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Reserve of Humanity, Artificial Intelligence and the Judicial Function in the Light of the AI Act.

*Considerations (and Some Proposals) on the Future of the Administrative Trial**

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ABSTRACT The constitutional principles and the most recent legislation of European derivation (including, in particular, the IA Act) draw a "reserve of humanity" in the trial, opening up to a "servant" use of artificial intelligence, only in support (and not in the stead) of the judge as a physical person. In a de jure condendo perspective, in the procedural regulation of the instrument, it will be necessary, however, to prepare (technical and legal) expedients able to contain the automation bias (i.e. the tendency to uncritically flatten on the computational result) and to avoid that this reserve be actually emptied of any real meaning. To this end, it appears necessary to focus on the development of specific skills on the part of the judge who is a natural person that will enable him or her to give concreteness to a judgement with 'augmented' humanity.

KEYWORDS: E-justice - Artificial intellingence - Reserve of humanity – AI Act

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1. *Person and trial in the constitutional and supranational model*

The impetuous development of technology and, in particular, of computer science, has confronted legal scholars with unprecedented questions that only a few decades ago would have been dismissed as the fruit of a science-fiction *divertissement.*[1]

Is it possible to entrust the entire judicial function to the software? Is it possible to conceive a trial that does not have human beings as protagonists (in the role of judge and lawyers)? Can the trial resolve itself into a fully automated computer operation? And if this is not allowed, what role should the human being play in the trial? What should be their relationship with the software?

Indeed, one cannot seriously doubt that the use of Artificial Intelligence, now perceived by politicians and legal practitioners alike as a sort of eschatological horizon for jurisdiction, will constitute an essential juncture in the historical evolution of the legal form we call "trial".

Digital technology has, indeed, long entered that sacred fence[2] but, compared to what has happened so far, the disruptive scope of technology will no longer invest only the extrinsic profiles of the rite, but may also condition, to some extent, its substance and

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[1] As it is often the case, literature, unencumbered by the weight of scientificity, has played an almost prophetic role, foreshadowing scenarios that have since found (or are finding) some kind of fulfilment. The best known reference is to I. Asimov*, Io Robot*, in the translation by R. Rambelli, Milan, Bompiani, 1963 and the laws of robotics described in the short story "Circolo vizioso" that will be an inspiration recently for the US legal scholar F. Pasquale*, Le nuove leggi della robotica*, in the translation by P. Bassotti, Rome, Luiss University Press, 2021.

[2] Consider, as far as administrative justice is concerned, the experience of the telematic administrative trial (the so-called P.A.T.; for an examination of its characteristics, see L. Viola, *Le dottrine del processo amministrativo telematico*, in *Judicium*, 3, 2018) and the subsequent applications of the remote pandemic and post-pandemic trial (in relation to which see C. Volpe*, Pandemia, processo amministrativo e affinità elettive*, in *www.giustizia-amministrativa.it*).

essence.[3] This is because, at least in its most pregnant (and most interesting) applications,[4] it will affect the decisional moment, the one in which the dynamic and guarantees of the judgement are uniquely coagulated.

We are, therefore, living in very interesting times for proceduralists in every field.[5] These are times that cannot be experienced with detachment (and disenchantment[6]) but which call for a renewed intellectual commitment, as we must avoid the risk that the current delicate transition be entrusted solely to technique.[7]

Technicians, in fact, often lack an element that is inherent in the legal culture and training and that is cloaked with its own sacredness: the properly legal sense of the "limit",[8] of a boundary that is "impassable" by reason of a value choice made *ex ante.*

Critically cultivating this sense is tantamount to asking ourselves how far the automation of the judicial function can go and, therefore, to question ourselves, in the end, on the trial that "will come" and, above all, on the trial that "we want".

This is, on closer inspection, one of the innumerable possible specific declinations of the theme of the relationship between men and machines, of the dialectic between subjects and objects. A theme, this one, pregnant with ethical implications, to be tackled in a necessarily historical perspective, pushing the interpreter towards the shores of the meta-legal dimension.[9]

Indeed, the most recent philosophical thoughts, despite the diversity of approaches, share, to a large extent, the fear that mankind may make itself superfluous.[10] This has awakened the need for an anthropocentric approach to the future that ushers a new season of "digital humanism".[11]

[3] The best scholarship has spoken in this regard of the advent of artificial intelligence as a phenomenon of "re-ontologisation" (L. Floridi, *Etica dell'intelligenza artificiale. Sviluppi, opportunità, sfide*, Milan, Raffaello Cortina Editore, 2022, 11).

[4] It is, in fact, possible to imagine very "unobtrusive" applications of artificial intelligence to the trial, such as for the organisation and management of roles, the search for precedents, and the pseudonymisation of court orders. Another possible (and fruitful) application could be that of "intelligent" document search (with the use of software capable of extrapolating specific information from the mass of documents acquired in court).

[5] It has been authoritatively observed that the application of artificial-intelligence tools to judicial decision-making constitutes "the most compelling, but also the most disturbing aspect: can the algorithm replace the judge's reasoning? And can the robot replace the human judge?" (G. Alpa*, L'intelligenza artificiale. Il contesto giuridico*, Modena, Mucchi Editore, 2021, 10-11). See, on this point, also the reflections of A. Pajno, *La transizione digitale e il contributo dei giuristi. L'importanza del processo amministrativo*, in M. Ramajoli (ed.), *Una giustizia amministrativa digitale?*, Bologna, Il Mulino, 2022, 8.

