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THE RESHAPING OF THE ADMINISTRATIVE  
PROCEDURE THROUGH TECHNOLOGY  
AS AN OPPORTUNITY TO REINFORCE  
SUBJECTS' RIGHTS

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**Summary.** The digital transformation of public administrations is visible in the way several services are being delivered, in the communication tools that are being used and on access to administrative information. Technology intervenes more deeply in decision-making procedures. The administrative decisions are increasingly based on automated processing, either partially or fully. Automated decision-making can facilitate the correctness of decisions, insofar as computing and algorithms potentially make the application of law less conducive to errors of fact and errors of law, and to motivations beyond the protected legal interests. It, however, poses interesting challenges: it redefines the very concept of executive application of the law (e.g., creating or making use of an administrative intermediate rationality), of procedural information gathering, of the duty to give reasons for decisions and of the way of reviewing them. Regardless of the automatization of decision-making, the administrative information systems interoperability conciliated with the data portability right redefine the gathering of information and evidence, reinforcing the principle of investigation, which can mean a higher accuracy of fact-finding with less burden on individuals. In both cases, the use of technology in

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the administrative procedure demands rethinking the meaning of central values of the exercise of administrative powers.

**Keywords:** automated decision-making; interoperability; portability; administrative rationality; subjects' rights.

**Przekształcanie procedury administracyjnej poprzez technologię jako szansa na wzmocnienie praw podmiotowych** – Cyfrową transformację administracji publicznej można dostrzec w sposobie świadczenia szeregu usług, w stosowanych narzędziach komunikacyjnych oraz w dostępie do informacji administracyjnych. Technologia coraz bardziej ingeruje w procedury decyzyjne. Decyzje administracyjne są w coraz większym stopniu podejmowane na podstawie częściowej lub całkowitej automatyzacji. Zautomatyzowane podejmowanie decyzji może zapewnić ich większą prawidłowość, ponieważ, przynajmniej potencjalnie, dzięki obliczeniom i algorytmom stosowanie prawa jest w mniejszym stopniu narażone na błędy rzeczowe i prawne, a także na motywacje wykraczające poza chronione interesy prawne. Stanowi to jednak ciekawe wyzwanie: redefiniuje samo pojęcie wykonawczego stosowania prawa (np. tworzenie lub korzystanie z administracyjnej racjonalności pośredniej), gromadzenia informacji proceduralnych, obowiązku uzasadniania decyzji i sposobu ich weryfikacji. Niezależnie od automatyzacji procesu podejmowania decyzji, interoperacyjność administracyjnych systemów informatycznych w połączeniu z prawem do przenoszenia danych na nowo definiuje gromadzenie informacji i dowodów, wzmacniając zasadę dochodzenia, co może oznaczać większą dokładność ustalania faktów przy mniejszym obciążeniu poszczególnych osób. W obu przypadkach wykorzystanie technologii w procedurze administracyjnej wymaga ponownego przemyślenia znaczenia podstawowych wartości związanych z wykonywaniem uprawnień administracyjnych.

**Keywords:** zautomatyzowane podejmowanie decyzji; interoperacyjność; przenośność; racjonalność administracyjna; prawa podmiotowe.

## 1. INTRODUCTION

Public Administration has the responsibility of handling the affairs of citizens, to “deliver services effectively and efficiently”<sup>2</sup>; to ensure equal access to them; and to support “sustainable economic prosperity (...), social cohe-

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<sup>2</sup> SIGMA, *The Principles of Public Administration*, 2017 Edition, pp. 63–64 (<http://www.sig-maweb.org/publications/Principles-of-Public-Administration-2017-edition-ENG.pdf>). It adds that “[e]ffectiveness depends to a great extent on fulfilling customer expectations while respecting legal provisions” and that “the efficient provision of these services sav[es]... citizens both money and time”.

sion and human wellbeing (...)”<sup>3</sup>. Digital Government<sup>4</sup> is an “integral part of governments’ modernisation strategies to create public value”<sup>5</sup>. Namely, it can “transform the way governments engage with citizens, make policy-decisions and manage the national infrastructure”<sup>6</sup>. “[G]iven government’s function and importance to every institution and individual”, it can have an impact much more significant than any other sector<sup>7</sup>. The digital transformation of societies and economies “requires new capacities for governments to adapt to the new digital environment”<sup>8</sup>; they must offer “services in ways that better respond to users’ needs, while improving public sector performance and openness”<sup>9</sup>. Digital government goes on a par with the emphasis on a more rational, accountable and open administration.

Administrative procedure is an important and ordinary tool of administrative activity. It organises the relationship between public administrations and citizens, the administrative decision-making and the implementing of public

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<sup>3</sup> It “influences social trust and moulds the conditions for creating public value” (European Commission, *European Semester Thematic Factsheet, Quality of Public Administration*, 22.11.2017, p. 1 (pp. 1–20), available at [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/thematic-factsheets/public-administration\\_pt](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/thematic-factsheets/public-administration_pt)).

<sup>4</sup> Refers to the use of technology, in particular of information and communications technology.

<sup>5</sup> OECD, *Comparative Study, Digital Government Strategies for Transforming Public Services in the Welfare Areas*, 2016, p. 57; OECD, *Recommendation of the Council on Digital Government Strategies*, adopted by the OECD Council on 15 July 2014, p. 6. According to the United Nations, in 2018, “[a]ll 193 Member States of the United Nations had national portals and back-end systems to automate core administrative tasks, and 140 provide at least one transactional service online. The trend of improvement in transactional online services is strong and consistent in all assessed categories with the three most commonly used services being payment for utilities (140 countries), submitting income taxes (139 countries), and registration of new business (126 countries)” – *New global survey shows e-government supports transformation towards sustainable and resilient societies*, (<https://publicadministration.un.org/en/Research/UN-e-Government-Surveys>).

<sup>6</sup> Z. Engin, P. Treleaven, “Algorithmic Government: Automating Public Services and Supporting Civil Servants in using Data Science Technologies”, *The Computer Journal*, 2018, p. 448 (<https://academic.oup.com/comjnl/article/62/3/448/5070384> – last accessed on January 11, 2020).

<sup>7</sup> *Ibidem*, p. 448.

<sup>8</sup> OECD, *Transformation A Roadmap for the Future*, March 2019, 7.7. Roadmap: Measuring digital government maturity. See also Slava Jankin Mikhaylov, Marc Esteve and Averill Campion, “Artificial Intelligence for the Public Sector: Opportunities and Challenges of Cross-sector Collaboration”, *Philosophical Transactions of the Royal Society*, 2018, Vol. 376, Issue 2128, p. 3 (<https://doi.org/10.1098/rsta.2017.0357> – last accessed January 20, 2020).

<sup>9</sup> OECD, *Transformation...*, p. 200. Public administration (institutional European administration as well as national administrations as European) should be “open efficient and independent” (Article 298(1) of the Treaty on the Functioning of the European Union).

policies. Administrative procedure is expected to promote “good administration and, consequently, the quality of final decisions, especially if discretionary powers exist”<sup>10</sup>; to make more visible administrative action and to protect citizens’ rights and interests. It should facilitate rather than hinder the exercise of rights and the decision-making. This is why, for instance, the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, has determined the “reduction of the number of procedures and formalities applicable to service activities and the restriction of such procedures and formalities to those which are essential in order to achieve a general interest objective and which do not duplicate each other in terms of content or purpose”<sup>11</sup>. Technology is expected to foster administrative procedures function and objectives. It is the case, as an example, of *e-procurement*, “that refers to the integration of digital technologies in the replacement or redesign of paper-based procedures throughout the procurement process”<sup>12</sup>.

