Artificial intelligence and administrative function.
General principles, guarantees and jurisdiction

Abstract

In the last few years the sector of technological innovation sector has been progressively advanced. With specific reference to artificial intelligence, sophisticated systems have evolved to collect, rework and compare an unimaginable amount of data, as well as to suggest organizational solutions or to make decisions.

This inevitably has influenced the role of public administration, prompting some authors to use the expression of "Public Administration 4.0" (taken up by the most recent jurisprudence of the State Council). In this context, pA is called to use instruments with an astounding potential and, at the same time, to face up to considerable challenges on multiple fronts[1].

Indeed, the use of artificial intelligence is able to have a significant impact on various manifestations of administrative function, for each of which it will be necessary to make a reflection. Firstly, the use of AI speeds up and rationalizes many of the organizational functions (for example, all registers held by the PA, which can be managed efficiently, like in many European states, through the use of *blockchain* technology); at the same time, in relation to the activity of the pA, the use of automation has had a particular impact on the structure of the procedure as traditionally understood, as well as on its discipline.

Well, regardless of the unimaginable advantages in terms of efficiency, speed and predictability of the administrative function, it is important to safeguard the general principles, the "invariants" of Administrative law, which must necessarily continue to guide the work of the P.A., as well as the procedural guarantees that in any way can be considered recessive when compared to the good intentions of the "revolution" in place.

In this context, scholars of administrative law are called to reason about how, and in which terms, the use of the AI by the Administration can be a suitable factor for the pursuit of the public interest, without losing sight of the "traditional" categories of administrative science. Indeed, as proposed by some Authors, it is necessary to think of an "update" of some classic theorizations of administrative law, but the coordinates, both for the legislature and for the Administration, must be clear to avoid irreparable compressions of the positions of the citizens.

Such research will have a strongly international approach. This for numerous reasons: i) for a correct classification at national level of the phenomenon at national level it will be very useful to study the applications of the states (EU and extra-EU) at the forefront of the use of AI in the public sector (UK, France, Germany , USA); ii) the issue of the use of artificial intelligence in the public sector will certainly be regulated at European level, as demonstrated by the first steps represented by the European Commission's White Paper on Artificial Intelligence published in February 2019.

State of the art and research objectives

The need for the use of AI in the public sector can be found in the principle of the good performance envisaged by art. 97 of the Italian Constitution. From this principle derive the criteria of effectiveness and efficiency of the administrative function.

Emblematic in this sense is the example of some Italian authors on the “Prometea” algorithm, used in Argentina to handle public tenders for the purchase of goods and services. Thanks to the use of this system, the contract is now awarded with a 4-minute expenditure, an activity that with the “classic” procedure would have taken an average of 29 working days.

Well, in the face of such benefits for the PA and, in some cases, for public finances, it is necessary to investigate in which way those benefits relay to the safeguarding of general principles as well as traditional procedural guarantees. In particular, the main objective of this research is to provide food for thought for a more informed dogmatic framework of automation tools, as well as for a more careful regulation of the phenomenon.

(a) Rule of law

Firstly, this project intends to delve into the topic ofthe relationship between the rule of law as traditionally understood and the utilization of AI.

Some Authors, on the point, and this view would also seems to be shared by the Italian Council of State, believe that the regulatory basis for the application of the AI, as well as the respective procedural guarantees, are found, among other things, in the General Data Protection Regulation (in particular articles 13, 14, 15 and 22).

However, this regulatory apparatus, in addition to referring specifically to decisions concerning the processing of personal data (that aspect is able to exclude its application for various administrative procedures), provides numerous exceptions to the right not to be subjected to automated decisions including for example, if person subjected to an automated decision gives their consent or in case the use of automated procedure has been authorised by the European Union or by a Member State.

