

A critical view of the introduction of artificial intelligence in the administrative process in Italy

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Abstract

In this article, I aim to present the Italian situation regarding the introduction of artificial intelligence into the world of law, in particular in administrative proceedings. While on the one hand, several parties are highlighting some unquestionable advantages arising from the introduction of machine learning, hyper-computation, and research systems, on the other hand, the world of law is an extremely delicate sphere in which to experiment with such processes. The need for a well-considered decision, for individualised reasoning on a case-by-case basis and above all *the human point of view* are central to a decision that is fair, just and individualised. In the first paragraph, I will provide a critical overview of the newly introduced Italian legislation on AI to give some context. In the second paragraph, I will describe the first projects aimed at introducing AI into the administrative sphere. In the third section, I will focus on the relationship between AI and judicial review of technical discretion, and on the possible procedural repercussions of a massive extension of artificial intelligence to administrative activities marked by technical discretion. Finally, in the fourth section, I will discuss a case of discriminatory administrative proceedings resulting from AI systems adopted by the public administration. Through this descriptive outline, I intend to propose a framework for a broader critical analysis that aims to protect the rights of individuals, especially when they are also “weak subjects”.

Keywords

artificial intelligence; administrative law; administrative procedure

Una visión crítica de la introducción de la inteligencia artificial en el proceso administrativo en Italia

Resumen

En este artículo, mi objetivo es presentar la situación italiana respecto a la introducción de la inteligencia artificial en el ámbito legal, en particular en los procedimientos administrativos. Aunque por un lado varias partes destacan ventajas incuestionables derivadas de la introducción de sistemas de aprendizaje automático, hipercomputación e investigación, por otro lado, el ámbito legal es una esfera extremadamente delicada en la que experimentar con dichos procesos. La necesidad de una decisión bien considerada, de un razonamiento individualizado caso por caso y, sobre todo, desde un punto de vista humano, es fundamental para una decisión justa, equitativa e individualizada. En el primer párrafo, proporcionaré una visión general crítica de la legislación italiana recién introducida sobre IA para aportar contexto. En el segundo párrafo, describiré los primeros proyectos destinados a introducir la IA en el ámbito administrativo. En la tercera sección, me centraré en la relación entre la IA y la revisión judicial de la discreción técnica, así como en las posibles repercusiones procedimentales de una extensión masiva de la IA a las actividades administrativas marcadas por la discreción técnica. Finalmente, en la cuarta sección, hablaré de un caso de procedimientos administrativos discriminatorios derivados de sistemas de IA adoptados por la administración pública. A través de este esquema descriptivo, tengo la intención de proponer un marco para un análisis crítico más amplio cuyo objetivo sea proteger los derechos de las personas, especialmente cuando también son «asuntos débiles».

Palabras clave

inteligencia artificial; derecho administrativo; procedimiento administrativo

1. Italian standards for the development and adoption of artificial intelligence technologies

On 23 April 2024, the Council of Ministers approved Bill No. 1066AS entitled *Regulations for the development and adoption of artificial intelligence technologies*. The bill is only the first, in the government's intentions, of a series of specific measures to implement mandates that the government will have to implement in 12 months.

The development of artificial intelligence systems is entrusted to a strategy prepared by a special structure of the Prime Minister's Office, in agreement with the national authorities responsible for technological innovation, the Ministry of Made in Italy, and the Ministry of Universities. This choice denotes the government's intention to play a crucial role in the development process of AI systems. Moreover, this is also evident from the decision to entrust AgId (Agenzia per l'Italia Digitale - Agency for Digital Italy) and the National Cybersecurity Agency with the task of ensuring the application of national and European regulations, since both are technical agencies of the Prime Minister's Office.

The risk is that on this issue an excessive national logic is badly reconciled with the gap in technology and investment in research and development: in no uncertain terms, it would perhaps have been preferable - in the opinion of the writer - for a programme that, although it entrusts close supervision and coordination of development and at the same time regulates the use of the instrument and the management of data in a particular way, to have been oriented towards "specialised collaboration". To be concrete, something similar to CERN (European Organization for Nuclear Research) or the Airbus model or even the ESA (European Space Agency): models that evidently work, are efficient and organised and above all achieve results and objectives. The risk - not even that hidden - is that behind this "nationalisation" and centralisation, there is the eagerness to manage (in all senses) and direct the (huge) resources that are about to rain down on the sector, also in terms of patronage and elections.

Also part of the strategy for the development of artificial intelligence is the venture capital activity of the Ministry of Enterprise and Made in Italy, i.e., the purchase of participations (up to a total amount of EUR 1 billion) in SMEs (small and medium-sized enterprises), operating in the

fields of new technologies, quantum computing or telecommunications and with high development potential.

The government's choice to favour suppliers operating on Italian territory rather than, more generically, within the perimeter of the European market (Art. 5) is peculiar.

Particularly significant is the defining interpretation in Article 1, which states that the bill aims to promote "a correct, transparent and responsible use, in an anthropocentric dimension, of artificial intelligence, aimed at seizing its opportunities".

1.1. The anthropocentric approach

This approach to artificial intelligence emerges from Article 3, which stipulates that the use of this new technology must respect the fundamental rights laid down in the Constitution and European law, as well as the principles of transparency and proportionality of the processes, and the reliability and correctness of the data used for the development of artificial intelligence systems. And here, apart from the fact that the meaning of anthropocentric is unclear (in a general sense, every instrument created by man is anthropocentric, even the ergonomics of a hammer is anthropocentric), some doubts arise precisely on the statements in Article 3.