The use (a better and more extensive use) of information and communication technologies can improve interactions between citizens and public administration<sup>13</sup> and public authorities’ responsibility for “the fairness of the procedure

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<sup>10</sup> J. Ponce, „Good Administration and Administrative Procedures,” *Indiana Journal of Global Legal Studies*: Vol. 12: Issue 2, p. 553 (pp. 551–588), available at: <http://www.repository.law.indiana.edu/ijgls/vol12/iss2/10> (last accessed on January 1.2020).

<sup>11</sup> See Recital 46.

It should be kept in mind that the negative effects of non-compliance with certain procedural requirements are not just economic, but also moral. As noticed by S. Correia, “[t]he risk of moral harm corresponds to the understanding of the rationale for fair procedure in keeping also with the dignitary approach and not merely in the light of a utilitarian approach” – “Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and a Global Right”, [in:] *Values in Global Administrative Law*, edited by G. Anthony, J. B. Auby, J. Morison, T. Zwart, Hart Publishing, Oxford and Portland, Oregon, 2011, p. 341,

<sup>12</sup> OECD, Directorate for Public Governance and Territorial Development, *Recommendation of the Council on Public Procurement*, 2015, p. 6 (<http://www.oecd.org/gov/public-procurement/recommendation/>). Albert Sánchez-Graells underlines that “even a maximum implementation of the EU-level eProcurement rules would still fall short of creating a fully digitalised procurement system” – “Digital technologies, public procurement and sustainability: some exploratory thoughts”, *How to Crack a Nut*, A blog on EU economic law, November 8, 2019. See also OECD, Working Papers on Public Governance, State of the art in the use of emerging technologies in the public sector, 2019 (DOI:<https://doi.org/10.1787/932780bc-en>).

<sup>13</sup> For instance, it allows citizens to access the online services of Public Administrations with a single digital identity.

by which a decision is made”<sup>14</sup>. As regards the administrative procedure, the use of the technology may have three main consequences:

- a) It can improve the procedure information gathering and reinforce the public authorities’ duty to prepare the decision carefully and impartially;
- b) It demands a renewed grasping of the scope of protection of procedural rights and highlights the importance of the exercise conditions of rights for their effectiveness;
- c) It can help to make the ideal of a more rational and sound public administration a reality.

It is important to consider each of these aspects in more detail, which will be done in the following pages.

## 2. MANAGEMENT OF PROCEDURE AND GATHERING OF INFORMATION

Information gathering is an essential dimension of any administrative procedure and the use of technology can improve it, “from its inception, through investigation and hearings to the making of the final decision”<sup>15</sup>.

At first, a fair relationship begins with the real possibility of making an application<sup>16</sup> (wherever the applicant is) without undue restrictions of shape, form, means of communication and without unjustified demands of information and documents<sup>17</sup>. Secondly, public authorities “shall investigate the case carefully

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<sup>14</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, ALRC Report 129, 2015, Commonwealth of Australia, p. 393 (<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>).

<sup>15</sup> P. Craig et al., “Book III – Single-Case Decision-Making”, *ReNEUAL Model Rules on EU Administrative Procedure*, edited by P. Craig, Herwig C.H. Hofmann, Jens-Peter Schneider, and Jacques Ziller, Oxford University Press, 2017, p. 82.

<sup>16</sup> Or, that being the case, a responsible declaration or a communication, that allow the recognition or exercise of a right or the beginning of an activity.

<sup>17</sup> A. Paulin, “Governing Through Technology and the Failure of Writing Law”, *Smart City Governance*, Elsevier, 2019, pp. 98 et seq. Alois Paulin noticed that, regarding application, in Slovenian, “[a]pplicants were advised to file their applications via the national e-Gov one-stop-shop, which was interpreted to be the ‘single access point for receiving applications’ as the law mandates. This in turn gave exclusive power to the system controllers to technologically limit the way in which stakeholders could interact with that system” (p. 98).

By way of example, Article 22(1) of Directive 2014/24/EC of the European Parliament and of the Council of 26 February 2014 on public procurement provides: “Member States shall ensure that all communication and information exchange under this Directive, in particular electronic sub-

and impartially”<sup>18</sup>. That means that they have to determine the facts (with the necessary evidence), to take into consideration the relevant factors to the decision and to assess them according to its proper weight, within the legal framework<sup>19</sup>. This role and the responsibility for procedure management are stressed by the exchange of information and knowledge possibilities offered by administrative interoperability solutions in which the public authorities are necessarily participants<sup>20</sup> and by interadministrative cooperative duties<sup>21</sup>, at national level and at transnational level. “Competent authorities are obliged to consider information supplied by other competent authorities under a duty to inform or (...) to search for and to consult information available in databases”<sup>22</sup>. It is inherent in

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mission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators’ access to the procurement procedure. (...)”

<sup>18</sup> P. Craig et al., “Book III – Single-Case Decision-Making”, op.cit., p. 86.

<sup>19</sup> See, for instance, Book III, III-10 (op.cit. ult., pp. 110–111); G. Malgieri, “Automated decision-making in the EU Member States: The right to explanation and other ‘suitable safeguards’ in the national legislations”, *Computer Law & Security Review*, 39, 2019, p. 6 [pp. 1–26] (<http://creativecommons.org/licenses/by/4.0/> – accessed November 11, 2019); and J. Schneider, “Information exchange and its problems”, [in:] *Research Handbook on EU Administrative Law*, edited by Carol Harlow and others, Edward Elgar Publishing Limited, 2017, p. 93 (who highlights the “added value of shared databases”).

<sup>20</sup> Recital 13 and Article 2(1) of Decision (EU) 2015/2240, of the European Parliament and of the Council, 25th November 2015, establishing a programme on interoperability solutions and common frameworks for European public administrations, businesses and citizens (ISA<sup>2</sup> programme) as a means for modernizing the public sector. Member States must implement all necessary measures to promote interoperability under the ISA<sup>2</sup> programme so that electronic registrations, IT tools and Social Media can work to benefit the complete implementation of a Digital Single Market. See also Recitals 31–35 of Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

About the relevance of interoperability, at a sector level, see Judgment of ECJ (Ninth Chamber) of 22 March 2017, C-665/15, *Commission v Portugal* (failure of Portugal to put in place the connection to the EU driving licence network); and Judgment of ECJ (Tenth Chamber) of 5 October 2016, *Commission v Portugal*, C-583/15 (failure of Portugal “to create a national electronic register of road transport undertakings and by failing therefore to establish the interconnection with the electronic registers of other Member States”).

<sup>21</sup> See, for example, Article 74 and Article 197 of TFEU.

<sup>22</sup> Article VI-20 of Book VI (Administrative Information Management) of ReNEUAL Model Rules on EU Administrative Procedures, 2014 [Drafting Team: Diana-Urania Galetta et al.], [in:] *ReNEUAL Model Rules on EU Administrative Procedure*, op.cit., pp. 219–220; Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *Online Platforms and the Digital Single Market – opportunities and challenges for Europe*, Brussels, 25 May 2016, COM(2016) 288 final; B.Ch. Ubal-

the due diligence duty<sup>23</sup>. This requires that public authorities conduct a care and attentive examination of a case or measure and, as so, obtain “the most complete and reliable information possible”<sup>24</sup>. In this context, technology reinforces the gathering of the necessary and precise information as a standard of the administrative due diligence<sup>25</sup>.

