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Book Review

Elsa Marina Álvarez González: *Regulatory function and legislative technique in Spain. A new tool: artificial intelligence,* Tirant lo Blanch, Valencia, 2022

This timely book collects and analyses relevant digital media cases at the supranational level in Europe,

In Spain, regulatory function is being seriously affected by the accelerated changes currently taking place. With this in mind, Professor Álvarez González embarks on an in-depth analysis of the issues surrounding regulatory function in Spain, and suggests that the key to improving the legislative technique lies in the use of artificial intelligence, an innovative resource that is becoming ever more present in our lives.

In the first section of this work, the author presents an excellent, comprehensive analysis of the disorderly and fragile nature of our regulatory system. We have a serious problem with over-regulation, and this is undoubtedly one of the main reasons why the system of legal sources is so weak, as it calls into question the structural principles of our legal system, including those of legality and the hierarchy of norms. In addition, there is a distinct lack of quality and rationality in our legislative technique regarding norms with the status of law and of regulatory nature. This leads to a violation of the principle of legal certainty and, as the author argues, justifies current public distrust of the political and legislative system.

The second section begins with a study of the regulatory process, in which the author's assessment of its organisation and her focus on the regulatory quality offices is of particular interest. Professor Álvarez goes on to discuss the legislative technique and the factors she considers could contribute to its improvement. Here is where we find the most important and original proposal of this work, namely that of incorporating artificial intelligence into the regulatory process.

Although the use of artificial intelligence is not yet provided for in our legal system, we believe this is an issue administrative law will have to address sooner rather than later, given the progress being made in technological innovations and their application to many sectors of activity, including administrative action. If public administrations can use artificial intelligence to streamline and speed up the processing of administrative procedures and issue reports generated by algorithms based on the data held by a given body, then they can also be useful in the regulatory process.

Artificial intelligence can contribute to better decision-making quality based on a thorough analysis of all the data public administration has at its disposal, as well as existing precedents. Furthermore, artificial intelligence would also contribute to improving the quality of our regulations. Introducing artificial intelligence would involve automating certain procedures in the regulatory process, without, of course, affecting the rights of citizens and groups who play an active role in the process - especially in the prior consultation and public-information procedures.

While artificial intelligence can clearly facilitate the exercise of regulatory powers, its use in the exercise of discretionary powers is a more contentious issue. In such cases, the administration determines the rights, goods or interests that should remain outside the scope of artificial intelligence, such that they cannot be replaced by an algorithm, even if it is technologically possible to do so. In other words, certain decisions should be left to human discretion, a concept that has been referred to as the "reserve of humanity". It is true, however, that the greatest efficiency gains are to be found in discretionary decision-making using artificial-intelligence tools. Here, the transformation is qualitatively different in those areas where increased computational capacity allows for new inferences and a better identification of situations, causes or possible solutions. In this case, efficiency gains are linked to an improvement in the ability to use these tools to evaluate situations, or to take decisions that are different from those that would have been taken, or that are generally taken, by human beings, and that are also not easily anticipated or foreseen by normative and regulatory instruments. And it is in these cases that the greatest risks lie, because the functioning of this type of programme is unknown, in other words, there is a 'black-box effect'. This can prevent programmers from reliably predetermining the specific results of the programme once it has been executed, forcing them to rely, to a certain extent blindly, on the validity of the results based solely

on the assumption that the programming has been carried out correctly. It is here that public law must take a stand and provide a legal response.

Nevertheless, as Professor Álvarez argues, what cannot be left in the hands of artificial intelligence is the will to decide to regulate an issue, and the reasons and justification for doing so, i.e. proposing the regulatory initiative. However, automated administrative action and artificial-intelligence tools could not only speed up certain procedures within the complex regulatory process, but also improve the quality of regulation.

Accordingly, the prior consultation, public hearing and public-information procedures could all be fully automated, as noted above. These procedures channel public participation in the regulatory process and, to date, only electronic means of carrying them out have been regulated. However, we must not lose sight of the power of social networks and platforms to channel information. As such, the author believes that public participation in the regulatory process through social media would generate valuable information and a vast amount of data which, when processed with artificial intelligence, would help public bodies make regulatory decisions.

Applying artificial intelligence to manage citizen participation is not unrealistic. Studies in the US have demonstrated the benefits of using computational analysis to process and evaluate comments and suggestions made by the public during regulatory rule-making procedures. This technology is extremely useful and is deployed when there is massive participation in these procedures and where the officials responsible for processing them cannot reasonably be expected to read and evaluate all the comments posted on social-media platforms and networks.