The use of this new technology must comply with the fundamental rights provided for by the Constitution and European law, and with the principles of transparency and proportionality in the processes, and with the reliability and correctness of the data used for the development of artificial intelligence systems. Apart from the declaratory screen (laws often declaim high-sounding statements of principle), and granted that, even from a technical-legislative point of view, the law could not have provided otherwise. To be honest, if it had provided otherwise, it would have been unlawful from every legal point of view.

In substance, its content is not understood. Clarified that an activity cannot be "contrary to the fundamental rights provided for by the Constitution and European law and also to the principles of transparency and proportionality of the processes, reliability and correctness of the data used for the development of artificial intelligence systems", nothing is said about how these rights - already established and inalienable - are defended, enhanced and protected "in the specific case".

And given that these rights appear increasingly "volatile" - when not mere declarations of principle in the era of liberalism combined with globalisation, in which the holders of the basic tools of AI are multinationals that are for the vast majority non-European - perhaps it would have been desirable to spend a few more words on active, preventive, prudential protection processes, as opposed to establishing that "everything must be controlled by the government". The bill contains a series of principles to be applied in the fields of information, economic development, health, intellectual professions, the judiciary, user protection, copyright and, finally, also criminal protection.

1.2. AI on information

Article 4 concerns the use of AI systems in the field of information, providing for the protection of the democratic nature and pluralism of the media; information on the processing of personal data must be clear and accessible to anyone, in order to guarantee the right of those concerned to oppose its dissemination.

Even in these cases, the remedies, the instruments, the systems made available for the protection of these rights are neither clear nor clarified (just compare the speed of AI to our civil justice, and the picture is perfect). The bewilderment, however, manifests itself in the fact - which I believe is not insignificant - that one does not really understand what one is dealing with.

Artificial intelligence is a system of hyper-computation combined with machine learning technologies; to function, it must "grind data and information". Otherwise, for example, it is hard to understand how a "generative AI" can grow. And this data comes from all over the web. Now, since the most authoritative websites, such as major, accredited TV stations, have closed access to their content, this means that generative AI (e.g., ChatGPT) can draw on Quora and Facebook posts (for example) when answering your question. Now, that's being concrete.

And a generic reference in a paragraph of Article 5 stating "guarantee companies engaged in the sector access to high quality data" is certainly not enough to resolve the issue. Because such access is not regulated, and high quality is not defined (not even definable a priori), nor can this paragraph violate industrial and research property and copyright.

In particular, Article 23 envisages the introduction, in the context of the **regulation of audiovisual services** – subject to the acquisition of consent from rights holders – of an obligation to identify content created or modified through AI systems “that are capable of presenting as real data, facts and information that are not”, through the insertion of an appropriate identification mark. This is a response to the concerns generated by so-called *deepfakes*. This obligation of transparency is placed on the author or holder of the rights to such content; it will be the implementation modalities of this rule that clarify on whom this responsibility falls in practice. The insertion of the identifying sign is excluded when the content is part of a manifestly creative, satirical, artistic or fictitious work or programme, without prejudice to the protections for the rights and interests of third parties. The resolution of doubts as to the manner of implementation is left to self-regulatory and co-regulatory soft law sources.

The government aims to foster the development of the **Italian entrepreneurial fabric**; for this reason, Article 5 stipulates that the state and other public bodies:

- promote the use of AI in production processes to improve human-machine interaction and increase productivity,
- foster the development of an innovative and open Italian artificial intelligence market,
- ensure that companies involved in the sector have access to high-quality data,
- direct the digital procurement platforms used by public administrations in such a way that preference is given to those solutions that guarantee the localisation and processing of critical data at data centres located throughout the country.

No specific direction is clear. Short of an “anthropocentric model that respects the constitution”. Apart from explicit 19th-century-style protectionism, the main thrust seems to be the AI’s orientation towards the technologisation of production enterprises.

1.3. AI and health

In healthcare, the use of AI systems must not result in the application of discriminatory criteria for access to treatment and medical services. The principle of informed consent is not applied to the duty to inform the patient about the use of artificial intelligence systems. Fine. But all this was already provided for, moreover, by general

rules consolidated by extensive case law. What is omitted is the handling and protection of the product derived from this use.

The question had arisen in connection with metadata.

Google paradoxically and dramatically states the truth when it denies access to much of the information requested on its own account by users: Google does not really know some things, because the transformed data, reassembled, become an articulated and amorphous metadata in which the individual is no longer traceable. The essential point was to standardise and protect metadata: a failed challenge. An AI may certainly need informed consent to acquire the “first data” originator of information, and existing norms already regulate such “access”.

But AI is not a cloud where files are simply stored in separate, recognisable folders; the AI that analyses 1 million ultrasound scans per month in Italy (for example) can break down the data: the gynaecologist looks for the foetus’s vital data, but tomorrow’s AI can investigate the macro-data of the uterine wall’s microcirculation: 12 million a year of anonymous uteruses, which tell a great deal.

Who manages and protects this data, and how? Also, economically, (since pharmaceutical companies, scanner industries, etc.) can make huge profits from it. And who can access this data, or ask this AI to analyse and search it for research purposes? For what purposes?

Here, the regulation is not missing; an amendment is sufficient. Here, the thing that needs to be regulated is not really understood, and at the root, you would not even know what you are talking about.

1.4. AI, intellectual professions and copyright

The regulation of AI use is also crucial in **the intellectual professions**, where AI systems are permitted only to carry out activities that are instrumental and supportive of the professional activity and where the intellectual work being performed is predominant.