[6] That typical post-modern man, bearer of a "weak thought" (an expression coined by G. Vattimo, P.A. Rovatti*, Il pensiero debole*, Milan, Feltrinelli, 2010) that is profoundly nihilistic (the reference is, in particular, to N. Irti*, Nichilismo giuridico*, Bari, Laterza, 2005) and that has translated into a weak legal discourse, which has remained orphaned of a solid ontology from which to draw.

[7] Technique, in fact, is both a harbinger of development and an instrument of oppression, drawing hierarchies and positions of power. The essence of technique has been investigated, in philosophy, by, among others, M. Heidegger*, La questione della tecnica* (1953), in Italian translation by G. Vattimo, Florence, goWare, 2017, and E. Severino*, Il destino della tecnica*, Bologna, Rizzoli, 1998. In the perspective of E. Severino, *Il destino della tecnica*, throughout history Christianity, humanism, the Enlightenment, capitalism and democracy have intended to use technique to make their own aims prevail over antagonistic ones, but have fallen victim to an illusion by transforming it from a means into an end and, in so doing, securing its domination over the contemporary world. The *continuum* along which the history of the human race oscillates, between slavery and power, between subjugation and dominance has been investigated, also in its future projection, in his latest work by R. Bodei*, Dominio e sottomissione. Schiavi, animali, macchine, Intelligenza Artificiale*, Bologna, Il Mulino, 2019.

[8] The "limit", like all the most pregnant institutes of legal scholarship, constitutes nothing more than a secularised theological concept according to the always valid reflection of C. Schmitt, *Teologia politica*, in *Le categorie del "politico"*, Bologna, Il Mulino, 2022, 61. As observed by G. Preterossi, *Teologia politica e diritto*, Bari, Laterza, 2022, 11, the topicality of Schmitt's thought lies in having emphasised "the unassailable persistence of a structural and formal correspondence between "ultimate", theological and metaphysical concepts and political-legal concepts".

[9] A crucial reading attempted in G. Gallone, *Riserva di umanità e funzioni amministrative. Indagine sui limiti dell'automazione tra procedimento e processo,* Padua, Cedam, 2023, 5.

[10] For a wide-ranging overview of the ethical debate surrounding the use of algorithms see B.D. Mittelstadt, P. Allo, M. Taddeo, S. Wachter and L. Floridi, *The ethics of algorithms: Mapping the debate*, in *Big Data & Society*, July-December 2016, 1. In the Catholic universe, the reference is to P. Benanti*, Oracoli. Tra algoretica e algocrazia*, Rome, Luca Sossella Editore, 2018 and by the same author *Le macchine sapienti. Intelligenze artificiali e decisioni umane*, Bologna, Edizioni Dehoniane, 2018.

[11] About "digital humanism", see J. Nida-Rümelin and N. Weidenfeld*, Umanesimo digitale. Un'etica per l'era dell'intelligenza artificiale*, translated by G. B. Demarta, Milan, Feltrinelli, 2019. In our field, it is, therefore, more appropriate than ever to return to talk about a 'legal humanism' by taking up the teaching of the Masters (G. Miele, *Umanesimo giuridico*, in *Id.*, *Scritti giuridici*, II, Milan, Giuffrè, 1987, 445).

This excludes, in any field, that the machine can take on a significance other than that of mere *instrumentum* in the service of men, as it must, rather, perform a "weak and servant" function, supporting and not replacing humanity.[12]

The centrality of the person must, in particular, be preserved, with regard to the moment when the decision is taken. The latter must remain at the disposal of the individual person according to a principle of "autonomy", meaning the power to "decide to decide", in search of a 'balance between the decision-making power that we reserve for ourselves and that which we delegate to artificial agents".[13]

Such a distinctly anthropocentric view of the man-machine relationship, as the mature fruit of Western culture in its Judaeo-Christian and Greco-Roman matrices,[14] can be found, with respect to the trial, in the Italian Constitution itself.

It appears, moreover, of clear evidence that the role of men in the trial is a question of primarily constitutional significance.[15] And this is not only as a projection of the personalist principle that innervates our legal system and is enshrined in Article 2 of the Italian Constitution, preventing any equalisation, in terms of value, of the human beings with machines.[16]

The "jurisdiction" referred to in Title IV of Part II of the 1947 Italian Constitution, in the deepest sense outlined by the best scholarship,[17] is, in fact, by its very nature, eminently human.

Like the public administration pursuant to Article 97 of the Italian Constitution,[18] it is made by men and for men and therefore

[12] This has prompted the development of new fundamental laws to which robotics must pay homage. Prominent among them are those according to which "robotic systems and AI must complement professionals and not replace them' and that they 'must not counterfeit humanity" (F. Pasquale, *Le nuove leggi della robotica*, 24-25).

[13] These are the considerations of L. Floridi, *Etica dell'intelligenza artificiale*, 98-99. The author adds that "humans should retain the power to decide what decisions to make, exercising freedom of choice where necessary and relinquishing it in cases where overriding reasons, such as effectiveness, may prevail over the loss of control over the decision-making process" with the further clarification that "any delegation should also remain in principle reviewable, adopting as a last guarantee the power to decide again".

