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AI technologies and right to human judge in public regulation

Alessandra Piconese*

Abstract

It is stated that the 'future is digital'. I would add 'but not completely'.

A tension that sees, on the one hand, the strong push towards technological innovation of the judicial system and, on the other hand, the tendency to preserve that essential datum of humanity placed in the judge's decision. The need for a technological organisation of the system must today come to terms with the human decision of the judge: these are the terms of the tension involving the right to a human judge.

A tension that passes through the debated process of drafting the new European Regulation for Artificial Intelligence and that inevitably spills over into the subsequent process of regulation by the public power of the Member States. The latter in fact feel the responsibility to concretely set those rules that regulate the administrative activities of judicial offices. Where it is not at all easy to translate the complexity of the judicial system into acts.

This contribution intends to investigate the relationship between 'administrative organisation' and 'the right to a human judge' in the light of the public regulation criteria dictated to the Member States by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe and the new Artificial Intelligence of Advisory Board, established in 2022 by the CEPEJ. The purpose of the latter is to support the CEPEJ in the application of AI to the field of justice and in the implementation of related strategies, and it also makes a valuable contribution to the reflection on the use of AI in the justice system while respecting fundamental rights.

It will be seen how the European Union's approach to regulation is also in the direction of enhancing human rights and specifically the right to a human judge, i.e. to human control and supervision of digital innovation systems, and finally to accountability.

Keywords:

Robotic decision; EU Law; Ethical Charter; New Digital Humanism

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AI systems and EU law enforcement

Between effectiveness and the rule of law

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I. Introduction

It is stated that the *'future is digital'*¹. A statement to which one can add *'but not entirely'*².

Digital is the future of administration, business, citizens, but also of health, agriculture, even art and much more³. This is to represent a transformation that is nothing new⁴, yet with the pandemic crisis it has accelerated dramatically for reasons we all know.

If we think of the regulatory profile and public interventions, the expression recently used is that of the *'digital state'* in order to emphasise, an *'intrinsic characteristic of public power and a phenomenon whose regulation is central to economic and social relations as a whole'*⁵.

A transformation that involves the activity of the public administration in its forms and also in many aspects: from the organisation to the exercise of functions up to the decision and finally to the judicial control of the latter⁶.

The application of new technologies to the public sphere and the concomitant change with respect to modes and tools is called *'digital transition'*⁷ precisely to signify the activity of redefining processes through the use of digital technologies, with the aim of making them more *efficient*, in qualitative and quantitative terms, *open* to citizens⁸ and therefore easier *to control*.

Academics of all legal disciplines and also those of administrative law seek to understand how the use of technology affects the law, at the same time identifying opportunities and risks⁹.

The common goal is to help shape the new rules that certainly take on a global dimension and have an indissoluble connection with the European legal system and its fundamental values¹⁰.

The pervasiveness on the one hand, the inevitability on the other, and finally the speed with which this process of digital innovation is taking place leads us to believe that it is more necessary than ever for legal academics to know first and foremost in order to understand¹¹ and, if necessary, to direct change¹².

¹ European Parliament resolution of 12 February 2019 on a comprehensive European industrial policy on artificial intelligence and robotics (2018/2088(INI)) https://www.europarl.europa.eu/doceo/document/TA-8-2019-0081_IT.html

² European Parliament resolution of 12 February 2019 on a comprehensive European industrial policy on artificial intelligence and robotics (2018/2088(INI)) defines to the point 5.2 *"Embedded values in technology — ethical-by-design"* e individua al punto 5.3. nell'ambito del *"Decision-making — limits to the autonomy of artificial intelligence and robotics"* and *"notes that artificial intelligence will remain a useful tool for collaboration in human action to improve its performance and reduce errors"*.

³ European Parliament resolution of 12 February 2019, cit.

⁴ Luisa Torchia, *Lo Stato digitale*, (Il Mulino, 2023), 18.

⁵ Luisa Torchia, *Lo Stato digitale*, cit., 17.

⁶ *Ex multis*, Luigi Carbone, 'L'algoritmo e il giudice', in *giustizia-amministrativa.it*, 2023; Isac Martin Delgado, 'Automazione, intelligenza artificiale e pubblica amministrazione: vecchie categorie concettuali per nuovi problemi?', in *Istituzione del federalismo*, 643, 2022; Filippo Patroni Griffi, 'La decisione robotica e il giudice amministrativo', in Alessandra Carleo (a cura di), *Decisione robotica*, (Il Mulino), 165, 2019;

⁷ Legislative Decree No. 217 of 1 December 2017 established the figure of the *'Digital Transition Manager'* in public administrations; by Decree of the President of the Council of Ministers (Dpcm) of 19 June 2019 (Amendments to the DPCM of 1 October 2012, the *'Department for Digital Transformation and Other Structures'* was established).

