

# **The Judicial Review of the Automated Administrative Act\***

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**ABSTRACT** More and more, administrative authorities are using algorithms to improve the efficiency of public decision making. Although algorithms are supposed to guarantee the neutrality, speed and adequacy of the decision, they nevertheless give rise to questions, which are now submitted to the judge. But is jurisdictional review, designed to control the human decision, adapted to a decision taken on the basis of an algorithm?

This question, largely unexplored, has been raised on the occasion of a more general study on the use of digital technologies by administrations and (administrative) judges, a study proposed by the French Society of Comparative Legislation and the University of Leiden\*. On the basis of a questionnaire sent at the end of 2018 to their correspondents throughout the world, the national responses to the theme of judicial review of decision-making processes based on algorithms were rather elliptical, due to the lack of litigation in the States surveyed. However, the disputes that have been brought to our attention through this survey are very instructive.

Litigation has crystallized on questions relating to the legal foundations of control. In this respect, certain French and Dutch cases offer particularly interesting avenues for reflection, revealing major trends on two issues: The question of communication of the algorithm is the one that comes up most often (I), as well as the question of its supervision (II).

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## **1. Communication of the algorithm**

Few states, like France, have enshrined in law a right to the communication of the algorithm. But in some countries, cases have allowed the judge to make progress on these questions. The few cases reported were precisely the occasion to raise the question of the communicability of the algorithm or source code at the origin of the administrative decision. It seems that the judge is reluctant to devote systematic communication of the codes and algorithms used by the administration, even when a text invites him to do so.

In France, since the law for a digital Republic (LRN) of October 7, 2016, source codes are included in the list of communicable administrative documents<sup>1</sup>. Consequently, algorithms used in the context of public service missions<sup>2</sup> must be communicated to “any person requesting them”, provided that they do not fall under the classic exceptions<sup>3</sup> (secrets, personal data requiring anonymization, in particular). In addition, the law requires the online publication of the rules defining the main algorithmic treatments used in the accomplishment of their missions when they form the basis of individual decisions, provided that such dissemination does not infringe on secrets protected by law<sup>4</sup>. These disclosure obligations are coupled with an

unprecedented right to information whereby, if an individual decision is taken on the basis of an algorithm, it must mention it in order to inform the person concerned. In concrete terms, the rules defining the processing and the main characteristics of its implementation must be communicated to the interested party who requests it. The right to communication is thus clearly enshrined.

However, the judge has applied these texts with caution.

The case of the Parcoursup algorithm is particularly emblematic. It is undoubtedly one of the best-known algorithms in France: every year, it processes the wishes of more than 850,000 candidates for higher education and has been the subject of intense and high-profile litigation. The Parcoursup procedure consists of two stages: one based on a national platform that collects the wishes of candidates, and the other on a local procedure for the examination of applications by universities. It is the algorithmic tool for decision support at the local level that is at the origin of this dispute, and more precisely, its non-communication.

The problem was that the Law of Student Orientation and Success (ORE law) which created Parcoursup provides only limited communication of algorithms (A. L. 612-I al. 5 Education) contrary to what is provided for in the LRN. Indeed, if the national algorithm is published, the local algorithms are communicated only to applicants who request them, and once the decision is taken. So an appeal was made against the refusal of communication of the local algorithm by a student association (Unef). The judge initially allowed this appeal (Administrative Court of

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*L'action publique et le numérique*, Actes du colloque du 22 novembre 2019, Ed. Société de législation comparée, à paraître: <https://www.legiscomparé.fr/web/Activites-de-la-section-921>.

<sup>1</sup> Art. L.300-2 Code of Relations between the Public and the Administration (CRPA).

<sup>2</sup> Art. L. 311-1 CRPA.

<sup>3</sup> Art. L.311-5 CRPA.

<sup>4</sup> Art. L. 312-1-3 CRPA.

Guadeloupe, February 5, 2019, Unef). However, the Council of State (CE) returned to a more orthodox reading of the ORE law, and concluded that the local algorithm was communicated only to the criteria and procedures for examining applications and the pedagogical reasons justifying the decision taken, and only to the candidates concerned (CE 12 juin 2019, Université des Antilles). But the litigation continued before the Constitutional Court (CC). Indeed, Unef requests the CC to declare the exemption from disclosure provided for in the ORE Act unconstitutional. In its decision of April 3, 2020, the CC first enshrines the Right to Communication of Administrative Documents as a constitutional right based on Article 15 of the Declaration of the Rights of Man and of the Citizen. But he adds that the legislator may limit this right if the general interest justifies it and if the limitations are not disproportionate. According to him, in this case, the limitations are not disproportionate. Indeed, He considers that the limitation to communication is justified by the secrecy of the deliberations and it is not disproportionate because guarantees are provided (informing the public beforehand, communication to candidates after the procedure). However, the CC expressed an “interpretive reservation”, saying that the provision, to be constitutional, must not prevent third party access to information once the procedure is completed.