[14] The idea of "trial" is as old as western civilisation. Its birth is recounted, with the instrument of myth, by Aeschylus in the tragedy of 'The Eumenides' (for a legal rereading of the work M. Cartabia, *Una parola di giustizia. Le Eumenidi dalla maledizione al logos*, Inauguration of the academic year of the Università Roma Tre, 23 January 2020). Putting an end to the trail of blood that runs through the first two plays of the Oresteia, Athena, the goddess of wisdom who sprang from the head of Zeus, breaks the chain of vengeance by taking Orestes away from the Furies and establishes a tribunal of sworn judges, chosen from among the best citizens. The inscrutable divine response is thus replaced by a human justice in which *logos*, speech, reasoning, persuasion and proof dominate. The advent of artificial intelligence in the trial, if not offset by the human factor, could mark, conversely, a regression towards an almost oracular dimension of judgement. S. Foà and G. Montedoro, *Dialogo sulla nuova oggettività*, Naples, Editoriale Scientifica, 2024, 35, effectively point out, in this regard, that "The intelligent machine tends to position itself as an alethic power. A device whose task is to enunciate the truth. A sort of new oracular function". Already A. Garapon and J. Lassègue, *La giustizia digitale. Determinismo tecnologico e libertà*, in the Italian version edited by M. R. Ferrarese, Bologna, Il Mulino, 2018, 172, had observed that "The use of the term 'predictive' undeniably implies a magical, almost divinatory character. This new form of justice is therefore perceived as an oracle".

[15] It is, therefore, no coincidence that the topic has been addressed, for the most part, by scholars of constitutional law. These include M. Luciani, *La decisione giudiziaria robotica*, in *Rivista AIC*, 3, 2018, 872; F.G. Pizzetti, *La Costituzione e l'uso in sede giudiziaria delle neuroscienze (e dell'intelligenza artificiale): spunti di riflessione*, in *BioLaw Journal-Rivista di BioDiritto*, Special Issue 2, 2019; F. Donati, *Intelligenza artificiale e giustizia*, in *Rivista AIC*, 1, 2020, 415.; E. Longo, *Giustizia digitale e Costituzione. Riflessioni sulla trasformazione tecnica della funzione giurisdizionale*, Milan, Franco Angeli, 2023.

[16] As already observed in G. Gallone, *Riserva di umanità e funzioni amministrative*, 50, the dignity of the person represents the first and most important barrier to the dehumanisation of both the jurisdictional and administrative functions. This is because the protection of the dignity of the person makes it constitutionally necessary for men to intervene in the fulfilment of the jurisdictional choice so as to restore the axiological hierarchy between the person and the machine drawn by the Constitution. In similar terms also E. Longo, *Giustizia digitale e Costituzione*, 336, according to which "Allowing then a decision on human beings to be made by a machine risks treating human beings as objects, showing a profound and intrinsic lack of respect for the very humanity of persons".

[17] According to the teaching of I.M. Marino, *Corte di Cassazione e giudici "speciali" (sull'interpretazione dell'ultimo comma dell'art. 111 Cost.)*, 913, in *Scritti giuridici*, Naples, Edizioni Scientifiche Italiane, 2016 whereby "the Constitution unequivocally lays down rules on the features of the jurisdictional "function" rather than on the division of jurisdictions" so that it "is not defined [...] in relation to the relationships between judges, but in relation to the relationships between the subjects of the system and of the trial".

[18] See on this point the considerations made in G. Gallone, *Riserva di umanità e funzioni amministrative*, 41 taken up and developed with respect to the trial at page 205.

revolves around the physical person of the judge and, with equal dignity and importance, the defence counsel, as the holder of the defence in the technical sense pursuant to Article 24 of the Italian Constitution.[19]

The "judge" subject only to the law is the individual appointed by a competitive examination or, in certain exceptional cases, elected pursuant to Article 106 of the Italian Constitution. And he/she is also the beneficiary of the guarantee of non-removability and the principle of equality under Article 107, paragraphs I and III of the Italian Constitution.

The same constitutional model of due process pursuant to Article 111 of the Italian Constitution has in mind the judge as a natural person to whom alone (and not also to the machine) the necessary attributes of impartiality and tertiarity can be referred.

Similar considerations also apply to the European-trial model and, in particular, to the conventional model under Article 6 of the European Convention on Human Rights. The "fair" trial designed therein requires, in fact, not only an "impartial" court[20] but also guarantees of publicity of the hearing that assume, in Strasbourg caselaw, direct contact between the judge and the parties to the trial.[21]

The guarantees of independence and impartiality, always declined in a personal way, also return in Article 47 of the Charter of Fundamental Rights of the European Union and in the reading of this article offered by the Court of Justice.[22]

Part of the scholarship has, in the same vein, shrewdly suggested an evolutionary reading of the provisions of Article 25 of the Italian Constitution and the principle of the natural judge (from which no one can be "diverted") that emancipates the latter from the role of a simple hendiadys with respect to the principle of pre-establishment by law of the judiciary (moreover indirectly reaffirmed

[19] As pointed out by M. Luciani, *La decisione giudiziaria robotica*, 89, who observes that a robotic trial would impose a radical transformation (and probably a compression) of the exercise of the right of defence, imposing new techniques in the drafting of appeals, in the articulation of the preliminary investigation, in the arguments of the defenders. This seems destined to have an impact on the legal profession by decreasing the competitiveness of small and medium-sized firms compared to those that are more structured and endowed with greater financial resources (and, therefore, able to access more advanced and efficient AI tools).