To ensure a relationship of trust between the professional and the client, information about the artificial intelligence systems used by the professional is communicated to the recipient of the intellectual service in clear, simple and comprehensive language.

A question therefore arises first and foremost about the meaning to be attributed to the concept of *instrumental and support activities* and the criteria for measuring the *prevalence* invoked by the rule. In this regard, it should not be forgotten that professionals compete with colleagues in other countries and with service companies, against whom these limitations would not apply. The ill-concealed idea underlying these statements is that the professional, called upon to write a text, for example, sits in an armchair, types the question into ChatGPT, and it works for him. It is the anthropocentrism of fraudulent human logic.

When designing a bridge or a tunnel, how do all the calculations, virtual simulations, 3D processing, and structural calculations, including those for each individual component, fit into this “bridge design”? This already happening: machine learning systems with hypercomputational capacity already do these things.

Since the use of artificial intelligence often intersects with the protection of users of audiovisual or radio services and with **copyright** matters, Article 23 of the bill states that any information content broadcast on any type of audiovisual or radio platform that has been entirely created or modified with AI systems must be made, by the author or the owner of the economic exploitation rights, recognisable to users by means of an identification sign or an embedded marking with the wording AI. With regard to the protection of copyright, on the other hand, Article 24 of the draft law provides for the amendment of Article 1, Law no. 633/1941, on the basis of which works of the mind, and therefore protected by the aforementioned law, also include those that have been created with the use of artificial intelligence, where the human contribution is in any case “creative, relevant and demonstrable”.

Again, anthropocentrism gives way to “suspicion of man”.

Yet the principles exist and are borrowed for example from common-law experience (for obvious and chronological reasons, these are also the systems that have been dealing with concrete cases on the subject for the longest time), on the other hand, copyright depends on the *threshold of originality*, i.e., the so-called “threshold of originality” given by three assumptions: *skill* (creative competence), *labour* (commitment, work) and *judgement* (ability to discern, distinguish and choose the distinctive elements of the work).

In extreme synthesis, we can say that, for Anglo-American jurisprudence, this threefold parameter (simultaneously subsisting, with the elements at least equivalent, if not quantitatively equivalent) applies to works produced by artificial intelligence systems, which present *skills* and *labour*. What is lacking, however, is the *judgment* that belongs to the human being.

These are common-sense principles, and not overly elastic as they might seem, yet it seems clear that those who wrote the rule missed the point radically.

Undersecretary Butti stated that, in the field of copyright law, competence lies with the EU, and EU rules already regulate content protection in the context of web scraping, including an opt-out mechanism for rights holders.

The bill includes two novelties and a reminder: the requirement for an identification mark on any content that is created or modified with AI; copyright protection for works produced with AI, provided the human contribution is creative, relevant and demonstrable; and a reference to copyright law regarding the reproduction and extraction of works or other materials through artificial intelligence models and systems, including generative intelligence, permitted for research purposes or when the use of the works and other materials has not been expressly reserved by the holders of copyright and related rights, as well as the owners of databases.

And yes, here, to be practical, nothing that is not foreseen, for example, in any disclaimer in a printed book.

1.5. AI and law

In the judiciary, artificial intelligence systems will be used exclusively for the organisation and simplification of judicial work, as well as for jurisprudential and doctrinal research. The Ministry of Justice will regulate the use of artificial intelligence systems by ordinary judicial offices. In other jurisdictions, use is regulated in accordance with their respective systems. It remains the magistrate's responsibility to decide on the interpretation of the law, the assessment of facts and evidence, and the adoption of any measures. The Civil Court will be the competent body to decide cases relating to AI operation.

There is an unclear point: if AI systems are used in evidence, in CTUs and CTPs (Court-appointed Technical

Consultant - CTU - Party-appointed Technical Consultant - CTP), in reconstructions, and in investigations, how much of the measure adopted is based on their evaluation and remains 'AI-free'? Above all, there is a lack of any limitation and reference - no matter how wide-ranging the debate, not only academic, is - on the criteria for programming algorithms in this matter, especially for the purposes of even potential verification of discriminatory and prejudicial proceedings.

Finally, the government also intervenes in **criminal matters**, punishing the misuse of artificial intelligence systems that can cause harm to legal assets, such as the moral integrity of individuals.

In fact, a new offence is introduced in Article 612-*quater* of the Criminal Code, which punishes "Whoever, in order to cause damage to a person and without his consent, sends, delivers, assigns, publishes or in any case disseminates his image, video or voice, falsified or altered through the use of artificial intelligence systems and capable of misleading as to their genuineness" (which includes, for instance, so-called deepfakes) with imprisonment of six months to three years, or of one to five years if unfair damage results from the act.

The offence is punishable on complaint by the offended person, but prosecution is *ex officio* if the offence is connected with another offence for which prosecution is *ex officio* required, or if it is committed against a person who is incapacitated by reason of age or infirmity, or against a public authority by reason of the functions exercised. A number of aggravating circumstances concerning the use of artificial intelligence are also provided for in Articles 61(11-*novies*), 494 and 501 of the criminal code.

Also on the criminal law front, the use of AI systems also becomes an aggravating circumstance for many of offences, such as substitution of person, fraudulent raising and lowering of prices, fraud, computer fraud, money laundering, self-laundering, and market rigging.

Copyright protection extends to cases of reproduction or extraction of text or data from works or other materials available on networks or in databases, in violation of Articles 70-ter and 70-*quater*, including through artificial intelligence systems.

In this respect, the measure does not deviate from the governmental tradition whereby every regulatory intervention, sometimes even only incidentally, intervenes in criminal matters.