⁸ Recently Enrico Carloni, *Il paradigma trasparenza. Amministrazioni, informazioni, democrazia*, (Il Mulino, 2022).

⁹ Carlo Casonato, *Intelligenza artificiale e giustizia: potenzialità e rischi*, in *Diritto Pubblico Comparato Europeo on line*, 2020.

¹⁰ The *'Digital Europe Programme'* in Regulation (EU) 2021/694 of the European Parliament and of the Council of 29 April 2021 establishing the Digital Europe Programme and repealing Decision (EU) 2015/2240 (Text with EEA relevance) PE/13/2021/INIT and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2030 Digital Compass; *the European way for the Digital Decade* COM/2021/118 final.

¹¹ Commission Recommendation (EU) 2021/946 of 3 June 2021 on a common Union Toolbox for a coordinated approach towards a European Digital Identity Framework C/2021/3968.

¹² Fiorenzo Pilla, 'Quali impatti avranno su di noi i Large Language Models e CHAT GPT (e quali saranno le conseguenze per il mondo del diritto)?', in *Giustizia Insieme*, 2023.

To anticipate the essential aspect of the conclusions, the idea is that Europe is adopting a ‘*so-called anthropocentric approach*’ in the definition of rules, since the central idea of many public regulation interventions in the sector is that ‘*modern technologies must be both at the service of people and in line with the principles, values, and fundamental rights of the European Union*’. In this sense, it is stated, for example, that the creation of the European Digital Innovation Hubs has the purpose of ‘*implementing the level of digitisation of the Member States, but above all to exploit technology in order to guarantee the effectiveness of certain principles of constitutional relevance*’¹³.

II. The Robotic Decision

On the basis of these premises, we have chosen here to explore the area of *digital justice* and *robotic decision-making* in which the debate seems to have the same liveliness as that surrounding algorithmic administrative proceedings and their judicial review.

In the area of digital justice and robotic decision-making, it is equally interesting to understand what are the risks and benefits of using technology, what is the current regulatory framework, and in what direction it is being operated.

It is certain that there is also a strong tension here between the drive towards technological innovation in the judicial system and the tendency to preserve the essential humanity placed in the judge's decision.

This is relevant both at the level of fundamental rights and at the level of the judge's own reserve of autonomy and independence.

In the current historical period defined by our point of view as the ‘*age of jurisdiction*’ to mean that ‘*the centre of gravity of the system seems to have shifted from the legislator to the judging body*’¹⁴ and where the principle of certainty and equality is in crisis, one wonders about the possibility of a machine that is able to think or at least imitate human thought¹⁵.

Technology is useful to automate jurisprudential research - through the creation of computerised archives of jurisprudence - and thus to support the exercise of the function¹⁶: in addition, it is believed that the use of artificial intelligence could affect serial decisions. In the case of the administrative judge, robotic decision-making is hypothesised when the review concerns non-discretionary administrative activities, or if it is a question of liquidating damages, and finally to determine damages for loss of chance¹⁷.

Instead, it is considered risky to build artificial intelligence systems that tirelessly apply the same high legal standards to every judgement. This is for at least three reasons.

First, because of the machine's repetition of human errors: fatigue, lack of knowledge and finally the same bias. If - as authoritatively stated - unavoidable cognitive biases were to be incorporated into the algorithm, the risk of repetition of the same cognitive biases would inevitably multiply. The effect will be not to enhance human intelligence, but to multiply its imperfections, creating a scenario that has recently been termed *human-stupidity-in-the-loop*¹⁸.

Secondly, it is argued that at present no artificial intelligence is capable of entering the realm of argumentation, since it is not capable of stepping outside formal logic. On the contrary, the use of artificial intelligence could lead to an impoverishment of reasoning, due to the simplifications it makes¹⁹. Among other things, this would result in a ‘*crystallised and cemented*’ law in which homologation to the flow of past

¹³ Giovanni Muto, ‘La digitalizzazione nell’Unione Europea: una sfida costituzionale’, in *Rivista Diritto dei Media*, 2022.

¹⁴ Paolo Grossi, ‘La invenzione del diritto; a proposito della funzione dei giudici’, in *Rivista Trimestrale del Diritto e Procedura Civile*, 2017.

¹⁵ Elena Gabellini, ‘Algoritmi decisionali e processo civile: limiti e prospettive’, in *Rivista Trimestrale di Diritto e Procedura Civile*, 59, 2022.

