

The Responsibility in Automated Administrative Decisions*

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ABSTRACT This paper dwells on the issue of responsibility in automated administrative decisions. From this perspective, on the one hand, the participation of the administrative official is considered as necessary – even simply in terms of supervision and control – in the case of procedural activities executed by software and, on the other hand, it is necessary to question the possibility of resorting to the organic theory to face decisions' attribution problems is explored.

1. The automated administration: an overview

The reasoning about administrative decisions in a future-oriented perspective implies the need to consider the possible use of technology and challenges of the algorithmic society. The need to implement the use of technology in the public sector has been particularly felt, for its potential to increase accessibility, security, efficiency, transparency and simplification.¹ Indeed, the algorithm is the focus of a new debate on the possible use of new technologies in the legal field. The potential of the digital revolution has attracted a growing interest since, in recent years, the interaction between technical-scientific knowledge and social structures has increased. In various sectors, algorithms are identified as instruments of redemption to correct systematic distortions, exclude human emotions and errors, take neutral and efficient decisions and improve the overall administrative action. Human beings' debatable evaluations can be replaced with objective and rational machines' choices, that are characterized by an intrinsic neutrality.

In this way, there would be less errors and doubts and the general distrust in human choices would also disappear. Benefits

increase even more with regard to public authorities, since the particular status of the administration originates an idyllic search for impartiality in the fulfilment of choices and assessments. In other words, algorithms would make possible to create a perfect administration.

Nevertheless, a different and much critical orientation about society's robotization has made its way, not excluding the wide scope of digitalization, but circumscribing its benefits. Indeed, even the use of algorithms imposes some evaluations in the choice of relevant data, selection criteria or models to be developed. These choices are not neutral or irrelevant and influence the final robotic decision. In fact, every action (consciously or unconsciously) taken by a human being who works alongside the software inevitably influences it. Thus, also algorithms that have been established to exclude human choices, requires subjective evaluations for their operation.

All of this means that human discretion is not nullified, but simply changes in its form, assuming relevance in the algorithm programming and in the data choice.

However, the use of algorithms requires something more than a mere digitization² since the technology is not used to shape a decision taken by the public administration, but to determine its content.³ In fact, the application of an algorithm is quite different from the digitization.⁴ This last phenomenon

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¹ M.A. Sandulli, *Il procedimento amministrativo e la semplificazione*, in *Jus publicum*, No. 4, 2012, 57. According to the author, interventions designed to streamline and simplify the administration must not be limited to the possibility of using legal instruments provided for and applicable in the procedure. In fact, it must also be possible to use other instruments that can lead to a concrete simplification, such as the use of telematics, because computerization is equivalent to simplification. See also, A.G. Orofino, *La semplificazione digitale*, in *Il diritto dell'economia*, No. 3, 2019, 87.

² On the distinction between digitisation and algorithms, see A. Simoncini, *Profili costituzionali della amministrazione algoritmica*, in *Rivista trimestrale di diritto pubblico*, 2019, 1149.

³ Like this, A. Simoncini, *Profili costituzionali della amministrazione algoritmica*, 1167.

⁴ For S. Del Gatto, *Potere algoritmico, digital welfare state e garanzie per gli amministrati. I nodi ancora da sciogliere*, in *Rivista italiana di diritto pubblico*

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has been in progress for a long time and is also well underway. The digitization started to emerge in the *Rapporto Giannini* of 1979, in which it was hoped that “electronic processors” would be used to reorganize the public administration.⁵ Therefore, digitization can only be the starting point for the automation, that consists in a much more complex procedure, with new variables.

For this reason, nobody has the intention to suggest that the robotization is already realized⁶ and lawyers only have to try limiting further damages or, at least, containing them using the secure garb of legal legitimacy. On the contrary, there is a need for studies aimed at circumscribing robotization’s limits within the meshes of reassuring constitutional guarantees.

