SUPERPOWERS GRANTED TO THE AIG BY LAW 144 OF 2020, COMPLICATES GOVERNMENT'S DIGITALIZATION AGENDA IN PANAMA

BY PUBLIO CORTÉS

It has already become commonplace, but it is important to reiterate: the pandemic has highlighted the need to make digital interaction in and with the government in Panama more effective. The process had been underway for years, but it is a fact that in the heat of the necessity during the pandemic, we stepped on the accelerator and that course will not stop; which is profoundly positive given that it is compatible with the digital economy in which we are already immersed.

It could be said that it is almost a fundamental human right for the Administered people of a country to be able to do their procedures with the government through digital means in a simple, transparent, fast, and effective way, as technologically as possible. There is no doubt about it.

Perhaps it was with this vision in mind that Law 144 of 2020 was adopted last April in Panama "Which modifies and adds articles to Law 83 of 2012, on the use of electronic media for government procedures, and dictates another provision". However, the path chosen to achieve the objective is, to say the least, controversial. According to this law, some sort of centralized superpower is granted to the Government Innovation Authority (AIG).

In this article we will only refer to two of the powers that according to the mentioned law can be exercised by the AIG over the Central Government; autonomous, semi-autonomous, municipal entities; the National Assembly; the Judicial Branch; financial intermediaries of the State; and over companies in which the State owns 51% or more of their shares. Such powers are the following:

(1) The AIG has the exclusive authority to establish what is called the "Digital Agenda" annually which will be published in the Official Gazette. Said document establishes the government's strategy in matters of technology and innovation, which is mandatory for public entities. That agenda will be for the compliance of all public entities to which this law applies "*in their relations among themselves and between them and the users... as well as to all the procedures, processes and services that such entities provide*".

The "Digital Agenda" will be applied gradually and progressively, according to an annual and multi-year execution schedule and will contain the number of government procedures to be digitalized by each institution, based on the prioritization established in that document.

(2) The AIG may fine any "public servant" responsible for having committed infractions or misdemeanors related to Law 144, which includes the "Digital Agenda". Fines will be up to 30% of the gross salary earned by the "public servant" and may lead to the application of other disciplinary measures and even to dismissal. The public entities to which the abovementioned law applies must take the necessary measures to comply with it.

In our opinion, in some cases, these powers violate the Political Constitution; in others, they clearly clash with other laws of greater specialty; and in all cases, they generate a breach in the institutional structure of the Panamanian State, diverging from many principles of Public Law and basic administrative logic.

By virtue of this way of doing things, the scheme proposed by Law 144 of 2020 will probably cause so much of a mix-up that it will end up confusing the goal we are all aiming for, that is, that the State is digitalized as soon as possible in a complete way, including the

sustainability and adaptability in the time in which the technological instruments are put into practice.

Below we support our point of view:

Digitalization as an INSTRUMENT or TOOL to achieve service and business goals more efficiently

In the glossary of terms on Gartner's consulting firm's website (gartner.com), which has worldwide presence, "digitalization" is defined as follows:

> "**use** of digital technologies to change the business model and provide new revenue and value-producing opportunities; it is the process of switching over to digital business." (The underlined is ours).

Regarding the same term, the Cambridge University Press dictionary gives us the following definition:

> "To initiate the **use** of digital technology such as computers and the Internet to do something". (The underlined is ours).

Both definitions emphasize on the **instrumental** nature of digital solutions. It is something that is **USED** to do something else. That is, digital technology, whether it is the logical designing of processes (software) or computer equipment, networks, etc. (hardware) are nothing more than **TOOLS** for a business that has a specific sales or service goal, to achieve objectives that it already had, by other more efficient means.

In the Public Administration it is the same. The **core** business goals of the Customs Authority or the Ministry of Housing are exactly the same as those defined by law since it is a matter of Public Law. This is so, regardless of whether such goals are executed in person, on paper, and by forming a line; via web; through a letter; by carrying a declaration on an antediluvian diskette; or by means of a cell phone text message. Legally, it is the same relationship of Administrative Law between the Administration and the Administered people or between the different branches of the Administration itself.

The above-said represents the cornerstone of our approach, since Law 144 of 2020 seems to ignore this principle and approaches the process of implementing digital tools in the State, **as if the tools themselves were the**

purpose, whose development can be transferred to a focal point outside all State institutions, not just the Central Government.

It seems that it is thought that after the matter involves processes and information technologies, it is immediately something that AIG can control and execute better than each and every one of the State's entities, as if each of those administrative units did not know its needs better and as if the technological tools used to execute administrative functions in a better way were something that can be separated from the main competences of each entity.