The delicate specificity of criminal law would call for greater caution in this approach, also for the sake of the stylistic rigour of the code of criminal law, the primary instrument for implementing that principle of *knowledge and cognisability* of the criminal law, as a prerequisite for awareness of the commission of the offence.

By dint of the insertion of bis-ter-*quater* articles and "x-nonies" paragraphs, the Italian penal code has more than tripled in volume without directly reducing the number of offences (except for those abolished or transformed into administrative offences).

Instead, this has led to less clarity, less knowability, and therefore less certainty, all of which are accompanied by the objective fact that the more you include the more you risk creating a conflict between norms, uncertainty of applicability in practice, conflict between offences - objective or interpretative - and widening the margins of interpretation: all characteristics that are ill-suited to Article 27 of the Constitution and in general to a penal system that is both guarantor-friendly (but also only definable as civil, and at the same time at least useful, if not effective).

There was no pressing need for 612-*quater*, for example. It was sufficient to make the case as specific as 612. And if one wanted to change the envisaged penalty range, one only had to amend it. Considering the use of AI - which is a tool - as an aggravating element of punishment is more of a political manifesto than an effective tool in the criminal law context. It is as if the crime of massacre provided for in Article 422 of the Criminal Code (one of those crimes for which there is no "attempt", but having only planted a device, even if exploded without human victims, corresponds to the case in point) were more serious if committed with a bomb than with a machine gun, and less serious if committed with a pistol.

What should count in criminal law - *which*, let us remember, is that branch of law that affects people's freedom - should be, both as an aggravating and as a mitigating factor, "the fact", and the consequent damage and injury to the right.

Criminal law should be parsimonious, but this would run the serious risk of also becoming clear, certain and stable, as any self-respecting criminal law is.

But the vice of 'weak politics' of intervening in a 'strong way' with political manifesto articles in criminal matters is the short way to say you have done something concrete. A concreteness reified in a few lines written in a law. And it is an issue of bipartisan legislative technique.

1.6. AI in training, education and research

Enhancement of customised teaching plans for students with high cognitive abilities, including the integration of **AI training** and the use of artificial intelligence systems to improve psychophysical well-being through sporting activity, and the development of innovative solutions aimed at greater inclusion of persons with disabilities in sport.

In case it had escaped our notice, let's clarify: AI is to be used to support customised educational plans for students with high cognitive abilities, while for people with disabilities, innovative solutions are to be sought to promote greater inclusion in sport.

Is the underlying cultural model clearer this way?

One completely ignores the entire decade-long field of revolutionary studies of the use of AI (today) and the 40-year-long field of the use of information technology (yesterday) for the development and cognitive support of differently abled, or even disabled, people.

Subject to the general principles set out in this law, artificial intelligence systems may also be used to organise sports activities.

On the relationship between **AI systems and minors**, the government sets a number of limits: for minors under 14 years of age, parental consent is required; minors between 14 and 18 years of age may give their consent to the processing of personal data related to the use of artificial intelligence systems, provided that the information and communications (privacy notices) are easily accessible and understandable (*sic!*). More generally, information and communications relating to the processing of data are provided in clear and simple language, to ensure that the user is fully aware of and has the right to object to any incorrect processing of their personal data.

Now, we were unable to do this with Google, Facebook & co. on data; we lost completely without "figuring it out" on metadata, and now we would like these principles applied to AI, which is a computational hypercapacity?

Using clear, simple language to explain complex metadata management and processing is indeed desirable, but someone who has at least understood the phenomenon should ask for it and clarify the rules. Here, this is clearly not the case.

It should be said in a clear and simple language that your data is taken from you. At the end of the day, AI hardly cares whether it is from Mario Rossi or Maria Bianchi; the names and surnames are "extra data" that weigh down the process.

The best way to explain it is that this data will be broken down, shredded, selected, reassembled, and reformulated. It's like constructing a house by tearing down three existing ones and choosing the pieces to build a new structure, all while anonymising the origins. But it will not be described in this way, for sure.

The provisions of Article 8 represent an attempt to remove some of the obstacles that the current legal framework poses to the use of health data for **scientific research**. Among other things, it provides that not-for-profit entities are authorised to make secondary use of personal data, including special categories, already collected during previous research projects, without the need to request further consent from the data subjects.

Of course, this is a text destined to be discussed and revised in parliament, but it is nevertheless possible to highlight, on the one hand, incompatibilities with the **GDPR** and, on the other hand, a gap regarding scientific research activities by profit-making organisations.

There is also a problem of coordination with the provisions on scientific research in the field of health, contained in the law converting the so-called PNRR decree, definitively approved on 23 April (the same day as the approval of the DDL AI), and aimed at amending Article 110 of Legislative Decree No. 196/2003 (Privacy Code).

These provisions, *inter alia*, remove the obligation to consult the Garante prior to processing data relating to health

without the consent of the data subject for the purposes of medical scientific research.

In short, therefore, that little guarantee on the most sensitive data is in fact circumvented, and at the same time any reference to the regulations on data management by for-profit companies is omitted.

Economic development and cybersecurity are areas in which the provision of quality data and storage in national data centres is valued, but these are principles. Reading the period three times, however, one realises that it is so empty as to become absurd, so useless that one cannot even say it is “wrong”.

Article 6 then identifies activities carried out with the help of AI systems for purposes of national security and defence - including activities to protect national security in cyberspace - which are excluded from the scope of the bill.

1.7. AI and Public Administration

Public administrations use artificial intelligence to increase the efficiency of their activities, reduce the time taken to define procedures, and improve the quality and quantity of the services provided to citizens and businesses, ensuring that those concerned are aware of its operation and can trace its use. The adoption of each measure remains the responsibility of the officials and managers (*responsibility over which nothing is done*).