¹⁶ Luisa Torchia, ‘Lo Stato digitale’, 173 e ss.

¹⁷ Filippo Patroni Griffi, ‘La decisione robotica e il giudice amministrativo’, in Alessandra Carleo (a cura di), *Decisione robotica*, (Il Mulino), 165, 2019

¹⁸ Diana Urania Galetta, ‘Human-stupidity-in-the-loop? Riflessioni (di un giurista) sulle potenzialità e i rischi dell’Intelligenza Artificiale’, in *Federalismi.it Rivista di diritto pubblico italiano, comparato europeo*, 2023.

¹⁹ Angelo Costanzo, ‘Dal pre-conscio al diritto artificiale’, in *Giustizia Insieme*, 2023 “*il passaggio dalla argomentazione alle cristallizzazioni dei significati dei termini e delle inferenze che si realizza con i modi dell’intelligenza artificiale comporta un ulteriore impoverimento dei ragionamenti, dovuto a semplificazioni e meccanizzazioni che possono essere utili purché che se ne serve resti vigile sui limiti degli strumenti dei quali si sta avvalendo*”.

decisions produces results for the future that are always identical to themselves. A situation in which the judge would be exempt from motivation²⁰ or, finding it difficult to depart from the outcome, could delegate the decision to calculation, the so-called *moutonnier* effect.²¹

Thirdly, it is assumed that *'the ideology underlying algorithmic justice is that of reducing, thinning out the judge's discretion in all its ramifications'*²². In addition, it quickly becomes so structured as to predict the individual decision²³. This consequently creates negative repercussions on the independence and autonomy of the judge, which are the constitutional values of the exercise of the function. If the machine then feeds the data itself, it is easy to understand that it will lead to the solution of the individual judge²⁴.

In conclusion although the idea of a robot judge is *'intriguing'* and at the same time *'useful and important'* nevertheless *'it generates more disadvantages than advantages'*²⁵.

Going back to the initial premise about *'the age of jurisdiction'*, it would be enough for us to *'make fewer demands on judges'* due to the uncertainty of the physical world and at the same time demand that judges recover *'a culture of jurisdiction' through which they can grasp their 'servant function (but no less important) with respect to legislation (and thus democratic decision-making)*²⁶.

All this, in the words of a legal philosopher, *'even the most mechanical law cannot do without the man who is called upon to give the 'instructions' he needs to make his mechanisms work: that is, again, to set limits and lay down conditions'*²⁷.

III. Right to the 'human' judge

The need for a technological organisation of justice demands, at least for the reasons mentioned above, to come to terms with the human decision of the judge: the human moment is inescapable just as the control of human activity in the use of technologies applied to justice is fundamental²⁸.

It is argued that human control can be seen as a *'cutting-edge legal response to the need to ensure the protection of legally deserving rights and interests in a scenario of artificial intelligence'*. Furthermore, it is stated that *'the autonomy and learning capacity of these systems make it imminently necessary to maintain human control in the processes of creation and development of artificial intelligence with the aim of avoiding undermining human rights and, where this happens, being able to remedy it'*²⁹.

The centrality of human control in the Italian legal system is expressed in Article 8 of Legislative Decree No. 51 of 18 May 2018, which prohibits *'decisions based solely on automated processing, including profiling, which produce adverse effects on the data subject, unless they are authorised by European Union Law or specific legal provisions'*. It also reiterates the need for the legal provisions to *'provide adequate*

²⁰ Carlo Vittorio Giabardo, 'Il giudice e l'algoritmo (in difesa dell'umanità del giudicare)', cit.

²¹ Luisa Turchia, *Lo Stato digitale*, 178 and Antoine Garapon et Jena Lassègue, *La giustizia digitale. Determinismo tecnologico e libertà*, (Il Mulino, 2021)

²² Carlo Vittorio Giabardo, 'Il giudice e l'algoritmo (in difesa dell'umanità del giudicare)', cit.

²³ Simone Silvestri, 'Giustizia digitale e giudizio. La lunga strada dell'innovazione alla prova della Costituzione', in *Questione Giustizia*, 13/10/2022 *"nelle esigenze di prevedibilità delle interpretazioni generali delle norme si annida il rischio connesso all'ambizione economicistica, che per sua natura tende a superare il limite della prevedibilità del diritto, per arrivare a strutturare interazioni tali da consentire la prevedibilità della singola decisione"*.