The duty of public authority to obtain all the needed information without unnecessary burdens to citizens and businesses<sup>26</sup> is enhanced by the once-only principle, according to which “they no longer have to provide the same documents and information they previously made available”<sup>27</sup>.

di, Ch. Van Ooijen, B. Welby, OECD Digital Government Project, *A data-driven public sector, Enabling the strategic use of data for productive, inclusive and trustworthy governance*, OECD, Working Papers on Public Governance, GOV/PGC/EGOV(2019)3, 2019, p. 49 ([https://www.oecd-ilibrary.org/governance/a-data-driven-public-sector\\_09ab162c-en](https://www.oecd-ilibrary.org/governance/a-data-driven-public-sector_09ab162c-en)).

<sup>23</sup> It is a dimension of the principle of good administration (e.g., Article 41 Charter of Fundamental Rights of the European Union).

<sup>24</sup> Judgment of 24.9.2019, Cases T-760/15 and T-636/16, *Netherlands v Commission*, § 194; Judgment of 18.9.1995, Case T-167/94, *Nöelle v. Council and Commission*, § 45.

<sup>25</sup> Commenting on the Case *Max.Mobil Telekommunikation Service GmbH* (Judgment of 30.01.2002, Case T-54/99), Juli Ponce argues that “the Court states formally that a right to good administration exists, but perhaps fails to establish a proper standard of due diligence to develop it” (“Good Administration...”, op.cit., p. 587). The duty to gather the necessary information, in a technology context, has become more clearly one of these standards. It connects with the duty of “a diligent examination of all the matters of law or of fact which are capable of justifying [a] measure” or a decision (Opinion of Advocate General Poiares Maduro delivered on 21 October 2004, *Commission of the European Communities v T-Mobile Austria GmbH*, § 84).

“[W]hether it is supervised or unsupervised learning, machine learning and AI applications have to learn on data and therefore the data that is supplied to them, whether in terms of quality or quantity, becomes a critical differentiator in terms of how the law treats a particular AI application” – Ian Walden, *Artificial Intelligence, Big Data and the Rule of Law Event Report*, elaborated by Lucy Moxham, with assistance from Anja Bossow, referring to Ian Walden, Bingham Centre for the Rule of Law, *The Law Society of England and Wales*, 2017, p. 7 (available at <https://www.biicl.org/events/1280/artificial-intelligence-big-data-and-the-rule-of-law> – accessed on January 28, 2020).

<sup>26</sup> Namely, the use of technology can “reduce the cost of each administrative decision made”, as well to reduce the cost to citizens of each interaction with public administration (K. Miller, “The Application of Administrative Law Principles to Technology-Assisted Decision-Making”, *Australian Institute Administrative Law Forum*, 2016, 86 AIAL Forum 20, p. 29 [pp. 20–34]), <http://classical.austlii.edu.au/au/journals/AIAdminLawF/2016/26.html> (accessed on January 12, 2020).

<sup>27</sup> Citizens and businesses have to “supply the same information only once to a public administration”. “Member States should implement the once only principle: once only obligation, reuse of data, making the best use of key enablers [...] and thinking cross-border services from inception” – “Digital4EU” 2016, Stakeholder Forum Report (<https://ec.europa.eu/digital-single-market/en/news/digital4eu-2016-report>). See, also, J.C. de Abreu, “Digital Single Market under EU political and constitutional calling: European electronic agenda’s impact on interoperability

The right to data portability, grounded on General Data European Regulation (hereafter: GDPR), can also favour the information interchange. The data subjects have the right to have their personal data – that they “provided knowingly and actively” as well as the personal data that are “generated by his or her activity”<sup>28</sup> – “transmitted directly from one controller to another, where technically feasible”<sup>29</sup>. Although this right does “not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller”<sup>30</sup>, many times, the portability of personal data is in the interest of both parts<sup>31</sup>. That is to say that the transmission between public authorities of personal data that is in the interest of the his or her holder<sup>32</sup> may hardly be hindered by the public authority addressed. The right to data portability enables “individuals to maximise the advantages of big data and to benefit from the value created by the use of their personal data”<sup>33</sup>. Another relevant effect coming from the GDPR is the emphasis on the importance of accuracy data and on the rights of the data subject to access and obtain the correction of his/her data<sup>34</sup>.

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solutions”, UNIO – *EU Law Journal*, Vol. 3, No. 1, January 2017, p. 129; and M. Dečman, *The role of government portals: an evaluation of the new Slovenian government portal*, [in:] ECEG 2016 – Proceedings of the 16th European Conference on e-Government, ed. M. Dečman et al. (Academic Conferences and Publishing International Limited: 2016), p. 46 (namely, she states that “[t]he registers and databases on the government side should be capable of gathering such data through easy to understand online services and deliver the data to all responsible authorities”).

<sup>28</sup> Article 29 Data Protection Working Party 16/EN, WP 242 rev.01, *Guidelines on the right to data portability*, adopted on 13 December 2016, as last Revised and adopted on 5 April 2017, pp. 3, 9 and 10 (“...given the policy objectives of the right to data portability, the term ‘provided by the data subject’ must be interpreted broadly, and should exclude ‘inferred data’ and ‘derived data’” ([https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=611233](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611233))).

<sup>29</sup> Article 20 (1) and (2) GDPR. Ruth Janal argues that the personal data is only the data provided to the first controller that is relevant and, hence, that its scope is not so relevant as one could think. See “Data Portability – A Tale of Two Concepts”, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2017, issue 8, pp. 59–69.

<sup>30</sup> Article 20 (3) of Regulation 2016/679/EU.

<sup>31</sup> It shall not affect “the rights and freedoms of others” (Article 20 (4) GDPR).

<sup>32</sup> The objective of the data portability is to “further strengthen the control [of the data subject] over his or her own data” (recital 68).

<sup>33</sup> I. van Ooijen and H.U. Vrabec, “Does the GDPR Enhance Consumers’ Control over Personal Data? An Analysis from a Behavioural Perspective”, *Journal of Consumer Policy*, 2019, 42, p. 102 (pp 91–107), <https://doi.org/10.1007/s10603-018-9399-7> (accessed on December 28, 2019).

<sup>34</sup> Chris Jay Hoofnagle, Bart van der Sloot & Frederik Zuiderveen Borgesius, “The European Union general data protection regulation: what it is and what it means”, *Information & Communications Technology Law*, 2019, Vol. 28, No. 1, p. 98 (<https://doi.org/10.1080/13600834.2019.1573501> – last accessed on January 28, 2020). See, also, e.g., Articles 16, 17 and 18. As stated in Recital 71, § 2, “[i]n order to ensure fair and transparent processing in respect of the data subject, taking



The right of every person to be heard before a decision, which would affect him or her adversely, is taken corresponds to an important moment of administrative procedure<sup>35</sup>. Besides the protection of the person's affected interests, it prevents the risk that the decision-maker will not be aware of all relevant aspects and be led into factual or other errors. The exercise of the right to be heard presupposes that "the central issues that are to be decided by the public authority and the core arguments that inform its reasoning"<sup>36</sup> are timely and properly noticed. Here, the use of information and communication technologies can strengthen the possibility of effective exercise of that right, overcoming difficulties in accessing adverse or fact-finding material.