Because of this, another part of the doctrine, entirely shared, argues that such regulatory references (GDPR) are not in themselves sufficient to regulate the exercise of public power through the use of AI. This is because, in accordance with the rule of law, the law must establish the forms, the methods and the content of the exercise of public power. Well, in the light of this, it seems reasonable to assume that the current regulatory environment is not sufficient to fully regulate the phenomenon of the use of AI for the activities in the administration. The current regulatory framework, on the contrary, risks generating legal uncertainty and serious compressions of the interests of citizens by completely nullifying the potential benefits of proper and conscious application of AI in the public sphere.

From the organization's point of view, this project aims to seek concrete solutions for the development of a regulatory framework that clearly regards in what hypotheses or scopes the Administration can benefit from the use of the AI. Indeed, a political choice must be made both at national and European level by the legislator, because algorithmic decisions represent real manifestations of power that must be duly regulated by taking against all the interests at stake.

With reference to the activity of the public administration, it is important to identify cases where it is possible to use AI, determining in which way this should be done, and which purpose should be pursued or which interest should be valued. Only in this way, studying (and suggesting regulation solutions) the exercise of public power in its "artificial" manifestations, could be created a *certain* legal context with benefits, guarantees and, where necessary, any limitations.

b) On the principles of transparency, impartiality and good administration in the face of the physiological opacity of the algorithm

Studying artificial intelligence associated with administrative activity, we will also reason about the relationship with the principles of impartiality and transparency, inextricably linked to the principle of good administration of supranational derivation. Firstly, it will be necessary to investigate the respect of essential guarantees outlined by l.n. 241/90 and by art will 41 of the Nice Charter. This due to the fact that the instruments of procedural participation, as well as the obligation of motivation, are not compatible with the physiological "opacity" of the algorithms.

The automation of the decision cannot be separated from a predetermined weighing of the interests at stake and the specific weight that each of them will have in the decision. In order to transfer the burden of decision to the machine, however, it must be equipped with the coordinates within which to act. In essence, the Administration is responsible for identifying the data to be evaluated, the criteria and objectives to be pursued (for the reasons mentioned earlier, will have to be predetermined by law); at this point, the indications of the pA are translated by the information technicians into machine codes that will build the algorithm suitable to adopt the final measure. Well, in that second step, during which the regulatory framework and the public interest that is to be pursued must be translated into technical rules, it is crucial that the translation of the technical rule into a legal rule is faithful and that there should be no forcing or distortion of the legal framework, which would lead to the adoption of an unlawful final measure.

In view of the described pathological effects of the algorithm, generated by a suboptimal translation of the law into codes, it will be necessary to shed light on the process of programming and applying the algorithm through the principles of algorithmic transparency, algorithmic traceability and non-discrimination.

In accordance with these principles, it has been assumed, both in jurisprudence and in doctrine, that access to the algorithm should be allowed, providing the recipients of the measure with the source code of the programme so that they can reconstruct the process carried out to reach the decision. Such a vision, however, has many limitations: (i) most of the software used by the pA is now provided by private companies that may have a qualified interest in not sharing the source code, deeming it a commercial secret; (ii) even if access to the source code were granted, this would hardly give the citizens the full reasons behind the decision taken. Among other things, there would be obvious problems of digital discrimination (so-called *digital divide*) as it is not certain that the majority of people have the tools to understand the steps of a source code. Nor would this limit be exceeded by the proposed translation into Italian, as it would results in a risky interpretations or reworkings of the code which would in fact nullify the very choice of translation.

There are also significant problems with traditional institutions of procedural participation, such as the notice of initiation of proceedings, the notice of rejection, or the assistance of the investigation. This is because, since the algorithmic process is de facto de-humanized in such circumstances, the role of the RUP takes on a marginal character, where it seems difficult to guarantee a full contradictory with the citizens. In order to overcome these problems, some authors, proposing a general approach, have argued that the applications of AI in the public sphere must be guided by a principle of “meta-autonomy” where the power of man must always retain the power to decide, working in "symbiosis" with the machine in order to reach the final decision. For example, where the entire process has been carried out by an algorithm, a "human" check of the machine's work will be necessary so as to detect any anomalies, discrimination or illegitimacy. Such a vision, although driven