The algorithm’s application lends itself to possible criticalities that concerns, on the one hand, technical and human resources and, on the other hand, procedural guarantees.⁷

With regard to the first issue, an investment in structures and human capital is needed, so that computerized decision-making processes can be implemented. Indeed, the introduction of new technologies must be supported by appropriate investments. In this sense, it is necessary to apply some changes to the public apparatus: one cannot speak, on the one side of digital and digitized public administration and, on the other side, of “another” one. Moreover, significant investments in technological innovation and digitization are made possible by the National Recovery and Resilience Plan (PNRR) and allows to implement smart policies and actions for the development of public administration’s information technology.⁸

Concerning the second issue, procedural

comunitario, No. 6, 2020, 830, algorithms and computer systems that process big data go beyond the mere digitization, changing the public administration from within. This is because they change the way in which decisions are made and public policies are developed.

⁵ See A. Simoncini, *Profili costituzionali della amministrazione algoritmica*, 1166.

⁶ This expression refers to R. Cavallo Perin, *Ragionando come se la digitalizzazione fosse data*, in *Diritto amministrativo*, No. 2, 2020, 305.

⁷ In this sense, M. Simoncini, *Lo Stato digitale. L’agire provvedimentoale e le sfide dell’innovazione tecnologica*, in *Rivista trimestrale di diritto pubblico*, No. 2, 2021, 530.

⁸ The mission 1 of the National Recovery and Resilience Plan “digitisation, innovation, competitiveness, culture and tourism” has a total budget of €40.32 billion, of which €9.75 billion is reserved for digitisation, innovation and security in the public administration.

guarantees and the protection of individual rights in algorithmic decisions must be left unprejudiced, setting the benchmark on the principles of responsibility, transparency, legality, non-discrimination and participation.⁹

Therefore, it is necessary to balance opposite demands: those related to the efficiency and simplification of the administrative action and the ones linked to the protection of individuals and involved public interests. This is because digitization cannot be imposed in breach of general principles of administrative law, which must form barriers against new forms of automated measures. Thus, it is required to start a transformation process that allows to adapt computer software to constitutional requirements and citizens’ full protection, even if it implies a revise (*rectius*: rethink) of the administrative organization.

2. The principle of responsibility and the automated administrative decision

The issue of the robotization of the public administration (and its choices) should not be separated from a prior discussion on the responsibility, that consists in a necessary and indispensable condition for speaking of automatized choices,¹⁰ even abstractly.

In this perspective, it is necessary to focus on two circumstances: why and how talk about responsibility in respect to the use of algorithms in automated decisions, that is, which responsibility imputation model it is needed to be adopted. This is because the responsible entity for decisions taken, and acts adopted through an algorithm constitutes a necessary condition in western democracies: it is not possible to speak of the rule of law without an appropriate system of responsibility attribution.¹¹

With regard to automated decisions, it is necessary to avoid two antithetical situations: one that would lead to an always responsible administration and the other that would steer

⁹ M.C. Cavallaro and G. Smorto, *Decisione pubblica e responsabilità dell’amministrazione nella società dell’algoritmo*, in *Federalismi*, 2019, 19.

¹⁰ On the centrality of this issue in the legal context, see A.G. Orofino and G. Gallone, *L’intelligenza artificiale al servizio delle funzioni amministrative: profili problematici e spunti di riflessione*, in *Giurisprudenza Italiana*, 2020, 1745.

¹¹ See C. De Nicola, *Illecito del dipendente e imputazione della responsabilità alla pubblica amministrazione*, in *Diritto amministrativo*, 2021, 917.

the system away from responsibility.¹² We could not even abstractly talk about administrative automation without clarifying, with reasonable certainty, who is to be held responsible and in which terms. The basic problem, however, is that today there is a logical inversion in the relationship between legal categories and innovations. That is, first new technologies are applied, and then problems that arise each time are framed in existing legal categories. Moreover, this path must be reversed, at least for what concerns responsibility. We cannot use machines and identify the person responsible after the damage has occurred, and this is also (and above all) to guarantee citizens who must know in advance who they can act against.

The starting point consists in the principle of responsibility and the existing constitutional framework.¹³ The article 28 of the Italian Constitution establishes officials' responsibility for acts committed in breach of rights. Results to be unquestionable the interpretation according to which, despite the literal fact, there is a direct responsibility of the administration as a result of the application of the theory of organic identification. Thus, although acts are materially adopted by the public official, both acts and effects are attributed to the administration, by means of the relationship of identification between the organ and the public body.