In summary, technology makes it easier to the public authority to carry out the appropriate and necessary investigation and to prepare a legal and fair decision, and therefore the administrative responsibility for factual errors and non-compliance with the principle of impartiality may emerge more clearly.

### 3. PROCEDURAL RIGHTS AVAILABLE IN THEORY AND IN PRACTICE IN ADMINISTRATIVE AUTOMATED DECISION-MAKING

The discussion regarding the automated decision-making has brought renewed attention to procedure rights. The debate has been grounded on General Data European Regulation, in particular on Article 22, which refers to automated individual decision-making. This provides that the data subject shall have

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into account the specific circumstances and context in which the personal data are processed, the controller should ... implement technical and organisational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimised,..."

<sup>35</sup> See, for instance, *Traditional Rights and Freedoms...*, op.cit., p. 136, n.º 14.20: The hearing rule requires that the decision maker afford "a person an opportunity to be heard before making a decision affecting their interests". "The right to a hearing includes not only the person the administrative act is directed at but also third parties if their rights are concerned." (Hermann Pünder, "German Administrative Procedure in a Comparative Perspective – Observations on the Path to a Transnational, 'Ius Commune Proceduralis' in Administrative Law", *International Journal of Constitutional Law*, Volume 11, Issue 4, October 2013, p. 951 (<https://academic.oup.com/icon/article/11/4/940/698721> – accessed January 29, 2020). "The rule against bias ensures that the decision maker can be objectively considered to be impartial and not to have pre-judged a decision", which is "determined by reference to the standards of the hypothetical observer who is fair minded and informed of the circumstances".

<sup>36</sup> P. Craig et al., "Book III – Single-Case Decision-Making", op.cit., p. 93.

the right not to be subject to a decision based solely on automated processing<sup>37</sup>, except if the decision is necessary for entering into, or performance of, a contract, authorised by Union Member State law, or based on the data subject's explicit consent<sup>38</sup>. In these cases, minimum explicit safeguards must be put in place, at least, the right to obtain human intervention on the part of the controller, the right to express his or her point of view and the right to contest the decision (or other similar safeguards established by the Union or Member State law).

Most of the rights provided therein are not really new. For instance, the right to express one's point of view<sup>39</sup> can be associated with the right of a person to be heard by a public authority before a decision is made that would adversely affect him/her<sup>40</sup>. It is very much discussed if GDPR lays down a right to explanation or, instead, a right to be informed about automatized decision-making<sup>41</sup>.

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<sup>37</sup> Article 22 GDPR. Sandra Wachter, Brent Mittelstadt and Luciano Floridi argues that, under GDPR, only decision making qualified "solely" automated are considered and that this "could make systems less accountable". In fact, by reason of identity, the guarantees therein should be applied to decision only partially automated. ("Transparent, explainable, and accountable AI for robotics", *Science Robotics*, Vol. 2, Issue 6, 2017 and at [https://www.researchgate.net/publication/318819126\\_Transparent\\_explainable\\_and\\_accountable\\_AI\\_for\\_robotics](https://www.researchgate.net/publication/318819126_Transparent_explainable_and_accountable_AI_for_robotics) -accessed on December 20, 2019).

<sup>38</sup> If the decision is based on special categories of personal data (Article 9 of the GDPR, including sensitive data such as health, race and religion), the automated decision-making is only allowed on the basis of explicit consent or if the processing is necessary for substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued substantial public interest (Article 9 (4) of GDPR) and provided that "suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place".

<sup>39</sup> Article 22 (2)-b) and (3) of GDPR.

<sup>40</sup> That is to say to have he/her "views taken into consideration before such a decision is implemented" – *Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights* (Council of Europe, 2019, p. 14 (<https://www.coe.int/en/web/commissioner/-/unboxing-artificial-intelligence-10-steps-to-protect-human-rights>)).

<sup>41</sup> See, for instance, S. Wachter, B. Mittelstadt, L. Floridi, "Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation", *International Data Privacy Law*, 2017, Vol. 7, No. 2, p. 96 ("a meaningful right to explanation is not legally mandated by the GDPR"); A. D. Selbst, J. Powles, "Meaningful information and the right to explanation", *International Data Privacy Law*, Volume 7, Issue 4, 1 November 2017, pp. 233–242 (p. 240, footnote 39: "We want to be clear here, that machine learning systems as currently built are often not explainable from either a specific decision or system functionality standpoint. Developing tools for explanation is an active area of computer science research") – <https://academic.oup.com/idpl/article/7/4/233/4762325> (last accessed January 20, 2019); S. Wachter, B. Mittelstadt, Ch. Russell, "Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR", Volume 31, Number 2, 2018, pp. 1–52; L. Edwards, M. Veale, "Enslaving the algorithm: from a 'right to an explanation' to a 'right to better decisions'?", p. 7, *Pre-print, January 2018 and in IEEE Security & Privacy*, 2018, pp. 46–54 (They claim that there is a risk of the right to explanation turning into an empty right similar to what happens to the right to consent of data subjects.); B.

The fact is that the right to receive/access meaningful information about logics, significance and envisaged effects of the automated decision-making<sup>42</sup> cannot be separated from the general right to reasoned decisions, independently of the way the decision is taken<sup>43</sup>. The duality between the right to explanation and the right to receive meaningful information cannot be clearly outlined and it is possible to argue that the second strengthens the status of the duty to give reasons.

In both cases, a special effort is required from the public authority to be “clear, simple and understandable”<sup>44</sup>; bearing in mind that “individuals should be able to understand autonomously (readability) the importance and implications (comprehensibility) of algorithmic data processing”<sup>45</sup> and that complexity is no excuse for failing to provide the necessary information<sup>46</sup>. The right to explanation is reinforced by the right of the data subject to correct any erroneous information and by the right against discrimination, in so far as these entail the need to check errors and verify the factors which were used in a decision<sup>47</sup>. An automated system should have “the capacity to automatically generate a comprehensive audit trail of the administrative decision-making path”, identifying the key decision points and their link to relevant normative and to factual references<sup>48</sup>. As such,

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Goodman, S. Flaxman, “European Union regulations on algorithmic decision-making and a ‘right to explanation’”, *AI Magazine*, Vol. 38, No 3, Fall 2017, p. 50 (“When put into practice, the law may also effectively create a right to explanation, whereby a user can ask for an explanation of an algorithmic decision that significantly affects them.” [pp. 50–57] (<https://www.aaai.org/ojs/index.php/aimagazine/issue/view/219>; Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, adopted on 3 October 2017, as last Revised and Adopted on 6 February 2018, 17/EN WP251rev.01 ([https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=612053](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612053)), p. 25 (“The controller should find simple ways to tell the data subject about the rationale behind, or the criteria relied on in reaching the decision.”).

<sup>42</sup> Articles 13(2), lett. f; 14(2), lett. g; and 15(1), lett. h), GDPR.

<sup>43</sup> G. Malgieri, “Automated decision-making...”, *op.cit.*, p. 4.