Therefore, institutions are invited to publish, at the end of the procedure, the criteria according to which they processed the files but the CC does not require them to communicate the exact configuration of their algorithm.

Thus, for reasons relating to the preservation of certain secrets, the judge imposes on the administration to deliver to the applicant only that which seems to him essential to the understanding of the decision. The right to communication is thus progressing in a measured way.

## 2. Supervision of the algorithm

Disputes related to the control of algorithms raise two sets of questions for the time being. The first concerns their explicability. The obligation to give reasons for administrative decisions is now well established in most Western countries. The obligation to motivate presupposes that “the author of the decision must fully and precisely set out the factual and legal reasons for which it is taken”. If the decision was made using an algorithm, does this only mean that the author must specify that fact, or must he or she further explain how the algorithm works? The Dutch and French judges who have been confronted with this question seem to expect explanations from the administrative authority on

how the algorithm works, since the understanding of the final decision depends on it.

In France, the constitutional judge has thus prohibited the use of self-learning algorithms to make individual administrative decisions exclusively based on algorithms (CC dec. 12 June 2018, n°2018-765 DC), because the judge is aware of the fact that the administration cannot explain how these algorithms work. Also, in accordance with the GDPR, if the judge has validated the possibility of taking individual administrative decisions exclusively based on an algorithm, it is only because he considers that the legislator provides sufficient guarantees: in particular when it obliges data controllers to master the algorithm and its evolutions and to be able to explain the algorithm (CC dec. 12 June 2018). But isn't this injunction illusory? Making the algorithm intelligible to citizens is a real challenge, essentially for two reasons: firstly, because translating lines of code into human language is a complex task; and secondly, because it is difficult to identify the perimeter of the code's opening, integrating the elements necessary for a global understanding of the system, while excluding modules that present security risks.

In the Netherlands, the judge is particularly demanding on this subject. The State Council decision - May 17, 2017 - about AERIUS algorithm (used to deliver land use permits based on nitrogen deposition) and the Hague District Court decision - February 5, 2020 - about the SyRi algorithm (program to fight tax fraud) are interesting decisions. In the first case, the Dutch judge sanctioned the administration's inability to explain the functioning of the algorithm (2017). Thus, he imposes on the administration to choose algorithms that are accessible to the litigants. In the second case, the lack of transparency also prevents the judge from controlling the algorithm (2020). In this case, for SyRI, he could not control whether the invasion of privacy was not disproportionate to the objective of fighting fraud. The judge adds, concerning SyRI, that it cannot be excluded that the deployment of the algorithm in sensitive neighbourhoods could lead to discrimination of citizens in these areas. Thus, in a way, he prohibits the administration from using this algorithm.

Still on the issue of supervision, another question arises, that of the problem of competence of administrative authority. Public authority has been invested by a text to take an act. It cannot, in the absence of a text, delegate its competence. In France, for example, the holders of regulatory power are vested with this power by the Constitution or the law: this means that it is forbidden to alienate the power thus conferred. The invested authority must keep control over the final decision.

In this legal context, the use of the algorithm can thus only be an aid to decision making. The public authority remains in control of the final decision.

This is a problem in the case of discretionary power: while in Germany, Art. 35 of the procedural law prohibits the use of algorithms in a situation of discretionary power, in many States, as in France, it is not prohibited. However, the operation of the algorithm, parameterized in advance according to predetermined general rules that will apply to particular situations to the strict extent that they too will have been predefined, is contrary to the very idea of discretionary power. However, the French Constitutional Court considered that, insofar as the provisions that provide for the use of the algorithm are limited to “authorizing the administration to make an individual assessment of the situation of the citizen, by means of an algorithm, according to the rules and criteria defined in advance by the data controller”, “they have neither the object nor the effect of authorizing the administration to adopt decisions without a legal basis, nor to apply rules other than those of the law in force”. Therefore, the judge considers that the legal rules and criteria that the algorithm reproduces are defined in advance by the administration. They are therefore based on a legal basis, and there is therefore “no abandonment of regulatory power” (CC Dec. 12, 2018).

For the time being, therefore, the judge does not follow the doctrine which, however, warns more and more about the risks of an apparent control of the algorithmic decision.

I would like to conclude by questioning the relevance of a jurisdictional control which remains, for the time being, modelled on that which applies to acts adopted in a more traditional manner. The control is based on classical foundations such as communication, motivation or competence, which seem appropriate to challenge algorithmic acts. However, it is worth noting the audacity of the Dutch judge who, in his review of the legal characterization of the facts, was able to annul a decision based on an algorithm whose administration had not shown that its use was not excessively prejudicial to freedoms. It is highly likely that, following the example of the Dutch judge, the judges will become emboldened and that the lack of transparency, inherent in the use of algorithms, will lead to a multiplication of jurisdictional sanctions. It will be a question of finding the “right balance” to avoid hindering the use of algorithms, whose importance in informing public decisions is now more than ever understood.