I am convinced that the Legislator's approach is entirely wrong since **digitalization is nothing more than an ACCESSORY to the "core business" of each administrative unit of the State.**

In this way, the authorities of the Social Security Agency are the most competent and best prepared to determine which digital tool solves their needs regarding actuarial calculations; the Supreme Court of Justice is the most competent and best prepared to have the last word on the digitalization of an ordinary process of greater amount; the *Caja de Ahorros* the same, as far as the management of its online banking system is concerned; as well as the Ministry of Foreign Affairs whenever it decides to generate a secure communication system on the sensitive information of national interest reported by the Ambassadors from all over the world.

The AIG has an important role to play as coordinator and advisor of all public entities in matters of technology, as well as advisor of the highest levels of the Executive Branch in these matters of digitalization, but to transfer to that entity the role of imposing its vision of how things should be done and the priorities of digitalization on the entire State seems exaggerated, especially when the AIG is given the capacity to fine, take disciplinary actions, and even dismiss any "public servant" who does not behave well.

However, the excess of powers granted to AIG not only seems to be far from the proper Public Administration, but also generates deep conflicts of legal competence that will probably make such powers inapplicable. Let us see.

Law 144 and the Constitutional Autonomy of certain entities

The mentioned law states that all autonomous entities will be governed by it and **does not make distinctions** as to what kind of autonomy. That also includes the Legislative Branch, the Judicial Body, and the municipalities. This means that the AIG can, according to this law, exercise its powers in the area of digitalization over these entities, which includes having the last word on their digitalization processes and even sanctioning any "public servant" of these entities who does not behave well.

The drafters of the law forgot to distinguish between autonomous entities with constitutional autonomy

and those with legal autonomy.

In the case of entities with constitutional autonomy, it is totally impossible for a law to impose on them the transfer of their competences to the AIG to digitalize their processes.

By Constitution, the other branches of State have total administrative autonomy, first and foremost: the judicial and legislative branches. This is the basis of the concept of "**separation** of powers", the essence of the liberal democratic government system. Not even the President can give orders to the Supreme Court or the National Assembly. Much less can the AIG tell these State Organs how and when to digitalize their processes and sanction their "public servants".

The municipalities are local governments with constitutional autonomy. Each municipality is self-governed; and the AIG cannot, for example, impose on the Mayor of Panama City and the Municipal Council how they should digitalize their processes.

The following also have constitutionally guaranteed autonomy: the Electoral Tribunal; the National Audit Office; the University of Panama; the Panama Canal Authority; the Attorney General Office; the Comptroller General of the Republic; and the Ombudsman Office. It is simply legally impossible for the AIG to claim the powers granted to it by Law 144 over these entities. It can advise them and coordinate with them but not impose decisions on them.

Law 144 and the Legal Autonomy of certain entities

There are other institutions whose autonomy is not based on the Constitution but on a law. A superficial approach to such autonomy supported by law might lead one to believe that in such cases Law 144 could indeed give AIG the powers it has been granted since Law 144 is a more recent law.

I disagree with that approach. Rather, in these cases, what Law 144 has created is a conflict of competences and application of laws that, in my opinion, has a solution that goes against Law 144 and the AIG and in favor of each entity with autonomy. A few practical examples will suffice to illustrate the point.

We have the case of the Panama Maritime Authority (AMP), founded in 1998 by President Ernesto Pérez Balladares, with the right idea of giving an overall perspective to maritime matters, which had been scattered among multiple government entities. By law it is an autonomous entity, where its administration is exercised by the Administrator and the Board of Directors. Since a positive reform carried out during the Administration of President Torrijos in 2008, it was specified that this autonomy is "*both administrative and functional, related to human resources and direct contracting*"; the AMP was introduced as "*the supreme authority for the implementation of the national maritime strategy*" and that the Administrator has the rank of Minister.

Another example is the "financial intermediary" called CAJA DE AHORROS which is a state-owned general license bank that is supervised by the regulatory agency called: Superintendency of Banks of Panama. CAJA DE AHORROS was created by President Harmodio Arias Madrid in 1934 to promote savings for housing. Today, it is the only banking institution in Panama that has more than one million deposit accounts and its mortgage portfolio exceeds 1.2 billion dollars. "The Panamanian Family Bank" has, by Law, "*administrative, budgetary and financial autonomy*".

The third example we will cite is the Caja de Seguro Social (CSS), founded in 1941 by President Arnulfo Arias Madrid to provide social security for the health and retirement of workers. Today, it is regulated by a 2005 law passed during President Torrijos' administration, which states that the CSS "*is a Public Law entity, autonomous from the State, in administrative, functional, economic, and financial matters*".

If we start from the premise that "digitalization" is an ACCESSORY process that must be put into practice in each public entity in order to function more efficiently both internally and with respect to its users and other State entities, we can conclude that the AMP, just as the CAJA DE AHORROS, and the CSS have the legal authority to decide how and when to carry out the digitalization of their processes.