The text of 26 articles stipulates that its implementation, also by public administrations, should be financially neutral. No additional resources, except for the one billion (already existing, simply differently tied) to CDP Venture capital destined for the entrepreneurial system, which should drive private investments of 3 billion.

“Italy is the first country to have launched an industrial policy on AI”, stressed Butti (Undersecretary of State to the Prime Minister with responsibility for Innovation).

The statement is definitely emphatic, disproportionate and technically untrue.

The “industrial” focus is there in all sector regulations. If anything, one wonders whether, in order to give attention (and emphasis) to *industriality*, other, ontologically more central aspects have not been omitted.

Incidentally, on this issue one waits to read the Italian Strategy, which has so far only come out in executive summary, while Article 21 is dedicated in the bill.

In the ten-page AGID document, however, there is a revolutionary idea: create a Foundation to coordinate... a new institution, and, if possible, even the most old-economy (though among the most flexible).

However, another aspect of Butti’s statement, “Italy is the first country to have launched an industrial policy on AI”, is interesting: an industrial policy without resources and isolated. Let someone explain to Butti what an industrial policy is.

These provisions, *inter alia*, do away, as we have seen, with the obligation of prior consultation of the Garante in the case of processing of data relating to health, in the absence of the consent of the data subject, for the purposes of medical scientific research.

The real crux of this general regulation is that any reference to the regulation of data management by for-profit companies is omitted.

(For a critical view of these arguments, see: Di Giacomo, 2025; Magnolo, 2025; Sorrentino, 2025; Di Giacomo, 2024; Donini, 2024).

2. AI in Administrative Justice: first projects and notes

In October 2024, the General Secretariat of Administrative Justice published a document on ongoing activities related to the introduction of artificial intelligence technologies in administrative justice.

The aim is to provide initial information on the developments initiated by the General Secretariat of Administrative Justice, at a time when interest in the use of these technologies has reached a particularly high level, driven by both the level of dissemination and technological development and by regulatory initiatives in the EU and at the national level.

The paper describes strategies, methodologies and use cases of AI. AI implementation projects in administrative justice concern:

- a) the anonymisation of measures;
- b) supporting the judge's work by searching and displaying content;
- c) cyber resilience.

On the first aspect, that of anonymisation **a)**, the paper explains the rationale followed, carefully seeking to reconcile two values: the confidentiality of the persons concerned and the intelligibility of the measure, which could be compromised, also with regard to the motivation, by unsupervised anonymisation.

"Achieving a balance between the two aspects (protection of confidentiality and comprehensibility of the text) in fact presupposes an interpretative activity that can only be carried out by judges, who, at that stage, help to define the intrinsic value to be assigned to each piece of information, also considering its relationship with the context, distinguishing the nature and characteristics of the disputes. Artificial intelligence is thus modelled to suit the variability of the context, to then verify in the course of concrete use, thanks to the feedback received from users (feedback duly verified and administered to the AI itself), the correctness of the results obtained still under the control of judges, who, in this executive phase, monitor the development of the system, i.e. the way it responds to the feedback offered by users, supervising its evolutionary path".

With regard to the judge's support activities **b)**, those activities considered high-risk by the AI Act are excluded from the AI applications. Instead, the applications include those that facilitate various activities of the judge in different roles and which, as structured, "do not involve 'creative' activity".

These are, in particular:

- identification of related or similar appeals pending in the individual Sections and to be set for decision. Identification makes it possible to achieve, the Report specifies, several objectives, such as optimisation of study and analysis; evaluation for the purpose of discussion in the same hearing or in 'thematic' hearings; avoidance of conflicting decisions in individual court sections; better distribution of workloads; and faster decisions;
- search for case law precedents with a tool based not only, as now, on keywords, but on the detection of semantic connections, thus ensuring a higher degree of relevance of the search results;

- detection and possibility of immediate visualisation of the rules or case-law pronouncements indicated, explicitly or implicitly, in a defence document, thus preventing the judge from having to interrupt the analysis of the document to search external databases, thus ensuring time savings and also preventing his concentration from being diverted.

As for cyber resilience **c)**, specific defence strategies have been implemented against internationally identified adversarial machine learning techniques.

According to the intentions expressed in the document:

"The guideline followed is that of valorising the positive impacts that can be derived from technological developments on the organisation of work, but with clear attribution to this technology of an instrumental role, of support to the judge in the phase of study, updating and analysis. The processing activity remains exclusively entrusted to the judge. On a conceptual level, it is more appropriate to speak of 'accelerated intelligence' instead of 'artificial intelligence'".

Machine learning models - especially deep learning models (i.e. machine learning systems that simulate, by means of multilayer artificial neural networks, the action of the human brain, such as, for instance, LLMs- large language models that use systems of this type for linguistic purposes) are difficult to govern and can lead to so-called hallucination phenomena or even overfitting phenomena, when the model fits too closely to specific training data, or overgeneralisation, when the model, on the contrary, generalises too much.

Research in the field (notably at Stanford) has highlighted the difficulty of these AI models in performing the type of legal reasoning, identifying various negative impact factors, including the lack of uniformity and the length of sentences in legal documents. The approach can only be cautious, aware of the risks and at the same time free of bias but characterised by a critical spirit and constant supervision.

In the Italian legal system in particular, the centrality of the "human" judge is constitutionally imposed: jurisdictional functions are by the Constitution entrusted to the judge who is a natural person, natural and pre-established by law, third and impartial, subject only to the laws; ethical values and the protection of rights cannot be delegated to tech-

nology; leadership cannot be automated. Considerations that are also reflected in the same document. However, the risk remains high due to the combination of uniform formats and AI applications, all integrated into the SIGA.

