public bodies deploying them. The obligations placed on providers include detailed requirements to ensure that data and training sets will not lead to bias or discrimination[48] and that high-risk systems are designed so that the public bodies using them can understand their outputs, preventing the black box problem.[49] When procuring AI, public authorities will also be required to ensure that the provider has itself met these obligations, mitigating the risk that authorities will merely become rule-takers of norms decided upon by the private sector.[50]

The strengths and weaknesses of this method of operationalizing public law values are the converse of those associated with the regulatory choices made by the UK, Canada and Singapore. It is a sophisticated regime that takes an extremely precautionary approach to the

[43] Philip Sales, 'Information Law and Automated Governance' (2023) 28 Judicial Review 280.
[44] 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) [2024] OJ L2024/1689.
[45] EU AI Act, Art 2.
[46] ibid Art 5.
[47] ibid Art 5(1)(d).
[48] ibid Art 10.
[49] ibid Art 13(1).
[50] ibid Art 13(1).

deployment of AI. Some forms of AI that are currently being deployed in the UK, such as in predictive policing,[51] are scheduled to be banned entirely in the EU. The Act therefore prioritises the protection of many public law values, such as fairness, transparency and fundamental rights. However, this may come at a significant cost if it inhibits innovation and efficiency in the delivery of state services by being overly cautious.

Judicial review

Given that the UK and other common law systems such as Canada and Singapore have chosen not to implement a systematic legislative regulation like the EU's AI Act, it seems likely that there will be a greater role for judicial review in fill in the gaps and operationalise public law values in the absence of legislative provisions or as a supplement to such legislation as there is. I do not mean that ADM will necessarily result in scope for more unlawfulness or a greater number of judicial review cases in total (although the systemic nature of the issues associated with AI does enhance this risk); as I have emphasised, there is scope for unlawfulness in the present system of public administration carried out by human officials and as ADM increasingly takes over public functions, it seems inevitable that judicial review cases involving ADM will take the place of those concerning human decisionmakers.[52]

I will focus today on two cases that illustrate the capacity of judicial review to respond to the risks posed by AI.

R (Johnson) v Secretary of State for Work and Pensions[53] concerned the rules for Universal Credit, a welfare benefit paid to individuals in the UK on low incomes. The amount of Universal Credit received by a claimant is reduced to take account of any income they receive from employment in a monthly assessment period. In order to make the benefit system amenable to automation, the Universal Credit Regulations specified that income for each monthly assessment period was to be calculated based on the actual amounts received during that period, without regard to whether the income related to work performed in that period or another. However, this meant that the system did not accommodate individuals who were usually paid their salary on a particular day but who were paid on a different day if the normal day fell on a weekend or bank holiday. Where this occurred, the individual would receive two monthly salaries falling within one Universal Credit assessment period, significantly reducing their benefits for that period, resulting in financial hardship. The Government attempted to defend this given "the importance to the system as a whole of having a simple way of identifying inputs required for the automated calculation of the monthly award for many millions of claimants".[54] The case therefore illustrates one of the risks I have discussed, namely where public authorities oversimplify a policy issue in order to make it amenable to automation, and the human interests which inform public law values are squeezed out. It is, on a small scale, a form of the problem analysed by James C. Scott in his book, *Seeing Like a*

[51] Lorna Christie, 'AI in Policing and Security' <https://post.parliament.uk/ai-in-policing-and-security/> accessed 30 July 2025.
[52] Lord Sales, 'Judicial Review Methodology in the Automated State' (Forthcoming).
[53] *Johnson* (n 9).
[54] *Johnson* [34].

State.[55] The Court of Appeal rejected this argument, holding that the system was irrational, in that no reasonable decision-maker could justify this regime. The Court held it was "perverse"[56], "extreme"[57] and "egregious"[58] to "cause considerable hardship" to claimants by ignoring their individual circumstances and inhibiting their employment choices. Whilst *Johnson* concerned a simple RPA, rather than a more sophisticated AI, the case shows that the court is unlikely to prioritise algorithmic efficiency over the rights of individual claimants.

Bridges v South Wales Police[59] concerned the use of live automated facial recognition technology ("AFR") by the South Wales Police Force. South Wales Police was the national lead on AFR, having received a government grant to test the technology.[60] In April 2017, the force began a trial of automatic AFR as a precursor to its subsequent national rollout. The trial comprised two pilots, one of which was AFR Locate. This involved capturing digital images of the public via live CCTV and comparing them with biometric data from a watchlist created from images held on databases maintained by the force as part of its ordinary policing activities. Mr Bridges, a civil liberties campaigner, brought a judicial review claim challenging deployment of AFR on two particular occasions.[61] The challenge was brought on a number of grounds, including that the deployment breached his right to private life in article 8 of the European Convention on Human Rights (as given effect by the Human Rights Act) and the public sector equality duty under the Equality Act 2010.[62] The Divisional Court dismissed the claim on both of these grounds, but the Court of Appeal allowed Mr Bridges' appeal.