If the AMP has autonomous administrative power to make decisions on maritime port issues; if the "Panamanian Family Bank "has administrative autonomy to make its decisions regarding its credit policies; if the CSS has administrative autonomy on how to collect the social security contributions; these institutions also have total administrative autonomy to decide how and when to apply the **accessory tools** of digitalization to fulfill their respective public functions better.

What should we do then with the conflict that arises between the laws of each entity and Law 144 of 2020 regarding digitalization? We have --in one corner-- the law that gives administrative autonomy to some autonomous institutions, which includes their control over the process of digitalizing their procedures; and -- in the other corner -- Law 144 that extracts a "portion" of that administrative autonomy from each institution, the one related to digitalization, and transfers it to the AIG. Which is the law that applies?

The solution to the riddle requires the application of a Civil Law rule found in the Civil Code, according to which, in case of incompatibility of laws, the provision relating to a special matter, or to businesses or cases, applies first. And if the incompatible rules have the same degree of specialty or generality and are in the same law, the latter one applies, but if they are in different laws, the special law on the matter in question applies.

In our opinion, the first rule is sufficient to unleash this dispute. If we take into account that the digitalization of processes is an **accessory** matter to, for example, the substantial work of the AMP, the CAJA DE AHORROS and the CSS, there is no doubt that for maritime matters the special rule is the AMP Law, for the competences of the CAJA DE AHORROS it is the Law of the CAJA DE AHORROS and in the same way for the CSS regarding social security. These primary, special, substantial, and autonomous competences of these entities bring along with them the decisions regarding accessory matters such as the digitalization tools that each entity decides to apply to its processes.

Based on the above, Law 144 of 2020 becomes inapplicable in cases such as the AMP, the CAJA DE AHORROS, and the CSS. The same will happen with other institutions that have a similar autonomy, based on the law. This administrative autonomy allows such entities to be supported and coordinated with the AIG, but it does not seem possible to allow them to transfer part of their special

competence.

Law 144 and the Central Government entities

In the case of the Central Government entities the situation is similar to that explained about autonomous entities, insofar as the Central Government entity has a special law which conflicts with Law 144 of 2020.

Let us take the case of the Ministry of Economy and Finance (MEF), created in 1998 in the administration of President Ernesto Pérez Balladares which derived from the merger of the Ministry of Planning and Economic Policy and the Ministry of Finance and Treasury. The Law says that the management of MEF "*shall be in charge of the Minister of Economy and Finance, who is the Chief Executive of the branch and responsible to the President of the Republic as for the compliance of his duties*".

In a very similar way, we have the case of the Ministry of Agricultural Development (MIDA), where the law that regulates it says that "*The Minister is the Chief Executive of the branch and the highest authority in charge of the administration and execution of the policies, plans, programs and standards of the sector-based actions of the Government in the matter, being responsible to the President of the Republic for the compliance of his duties*".

Both the MEF Law and the MIDA Law are special laws that prevail over the very generic regulations of Law 144 of 2020, especially because this law deals with a matter that is accessory to the substantial functions of these Ministries.

But it is not only a matter of legalisms, it also has an administrative logic. If the Minister of the MEF must answer to the President on the effectiveness of the management of the National Treasury Office or the National Budget Management Office, it is obvious that the Minister must have the last word regarding the digitalization of the processes of those MEF Departments, not the AIG. The same goes for the Minister of MIDA and the Executive Office of Agricultural Quarantine.

Special comment on AIG's sanctioning function established in Law 144

In the initial part of this article, we described the sanctioning power granted to the AIG over "public servants" of the Central Government; autonomous, semi-autonomous, and municipal entities; the National Assembly; the Judicial Branch, financial intermediaries of the State, and over companies in which the State owns 51% or more of their shares.

In order to understand the magnitude of the Constitutional and Administrative Law aberration that this law represents, it is helpful to review the definition of "public servant" offered by the Political Constitution:

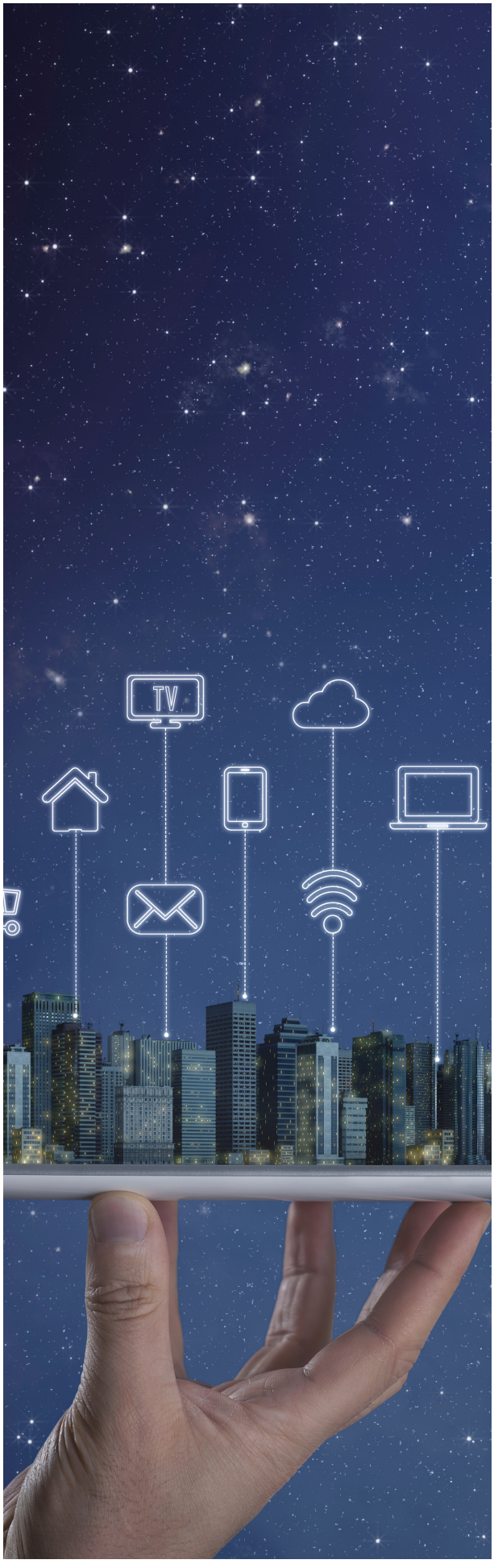
> *"Public servants are those persons temporarily or permanently appointed to positions in the Executive, Legislative and Judicial Branches; in Municipalities; in autonomous or semi-*

autonomous entities; and in general, those that receive remuneration from the State"

In short, Law 144 of 2020 has given AIG the power to fine and even dismiss any official, regardless of their rank, from any of the three State Branches, from autonomous entities, municipalities, state banks and public companies. In other words, that AIG can supposedly sanction the Manager of Tocumen International Airport, S.A, a secretary in a Department of the Ministry of Health, the Chief Technology Officer of the Agricultural Development Bank, the Board of Directors of the Panama Canal, the Chief Procurement Officer of the National Lottery, a judge from the Second Judicial District Court, the Minister of Economy and Finance, the Secretary of the National Assembly, the Mayor of Chitré, the Sub-Director of the Sanitation Authority; that is to say, any person receiving remuneration from the State and who according to AIG's judgement is not complying with the Digital Agenda established by them.

Furthermore, Law 144 does not clearly define the causes for sanctions nor the procedure for the "public servant" to be heard, nor the appeal that may be exercised by way of governmental proceedings to defend their rights.

Not only is this sanctioning power somewhat unorthodox, but it is also inapplicable, because it goes against the special rules of each public entity and the general personnel rules that the country has, which give the Chiefs of Staff the power to sanction their subordinates; a relationship that the AIG cannot and should not interfere with.



Final Comments

I can understand that in many cases it is in the State's interest to manage the digitalization process with an overall perspective, for example, to avoid duplications, to achieve better prices through economy of scale and to avoid using systems that communicate inefficiently. Likewise, the global vision is important to help overcome resistance to change.

However, in order to address these angles of the problem, it is not necessary to violate the Constitutional and Administrative system as Law 144 of 2020 does. More than an AIG with superpowers that are outside the institutional framework, we need an AIG that exercises leadership based on conviction, on technological advice that is scientifically supported, on development, and transparency. This is achieved through administrative capacity, not through threats of monetary fines and dismissals.

On the other hand, the centralization of decisions in the AIG creates a high risk of designing processes that are far from reality. In effect, the digitalization of public functions is directly linked to the specialty of the core competence of each institution. It is not true that AIG knows about everything.

It is not true that all at the same time the AIG will know what is best for the Ministry of Health, for the General Revenue Office, for Human Resources at the Ministry of Labor, for the management of the Tocumen International Airport, or for the Plan Approval of the Municipality of Parita.

As the information society and the digital economy take hold, almost all public functions will be carried out digitally. This is inevitable. Therefore, if the AIG is given control over all the digitalization of the State, in a way we are eliminating a large part of the functions of the other State entities.

Hopefully, AIG itself will understand that the path that can be seen in its management, starting with Law 144 of 2020, implies an institutional conflict of competences that can damage the necessary agenda of the digitalization of the State. We hope that AIG itself will take the initiative to reform this law so that we go back to the model of a prudent AIG that advises on the best technology and instead of an organization with superpowers.

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PUBLIO CORTÉS
ABOGADO - LAWYER

WWW.LEGALADVISORPANAMA.COM

M: +507 6679-4646 E: CORTES@LEGALADVISORPANAMA.COM

@PUBLIOCORTES.LAWYER