The use of formats would in itself conflict with the originality that is inherent in the intellectual profession of the lawyer; with decorum and, even before that, with the function of the legal profession, which requires that the lawyer's task not be restricted within rigid formalisms that would inevitably end up compromising the effectiveness of defences.

At a time when legal design is being discussed (Di Salvo 2024a), what has already been stated needs to be reinforced with regard to the format of judgments and acts.

A first step would be to guarantee all forms of cross-participation in the decision-making process in the introduction of AI systems in the administration of justice, not only therefore to ensure both the participation of lawyers in the process of regulating AI systems and that the latter are regulated at least by means of a delegated regulation, after agreement with the specialist legal associations, but also with the input of experts in the non-law specialist branches, which could detect and highlight heterogeneous weaknesses and frailties, even those not typified in the narrow procedural dynamics.

The use of artificial intelligence in administrative procedures should then be better regulated, in the sense of imposing on PAs (Public Administrations) the obligation to justify the use of AI as a function of real efficiency and improvement of the specific activity at the service of citizens and businesses, ensuring the interested parties the knowability of its operation and the traceability of its use and, more generally, the obligation of transparency; the reservation of autonomy and decision-making power of the person responsible for adopting the measure/activity and/or the person in charge of the procedure; the exclusion of the use of artificial intelligence for the generation of texts of any kind.

The subject is particularly delicate - especially in the context of the repeal of the offence of abuse of office and amid the related events at the Constitutional Court - especially since there are essential declinations yet to be clarified.

The justification of the procedure - an essential and central moment in law 241/90 (Di Salvo 2024b) - must be human,

it must be specific, on the single/individual measure and not "per tabulas or generalised", it must run through and be based on the entire procedural event, and be anchored to the specific subjective case. Intrinsic characteristics that ontologically exclude - today - the generic formula adopted with copy-paste, and - tomorrow - the mechanical delegation to digital automatism.

If in this sense motivation, even if discretionary, cannot turn into arbitrariness where motivation is absent or lacking or "per tabulas", this applies even more so in the case of the use of a discriminating algorithm where the objective weight of each element and value to be weighed is not made public: in the absence therefore of absolute and verifiable *ex ante* transparency, a use of AI should be considered to be excluded *a priori*.

Even more so if we are talking about the motivation of a judgment. While on the one hand, the integration of AI forms in the search is certainly desirable - in fact, to our partial knowledge, this is already the case today in the daily use of classic search engines, which make wide and abundant and too indiscriminate use of them - on the other hand, the non-transparent and verifiable weighting of the 'weights' to be assigned to the results raises not a few perplexities in terms of risk: 5 judgments against 3, how much weight are they given, how much weight is to be given to chronological relevance or to the forum, what distinction is guaranteed with respect to the real traceability to the specific case dealt with, what guarantees of non-discrimination can be offered *ex ante* and in a transparent manner?

These are just a few of the *prima facie* findings that can be listed, each of which it would be desirable to dwell on in an analysis that is only incidentally legal in nature and that involves complexities that unequivocally call into question heterogeneous professionalism and research experience.

The judge, in this sense, in his reasoning, must therefore make provision to clarify in a complete and transparent manner all these aspects of weighting, beyond any doubt and with the possibility of verification ... and in this sense it is not certain that the adoption of these systems can guarantee *ex post* effective economy and celerity to the proceedings. It is more immediate for the judge to clarify his own parameters than those adopted in the programming of a machine - which indeed are not necessarily his own nor that he must - rightly - share - triggering a new mechanism of counter-assessment.

3. IA and judicial review of technical discretion. The possible procedural repercussions of a massive extension of artificial intelligence to administrative activities characterised by technical discretion

In recent years, we have witnessed a growing push to introduce artificial intelligence into public administration. In this case, we are not talking about generative AI but about a set of processes performed by an algorithmic system, capable of going beyond the work of a “traditional” algorithm.

The AI-based one uses a machine learning system that enables it to analyse data, make decisions and act independently, even without human intervention.

In the course of the years, the Council of State has broadened the range of hypotheses in which the public administration may make use of automated decision-making procedures; in fact, while at first it was held that recourse to the algorithm was permitted only in the presence of binding activities, over time the judges have taken a more “open” attitude, arriving at the conclusion that: “if recourse to computer tools may appear easier to use in relation to so-called binding activities, there is nothing to prevent the [purposes established by law], pursued with recourse to the computer algorithm, from also being pursued in relation to activities characterised by areas of discretion. Rather, if in the case of the bound activity much more relevant, both in quantitative and qualitative terms, may be the use of tools for the automation of data collection and evaluation, even the exercise of discretionary activity, especially technical, may in abstract benefit from the efficiencies and, more generally, the advantages offered by the tools themselves” (Council of State, Sec. VI, 13 December 2019, no. 84723) and that: “there are no reasons of principle, or rather concrete reasons, for limiting the use to binding rather than discretionary administrative activity, both of which are expressions of authoritative activity carried out in pursuit of the public interest” (Council of State, Sec. VI, 4 February 2020, no. 881).

It has been noted that the extension of the automated administrative decision to discretionary activities requires

the judge to assess the correctness and transparency of the procedure in all its components, blurring the distinction between legitimacy - which can be reviewed - and merit - which cannot be questioned - of administrative action; in this way, the automated decision determines the reversal of relations between the administration and the judge - to the benefit of the latter - in the assessment of the correctness of the inter-subjective relations between the citizen and public power.