²⁴ Simone Silvestri, 'Giustizia digitale e giudizio, nel caso di *'machine learning in cui è la stessa macchina ad alimentare i dati e a sviluppare ulteriori risposte sulla base delle interazioni tra i dati conosciuti e già elaborati, fino a calcolare una soluzione cucita sullo specifico tipo di autore o, magari, di giudice'*.

²⁵ Massimo Luciani, 'La decisione giudiziale robotica', in *Rivista Associazione Italiana Costituzionalisti*, 872, 2018.

²⁶ Massimo Luciani, 'La decisione giudiziale robotica', cit.

²⁷ Tommaso Greco, 'Per un diritto che "non serve". La cultura giuridica e le sfide della tecnologia', in *Giustizia Insieme*, 2020

²⁸ On the judge's need to approach the algorithm used by the administration Luigi Carbone, 'L'algoritmo e il giudice', in *giustizia-amministrativa.it*, 2023.

²⁹ Carolina Sánchez Vásquez and José Alberto Toro-Valencia, 'El derecho al control humano: Una respuesta jurídica a la inteligencia artificial The right to human control: A legal response to artificial intelligence', in *Revista chilena de derecho y tecnología*, 225, 2021 *"se concluye que el control humano se puede considerar como una respuesta jurídica vanguardista a la necesidad de garantizar la tutela de los derechos e intereses jurídicamente tutelados en escenarios de inteligencia artificial. La autonomía y la capacidad de aprendizaje de dichos sistemas hacen inminente la necesidad de mantener un control humano en los diferentes procesos de creación y desarrollo de la inteligencia artificial con el objetivo de evitar que afecte derechos humanos o que, en caso de tal afectación, se pueda remediar"*.

safeguards for the rights and freedoms of the data subject. In any case, the right to obtain human intervention by the data controller is guaranteed'.

All the more so with regard to the procedural argumentation model, it is desired that *'the algorithmic result [be] corroborated by evidence that is elaborated on the dialectical method and requires human intervention'*³⁰. This is to guarantee and respect the principle of due process of law³¹.

In the background of the choices of the domestic legislator is Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by the competent authorities.

The same tension would be resolved in favour of human control also within the discussed process of drafting the New European Regulation for Artificial Intelligence³²: an arrangement that will inevitably spill over into the subsequent process of regulation by the public power of the Member States.

In fact, in the search for a *'dynamic balance between regulation and innovation'*, the proposal for a European regulation indicates as a priority the introduction of control for verifying the conformity of artificial intelligence systems with the fundamental rights and freedoms of the European Union.

It thus includes justice among the high-risk systems due to the seriousness of the danger of harmful effects.

It concretises the so-called *Human in the loop*³³ through the obligation of *'effective and efficient human supervision of the functioning of artificial intelligence systems'*³⁴. This with the specific aim of preventing and reducing risks to health, safety and fundamental rights³⁵.

IV. The Ethical Charter on the Use of AI and 'ethical-by-design'

The *Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment*, adopted on 3 December 2018 by the European Commission for the Efficiency of Justice Systems (CEPEJ) calls for the *'logical consistency of algorithmic calculations in a decision itinerary in accordance with the principles of procedural law'*³⁶.

This is the first document of its kind not only in Europe but in the world in which five key principles to be observed in the design and use of Artificial Intelligence systems are laid down.

- 1) The principle of respect for fundamental rights;
- 2) The principle of non-discrimination;
- 3) The principle of quality and safety;
- 4) The principle of transparency, impartiality and fairness;
- 5) The principle of user control.

It seems essential at this point to refer to the first of the key principles, which is stated in the Charter as follows. *'When AI is used to resolve a dispute or as a tool to assist in judicial decision-making or to give guidance to the public, it is essential that it does not undermine the guarantee of access to a judge and the right to a fair trial (equality of arms and respect for the adversarial process)'*. And again *'they should also be used with due respect for the principles of rule of law and the independence of judges in decision-making. Preference should therefore be given to ethical-by-design'*³⁷ or a human rights-based approach. *This means that law from the design and learning stages,[and] rules preventing direct and indirect violations of the fundamental values protected by law are fully incorporated*'.

³⁰ Angelo Costanzo, 'Dal pre-conscio al diritto artificiale', cit.

³¹ Andrea Giordano, 'Intelligenza artificiale e giusto processo civile', in *Munera*, 2022; Andrea Giordano, 'Intelligenza artificiale, giusto processo e giustizia contabile', in *Rivista Corte dei Conti*, 29, 2022

³² Proposal for a Regulation of the European Parliament and of the Council Laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts COM/2021/206 final.