[20] In the caselaw of the European Court of Human Rights, the "impartial" character of jurisdiction is based on the absence of "prejudice or preconceptions" on the part of the judge-person. This absence of prejudice or preconceptions is declined in a subjective and objective sense (European Court of Human Rights, 1 October 1982, Application No. 8692/79, Piersack v. Belgium, esp. para. 30; 10 February 2004, Application No. 53971/00, D.P. v. France; 26 April 2011, Application No. 31351/06, Steulet v. Switzerland; 31 May 2011, Application No. 59000/08, Kontalexis v. Greece). The impartiality of the adjudicating body must therefore be ascertained by means of a verification based on a dual approach, both subjective and objective. On the one hand, in a subjective sense, no member of the court must have any personal bias towards the defendants or in any case towards the parties; the absence of such bias is presumed unless there is proof to the contrary (ex multis Court of Human Rights, 18 October 1982, no. 6878/75; 7238/75, Le Compte, Van Leuven and De Meyere v. Belgium, in *www.echr.coe.int*.). On the other hand, in an objective sense, jurisdiction is impartial to the extent that any legitimate doubt can be ruled out, even if it is apparent and does not depend on the personal conduct of the judges (thus, among others, European Court of Human Rights, 20 May 1998, nos. 21257/93; 21258/93; 21259/93; 21260/93, Gautrin v. France; 15 December 2005, no. 73797/01, Kyprianou v. Cyprus, all in *www.echr.coe.int*.).

[21] According to the interpretation provided by the Strasbourg judges, the publicity of the hearing constitutes an essential element for the implementation of the fair trial, as it ensures transparency in the judge's work and final decision, preventing "a secret justice, removed from public scrutiny". Moreover, it is one of the means by which "confidence in the courts and tribunals on the part of the public, reassured that the effort to establish the truth will be maximum" is realised and preserved (European Court of Human Rights, Riepan v. Austria, 14 November 2000, no. 35115/97, § 27; Tierce and Others v. San Marino, 25 July 2000, nos. 24954/94, 24971/94 and 24972/94, § 92; all at *www.echr.coe.int*.). This right can be realised either directly in the form of immediate publicity, allowing every adult citizen to participate in the trial and, thus, have a direct perception of the ways in which justice is administered (and, therefore, to have contact with the physical person of the judge), or indirectly in the form of mediated publicity, capable, however, of reaching an unlimited number of people, through the presence of the press and its work of dissemination, thus contributing to the realisation of the right of reporting on judicial events and the activities of public authorities. For scholarship on the requirement of publicity of the hearing in the E.C.E.D.U., see M. Chiavario, *Commento dell'art. 6 C.E.D.U.*, in S. Bartole, B. Conforti and G. Raimondi (eds.), *Commento alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, Padua, Cedam, 2001, 154-248.

[22] The case-law of the Court of Justice on this matter has followed the footsteps of that of the Strasbourg Court, interpreting impartiality in both subjective and objective terms (thus European Court of Justice, C-506/04, Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg, 19 September 2006, para. 53. 101; C. Justicia, Joined Cases C-341/06 P and C-342/06 P, Chronopost SA and La Poste v. Union française de l'express (UFEX), 1 July 2008, paragraph 54).

by Article 102 of the Italian Constitution).[23] Relying on one of the meanings of the term "natural" as an entity as opposed to what is (instead) "artificial", the possibility has thus been raised of basing on this constitutional provision the right of each person not to be deprived of his/her "human" judge to be instead entrusted (solely) to the "robotic" judge.

In another respect, it has also been observed that an obstacle that is difficult to overcome with respect to the full automation of the judicial function can be found in Article 101(1) of the Italian Constitution, which, in providing that judges are subject only to the law, implicitly excludes the judge from being bound by the outcome of algorithmic procedures that place legal practitioners in front of dangerous application automatisms.[24]

On a constitutional level, this dense web of principles thus draws on what has been called a "reserve of humanity", meaning an incompressible legal sphere of individuals' exclusive prerogative also (and especially) in the trial.[25]

2. *The most recent legal developments and the emergence, with the IA Act, of a "reserve of humanity" also in the trial*

The most recent developments in the legal system all seem to be moving towards the gradual emergence of a "reserve of humanity" in the trial, turning it from an immanent implicit principle into an express one.

Indeed, such emergence is slow and gradual, resulting from the growing awareness of the implications that may arise from the use of AI.

A first step was the adoption by the European Commission for the Efficiency of Justice (C.E.P.E.J.) of the Council of Europe, at the outcome of its XXXI plenary meeting held on 3-4 December 2018, of the *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment.*[26]

This document, though lacking any immediately binding value, is of very high symbolic value and enunciates five ethical principles, the last of which provides precisely that the use of artificial intelligence services or devices should never limit, for the operators of the justice system, the possibility of submitting judicial decisions (and the data underlying them) to external human control at any time. In detail, its fifth principle (p. 12), entitled "Principle 'under user control'", states that practitioners who employ the AI tool in the trial should retain the power to review the solution proposed by the *software* at any time, also in the light of the actual case under consideration, without being bound by it.[27]

At the same point, the party's right to a human decision is also expressly stated. This must, first of all, be informed of the use of artificial intelligence in the trial. This safeguard is meant to ensure guaranteeing the parties the possibility of appealing the result by exercising their right of access to the judge

[23] F.G. Pizzetti, *La Costituzione e l'uso in sede giudiziaria delle neuroscienze (e dell'intelligenza artificiale): spunti di riflessione*, 706; in similar terms also M. Sciacca, *Algoritmo e giustizia alla ricerca di una mite predittività*, in *Persona e Mercato*, 1, 2023, 76.

[24] F. Donati, *Intelligenza artificiale e giustizia*, 429 and 432.