However, the Council of State clarified that, to be legitimate, the P.A.'s use of the algorithm must comply with three important principles:

- **the principle of knowability - a strengthened rejection of the principle of transparency** - by virtue of which, in order to prevent citizens from being excluded from decisions that affect them, the P.A. must prepare instruments capable of clearly illustrating the functioning and the impact of the algorithm on its decision-making process; if this were not the case, the correctness of the decision would be knowable only to those few, highly qualified subjects, and, consequently, democracy would give way to technocracy;
- **principle of algorithmic non-discrimination**, by virtue of which it is necessary for the administrative officer called upon to instruct the machine to carry out a check on the input data aimed at preventing the output data from being discriminatory. It is undeniable, in fact, that the A.I., thanks to its capacity to process large volumes of data, to automate complex and repetitive processes - thus reducing waiting times for citizens - and to provide predictive analyses capable of satisfying citizens' needs in advance, is capable of improving the efficiency of the methods of management and delivery of public services, making them increasingly interactive and personalised; however, these benefits are counterbalanced by many pitfalls, since the use of I. A projects the decision into a sort of black box, an inextricable and indecipherable dimension in which man finds it difficult to orient himself;
- **principle of non-exclusivity of the algorithmic decision**: that is, a mediation and interest-settlement role played by the administrative officer is always necessary upstream, the algorithm being a procedural and investigative tool, which, as such, does not escape the verifications typical of any administrative procedure. Therefore, far from becoming a substitute instrument for the indispensable human activity and de-empow-

ering of administrative officials, the algorithm must limit itself to acting as a mere *modus operandi*; in other words, it is the algorithm that must place itself in a servant position with respect to man, and not the other way around.

In recent years, the doctrine has tackled the thorny problem of the imputability of algorithmic decisions in cases where the machine generates outputs that cannot be attributed to either the public authority or the programmer. In particular, a first thesis according to which the use of automated procedures would not affect the liability regime – with the consequent imputability of the decision to the holder of the public office – is countered by a second thesis that, by separating the moment prior to the compilation of the software – in which the rules for programming are established – from the actual computer programme for issuing the act, proposes a dualistic approach according to which the official would be liable for the pre-software errors and the programmer for the damages produced by the software.

Starting from the assumption that, as of today, recourse to the A.I. is deemed precluded in the presence of highly debatable or non-standardisable assessment criteria, and therefore in all cases where a concrete assessment by the official is required, it is extremely interesting to consider the possible procedural consequences that would arise from a massive extension of the use of the A.I. to administrative activities characterised by technical discretion; think, for example, of the preparation of competition questions and the identification of the correct answers, which, as case law has repeatedly clarified, are an expression of technical discretion and are beyond judicial review, in the sense that the judge cannot challenge the accuracy of the answers deemed correct by the commission of experts but must limit himself to detecting flaws of legitimacy in the presence of actual errors (TAR – administrative regional court – Lazio, sez. IV Ter, Order no. 4567, 27 July 2023).

The real crux of the matter is precisely the reviewability of the decision, since there are several levels: the reviewability of the decision itself, that of the “motivation”, and, above all, that of the algorithm.

This would imply the recognition of a substitutive jurisdictional review in all cases in which the technical assessment carried out by the AI proves to be inadequate/unreliable or incorrectly applied: the judge – availing himself of the

technical advice – could in such cases (and only in such cases, in order to avoid serious distortions of the constitutional framework) replace the technical assessment made by the I.A. with his own.

This path would appear to be the most rational and coherent with the system; in fact, in the absence of *ex ante* control by the administrative authority, an intense *ex post* control by the judicial authority would be absolutely necessary to correct the AI's technical appreciation.

Such reflection undermines those theoretical doctrinal reconstructions according to which the activity of technical evaluation is reserved to the P.A. (it being understood that their reliability would already be indirectly denied by the recognition of the power of technical evaluation at the head of the P.A.), among which stands out the one that derives the existence of a reserve of technical evaluation at the head of the P.A. from the principle of good performance enshrined in Article 97 of the Constitution.

Establishing that the P.A. must efficiently satisfy the needs of the community is not the same as excluding that there are other entities capable of making technical assessments in a more efficient manner. On the contrary, it seems probable that the Constituent Assembly had decided to introduce this rule precisely because of the fact that, often and often, the P.A. struggled – as, moreover, still happens today – to guarantee an adequate standard of efficiency.

It follows that it would be absolutely unreasonable to assume the existence of a reservation of administration (also) in respect of non-discretionary assessments. Even if, on balance, since the adopted IA system is in fact part of the P.A. itself, such reservation would in any case – in a different form – be guaranteed.

The principle of fullness and effectiveness of judicial protection – which can be derived from a joint reading of Articles 24 and 113 of the Italian Constitution – and the principle of equality of the parties to proceedings under Article 111(2) of the Italian Constitution, a corollary of the principle of due process and a specification of the broader principle of equality enshrined in Article 3 stipulates that all parties to the proceedings must be accorded the same rights and obligations – and that of parity between the parties to the proceedings pursuant to Article 111, paragraph 2, of the Italian Constitution, a corollary of

the principle of due process of law and a specification of the broader principle of equality enshrined in Article 3, require that “all those judgments that do not impose the only choice reserved to the administration, which is that of opportunity/untimeliness, cannot be considered excluded from judicial review”.