Clearer is the provision contained in the Article 97 of the Italian Constitution, in which, in addition to the legal reserve that ensures public administration's impartiality and good performance, it is specified that officials' spheres of competence, powers and responsibilities are established in the organization of offices.

Therefore, the Italian Constitution requires a link between the responsibility for the adoption of an authoritative act and a public official, for the obvious reason that an act capable to affect unilaterally the legal sphere

of individuals must always be controlled by public authorities, through the participation of the public official in the decision. Moreover, this control attributes responsibility to the public administration, using the theory of organic identification. This is particularly important for algorithms' use. In fact, the robotization of the administration pursues, the opposite need: that is, to remove the human contribution from the decision, in the idyllic belief that replacing human beings' debatable evaluations with machines' objective and rational choices can lead to a neutral and efficient administrative action.

However, the Constitution sets a limit on the use of automated choices, requiring that there must be a link between the act and the official. It follows that robotization should be excluded, whenever it is not possible for a person belonging to the administration to intervene in the decision, even in terms of supervision and control. In other words, automation should be allowed only if it is possible to have an effective intervention of the official, with respect to the automated decision.¹⁴

In this sense, it is referred to the principle of non-exclusivity of the algorithmic decision, that derives from the provisions of Article 22¹⁵ of the General Data Protection Regulation (GDPR) and is also accepted by national and EU case law.¹⁶ In fact, judges of the Council of State, require a human contribution in the decision-making process, capable of checking, validating or refuting the automatic decision.¹⁷

¹⁴ I.M. Delgado, *La riforma dell'amministrazione digitale: un'opportunità per ripensare la pubblica amministrazione*, in L. Ferrara e D. Sorace (eds.), *A 150 anni dall'unificazione amministrativa italiana*, Florence, Firenze University Press, 2016, 133, the author clarifies that the presence of an automated decision – moreover, even if there is no contribution by a person – it does not imply that the authorship of the act is attributed to the algorithm, always having to fall on the administrative body that holds the power and exercises it.

¹⁵ “The data subject has the right not to be subject to a decision based solely on automated processing”.

¹⁶ Council of State, Sec. VI, 13 December 2019, No. 8472 and Council of State, Sec. VI, 4 February 2020, No. 881, according to which there must in any case be a human contribution in the decision-making process capable of checking, validating or refuting the automatic decision. In mathematics and computer science, the model is defined as HITL (human in the loop), in which it is necessary that the machine interacts with the human being, in order to produce its result.

¹⁷ Council of State, Sec. VI, 13 December 2019, No. 8472 and Council of State, Sec. VI, 4 February 2020, No. 881.

¹² A.G. Orofino and G.R. Orofino, *L'automazione amministrativa: imputazione e responsabilità*, in *Giornale di diritto amministrativo*, No. 12, 2005, 1306, underlines that it is necessary to establish some criteria for the attribution of the responsibility, in order to avoid a kind of depersonalisation of the administrative action by means of computers, that allows to escape from responsibility.

¹³ For a deeper view, M.C. Cavallaro, *Immedesimazione organica e criteri di imputazione della responsabilità*, in *P.A. persona e amministrazione*, No. 1, 2019, 41.

In application of this model, known in informatics as human in the loop (HIDL), human participation in the machine's activity is indispensable for the final result.¹⁸ In this sense, one can understand the need to recover (*rectius*: preserve) the human element in administrative decisions, in order to safeguard their increasingly necessary dignity.

However, the European formulation of the non-exclusivity principle and the one of the national case-law do not completely coincide, since the orientation adopted by local judges tends to be more flexible, considering human participation as sufficient, even if only in terms of control and supervision. In any case, the intention of the European legislator is to exclude the admissibility of fully automated decisions. This has a central role in the relationship with the principle of responsibility and makes it indispensable for individuals belonging to the public administration, to assess compliance with legal parameters and consistency between the model used and the intended one.

However, an effective control is not always possible, and it is important to prevent the creation of an absolute-responsibility system, which would always bring the administration to account even if the public official could not carry out a check or a verification, even abstractly. In this sense, the Italian Constitution sets a limit on the use of the algorithm. In fact, if it is not possible to trace the act back to the official, due to impossibility of carrying out controls, the automated decision should be excluded.