On the human rights claim, Mr Bridges sought to argue that AFR Locate failed to comply with article 8's requirement that any interference with the right to privacy is 'in accordance with the law'. This requirement means that the measure interfering with the right must have a sufficient legal framework governing its use, which is to say that it has 'some basis in domestic law' and complies with the requirements of accessibility, foreseeability of application and protection against arbitrariness.[63] The Divisional Court held that there was a sufficient legal framework provided by the combination of the data protection regime, the Surveillance Camera Code of Practice (a national policy), and the force's own policies. However, the Court of Appeal disagreed, holding that there were "fundamental deficiencies" in the legal framework governing AFR Locate.[64] In particular, too much discretion was left to individual police officers as to who would be subject to AFR Locate and where it would be deployed.[65]

The equality duty places a duty on public authorities to, among other things, "have due regard to the need to… eliminate discrimination".[66] Mr Bridges argued that the police had

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[55] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition have Failed* (1998).
[56] *Johnson* (n 9)[59]
[57] ibid.
[58] ibid [62]
[59] *Bridges* (n 9).
[60] Joe Purshouse and Liz Campbell, 'Automated Facial Recognition and Policing: A Bridge Too Far?' (2022) 42 Legal Studies 209, 214.
[61] *Bridges* (n 9) [25].
[62] Equality Act 2010, s 149.
[63] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; Sliver v United Kingdom (1983) 5 EHRR 347; and *Malone v United Kingdom* (1985) 7 EHRR 14.
[64] *Bridges* (n 9) [91].
[65] *Bridges* (n 9) [91].
[66] Equality Act 2010, s 149(1)(a).

breached this obligation by failing to take positive steps to ensure that AFR Locate was not indirectly discriminatory. The Divisional Court rejected this claim, holding that there was no evidence at the time AFR Locate was deployed that it was indirectly discriminatory and there was therefore no further action required of the police. The Court of Appeal again disagreed, holding that the equality duty requirement places a continuing obligation on decision-makers to take positive steps to enquire into the potentially discriminatory effects of their decisions; and the police had breached this requirement by failing "to satisfy themselves, either directly or by way of independent verification, that the software program… [did] not have an unacceptable bias on grounds of race"

Both *Bridges* and *Johnson* illustrate the capacity of judicial review to subject the lawfulness of the deployment of ADM to rigorous assessment. Whilst this kind of regulation is often described as a limited 'ex post' mechanism of enforcement, focusing only on the correction of unlawfulness in the past, in my view, this is only part of the picture. When giving judgment in a judicial review claim, a court is not only concerned with remedying the historic public law unlawfulness in the case before it but also with developing public law principles that will support good governance in the future. The common law is always Janus-faced in this way, looking forwards and backwards at the same time.[67] The principles articulated in these cases will be diffused through public authorities by lawyers and other officials taking them into account when formulating policy and making decisions. Thus, in our systems, the judiciary will inevitably fulfil something of a policy-making role in developing doctrine, directed to defending public law values. The availability of judicial review means that it is to be hoped that public authorities using ADM and AI will be encouraged to foster for themselves a culture of legality, and will be subject to an incentive to internalise public law values in their own practice and to embed them in the ADM systems they adopt.

Conclusion

I have discussed how the response to the rise of automated decision-making in government has led to a clear divergence in regulatory approaches around the world. Whilst public law values have traditionally been protected by the courts, the novelty of ADM means that it is critical to assess the full range of policy options currently being explored in different jurisdictions. Whilst the mechanisms required to meet these challenges may need to evolve, the underlying public law values are unlikely to change. The commitment to legality, transparency, accountability, and human dignity remains central to the legitimacy of public administration, regardless of whether decisions are made by humans or machines.[68] The task ahead is to ensure that these values are not only preserved but are actively embedded in the design, deployment, and oversight of ADM systems. Only then can we ensure that automation innovation serves, rather than undermines, good governance and the rule of law.

[67] See P Sales, "The Common Law: Context and Method" (2019) 135 LQR 47.
[68] Charlotte Langer, 'Decision-Making Power and Responsibility in an Automated Administration' (2024) 4 Discover Artificial Intelligence 59.