In short, there are clear benefits to be gained from the use of digital technologies in the regulatory process. These technologies can be used not only to assess public participation but also to interpret the impact of a regulation or the level of compliance with it, as well as facilitate regulatory assessment (both ex ante and ex post), ensure greater regulatory transparency, and even provide information on how to regulate certain situations. This is the conclusion that Professor Álvarez González draws from an exhaustive, innovative and courageous piece of research, which makes a decisive contribution to laying the foundations for a debate on one of the main challenges facing administrative law in our time [reviewed by MANUEL MORENO LINDE].

Luigi Previti, *La decisione amministrativa robotica*, Editoriale Scientifica, Naples, 2022

Scrolling through the tables of contents of the main legal journals, or consulting the relevant databases (for instance, issue 1-2/2020 of this Magazine, dedicated to "The Use of Artificial Intelligence by Public Administration", or issue 2/2020 of Diritto amministrativo), one clearly sees the "uniqueness" of the new monographic work by Luigi Previti, as he himself clearly warns: recently the debate on the technological transformation of the public sector reached a real turning point ["ha raggiunto un vero e proprio punto di svolta"]. In this regard, it is possible to mention, for example, the more than one hundred contributions that the database on the legal documentation of the CNR returns to us when questioned with the query "algorithm" "public": at monographic level, the number of writings is less large, but the relevance of the transformation resulting from technological development, that now leads to the "Algorithmic Society", cannot be underestimated.

It is indeed a decisive change, which marks a turning point not only in the recent history of public digitalization, but also -more generally- in that of the Information Society. Paraphrasing the well-known dialogue between Louis XVI and the Duke of Rochefoucauld-Liancourt, "C'est une révolte? - No, Sire, c'est une révolution", it is no short of a memorable break. Not by chance, also the recent books edited by Pajno, Donati and Perrucci designate artificial intelligence precisely as "revolution" for law (Intelligenza artificiale e diritto: una rivoluzione?, Bologna, Il Mulino, 2022).

Even in the face of the reforms and the investments of the National Recovery and Resilience Plan, which aim (with their own critical issues) at implementing the long-promised "digital administration", the attention of legal scholarship is not devoted solely to e-Government (i.e., the issue of to the provision of digital services and related infrastructure, interconnection, and interoperability) but it is also irresistibly attracted to the only-apparently marginal phenomenon of technology entering the heart of the administrative decision-making process. An indeed, such issue is deeply meaningful: when public decisions are carried out through algorithms, with minimal or no human intervention (e.g. through the use of robotization in procedures), legal scholars do grasp the manifestation of (public) power potentially unchecked by the precautions and protections that the legal system usually (but not yet) provides. Just like in the past adminis-

trative judges, in dialogue with legal scholarship, constrained public power by building banks, and elaborating principles and criteria to balance public functions with the protection of individual rights, administrative law (and not only) is once again in a phase of refoundation, which provides stimulating thoughts for legal scholars. The relevance of the challenge, the complexity of the possible solutions, the magmatic moment, the disorientation (but also the excitement) resulting from the (apparent) lack of applicable legal rules are all elements of a debate that is both intense and also inevitably challenged by the pace of technological evolution, which already forces to face the issues of artificial intelligence, long before having settled the problems arising from variously complex algorithms.

A recent (and only apparently light) Italian movie, directed by Pif, a renown socially-active author , makes us reflect on the entry of "algorithms" into our daily life and their choice-making ability in our relational dimension, work dimension, and overall social dimension. A scenario which, rather than being futuristic and dystopian, is already ongoing and (even worse) not-adequately-regulated. Referring to the inactivity of all who "stood by" while an alienating, insensitive, mechanical, and dehumanizing system took root, the title of the movie prosaically reminds us these processes still remain largely unregulated. In particular, the criticism can be directed against: law-makers (despite initial attempts of a legal framework do exist, also at the European level); independent authorities (although attention to the issue is high, especially by the Data Protection Authority); citizens themselves (who carelessly authorise invasive processing of their data in order to access the increasingly-sparkling services of the Information Society); and public administrations (which seemingly act with excesses of both unpreparedness and superficiality). However, such criticism is not really applicable to administrative judges and scholarship; indeed, thanks to their continuous exchange of ideas and orientations, a framework of algorithmic legality begins to emerge, even if still affected by remaining conspicuous inconsistencies and partial solutions which do not always grasp rapidly-changing phenomena.