[25] G. Gallone, *Riserva di umanità e funzioni amministrative*, *passim* and, in particular, 205. The coining of the expression "reserve of humanity" (in Spanish "reserva de humanidad") is owed, with regard to substantive administrative law, to J. Ponce Solè, *Inteligencia artificial, Derecho administrativo y reserva de humanidad algoritmos y procedimiento administrativo debido tecnológico*, in *Revista General de Derecho Administrativo*, 50, 2019). The locution was first taken up, in Italy, again with regard to substantive administrative law, by F. Fracchia and M. Occhiena, *Le norme interne: potere, organizzazioni e ordinamenti. Spunti per definire un modello teorico-conceptettuale generale applicabile anche alle reti, ai social e all'intelligenza artificiale*, Naples, Editoriale Scientifica, 2020, 137. The concept of "reserve" has, moreover, its own specific legal significance. It is a classic institution of constitutional law, transited from the liberal tradition to the contemporary constitutional state. Although in its various declinations (of law, of jurisdiction, of administration) it expresses the idea of the existence of a material sphere of action that is not contestable and remains the exclusive prerogative of a specific State power or of a specific source of law.

[26] The Charter can be found at *www.coe.int* with commentary by C. Barbaro, *L'uso dell'intelligenza artificiale nei sistemi giudiziari: verso la definizione di principi etici condivisi a livello europeo? Il lavoro in corso presso la Commissione europea per l'efficienza della giustizia (Cepej) del Consiglio d'Europa*, in *Questione giustizia*, 2018, 189-195. On the Charter, see also E. Gabellini, *La comodità del giudicare: la decisione robotica*, in *Trim. dir. e proc. civ.*, 4, 2019, 1305.

[27] The principle in question states that "Professionals in the justice system should, at any moment, be able to review judicial decisions and the data used to produce a result and continue not to be necessarily bound by it in the light of the specific features of that particular case". It is interesting to note how the rule refers, on a broad spectrum, to all persons called upon to play a technical role in the trial (i.e. "Professionals in the justice system"), thus including, one must assume, both judges and lawyers.

as a natural person in the sense of the aforementioned Article 6 of the European Convention on Human Rights.[28]

The scholarly debate[29] has also tuned in, albeit with different nuances, to this basic approach that sees the human person's contribution to the trial as ineliminable and necessary.

It should come as no surprise, therefore, that in such a *milieu,* the European Artificial Intelligence Regulation[30] has finally given formal consecration to the "reserve of humanity".

This follows from the inclusion of AI systems intended to be used "by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution" among the high-risk systems referred to in Article 6(2) of the Regulation.[31]

This unequivocal qualification,[32] indeed limited only to the phase of the decision,[33]

[28] Stating that each party "must also be clearly informed of any prior processing of a case by artificial intelligence before or during a judicial trial and have the right to object, so that his/her case can be heard directly by a court within the meaning of Article 6 of the ECHR".

[29] Shared and widespread is the view of the existence of a reserve of humanity in the trial in general and, for what is of interest here, in the administrative trial. On this point see: F.G. Pizzetti*, La Costituzione e l'uso in sede giudiziaria delle neuroscienze (e dell'intelligenza artificiale): spunti di riflessione*, 706, who expressly argues in favour of the extensibility of the principle of algorithmic non-exclusivity elaborated by the caselaw of the Council of State in the oft-quoted pronouncement no. 8472 of 13 December 2019 of Section VI, also in the exercise of the judicial function; F. Patroni Griffi, *La decisione robotica e il giudice amministrativo*, in *www.giustizia-amministrativa.it*, 2018, 9, which concludes by announcing that judicial decisions will remain entrusted to a Judge who is a physical person "if only because, all things considered, we prefer to be judged by our peers, whose decisions lend themselves to more extensive criticism than the robotic decision would. And this too, after all, we like to be able to do"; L. Viola*, L'intelligenza artificiale nel procedimento e nel processo amministrativo: lo stato dell'arte*, in *Federalismi*, 21, 2018, 28; V. Giabardo*, The judge and the algorithm (in defence of the humanity of judging)*, in *Justice Together*, 2020; S. De Felice, *Intelligenza artificiale e "Invalidità e giustiziabilità dinanzi al giudice amministrativo"*, in *www.giustizia-amministrativa.it*, 2021, 15, according to which "administering and judging, pursuing the public good and attributing to each its own, since antiquity, are human sciences and algorithmic science looks to the past but cannot have human sensitivity"; E. Follieri*, La sentenza frutto dell'intelligenza artificiale*, in *Diritto e processo amministrativo*, 4 , 2022, who forcefully states that "if we 'skip' man (his individuality, dignity and freedom) to substitute the ‚machine for the judge, I fear that we are on the brink of a byssus into which we may sink, burying the human and democratic principles and values of our system"; D. Simeoli*, L'automazione dell'azione amministrativa nel sistema delle tutele di diritto pubblico,* in A. Pajno, F. Donati and A. Perrucci (eds.), *Intelligenza artificiale e diritto: una rivoluzione?*, vol. II, Bologna, 2022, 650, who imagines "guardianship applications" of artificial intelligence to the administrative trial or as a tool "to enhance the cognitive abilities of the judge-physical person, with an effect not of substitution but of support"; also D. Simeoli, *L'automazione dell'azione amministrativa nel sistema delle tutele di diritto pubblico*, 652, speaks of "cobotization" (as convergence between artificial intelligence system and judge-physical person) with respect to the use of software for searching, comparing and categorising precedents with a view to enhancing the function of the Council of State of providing uniform application of the law; B. Marchetti, *Giustizia amministrativa e transizione digitale. Spunti per riflettere su un futuro non toppo lontano*, in M. Ramajoli (ed.), *Una giustizia amministrativa digitale?*, Bologna, Il Mulino, 2022, 65.; L. Carbone, *L'algoritmo e il suo giudice*, in *www.giustizia-amministrativa.it*, 2023; V. Tenore*, Può l'intelligenza artificiale sostituire un giudice? I rischi della involuzione verso un "cretino digitale"*, Rome, Anicia, 2023; M. Sciacca, *Algoritmo e giustizia alla ricerca di una mite predittività*, *passim* and 78; E. Longo, *Giustizia digitale e Costituzione*, 335, according to whom "On a strictly legal level, the humanity of judging is profoundly linked to the axiological scope underlying the decisions of judges, who thanks to their interpretative contribution become a vehicle of values and meanings"; R. Cavallo Perin*, Ratio decidendi ed intelligenza artificiale*, in P. G. Monateri (ed.), *Scritti in onore di Rodolfo Sacco*, I, Turin, Utet, 2024, 309.