To better understand the foregoing, it is necessary to start from a twofold consideration: the first concerns the type of decision that the machine could adopt, and the second concerns the type of algorithm that can be used.

Regarding the first question, the algorithm could be adopted for serial and standardized

procedures (constrained activity) or with respect to discretionary activity. The exercise of the bound power requires only the unambiguous identification of assumptions followed by predetermined results. In this sense, the automated procedure is well suited to handle necessary steps, speeding up procedures and reducing their duration. This would become particularly complex in the hypothesis of discretionary choices, since it would be necessary to implement a comparative evaluation of several interests, in order to enforce the final decision. In this way, the algorithm could play a role that is not only limited to the impersonal collection of data necessary to make a binding decision, being able to constitute a system for the formation of the procedural will itself.¹⁹

With regard to the second question, making the discourse as simple as possible, the term "algorithm" refers to a clear and unambiguous set of instructions drawn up to solve a problem.²⁰ In this sense, it is only able to execute entered commands, in order to automate procedures. In other words, it operates in an objective sense: the same inputs will always produce the same outputs.²¹

Alternatively, the algorithm can interact with artificial intelligence systems²² and this makes possible to develop a self-learning software. The algorithm is able to make "intelligent" choices autonomously. In fact, the use of so-called machine learning means that the algorithm, which has a good degree of controllability, can develop its own

¹⁸ This model has been positively accepted in doctrine, *ex multis*, E. Carloni, *I principi della legalità algoritmica*, in *Diritto amministrativo*, No. 2, 2020, 294; V. Neri, *Diritto amministrativo e intelligenza artificiale: un amore possibile*, in *Urbanistica e appalti*, No. 5, 2021, 581; M.C. Cavallaro, *Imputazione e responsabilità delle decisioni automatizzate*, in *European Review of Digital Administration & Law*, vol. 1, issue 1, 2020, 70; A. Simoncini, *Profili costituzionali della amministrazione algoritmica*, 1186. The latter author points out that human participation in algorithmic activity is inevitably influenced by ethical principles that must govern the use of machines.

¹⁹ M.C. Cavallaro and G. Smorto, *Decisione pubblica e responsabilità dell'amministrazione nella società dell'algoritmo*, 16.

²⁰ In this sense, *ex multis*, P. Ferragina and F. Luccio, *Il pensiero computazionale. Dagli algoritmi al coding*, Bologna, Il Mulino, 2017, 10.

²¹ G. Gallone, *Il Consiglio di Stato marca la distinzione tra algoritmo, automazione ed intelligenza artificiale*, in *Diritto dell'internet*, No. 1, 2022, 163. In particular, the Author starts from the judgment of the Council of State of 25 November 2021 No. 7891 and dwells on the distinction between "traditional" automation, that is the mere use of algorithms, and "advanced" automation, through the use of artificial intelligence systems.

²² The first studies on the application of artificial intelligence date back to the Dartmouth Conference in 1956. On the characteristics of artificial intelligence in the modern context, D. Marongiu, *L'intelligenza artificiale "istituzionale": limiti (attuali) e potenzialità*, in *European Review of Digital Administration & Law*, vol. 1, issue 1-2, 2020, 37. For a careful analysis of new risks for public authorities, see A. Barone, *Amministrazione del rischio e intelligenza artificiale*, in *European Review of Digital Administration & Law*, 2020, vol. 1, issue 1-2, 63.

“consciousness”. The reason is that, if for what concerns the mere software, consequences are predictable given the assumptions, with the use of artificial intelligence programs are not limited to commands’ execution but become part of the formation of will: they shape the given rules, producing new ones.²³

In the light of the above, it is clear that the use of the algorithm seems to be sufficient, with respect to constrained activity. In fact, the solution offered by the algorithm is standardized: once identified relevant data, for identical cases the decision will be the same. In such a case, the algorithm is controllable. In fact, once premises have been established, consequences are predetermined, so that verification by the official or the person responsible for the procedure is possible.