This approach was also confirmed by the Strasbourg Court, which clarified that:

“in a given case where full jurisdiction is contested, the proceedings could still satisfy the requirements of Article 6 § 1 of the Convention if the court deciding the matter would examine all of the plaintiff's claims on the merits, point by point, without ever having to decline jurisdiction in answering the questions or establishing the facts. On the other hand, the Court has found violations of Article 6 § 1 of the Convention in other cases where national courts had considered themselves bound by the previous findings of administrative bodies, which were decisive for the outcome of the cases before them, without independently examining the relevant issues.” (Judgment of 31 July 2008, Case 72034/01, *Družstevní záložna Praha and Others v. the Czech Republic*)

The judge could repeat in its entirety the technical assessment carried out by the I.A. – even if complex – and would not be bound by it in any way; in fact, a judicial review limited to the verification of the legitimacy and manifest unreasonableness of the robodecision would be contrary to constitutional and European principles, as well as the rulings of the European Court of Human Rights.

Recognition of the power of technical assessment in the hands of the public authority would require overcoming the traditional orientation of the so-called weak intrinsic review, inaugurated in 2001 by the Council of State – according to which, in the general jurisdiction of legitimacy, the judge could verify the suitability/adequacy of the technical criterion used by the public authority and the correctness of its application procedure, but not, in application of the principle of separation of powers, replace the public authority. This would entail moving towards the so-called strong intrinsic – hence substitutive – review, which to date is commonly held to be exercisable only in the matter of sanctions imposed by the Competition and Market Authority (Council of State, Sec. VI, judgment no. 4990/2019).

4. When PA discrimination comes from AI. An English case

In the UK, the AI system that detects benefit fraud is discriminatory: the machine learning programme used to examine Universal Credit claims incorrectly selects people from some groups more than others. This was recently revealed in an investigation published on 6 December 2024 by Robert Booth in the *Guardian*: the AI system used by the UK government to detect welfare fraud shows discrimination based on people's age, disability, marital status and nationality.

An internal evaluation of the machine learning programme used to examine Universal Credit claims in England found that it incorrectly selected people from some groups more often than others for investigation for possible fraud. In practice, the system disfavoured specific racial groups in investigations for alleged abuses of the welfare system.

The circumstance emerged after access to records at the Department for Work and Pensions. The final decision on whether a person will receive unemployment benefits is still made by a human being, and officials believe that the continued use of the system, which aims to save around £8 billion a year lost to fraud and error, is “reasonable and proportionate”.

Activists retaliated by criticising the government for adopting the policy of ‘first do wrong, then fix it’ and called on ministers to be fairer to groups that the algorithm wrongly suspects of trying to cheat the system.

Recognition of disparities in the way the automated system assesses fraud risks is also likely to increase government scrutiny of AI systems and, at the same time, fuel demands for greater transparency.

There are 55 automated tools used by public authorities in the UK, potentially influencing decisions affecting millions of people, despite the government register covering only nine.

In recent years, government departments, including the Ministry of the Interior, have been reluctant to release information on the use of artificial intelligence, citing concerns that disclosing more details could allow malicious parties to manipulate the systems.

The British case is neither unique nor isolated, and it stems from a well-known but difficult-to-eliminate “bias” in programming and data weighting – certainly not from machines but from people’s heads – that is due to a vicious circle already identified in many predictive systems used, for example, in the United States.

In this sense, adopting standardised models – under the pretext of being cheaper than programming new ones – does not help to solve the problem; indeed, like a virus, it spreads from country to country and in heterogeneous administrations.

It is evident that the “historical” weight of a neighbourhood in large urban centres involves a convergence of racial and educational levels, which affects income statistics, access to health services, and the type of work.

It is therefore clear that an algorithm designed in this way will assign higher risk scores to certain neighbourhoods and social classes, which, transversally and not coincidentally, are also where the need for subsidies is concentrated.

As the rate of application processing increases, so does the risk of fraud: if there are 10 applications in district A and 100 in district B, it is very easy for district B to have a higher risk of fraud. The whole thing should then be read from a socio-racial cross-sectional perspective.

This bias was first detected in the algorithms used in systems for predicting and determining health insurance premiums in the United States, but upon verification appears to be reproduced in the same dynamics and spotty weightings across numerous systems adopted by PAs. This suggests the great difficulty of understanding the error and reprogramming the set of weights with new non-discriminatory predictive models. The *vulnus* is thus in adopting “preset products” uncritically and without verification, instead of discussing and thinking about specific weights.

Conclusions

In this article, I tried to represent the Italian situation in the introduction of artificial intelligence in the world of law and, in particular, in administrative proceedings. This theme is placed alongside the even more delicate one of the relationship between AI and criminal justice (Di Salvo,

2024b). On the one hand, several parties highlight unquestionable advantages arising from the introduction of machine learning, hyper-computation, and research systems; on the other hand, the world of law is an extremely delicate sphere in which to experiment with such processes. The need for a well-considered decision, for individualised reasoning on a case-by-case basis, and above all “the human point of view” are central to a decision that is fair, just, individualised. I have critically discussed the newly introduced Italian legislation on AI to provide an overall context, as I have also described the initial plans for the introduction of AI in the administrative sphere. In the third section, I focused on the relationship between AI and judicial review of technical discretion, and on the possible procedural repercussions of a massive extension of artificial intelligence to administrative activities marked by technical discretion. Finally, in the fourth section, I cited a case of discriminatory administrative proceedings due to AI systems adopted by the public administration. Through this outline, it clearly emerges the need for jurists – first and foremost – to intervene with the technical and critical capacities proper to their professional approach, to highlight the concrete risks to the protection of citizens posed by the uncritical and pervasive use of AI systems in the delicate context of justice and litigation.

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