[30] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No, 300/2008, (EU) No, 167/2013, (EU) No, 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Regulation), also referred to hereinafter as the "AI Act", published in the Official Journal of the European Union on 12 July 2024.

[31] Thus Annex III to the Rules of Procedure, point 8, on "Administration of Justice and Democratic Processes".

[32] This qualification should also be read in the light of Recital 61 to the Regulation according to which "Certain AI systems intended for the administration of justice and democratic processes should be classified as high-risk, considering their potentially significant impact on democracy, the rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial. In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to be used by a judicial authority or on its behalf to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts. [...] The use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity".

[33] In fact, ancillary activities of an administrative nature

brings with it, in fact, the application of the legal regime provided for in Section II of Chapter III of the Regulation (Art. 8 et seq.) and, as far as it is of more interest here, the guarantee of "Human oversight" under Art. 14.[34]

Of particular importance is what is prescribed in para. 4 of the aforesaid article which, in defining the canons *of design* of the high-risk IA system to be followed by the supplier, establishes, under letter d), that it must be possible to "decide, in any particular situation, not to use the high-risk IA system or otherwise to ignore, cancel or reverse the output of the high-risk IA system" and, under letter e), to "intervene in the operation of the high-risk IA system or interrupt the system by means of a 'stop' button or a similar procedure enabling the system to come to a safe halt". (e), to 'intervene in the operation of the high-risk IA system or to interrupt the system by means of a "stop" button or a similar procedure enabling the system to safely shut down'.[35]

This is clearly a minimum regulation that leaves the national legislator with a wide discretion in implementation.

It is, moreover, beyond doubt that the regulation is a discipline that looks, from the perspective of the EU legislator, at the IA system essentially as a 'product' to be placed on the single market. [36]

However, even in such a peculiar perspective, it seems inevitably destined to condition, albeit in a mediated way, the trial model. Establishing, in fact, mandatory conditions for the functioning of the AI system employed that require human oversight is tantamount to carving out an incompressible reserve in favour of the person in the trial.

In this sense, some sure indications can be drawn from the regulatory framework of the Regulation.

While the use of artificial intelligence in decision support is certainly not prohibited,[37] neither is it imposed.

It is therefore up to each Member State to make the political choice as to whether to allow, and to what extent, the IA instrument to enter the trial.

For example, although Annex III to the Regulation, point 8, seems to open up the possibility of employing the instrument in

with respect to decision-making in the strict sense, such as, for example, role management or pseudonymisation, remain outside the reserve of procedural humanity outlined by the AI Act. This follows from the exceptional nature (and, therefore, strict interpretation) of the rules qualifying a given IA system as 'high-risk', which leads one to give a taxative reading of the provisions of point 6 of Annex III to the Regulation. Moreover, the aforementioned Recital 61 also points in this direction, which, in closing, clarifies that 'It is not, however, appropriate to extend the classification of AI systems as high-risk to AI systems intended for purely ancillary administrative activities, which do not affect the actual administration of justice in individual cases, such as the anonymisation or pseudonymisation of decisions, documents or judicial data, communication between staff, and administrative tasks. E. Longo, *Giustizia digitale e Costituzione*, 305, observes that this choice is linked to the circumstance that such uses may not constitute a direct and related threat to rights and freedoms.

[34] It states in its opening paragraph 1 that "High-risk AI systems shall be designed and developed in such a way, including with appropriate human-machine interface tools, that they can be effectively overseen by natural persons during the period in which they are in use".

[35] As E. Longo, *Giustizia digitale e Costituzione*, 309, the norm contemplates two of the three ways of understanding the monitoring models of decisions taken by machines, i.e. the ability to control the planning and design of algorithmic operations (*ex ante*) and to monitor them (*ex post*) (so-called *human-on-the-loop*) and the ability to submit each operation to the control of a human being and to allow intervention at each point of it (so-called *human-in-the-loop*). The third way to express *human oversight* is through *human-in-command*, which is the ability to examine and address, along with individual operations and decisions, the large-scale effects of systems, including the social, ethical and legal implications of using an algorithm.

[36] It is, moreover, hardly worth recalling that the legal basis of the IA Act is Article 114 of the Treaty on the functioning of the European Union which provides for the adoption of measures intended to ensure the establishment and functioning of the internal market, and that in the *Explanatory Memorandum* accompanying the proposal, the Commission specified that the main objective of the Regulation is to establish harmonised rules, in particular as regards the development, placing on the EU market and use of products and services that make use of artificial-intelligence technologies or are supplied as stand-alone AI systems.