³³ Paolo Benanti, *Human in the loop. Decisioni umane e intelligenze artificiali*, (Mondadori Education, 2022).

³⁴ Proposal for a Regulation of the European Parliament and of the Council Laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts COM/2021/206 final.

³⁵ Luisa Torchia, *Lo Stato digitale*, 89, cit.

³⁶ Angelo Costanzo, 'Dal pre-conscio al diritto artificiale', cit.

³⁷ European Commission, DG Research & Innovation RTD.03.001 - Research Ethics and Integrity Sector, 'Ethics By Design and Ethics of Use Approaches for Artificial Intelligence'. Version 1.0 25 November 2021

Consequently - in the words of Natalino Irti - with robotic technology applied to decision-making, the locus of conflict shifts from this to the information selection phase³⁸.

Turning finally to the last of the principles indicated in the Ethics Charter, it is stated that with the use of Artificial Intelligence, the autonomy of the user must be increased. Professionals in the judicial system must be able at any time to review the decision and the data used and continue to be unconstrained by the specifics of the case. The user also has the right to object to the precedent set by the Artificial Intelligence so that his or her case can be examined by a judge under Art. 6 ECHR³⁹.

V. Conclusions

Any conclusion on the subject can only be provisional, also and above all due to the continuous evolution of the topic under analysis.

What is certain is that the trend at the European level is to build a *governance* of Artificial Intelligence in an 'anthropocentric' sense, which looks at respect for fundamental rights. What has been called the New Digital Humanism⁴⁰.

In general, there is a strong awareness of the complexity of the relationship between AI and the protection of fundamental rights. However, the focus on a human rights-based approach is growing in all areas⁴¹.

Restricting the use of Artificial Intelligence to court decisions can only affirm the right to a human judge over an automated decision.

This is to say that no Human Intelligence will be able to be completely deprived of its power by an Artificial Intelligence: both work towards an Augmented Reality decision.

Where the role of Artificial Intelligence with respect to the judge is that of aid and support in decision-making for a broadening of knowledge factors, the Artificial Intelligence being able to incorporate and make available to the judge a very large number of precedents.

It remains the judge's responsibility for the decision and the human supervision of the data used, thus respecting the judge's autonomy and independence on the one hand and implementing the '*human in the loop*' principle on the other.

In this sense, the locus of conflict tends to shift from the decision to the information selection phase.

In fact, in the face of a completely robotic decision, which would even be allowed in certain cases, the party will have, according to the recently written ethical rules, the possibility of opposing it and asking for human intervention, accessing the human judge.

Humanity, which in the case of the decision is able to restore:

- the profile of dialogical argumentation and legal reasoning that no Artificial Intelligence is currently able to reproduce;

- the profile of the evolution of jurisprudence possibly operating those *overruling* from which the living law will no longer be equal to its precedent and at the same time overcoming the limit of the *petrification*⁴² that the use of Artificial Intelligence could entail through the mechanism of the projection of the past into the future, overcoming the risk of the endless multiplication (so-called *human stupidity in a loop*) of cognitive *biases* embedded in the system of data used.

For all these reasons, the hope is that a database of decisions applying European legislation can be elaborated: this could play an important role for the European institutions to verify the concrete application of Union law and for national judges to have the possibility of verifying the interpretative and applicative precedent of the rules.

³⁸ Natalino Irti, 'Il tessitore di Ghoete (per la decisione robotica)', in Alessandra Carleo (a cura di), *Decisione robotica*, (Il Mulino), 20, 2019.

³⁹ European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment'. Adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3-4 December 2018).

⁴⁰ Julian Nida-Rümelin, Nathalie Weidenfeld, *Umanesimo Digitale. Un etica per l'epoca dell'Intelligenza Artificiale*, (Franco Angeli, 2019).

⁴¹ Filippo Raso, Hannah Hilligoss, Vivek Krishnamurthy, Christopher Bavitz and Levin Kim, '*Artificial Intelligence & Human Rights: opportunities and risks*', (Berkman Klein Center for Internet & Society Research Publication, 2018), 58.

⁴² Mario Nigro, 'Introduzione', in Mario Nigro, 'Scritti giuridici', III, 1487, in *Foro Amm.*, 1671, 1982.

This could be particularly useful to the administrative judge of last instance, for whom the issue of liability for not having referred the interpretative question to the Court of Justice and the related exercise of the instruments of revision of the judgement issued has recently arisen⁴³.

⁴³ Maria Alessandra Sandulli, 'Rinvio pregiudiziale e giustizia amministrativa: i più recenti sviluppi', in *Giustizia Insieme*, 2022.

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