by pre-guaranteed ideals and fully consistent with the traditional conception of administrative activity, risks, however, to deny the valuable benefits in terms of efficiency that automation can give. This project will therefore pursue an additional objective of seeking the right balance, the right "symbiosis", between human and artificial activity in the pursuit of the public interest. On the point, significant are the indications given by the EU Commission in the Communication to the European Parliament, to the Council, the European Economic and Social Committee and the Committee of the Regions in April 2019, according to which "*The European Ai Strategy and the Coordinated AI Plan clearly indicate that trust is an indispensable condition for ensuring an anthropocentric approach to AI: artificial intelligence is not an end in itself, but is a tool at the service of people that ultimately has the ultimate goal of improving the well-being of human beings*".

Considering what has been said so far, it will be necessary to ask oneself about the possibility of introducing the principle of *administrative law by design*[2]in the light of which the whole process of developing, programming and using the algorithm must be able to ensure its integration with the existing legislation and compliance with the general principles of administrative law. In other words, we will have to think about how to steer the entire chain of use of B.I. in the public sector to comply with the relevant legislation as well as the essential general principles of administrative action and the respective procedural guarantees associated with them. All this needs to be considered in the light of an inevitable and physiological contamination of administrative law with science and technology, also weighing any "updates" of some traditional institutions.

c) On the administrative judge's union on algorithmic decisions. On the need for a regulatory framework (certain) to prevent the exercise of jurisdictio *would intrude into* legislatio.

An important role of the research will be represented by the effects of the administration's use of the AI in the jurisdictional process.

First, we will focus on the limits of the judge's activity with reference to the use of algorithms in discretionary proceedings. It is clear that the administrative court should be able to carry out on the legitimacy of the automated decision in the same way as they do for "traditional" decisions. The court will be required to assess the correctness of the automation process in all its components, and this will first require the full transparency of all the steps in progress. In other words, judge's activity will necessarily have to cover the (described) steps of translating the legal rule into machine-code, in order to judge its full legitimacy.

On the other hand, some authors have argued that judges assessing automated administrative activity should be supported by technical advice (so-called CTU). However, in doing so, the court's activity, in matters of extreme importance, would be confined to the mere acceptance of the findings presented by the consultants. Regarding this point, some authoritative Authors, theorize the possibility that the judging colleges are integrated by technicians. In other words, it is theorizing that it is being able to include in the judicial function the figures of AI experts who can assist judges. Given the immeasurable increase of AI, this would also ensure a strengthening (as well as an update) of the judicial protection referred to the citizens. Such a hypothesis, however, although shareable, would probably require constitutional reform but, before that, a real cultural revolution.

In the current judicial framework, based on the rule of law mentioned at the beginning of the present paper, a better defined regulatory framework will be needed that establishes limits and

guarantees with respect to the use of AI in the field of advertising. In this way the administrative court would be prevented from having to carry out legislative functions in the absence of a reference discipline. An in-depth study of possible regulatory developments on the subject may, in other words, help to ensure effective and as predictable judicial protection as far as possible, while at the same time preventing creationist impulses from jurisprudence. Indeed, in the most recent rulings, in addition to taking diametrically conflicting positions, the laters jurisprudens's rulings have undoubtedly expressed the need for a stronger regulatory definition for the applications of AI in the advertising sector.

Therefore, if there had been no problems were no problems with "elementary" applications of AI, and it was sufficient to apply the GDPR system and the guarantees it contained, in the case of more complex applications this wold certainly not be sufficient.

Description of the project and methodology

The methodology proposed to be used essentially covers the following guidelines:

- First, there will be an in depth study, also from a technical point of view, of the different forms that AI can take and its possible applications to the advertising sector.

- Subsequently, we will proceed with a careful examination of the entire regulatory framework, both national and supranational, thinking about possible implementations of the same. On this point, it will be take into account the experience of European states with a legal culture more open to the use of AI in the public sphere will be taken into account.Similarly, the activities of the European Union institutions will continue to be monitored, because we think that the phenomenon of AI must be regulated at European level (also, if necessary, with the creation of a specific Authority).