About the duty to give reasons in European area, see I. Opdebeek, S. De Somer, “The Duty to Give Reasons in the European Legal Area: a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law”, *Rocznik Administracji Publicznej*, 2016, 2, Artykły, Administracyjne prawo procesowe, <http://www.ejournals.eu/RAP/>, ISSN 2449-7800 (online), pp. 97–148.

<sup>44</sup> P. Craig et al., “Book III – Single-Case Decision-Making”, *op.cit.*, p. 130.

<sup>45</sup> G. Malgieri, “Automated decision-making...”, *op.cit.*, p. 4.

<sup>46</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making...*, *op.cit.*, p. 25, note 40.

<sup>47</sup> Recital 71 and Articles 5(1)-d) and 16 of GDPR; and Margot E. Kaminski, “The Right to Explanation, Explained”, *Berkeley Technology Law Journal*, Volume 34, 2019, p. 213 (<https://scholar.law.colorado.edu/articles/1227> – last accessed January 20, 2020).

<sup>48</sup> *Automated Assistance in Administrative Decision-Making...*, *op.cit.*, pp. 46–47. The reasons for the decision and the documents relating to the procedure should be “accessible by the system’s user, a reviewer or an auditor” (*idem*, p. 48).

the explanation given can be more objective<sup>49</sup>. In French law, for instance, it is provided that an individual decision taken on the basis of algorithmic processing must include an explicit mention to it<sup>50</sup> and that “the controller must ensure that the algorithmic processing and its developments are under control so as to be able to explain in detail and in an intelligible form to the data subject the manner in which the processing has been carried out”<sup>51</sup>.

The right to contest or to challenge the decision corresponds to the general right to a remedy. This requires that “the reasoning followed by the public authority” be disclosed “in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review”<sup>52</sup>, ensuring effective judicial protection<sup>53</sup>. Hence, the communication

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<sup>49</sup> Finale Doshi-Velez and Mason Kortz underline: “AI systems can be designed to store their inputs, intermediate steps, and outputs exactly (although transparency may be required to verify this). Therefore, they do not suffer from the cognitive biases that make human explanations unreliable. Additionally, unlike humans, AI systems are not vulnerable to the social pressures that could alter their decision-making processes” – Accountability of AI Under the Law: The Role of Explanation, Berkman Klein Center Working Group on Explanation and the Law, Berkman Klein Center for Internet & Society working paper, 2017 p. 10. (<http://nrs.harvard.edu/urn-3:HUL.InstRepos:34372584> – accessed January 30, 2020).

<sup>50</sup> It states also that “[t]he rules defining such processing and the main characteristics of its implementation shall be communicated by the administration to the person concerned if he so requests”.

<sup>51</sup> Article 40, 2<sup>o</sup>, of the Law n<sup>o</sup> 78–17 of 6 January 1978 relating to data processing, files and liberties

Consolidated version as of January 26, 2020 (Loi n<sup>o</sup> 78–17 du 6 janvier 1978 relative à l’informatique, aux fichiers et aux libertés) – <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068624&dateTexte=20200126>; and Article L 311-11 of the Public-Administration Relations Code (Code des relations entre le public et l’administration), consolidated version of January 8, 2020 (<https://www.legifrance.gouv.fr/>). See also the French *Conseil Constitutionnel* Decision No. 2018-765 DC of 12 June 2018, n<sup>o</sup> 69 (<https://www.conseil-constitutionnel.fr/en/decision/2018/2018765DC.htm>).

<sup>52</sup> P. Craig et al., “Book III – Single-Case Decision-Making”, op.cit., p. 96.

The right to a reasoned decision is correlated with the right to contest or challenge the decision, in the sense that this implies the possibility to check “points of that decision that are biased/wrong/inaccurate” – Gianclaudio Malgieri, “Automated decision-making ...”, op.cit., p. 22. See, also, e.g., Bucura C. Mihaescu Evans, *The Right to Good Administration at the Crossroads of the Various Sources of Fundamental Rights in the Eu Integrated Administrative System* (Luxemburger Juristische Studien – Luxembourg Legal Studies), 2015, pp. 269–271; Judgment of the ECJ of 15 October 1987, C-222/86, Heylens, § 15.

<sup>53</sup> “In terms of the intensity of judicial review, the properties of the algorithm should not be considered an area reserved to public authorities, which are not subject to judicial review

except as concerns the reasonableness and proportionality of their measures, but must be susceptible to a full and direct investigation.” Marco Bassini et alii, “Paper on legal principles”, *The Ethics and Law of AI*, Civiltà delle Macchine, Fondazione Leonardo, p. 70 (<https://fondazi->

about algorithmic decision-making must be simultaneously meaningful, understandable, and actionable.

“[T]ransparency and explainability may allow for the discovery of deficiencies, but do not provide absolute guarantees for the reliability, security or fairness of an algorithmic decision system”<sup>54</sup>. These imply “complementary means such as algorithmic impact assessments, auditing and certification”<sup>55</sup>. For example, in Slovenia, before “the introduction of a system of automated decision-making procedures, a specially focused impact assessment... should be carried out, which should also include an impact assessment on related human rights and fundamental freedoms, in particular with regard to non-discrimination”<sup>56</sup>.

In a scenario of increased use of fully or partially automated decisions, the administrative procedure laws must establish new or adapted guarantees. These must include, namely<sup>57</sup>:

- a) appropriate design choices of algorithm or structure of automated systems, that “accurately and consistently reflect the relevant law”<sup>58</sup>;

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oneleonardo-cdm.com/en/civilita-delle-macchine/nuove-edizioni/dicembre-2019/ – accessed on January 28, 2020).

<sup>54</sup> European Parliament, in March 2019, Claude Castelluccia and Daniel Le Métayer, *Understanding algorithmic decision-making: Opportunities and challenges*, study done at the request of the Panel for the Future of Science and Technology and managed by the Scientific Foresight Unit within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament), p. VII ([https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_STU\(2019\)624261](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2019)624261)).

<sup>55</sup> See *Understanding algorithmic decision-making...*, op.cit., p. VII and p. 78.

The certification is stated in Article 42 of GDPR. It refers to “the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors”. In the case under consideration, the certification is of the automated decision-making. As provided in Article 42(3), the certification “does not reduce the responsibility of the controller or the processor for compliance with this Regulation”, but it can prevent it.

<sup>56</sup> G.Malgieri, “Automated decision-making...”, op.cit., p. 18. M. Zalnieriute, L. Bennett Moses, G. Williams (“The rule of law and automation of government decision-making”, *Modern Law Review*, 2019, Vol. 82, Issue 3, p. 9) highlight that “[s]upervised machine learning requires data that has already been classified or labelled, for example as to whether... an applicant is eligible or not eligible for a benefit. Because the data is pre-labelled (either in the context of historic decision-making or in the context of development of the system), it carries within its human biases and assumptions. // The line between the two types of automation (pre-programmed and rules derived from historic data) is not always clear.”

<sup>57</sup> Article 29 Working Party, *Guidelines on Automated individual decision-making...*, op.cit., p. 28.

<sup>58</sup> Automated Assistance in Administrative Decision-making..., op.cit., p. 75.

- b) algorithmic impact assessment<sup>59</sup>;
- c) “regular reviews (*e.g.* systems of algorithms auditing [by independent third-party]) of the accuracy and relevance of automated decision-making”<sup>60</sup>, including assessment on the data sets processed, to check for any bias, inaccuracies or errors<sup>61</sup>;
- d) “a structured mechanism for human intervention in the automated decision-making process”<sup>62</sup>, both of the competent public authority to ensure “appropriate processes for correction, substitution, audit, and review of automated decisions”<sup>63</sup> and, as above mentioned, of the persons who would be affected by the decision<sup>64</sup>.