[37] So much so that it is not included in the exhaustive list of "Prohibited IA practices" in Chapter II of the Regulation. Indeed, the catalogue provided for in Article 5 contemplates only a few specific AI practices relating to procedural use, including, for example, subparagraph (d) of paragraph 1 according to which "the placing on the market, the putting into service for this specific purpose, or the use of an AI system for making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence, based solely on the profiling of a natural person or on assessing their personality traits and characteristics; this prohibition shall not apply to AI systems used to support the human assessment of the involvement of a person in a criminal activity, which is already based on objective and verifiable facts directly linked to a criminal activity ".

order to assist the judge both "in researching and interpreting facts" and "in applying the law to a concrete set of facts", the legislator might decide to restrict the use of AI to only one of these aspects (again, by way of example, to regulatory or case-law research only).

Even the construction methods of *procedural safeguards* related to "human oversight" are not rigidly predefined, but follow a flexible and *risk-based* approach[38] that can potentially lead to very different solutions, ranging from the most "conservative" to others more "driven" towards automation.[39]

It should not be forgotten, moreover, that the Regulation's rules, however minimal, seem, by reason of their wording, to be endowed, at least in their hard core, with direct effect in national legal systems (with all the consequences that would ensue with regard to the possible disapplication - or rather non-application - of conflicting rules of national law).[40]

We are thus faced with a first fragment of a uniform EU procedural regulation, which to some limited extent goes beyond the traditional attitude of *self-restraint* substantiated by the development of the well-known principle of procedural autonomy of the Member States.[41]

This means that any fully-automated adoption of a judicial decision without the provision of due safeguards in terms of human oversight would be vitiated for breach of the aforementioned regulatory provisions and thus affected by an *error in procedendo*.[42]

The reserve of humanity is, therefore, protected by a procedural sanction, which makes it, to all intents and purposes, a new rule of the administrative (and other kinds of) trial.[43]

3. *In search of a procedural legal form for the algorithm*

If the scholarly and normative *acquis* by now point to the existence of a procedural reserve of humanity circumscribed to the decisional moment, the debate on its concrete implementation remains completely open.

The first and fundamental issue to be resolved is whether or not any legal status should be given to the algorithm by providing it with a formal role in the trial.

On the other hand, it cannot be overlooked that judges (and especially administrative judges) have long been making quite informal use of IT tools to support their decisions. It is, in fact, common experience to resort to databases of various kinds to search, also by means of meta-data, for case-law precedents.

This could lead to the conclusion that the use of artificial-intelligence tools can also take place on a *de facto* basis, without being relevant on a strictly legal-formal level.

However, the reasons for the opposite solution appear to be different and very solid.

In favour of the need to recognise AI software as a formal legal entity within the trial, one of the main arguments is the

[38] The "law of risk" thus also enters into the trial (reference is, among others, to A. Barone*, Il diritto del rischio*, Milan, Giuffrè, 2006). This is expressly stated in Article 14(3) of the Regulation, according to which "The oversight measures shall be commensurate with the risks, level of autonomy and context of use of the high-risk AI system". The flexibility of the approach derives from the use of canons for the choice of surveillance measures, such as those of appropriateness and proportionality (para. 4 of Art. 14). For a critical comment on the "risk-based" approach used for the AI Act C. Novelli, *L'Artificial Intelligence Act Europeo: alcune questioni di implementazione*, in *Federalismi*, 2, 2024, 95.

[39] In this sense, see the opinion of M. Fink, *The EU Artificial Intelligence Act and Access to Justice*, in *EU Law Live*, 10 May 2021.

[40] The theory of direct effectiveness represented the conceptual basis that led to the identification, in the famous European Court of Justice, 9 March 1978, Case 106/77, Amministrazione delle Finanze dello Stato v. S.p.A. Simmenthal, of the normative "disapplication" as a technique for resolving antinomies and a remedy to ensure community primauté (a construction resumed and refined in the form of "non-application" by the Italian Constitutional Court starting from the famous sentence of 8 June 1984 no. 170 on the Granital case).

[41] On the principle in question, see, among others, D.U. Galetta, *L'autonomia procedurale degli stati membri dell'Unione Europea: «Paradise Lost?». Studio sulla c.d. autonomia procedurale: ovvero sulla competenza procedurale*, Turin, Giappichelli, 2009. For its recent and delicate application with regard to the institution of the so-called "improper" suspension see, most recently, Cons. Stato, Ad. plen., 22 March 2024, no. 4.

[42] And it is not to be excluded, even if this forum does not allow for the necessary in-depth analysis, that it may also integrate a hypothesis of "excess of jurisdictional power" and may, therefore, be asserted as a ground of jurisdiction pursuant to Articles 111 of the Italian Constitution and 110 of the Italian Code of Administrative Procedure. In general on the topic see the reflections of A. Cassatella*, L'eccesso di potere giurisdizionale e la sua rilevanza nel sistema di giustizia amministrativa*, in *Riv. trim. dir. pubbl.*, 2, 2018.

[43] Beginning, of course, with the entry into force of the regulation in question, which is scheduled, in relation to high-risk systems, for 2 August 2026.

acknowledgement of its ability to influence the decision-making process much more profoundly than other traditional tools. In fact, as a surrogate for the human intellectual product, it provides an *output* that is close in features to a decision.

On a more purely legal level, then, it would seem that the need for the legislature's intervention stems, on the one hand, from the reserve of procedural law under Article 111 of the Italian Constitution and, on the other, from the flexible nature of the Union's rules, which requires the intermediation of detailed rules.