At the current crossroad, in between the acceleration of public digitalization and the growth of algorithmic administration, it is inevitable to accept the challenge of the robotization of public power (i.e., not merely predetermined mechanization, but also not-predetermined and complex decision-making resulting from self-learning dynamics and even artificial-intelligence technologies), but at the same time also define its conditions and limits.

In this context, Previti's book joins other monographic works that have recently started to address these issues, in particular; the 2019 book by Giulia Avanzini ("Decisioni amministrative e algoritmi informatici. Predeterminazione analisi predittiva e nuove forme di intelligibilità", Napoli, Editoriale Scientifica); the work of Vinicio Brigante ("Evolving Pathways of administrative decisions. Cognitive activity and data, measures and algorithms", Napoli, Editoriale Scientifica); the book edited by A. Lalli (L'amministrazione pubblica nell'era digitale, Torino, Giappichelli, 2022).

While scholarship on the issues developed, so did the case law, providing new insights and solicitations, even after the "founding" judgments of 2019.

Previti's book joins and develops the debate. It is not a case that the author immediately feels the need to set the factual limits (and the definition) of the phenomenon commonly covering a wide range of manifestations: from "robotization", to "artificial intelligence", passing through the (key, but still somewhat undefined) concept of "algorithm". Herein lies one of the many merits of Previti's book: grasping the need for an approach that, while attentive to legal scholarship, cannot but be interdisciplinary if it is to effectively understand the different situations to regulate. In its recent decisions, also the Council of State deals with the same issue, ultimately distinguishing between simple and complex algorithms, which are sometimes confused with artificial intelligence.

The context, however, is still not well-defined, thereby the challenges of (even scrupulous) judges to grasp the distinction between the concepts, as well as building the necessary taxonomies. Even more though, the real challenge is perhaps understanding a "robotic" reasoning (a reference to the wording of Previti's title) that independently follows its own thinking paths, without overlapping with human ones, as reported in the beautiful work by Kate Crawford (Nè intelligente nè artificiale: il lato oscuro dell'IA, Bologna, Il Mulino, 2021).

This leads us to the heart of the question that stirs the thoughts of those dealing with robotization of the exercise of power (in particular, public power), meaning human ability to control not only the current, but also the possible future technological transformation. Previti opens his work with a quote from Borruso (La legge, il

giudice, il computer, Milano, Giuffrè, 1997), according to whom machines are not free, they only do as they are told ["il computer non è libero, fa solo quello che gli è stato comandato di fare"]; but in reality they are rather "unpredictable" than "free", and the two are not the same. Given the complexity of the phenomenon related to decisions taken "by robots" (including issues arising from simple and complex algorithmic decisions, and AI) the two concepts, in my opinion, often get lost in an area of free choice. An area, however, which is not comparable to a manifestation of individual will, but rather is substantially released, unquestionable, and unfathomable in its elements, as machines grow less and less tied to "what was told".

Two clear examples will suffice: on the one hand, GPT Chat, the new generative artificial intelligence, was commanded to learn and evolve in order to interpret questions and answer problems, even accepting to make mistakes in this path of solution-seeking and self-learning; on the other, nowadays artificial intelligence is asked to create even works of art, whose common (but perhaps soon-obsolete) definition is the typical form of human activity. That alone should be "proof or exaltation of creative talent and expressive ability", therefore the maximum expression of free action. However, this is not the appropriate venue to dwell deeper into this topic.

Previti's book convincingly deals with the ongoing digital transformation leading us in a new era for the public administration; an era where "legal sustainability" (ivi, 167) neither can pass for the zero option of rejecting automation in decision-making processes, nor can reasonably be relegated solely to cases of exercise of constrained powers. However, since such revolution is both relevant and inevitable, it is imperative that the law should set how to limit this power.

There is no straightforward way to do it: Previti persuasively identifies transparency and participation as core protections in algorithmic procedures. However, as the Author convincingly argues, the operative definitions of transparency and participation are not part of the current (that is, "analogical") "toolbox" set forth in the Italian Law of the Administrative Procedure.

Complying with a broad meaning of transparency (towards directly-concerned individuals as well as third parties, as deriving from the general right to access information to increase public accountability) that goes beyond explainability for public decisions is a crucial and complex issue. Doing so will require both the ability to adapt the existing legal framework (also through recourse to analogies and principles that, as Previti underlines, administrative judges already strive to do), as well as the development of new rules expressly designed to regulate this phenomenon [reviewed by ENRICO CARLONI]