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<sup>59</sup> Namely, to assess “whether the data processing is within the scope of the power granted under the law”, “will correctly implement the law” and involve “any risk of discrimination” and to analyse “how decision-makers and individuals subject to the system will interact with the system” – Swee Leng Harris, “Data Protection Impact Assessments as Rule of Law Governance Mechanisms”, 3<sup>rd</sup> June 2019 (<https://zenodo.org/record/3237865#.XkqS9y3rIU> – accessed on January 19, 2020). The Italian *Consiglio di Stato*, in the Judgment of 8 of April 2019, n. 2270, stated “the need for the administration to play an *ex ante* role of mediation and interest composition, also by means of constant tests, updates and algorithm improvement methods (especially in the case of progressive and deep learning)” – point n. 8.2, third indent.

According to Article 35 (3)-a) of GDPR, “[a] data protection impact assessment shall in particular be required in the case of...a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person”. “The European Parliament, (...) [s]tresses that algorithms in decision-making systems should not be deployed without a prior algorithmic impact assessment (AIA), unless it is clear that they have no significant impact on the life of individuals” – *A comprehensive European industrial policy on artificial intelligence and robotics*, European Parliament resolution of 12 February 2019, 2018/2088(INI), P8\_TA(2019)0081, n.º 154 ([http://www.europarl.europa.eu/doceo/document/TA-8-2019-0081\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0081_EN.pdf)). About how to make a data protection impact assessment, see Simon Reader, *Data Protection Impact Assessments and AI*, 23 October 2019 (<https://ico.org.uk/about-the-ico/news-and-events/ai-blog-data-protection-impact-assessments-and-ai/> – accessed on December 20, 2019).

<sup>60</sup> Gianclaudio Malgieri, “Automated decision-making...”, *op.cit.*, p. 5; and Margot E. Kaminski, “The Right to Explanation...”, *op.cit.*, p. 216.

<sup>61</sup> Article 29 Data Protection Working Party, 17/EN, WP251rev.01, *Guidelines on Automated individual decision-making...*, *op.cit.*, p. 28.

<sup>62</sup> Gianclaudio Malgieri, “Automated decision-making...”, *op.cit.*, p. 5.

<sup>63</sup> Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020-25* (2019), p. 24.

<sup>64</sup> Council of Europe, Commissioner for Human Rights, *Unboxing Artificial Intelligence: 10 steps to protect Human Rights*, 2019, p. 14 (<https://www.coe.int/en/web/commissioner/-/unboxing-artificial-intelligence-10-steps-to-protect-human-rights>).

- e) a review board that secure the right to contest the decision and that has powers to correct the system design or information used<sup>65</sup>.

Among these guarantees, maybe the most important is the first one<sup>66</sup>. It shapes *ab initio* the possibility of correctness of the decision<sup>67</sup>. The more complex is the process of automated decision, more attention is due to its reliability<sup>68</sup>. To prevent difficulties, strict rules should be required regarding impact assessment, auditing and certification of decision systems<sup>69</sup>. Public authorities must also be prepared to guarantee understandable information<sup>70</sup>, regarding all pro-

<sup>65</sup> *E.g.*, Article 22(3) of GDPR; and Melissa Perry and Alexander Smith, “iDecide: the legal implications of automated decision-making”, 2014, p. 7 (<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20140915> – accessed on January 8, 2020, p. 6 (An “appropriate mechanisms for review in the individual case by humans [must be] put in place”).

<sup>66</sup> Australian Law Reform Commission, *The Future of Law Reform...*, op.cit., p. 28; M.E. Kaminski, “The Right to Explanation...”, op.cit., p. 216; and Article 29 Working Party, *Guidelines on Automated individual decision-making...*, op.cit., p. 28. M. Zalnieriute, L. Bennett Moses, G. Williams (“The rule of law...”, op.cit., p. 3) underline: “Indeed, one consistent theme is that human choices, and often error, at the design and implementation stage of automation can cause a system to fail to meet rule of law standards. A contrast is the Swedish student welfare system, which involves high levels of automation, but does not raise the same concerns. The Swedish model, which puts a strong emphasis on compliance with national legislation, officers’ ethical codes, and publishing of the rules, demonstrates how a carefully designed system integrating automation with human responsibility can realise many benefits, while remaining sensitive to the values expressed in the rule of law.”

<sup>67</sup> K. Miller, “The Application of Administrative Law...”, op.cit., p. 30 (“One of the possible strengths or benefits of technology-assisted decision-making is that technology navigates a human decision-maker to the ‘correct or preferable decision’. However, this also raises the concern that what is ‘correct or preferable’ will be determined by the agency when it programs the technology rather than by the human decision-maker when they consider a particular decision.”); M. Hildebrandt, “The Artificial Intelligence of European Union Law”, *German Law Journal*, 2020, 21, p. 77 (“Machines cannot do anything but execute programs developed by humans, even if those programs enable the machine to reconfigure its program in view of specified machine-readable tasks, and even if humans may develop programs that build new programs.”) – doi:10.1017/glj.2019.99, accessed on January 20, 2020.

<sup>68</sup> For instance, if there is machine learning, which is a “subset of Artificial Intelligence, ... the ability for a computer to perform tasks without being given explicit instructions how, instead ‘learning’ how to perform those tasks by finding patterns and making inferences” (*Closer to the Machine, Technical, social and legal aspects of AI*, Office of the Victorian Information Commissioner, State of Victoria 2019, p. 3). “AI is better understood as referring to automated inferences and is better described as machine intelligence” (Mireille Hildebrandt, “The Artificial Intelligence...”, op.cit., p. 74).

<sup>69</sup> Australian Law Reform Commission, *The Future of Law Reform...*, op.cit., p. 28.

<sup>70</sup> K. Miller, “The Application of Administrative...”, op.cit., pp. 28–29. M. Zalnieriute, L. Bennett Moses, G. Williams (“The rule of law...”, op.cit., p. 15) highlight that “[e]valuations and testing can be used to ensure that systems satisfy stated requirements, whether based on predictive accuracy or equal treatment of groups. and comply with other information obliga-

cedure<sup>71</sup>. When an automated system does not offer the necessary guarantees, it should not be applied<sup>72</sup>. For instance, “machine learning that cannot be rendered transparent and comprehensible may not be appropriate where it is used to make decisions that have greater effects upon the lives and liberty of individuals”<sup>73</sup>.

Many decisions require the exercise of discretion and, in various cases, different factors need to be weighed against each other and be finely balanced. In such cases, it seems difficult to use an automated system<sup>74</sup>. It is argued that automation can replace discretion by applying strict criteria, and that, as so, it depends on criteria chosen, but the question is whether it corresponds to the removal of evaluation moments<sup>75</sup>, noting also that administrative decisions are

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tions” (emphasis added). The *Tribunale Amministrativo Regionale per il Lazio*, Section 3-bis, in the Judgment of 21 March 2017, No. 3742 ordered “the release to the applicant party of a copy of the so-called source codes of the software of the algorithm for managing the mobility procedure of teachers” (available at <https://www.foia.gov.it/sentenze-tar/>).