- With regard to activity and administrative organization, the study will focus on the dissemination of a possible coexistence, and, coexistence between the "traditional" categories of administrative law(national, European and global), the general principles, procedural guarantees and new grafts brought about by technological innovations. In this regard, keeping in mind the essential achievements of administrative science in Italy, we will have to consider any updates of some traditional legal concepts. This is in order to hypothesize the introduction into the system, in the face of a technologically more advanced administrative action and with new guises, a set of instruments of protection (both procedural and procedural) effective and in line with the times. In other words, the relentless search for greater efficiency and speed of administrative action will necessarily have to be accompanied by an adjustment and strengthening of the protection for citizens.

- Special attention should finally be given to matters intimately related to the administrative process. As has been said, we will try to outline the limits to the judge's activity and the procedural instruments that can be used as the source of automated administrative activity. In this area too, supranational experiences can be deepened (think of the experience French where the appeal for illegitimacy of the computer program is allowed).

Bibliography

1. G. AVANZINI, *Administrative Decisions and Computer Algorithms,* Scientific Editorial, Naples, 2019;
2. V. BUSCEMA, *Administrative Discretion and Artificial Neural Networks,*in Photo *amm*, 1993, 620 and ss.;

1. MAJA BRKAN, *Do algorithms rule the world? Algorithmic decision-making and data protection in the framework of the GDPR and beyond*, in International Journal of Law and Information Technology, 2019, 27, 91–121.
3. F. CARDARELLI, *Digital Administration, Transparency and Principle of Legality*,in *Dir. Inf.*, II, 2015, 227 ss.;
4. S. CIVITARRESE MATTEUCCI – L. TORCHIA (EDITEDby), *Technology, 150 years after the Italian Administrative Unification*, Florence, 2016;
5. S. CIVITARRESE MATTEUCCI, *Too Human, Automated Administrative Decisions and Principle of Legality*,in *Dir. Pubbl.*, I, 2019, 5 ss.;
6. C. COGLIANESE – D. LEHR, *Regulating by a Robot: Administrative Decision Maching in the Machine-Learning Era*,in The Georgetown Law *Journal*,2017, vol. 105, 1147 ss.;
7. G. DUNI, *Digital Administration -Administrative Law in Telematics Evolution*,Giuffrè, Milan, 2008;
8. U. FANTIGROSSI, *Automation and Public Administration*, Bologna, 1993;
9. D.U. GALETTA – J.G. CORVALAN, *Artificial Intelligence for a Public Administration 4.0? The potential, risks and challenges of the ongoing technological revolution*,in *federalismi.it*,3/2019;
   A. MASUCCI, *The Ita Administrative Act*, Naples, 1993;
10. M. NIGRO, *Studies on the organising function of the public administration*, Milan, 1966;
11. A.G. OROFINO, *The Pathology of the Electronic Administrative Act: Judicial Union and Protection Tools*,in Forum *Amm.*, 2002, 2257 ss.;
12. A.G. OROFINO – R.G. OROFINO, *Administrative Automation: Imputation and Responsibility*,in *Giorn. Say. Amm.*,2005, 1300 ss.;
13. F.B. SAITTA, *The Pathologies of the Electronic Administrative Act and the Administrative Court Union*,in *Riv. Say. Amm. Elettr.*, 2003, 1 ss.;
14. A.M. SANDULLI, *The Administrative Procedure*, Milan, 1959;
15. L. VIOLA, *Artificial Intelligence in Administrative Process and Process: The State of the Art*,in Forum *Amm.*, 2018, 1598 ss.;

[1] As a demonstration of the great interest that arouses the subject, it is enough to mention the investigations carried out by various institutions both national and supranational. Think, in particular, of the White Paper on Artificial Intelligence published in March 2018 by the Agency for Digital Italy; and the European Commission's White Paper on Artificial Intelligence in February 2019.

[2] The term comes from the principle enshrined in GDPR with reference to the use of personal data processing software referred to as privacy by *design.*