When applied to discretionary choices, this mechanism is insufficient. Hence the need to supplement the algorithm with recourse to artificial intelligence, with the consequence that decisions may not be controllable or predictable by the administration nor by the programmer, since there will be a progressive and ever-increasing distancing of the program from the person who chooses. Beyond possible future developments of artificial intelligence, it should be noted that systems adopting this model led to the loss of effective control over the software.²⁴

In this last case, it is necessary to verify the concrete possibility of an intervention of the public administration and if the damage would be represented as certain in any case, regardless of the officials’ degree of diligence and the intervention envisaged; then, the use of machines would be unconstitutional, insofar as taken decisions are not verifiable. Moreover, there would be also the problem of justifying a choice, if it differs from a possible investigation carried out by an individual, without having fully understood its reasons.²⁵

This is not a preclusion for automated administrative decisions, even in the case of discretionary activity. Apart from the aim to limit the administration’s robotization, a

control on a self-learning system is particularly complex. Without considering computer skills, it is easy to see that if (and only if) the official is unable to control and verify the work of the machine, there would either be absolute responsibility, without no control possibility, or there would be no responsibility at all. This would also be inadmissible in practical terms, because no administration would assume responsibility for an uncontrollable act, capable of affecting legal situations of private individuals. Moreover, no legal system could admit the creation of a grey area, in which the administration would not be responsible, even in the presence of authoritative acts. Alternative solutions, such as a programmer’s responsibility,²⁶ are not even abstractly conceivable with respect to an authoritative act²⁷. As perhaps ironically stated in a Resolution of the European Parliament of 16 February 2017 on the relationship between robots and civil law, we would be forced to enhance machines’ decision-making autonomy.²⁸ There is a need to balance the

²⁶ For a different but interesting solution, see E. Picozza, *Politica, diritto amministrativo and artificial intelligence*, in *Giurisprudenza italiana*, 2019, 1657. According to the Author, it is possible to attribute responsibility for omissive or negligent conduct of the A.I. to its programmer and maintainer: in such a case, however, the software engineer who ‘drives the machine’ objectively becomes a public official with all related consequences, including the accounting responsibility case before the Court of Auditors for financial loss; if, on the other hand, one opts for a ‘direct’ responsibility of the machine towards third parties (as normally happens in a ‘real’ administrative office), the responsibility of its programmer and maintainer would still be a civil and recourse responsibility.

²⁷ A.G. Orofino and G.R. Orofino, *L’automazione amministrativa: imputazione e responsabilità*, 1308. According to the Authors, there are three moments of imputation of responsibility: the first concerns those who decided on the programming criteria; the second concerns those who dealt with the investigation phase; the third concerns those who are competent to adopt the act.

²⁸ D. Di Sabato, *Gli smart contracts, robot che gestiscono il rischio contrattuale*, in *Contatto e impresa*, No. 2, 2017, 388. More recently, there are interesting suggestions in S. Civitarese Matteucci, «Umano troppo umano». *Decisioni amministrative automatizzate e principio di legalità*, in *Diritto pubblico*, No. 1, 2019, 5. The Author underlines that there are computer techniques that are able to replicate different humans’ cognitive capacities and the possibility of machine learning. Moreover, G. Carullo, *Decisione amministrativa e intelligenza artificiale*, in *Diritto dell’informazione e dell’informatica*, No. 3, 2021, 342, underlines that in certain circumstances machines’ cognitive capacities can exceed those of humans, taking

²³ G. Gallone, *Il Consiglio di Stato marca la distinzione tra algoritmo, automazione ed intelligenza artificiale*, 163.

²⁴ A. Matthias, *The responsibility gap: Ascribing responsibility for the actions of learning automata*, in *Ethics and Information Technology*, No. 6, 2004, 182.

²⁵ See S. Del Gatto, *Potere algoritmico, digital welfare state e garanzie per gli amministrati. I nodi ancora da sciogliere*, 481.

pursuit of celerity, efficiency and cost reduction (is this feasible today?) with the constitutional principle of public administration's accountability. The Constitution precludes the use of uncontrollable automated choices, insofar as they indirectly lead administrative acts back to the employees.

Therefore, the principle of responsibility could (and should) represent the deadline between a legitimate and possible recourse to the algorithm and an impermissible one. In fact, if an effective control on the decision adopted by the official becomes necessary, also in terms of supervision, then the same must be possible, at least abstractly. Obviously, there is a need to improve human capital's skills, because the legal training of public officials is no longer sufficient.