<sup>71</sup> “[C]ontrollers cannot rely on the protection of their trade secrets as an excuse to deny access or refuse to provide information to the data subject” (Article 29 Data Protection Working Party, 17/EN, WP251rev.01, op.cit., p. 17). From the perspective of the rule of law and “in government decision-making in contexts that directly affect individuals” (M. Zalnieriute, L. Bennett Moses, G. Williams, “The rule of law...”, op.cit., p. 14), the software used should not be protected by trade secret. When a government agency outsources the building of or licence the use of an automated system, should guarantee that the contractual terms do not prevent the necessary disclosure. It must be borne in mind that the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, “respects the fundamental rights and observes the principles recognised in particular by the Charter, notably ... the right to good administration, and in particular the access to files” (Recital 34).

<sup>72</sup> Namely, “AI systems that are complex to a degree that they cannot be subjected to human review and scrutiny by appropriate standards of transparency and accountability” shall not be used – *Unboxing Artificial Intelligence...*, cit., p. 19.

<sup>73</sup> M. Zalnieriute, L. Bennett Moses, G. Williams, “The rule of law...”, cit., p. 26.

<sup>74</sup> According to *Australian Automated Assistance in Administrative Decision-Making, Better Practice Guide*, 2007 (p. 4), “expert systems that make a decision – as opposed to helping a decision-maker make a decision – would generally be suitable only for decisions involving non-discretionary elements” and should not automate the exercise of discretion” (p. 74). “A hallmark of an automated system is its ability to examine a set of circumstances...by applying ‘business rules’...to ‘decide’ dynamically what further information is required, or what choices or information to present to the user, or what conclusion is to be reached.”

<sup>75</sup> Melissa Perry and Alexander Smith state that there is a “risk that the removal of discretionary or evaluative judgments may result in unfair or arbitrary decisions” – “iDecide...”, cit., p. 7. Marion Oswald argues: “Algorithms should not be inserted into a process that requires the exercise of discretion by a public authority where the algorithm prevents that discretion; either because all of the factors relevant to the decision cannot be included, or required elements of the decision itself cannot be appropriately codified into, or by, the algorithm.” (“Algorithm-assisted decision-making in the public sector: framing the issues using administrative law rules governing



not, as a rule, entirely discretionary or binding. The Italian *Consiglio di Stato* stated in the Judgment of 8 of April 2019, n. 2270, that the algorithmic rule “cannot leave room for discretionary application (of which the computer is devoid), but must reasonably foresee a defined solution for all possible cases, even the most unlikely (which makes it partly different from many general administrative rules); administrative discretion, if certainly cannot be delegated to the software, is therefore to be found when the digital instrument is designed”<sup>76</sup>.

#### 4. THE TECHNOLOGY AND THE SIGNIFICANCE OF THE EXECUTIVE FUNCTION

The use of algorithmic decision systems has been putting administrative “decisions at the front and centre of public debate”<sup>77</sup> and it calls for renewed reflection on the exercise of the executive function. The history of executive function is the history of the difficult relationship of those who exercise it with the law, with politics and with the people that public administrations should serve. William J. Novak, writing about the Administrative State in America<sup>78</sup>, recalls Woodrow Wilson and Herbert Croly, to highlight that the first author stated that “[t]he field of administration is the field of business (...) removed from the hurry and strife of politics”<sup>79</sup>; and to stress that the second one sets out that “[t]he progressive democracy is bound to be as much interested in efficient administration as it is in reconstructive legislation”<sup>80</sup> and that it “cannot get along without an adequate and efficient administrative organisation”<sup>81</sup>. In the same vein and later, Edward Rubin upholds that “the modern administrative state is a distinctively new mode of governance, founded on the principle of instrumental rationality.

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discretionary power”, p. 22 (June 25, 2018), *Philosophical Transactions A: Mathematical, Physical and Engineering Sciences* (2018) doi:10.1098/rsta.2017.0359. Available at SSRN: <https://ssrn.com/abstract=3216435> – accessed on January 12, 2020).

<sup>76</sup> Point 8.2, second indent (own translation from the Italian Judgment) – available at <https://www.giustizia-amministrativa.it/>.

<sup>77</sup> *Understanding algorithmic decision-making*, cit., p. III.

<sup>78</sup> “The Administrative State in America”, [in:] *The Max Planck Handbooks in European Public Law*, Volume I, The Administrative State, edited by S. Cassese, A. von Bogdandy and P. Huber, Oxford: Oxford University Press, 2017, p. 118 (pp. 98–124).

<sup>79</sup> “New Meaning of Government”, *Political Science Quarterly*, Volume II, 1887, Vol. 2, No. 2 (Jun., 1887), p. 212 (pp. 197–222).

<sup>80</sup> “State Political Reorganisation”, in *Proceedings of the American Political Science Association*, Vol. 8, Eighth Annual Meeting, 1911, p. 132 (pp. 122–135) – [https://www.jstor.org/stable/3038400?seq=11#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/3038400?seq=11#metadata_info_tab_contents) (accessed November 11, 2019).

<sup>81</sup> “State Political Reorganisation”, cit., p. 132.

Procedural requirements should be based on this principle and should apply to all administrative action...<sup>82</sup>.

The use of technology in decision making refocuses the very concept of executive application of the law from both perspectives that stand out from the aforementioned literature. On the one hand, it creates or makes use of an administrative intermediate rationality. On the other hand, it improves the administrative citizenship<sup>83</sup>. Rationality refers to the accuracy of the decision, both on facts and on law. This means improving the quality of administrative decision and the range of citizens' rights against or within administrative activity. In a complex system, where the administration has privileged access to information and uses computerized decision-making methods, it has necessarily the burden of demonstrating that the decision made is legally and factually correct. Accuracy also means recognizing the importance of rights (procedural<sup>84</sup> and substantive rights<sup>85</sup>) of administrative citizenship. Lilian Edwards and Michael Veale relevantly highlight that “[r]ights become dangerous things if they are unreasonably hard to exercise, or ineffective in results, because they give the illusion that ‘something has been done’ while in fact things are no better”<sup>86</sup>. The shift to the

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<sup>82</sup> “It’s Time to Make the Administrative Procedure Act Administrative, Cornell Law Review, 2003, Volume 89, Issue 1, p. 95. (available at: <http://scholarship.law.cornell.edu/clr/vol89/iss1/2> – (accessed November 11, 2019).

<sup>83</sup> For instance, Giovanna De Minico writes: “L’accesso alla rete, così inteso, rende uguali coloro che tali non erano a causa delle differenti condizioni di partenza: agisce come una leva capace di rimuovere gli ostacoli materiali ed economici che si frappongono al pieno sviluppo della persona (art. 2 Cost.), consentendole l’effettivo esercizio delle libertà fondamentali, quali la manifestazione del pensiero e la comunicazione intersoggettiva, nell’ambiente digitale. La missione equilibratrice del diritto di accesso, in definitiva, lo rende funzionale all’uguaglianza sostanziale, di cui all’art. 3 Cost.” (“Accesso a Internet tra mercato e diritti sociali nell’ordinamento europeo e nazionale”, *federalismi.it*, ISSN 1826-3534, numero speciale 4/2019, p. 127).

<sup>84</sup> Such as the right to be guided through an e-service in accordance with an ethical code or to be advised concerning the relevant procedural rights, the right to be heard and the right to have access to the file.