The paradox is that, in no time, jurisprudence has gone from limiting the use of the algorithm to the mere exercise of the bound power²⁹ to find no reasons of principle, or rather concrete ones, for limiting the use of technology of bound administrative activity, rather than discretionary one,³⁰ even if the reason can be found in the principle of responsibility.

Therefore, another aspect must be emphasised³¹: after clarifying the need of human control, avoiding that the decision remains at the mercy of machines – need which derives from the Constitution and is accepted by the case law – it is necessary to question if, today, the abovementioned control is possible and effective and admit automated decisions only within these limits. This does not exclude the possibility that actual margins of intervention may increase, even in the short terms, with the science evolution. Therefore, with respect to the use of artificial intelligence – and to all systems that want to exclude human intermediation – a concrete control is necessary to assess the possibility of intervening in the decision, if an absolute

from data imperceptible or hardly detectable information.

²⁹ Council of State, Sec. VI, 8 April 2019, No. 2270.

³⁰ Council of State, Sec. VI, 13 December 2019, No. 8472 and Council of State, Sec. VI, 4 February 2020, No. 881.

³¹ Council of State, Sec. VI, 13 December 2019, No. 8474, where it is stated that there aren't reasons of principle, or concrete reasons, for limiting the use to binding rather than discretionary administrative activity, since both are expression of the authoritative activity carried out to pursue the public interest.

preclusion is not to be envisaged.

3. The model of responsibility

After clarifying the need to track the responsibility to the Public Administration and the official, a second question arises: which system should be adopted to attribute the responsibility of the public body for the offence committed in case of automated decisions?

There are two possible solutions: the traditional theory of organic identification, with respect to which it should be questioned whether it is also suitable in relation to algorithms, as an alternative to the system of strict responsibility of the Civil Code.

The discourse on the organic identification is now well known and, according to this theory, acts are considered as carried out by the public body, although if they are materially adopted by the official. Therefore, there is no difference between the individual who acts and the body in which he is incardinated, hence officials' activity is imputed to the administration. In this case, the question is whether to attribute to the organ also machines' activity, in the hypotheses that the person limits himself to carry out supervisory and control tasks, acting through the organ. Therefore, would the organ remain the centre of imputation of the machine's acts even if officials do not materially take the decision, but they merely carry out a control?

The alternative would be to resort to systems of objective responsibility.

The possibility to track back responsibility to the Article 2051 of the Italian Civil Code is suggestive, because this rule is inspired by the need for distributive justice, according to which it is not permissible that consequences caused by inanimate things fall on an innocent person, rather the responsibility is of the person who holds or uses the *res*.³² In this way, the machine is considered for what it really is: a thing, a tool at the service of the administration (an excellent tool, but, however, one of many). In this case, it is necessary that the thing is included in the causal sequence that led to the harmful event, in order to establish the responsibility of Public Administration. Moreover, following the case law, the requirement of dangerousness occurs both if the object has an intrinsic dynamism – that is, dangerous in its

³² Civil cassation Court, 31 May 1971, No. 1641.

functioning – and if the interaction with the damaged party is *a condicio sine qua non* for the event. The algorithm is not dangerous, but it could be, since it is capable of producing damages. It follows that the administration would be responsible both for the damage that depends on an intrinsic situation of the thing (a defective program) and for a harmful element arising in the thing (criteria established by the administration for the automated choice are discriminatory).

This does not seem to be such a negative solution, at least on a first reading. Moreover, since responsibility is objective, the private party is not called upon to prove the subjective element, which is not simple in a technical and complex situation such as the use of machines. The problem has arisen because jurisprudence admits the administration's responsibility for breaching custody obligations, even regardless of possibilities of an effective control, if the damage is caused by intrinsic reasons to the thing.³³ This, compared to an automated decision, would mean an administration that is always accountable.

From the above explanation derives the need to resort to the theory of organic identification,³⁴ which is to be deemed possible and is today also the most reassuring choice, since it is the solution accepted by case law. This is because accepting this model would not distort the system of responsibility imputation to Public Administration, since the case law of the Council of State underlines the need to attribute the decision to the organ holding the power, which must be able to carry out the necessary verification of the choice's logic, its legitimacy and the results entrusted to the algorithm.³⁵

Moreover, if the theory of organic identification represents the theoretical scheme by virtue of which the public administration becomes the imputation centre of acts carried out by a natural person, this model is also the most suitable if the act is referable to a person, even though it is carried out by the machine.³⁶

The problem arises if an official's control is not possible, in which case the applicability of the organic theory would seem to be precluded upstream. In fact, the acts on which the official must carry out a check can be attributed to the Public Administration, even if with a slight forcing; the hypothesis of acts taken 'in conscience and autonomy' by the machines is different, since they are not attributable to public powers, for this reason. Therefore, if someone chooses to impose human participation in decision-making processes, as required by the Italian Constitution, then organic identification is (still) suitable to address the problems of imputation.

4. Brief conclusions

In light of the above, each time it is objectively impossible for the authority to exercise a power of control over the decision the responsibility should be excluded, considering the specific situation. In fact, the responsible for the procedure or the manager responsible for an act must always control the procedure for the formation of the will, in order to analyse eventual results of resorting to the algorithm.

This is because the adopted act must comply with national and international law, with the principles of reasonableness, proportionality and non-discrimination, be clear and, therefore, accessible to the community. It follows that if official's control is not possible, the administration cannot be liable because it would have no real possibility for the prevention of damage.

On the other hand, it would be utopian to ignore that the mankind is far from being replaced by robots and that the actual evolution of science cannot cause most of the problems that today (rightly) catch legal scholars' attention.

Moreover, the principle of responsibility implies the need to maintain the official's control over the software, if applied to automated administrative decision-making processes. In this sense, the public administration is a servant – and not supporting – element of the administration, keeping on public authorities the competence

algorithm to make the final decision. On this issue, A.G. Orofino, *La patologia dell'atto amministrativo elettronico: sindacato giurisdizionale e strumenti di tutela*, in *Il Foro amministrativo CDS*, 2002, 2263.

³³ Civil cassation Court, 15 October 2019, No. 25925.

³⁴ In general, on the theory of organic identification, M.C. Cavallaro, *Immedesimazione organica e criteri di imputazione della responsabilità*, 39.

³⁵ Council of State, Sec. VI, 4 February 2020, No. 881 and Council of State, Sec. VI, 13 December 2019, Nos. 8472, 8473 and 8474.

³⁶ Indeed, there is no reason to exclude the responsibility of the administration if it is used an

and the control over the decision.³⁷

Therefore, the public administration must carry out a twofold verification: on the one hand, to supervise machine's operations and, on the other hand, to identify necessary prerequisites for the algorithm. In fact, the prerequisites' identification implies some consequences. Algorithms have the power to enable and assign significance to relevant circumstances, because different assumptions can lead to different decisions.

Obviously, this would partly shift the problem. The question would not be who or why is liable, but where to place the divide between a controllable automated decision and an uncontrollable one. Alternatively, the judge would be called upon to assess the legitimacy of machines' use in the concrete case and, whenever the automated act could not be traced back to a person belonging to the public administration, even indirectly, it would be null and void because it would contravene to mandatory rules requiring compliance with the principle of responsibility.

This is because the alternative to such a (albeit problematic) balancing act would be the decline of the use of artificial intelligence, even before the era of automated decisions really comes. For the obvious reason that no public administration would take responsibility for uncontrollable decisions, the so-called defensive administration would reach its extreme consequences, in such cases. Alternatively, there would be the opposite solution: a total lack of responsibility for public authorities, a grey area without control. In other words, if uncontrollable decisions were allowed, this would legitimize either an administration that always responds or a never responsible one.

Therefore, with respect to a necessary administration-machines integration, the limit must be found in the Constitution and, therefore, in a responsible administration, because it is the basis of progress and denying it would be anachronistic. This would be a benefit for all: for citizens, who are protected since they can take action against the administration, in any case and for any eventuality; for public officials, who would be called upon to verify only what can be

verified; for the public administration, which would not be responsible in an absolute way and without any limit (when the administration pays, citizens pay); for the digitization of society, with respect to which, if we do not set limits, we would end up stopping and destroying it, losing any possible future benefit.

³⁷ In this sense, M.C. Cavallaro and G. Smorto, *Decisione pubblica e responsabilità dell'amministrazione nella società dell'algoritmo*, 21.