<sup>85</sup> Such as the right to be given reasons.

<sup>86</sup> “Enslaving the algorithm...”, cit., p. 7; Council of Europe, *Study on the human rights dimensions of automated data processing techniques (in particular algorithms) and possible regulatory implications*, DGI(2017)12, 2018, p. 43, <https://edoc.coe.int/en/internet/7589-algorithms-and-human-rights-study-on-the-human-rights-dimensions-of-automated-data-processing-techniques-and-possible-regulatory-implications.html>: “As decision-making processes by human beings are not necessarily ‘better’ than but simply different from automated decision-making systems, different kinds of bias, risk or error are likely to develop in automated decision-making.” In terms of discrimination, Walden noted “that while discrimination can be built into such systems, they also have the ability to identify bias and variance” (Centre for the Rule of Law, *Artificial Intelligence...Report*, op.cit., p. 8).

digital or technological sphere can make the difficulties of exercising those rights more evident, and, therefore, public authorities cannot fail to impose a legal discipline that best guarantees them. These have the main responsibility to ascertain the fidelity of the translation of law into code by computer programmers (that seldom do not have legal training)<sup>87</sup>. They must also be able to demonstrate that the used algorithm is the computational translation of the normative premises relevant to the decision and, so, that it is legally sound. That is why they should involve themselves in the design and maintenance of software applied to decisions for which they have the legal competence<sup>88</sup>. Moreover, “the right to obtain human intervention on the part of the controller” implies that he “has the authority and competence to change the decision”<sup>89</sup>. The responsibility can also be related to the degree of transparency secured by the public authority, regarding what was decided about “what output of the system will be and whether it will include reasons for its conclusions or decisions”<sup>90</sup>.

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<sup>87</sup> M. Perry, A. Smith, “iDecide...”, op.cit., p. 5. The training of decision-makers and legal professionals should include necessarily mandatory computer literacy. With regard to the blockchain, Luigi Buonanno (“Civil Liability in the Era of New Technology: The Influence of Blockchain as the Backbone of a New Technology-based Civil Liability Regime”, European Law Institute, 2019, p. 11) argues that “it is logical and fair that such risks be assigned ... to the blockchain operator, for it is the operator that is obliged to guarantee the maximum security of the technological service made available to the users and, in a cost-efficient manner, to prevent the service from being harmful”.

<sup>88</sup> Melissa Perry and Alexander Smith, “iDecide...”, op.cit., p. 6; French *Conseil Constitutionnel* Decision No. 2018-765 DC of 12 June 2018, n° 70. Walden “suggested that in the absence of an accountability mechanism built into the AI application and if you are not able to account for the way the decision has come about, the methodology, the data and the process, then the evidential presumption is that your application has caused the harm and you will be responsible” (Bingham Centre for the Rule of Law, *Artificial Intelligence...*, cit., p. 8). Monika Zalnieriute, Lyria Bennett Moses and George Williams underline: “While it is the system that ‘makes’ decisions, the officers are obliged by law to take responsibility for them and to communicate the decisions to the customers by editing the default formulation and signing it.” (“The Rule of law...”, op.cit., p. 12). Finale Doshi-Velez and Mason Kortz highlight: “System designers should design systems to learn these human-interpretable terms, and also store data from each decision so that is possible to reconstruct and probe a decision post-hoc if needed. Policy makers should develop guidelines to ensure that the explanation system is being faithful to the original AI.” (Accountability of AI Under the Law..., op.cit., p. 9).

<sup>89</sup> Article 29 Data Protection Working Party, 17/EN, WP251rev.01, *Guidelines on Automated individual ...*, cit., p. 21; Judgment of the Italian *Consiglio di Stato*, Sez. VI, of 13 December 2019, n. 8472, Massima, n. 14, in particular, n.14.4 (available at <https://www.giustizia-amministrativa.it/>).

<sup>90</sup> M. Zalnieriute, L. Bennett Moses, G. Williams, “The rule of law...”, cit., p. 14.

## 5. CLOSING REMARKS

The use of technology can be an opportunity to overcome the fragilities of administrative procedure law compliance issues<sup>91</sup> and it is also a reason to reflect on the tasks to be performed at each of its phases. It redefines the gathering of information and evidence, reinforcing the principle of investigation, which implies a higher accuracy of fact-finding with less burden on individuals. Ensuring procedural rights in an automated decision making requires further attention on how to make them effective. It requires public administration to adjust the way it understands and applies the procedural obligations and secure procedural rights. As a result, it is expected to be easier for individuals to exercise their rights of freedom (such as freedom of economic initiative) and their social rights (like access to social benefits<sup>92</sup>, which are very much dependent on the former or on procedural conditions<sup>93</sup>.

The use of technology – the extent and how to use it – implies human design choices and meaningful and accurate human intervention in automated decision-making. If none of the approaches to automated decision-making considered to remove humans from the process entirely – inasmuch as they “decide which processes to automate and what techniques to deploy, as well as identify data or rules that will form the basis for inferences”<sup>94</sup> – then what is important is,

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<sup>91</sup> Katie Miller wonders “whether technology-assisted decision-making is capable of achieving the same administrative law outcomes as human-only decision-making” (“The Application of...”, cit., p. 20). The question is rather to know how it can help achieving better administrative outcomes than human-only decision-making. It is “believe[d] that if appropriate accountability measures are taken, in certain situations algorithmic decision systems have the potential to improve transparency and reduce unfairness and discrimination” – *Understanding algorithmic decision-making* ..., cit., p. VII.

<sup>92</sup> As is the case of “financial aid to students in Sweden for their living costs, which includes grants and various loans” (M. Zalnieriute, L. Bennett Moses, G. Williams, “The rule of law...”, cit., p. 12).

<sup>93</sup> “The protection of fundamental constitutional rights must also be a concern of administrative procedure, and that these fundamental constitutional rights shall influence not only material law, but also procedure, in as far as this is required to adequately protect these rights” – BVerfG 53 (1979), translation by Hermann Pünder, “German Administrative Procedure in a Comparative Perspective...”, cit., p. 944.

<sup>94</sup> M. Zalnieriute, L. Bennett Moses, G. Williams, “The rule of law...”, cit., p. 9; and D. Lehr, P. Ohm, “Playing with the Data: What Legal Scholars Should Learn about Machine Learning”, *University of California Davis Law Review*, 2017, Volume 51, p. 717 [pp. 653–717] (“From the moment these humans conceptualize a predictive task to the moment the running model is deployed, they exert significant and articulable influence over everything from how the data are cleaned to how simple or complex the algorithm’s learning process is. Along the way, they have the power to affect the running model’s accuracy, explainability, and discrimination.”).

not only to secure that the rule of law is not “displaced by the rule of computer code”<sup>95</sup>, but that this is an opportunity to better implement rule of law.

Hence, the human disintermediation in conjunction with human intervention<sup>96</sup> could have advantages in terms of a more objective, fair and efficient administrative procedure and public administrations.

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<sup>95</sup> Bingham Centre for the Rule of Law, *Artificial Intelligence, Big Data and the Rule of Law Event Report*, cit., referring to Christina Blacklaws, p. 1.

<sup>96</sup> M. Zalnieriute, L. Bennett Moses, G. Williams, (“The rule of law...”, cit., p. 26) highlight “the need to consider consistency and predictability not only over time but also as between automated and human systems”.

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