Lastly, what pushes towards the formalisation of the role of the algorithm in the discipline of the trial is, above all, the need to give direct legal significance to the safeguards that must be built around the use of AI to support decision-making so that they do not remain confined to a merely technical dimension. And, first among these, the end user's right to be informed about the use of the tool also in order to ensure the effectiveness of the related right to have a human decision.[44]

This makes the use of AI in the trial an issue largely, subject to the minimum coordinates set by the Regulation, to be addressed in a *de jure condendo* perspective.

Indeed, some legislative initiatives have already been undertaken in Italy on this matter, but they currently suffer from a certain degree of vagueness and approximation.[45]

It seems, on the other hand, that great caution and care must be exercised in defining the discipline in question, since it will be difficult to go back on the choices that will be made.

In the first place, it seems appropriate that the necessary novelties be accommodated in the Code of the Judiciary (or, as would perhaps be preferable, in its implementing rules[46]) so as to avoid frustrating the text's claim to completeness and exhaustiveness by introducing extravagant rules.

Secondly, it would be desirable to give the algorithm (and, therefore, the software that is an expression of it) a place that is consistent (and not eccentric) with respect to the traditional structure of our trial.

To this end, it is first necessary to clarify which tasks to entrust to the former.

If, in fact, it is beyond doubt that this should be given a 'weak servant' role and not become a substitute for the person of the judge[47] (which would otherwise be at odds with the minimum essential core of the reserve of humanity in the trial), its scope for intervention could, however, vary significantly.

In particular, in the light of the wide margin left by the IA Act, the support offered by the machine could concern both "research" and "interpretation of facts" as well as "the law", also with a view to applying "the law to a concrete set of facts".[48]

Well, it seems that prudence advises against the use of artificial intelligence, at least at an early stage, with regard to the

[44] As enshrined in the aforementioned "under user control" principle of the *European ethical Charter on the use of Artificial Intelligence in judicial systems and their* environment. It is, in fact, evident that bringing the algorithm into the trial means subjecting it to the regime of publicity that normally characterises the latter.

[45] The reference is to Bill No. 1146 of 20 May 2024 ("Provisions and Delegation of Authority to the Government on Artificial Intelligence") presented by the Prime Minister and the Minister of Justice, which, at the time of writing this essay, is being examined by the Senate of the Republic. It, with an essentially blank rule that acknowledges the existence of a reserve of humanity in the trial without adding anything, provides, among the "Sector Provisions" in Chapter II, Article 14 ("Use of Artificial Intelligence in Judicial Activity") that "Artificial intelligence systems shall be used exclusively for the organisation and simplification of judicial work, as well as for jurisprudential and doctrinal research. The Ministry of Justice disciplates the use of artificial intelligence systems by ordinary judicial offices. For other jurisdictions, the use is regulated in accordance with their respective orders nautions" (para. 1) and that "It is always reserved to the magistrate to decide on the interpretation of the law, the assessment of facts and evidence and the adoption of any measure" (para. 2). The same draft law provides, in Article 22 ("Delegations to the Government on the matter of artificial intelligence"), that "The Government is delegated to adopt, within twelve months from the date of entry into force of this law, with the procedures set forth in Article 31 of Law no. 234 of 24 December 2012, after obtaining the opinion of the competent authorities of the Member States, the provisions of this law and the adoption of any measure" (paragraph 2).

[46] It should be noted, in this regard, that the *sedes* of the Implementing Rules was chosen in the past for the introduction of the discipline of the digital administrative process (Title IV "Telematic Administrative Process"). Moreover, placing the regulation of the use of the IA among the "Implementing Rules" would help to contain the systemic impact of the novelty by emphasising that the latter is not intended to affect the substance of the procedural model.

[47] This is the AI Assistant solution prefigured by B. Marchetti, *Giustizia amministrativa e transizione digitale. Spunti per riflettere su un futuro non toppo lontano*, in M. Ramajoli (ed.), *Una giustizia amministrativa digitale?*, Bologna, Il Mulino, 69.

[48] Thus arguing from the aforementioned Annex III to the Regulation, point 8.

ascertainment and reconstruction of the facts of the case.[49] The reasons are at least twofold: the inadequacy, at least currently in the state of the art, of the inductive experiential approach of machine learning[50] and, above all, the irreducible uniqueness of the actual event that comes into play as the *thema probandum* of the individual trial.[51]

It therefore seems preferable, at least under the present conditions, to limit the use of the IA instrument to profiles and questions of law and only downstream of the fact-finding activity brought before the court.

Artificial intelligence could thus prove particularly useful in pursuing the goal of legal certainty and predictability of interpretative guidelines,[52] a need that is particularly felt especially in terms of uniform application of the law.[53]

The software would allow the judge, first and foremost, to know and accurately map his precedents (even minority ones[54]), to weight them (in terms of numerical consistency), to give an account of their evolution and to census the arguments in support of each one, even if necessary suggesting compliance with one or the other.

In the event of such a limited use, the software is called upon to intervene in a pre-decisional phase that lies between the preliminary-investigation phase in the strict sense and the formal decision-making of the case.[55]

With this in mind, a comparison has been made by one scholar between the algorithm and the figure of the Advocate General, *amicus curiae* whose conclusions the human judge is obliged to consider, but free to disregard, exposing reasons of his/her choice.[56]

[49] This seems to be distinguished from "intelligent" documentary research (*id est* the use of software capable of extrapolating specific information from the mass of documents acquired at trial) insofar as it has an auxiliary value with respect to the ascertainment and reconstruction of the events in fact that does not in itself assume decisional value.

[50] As E. Gabellini observes in *La "comodità nel giudicare": la decisione robotica*, taking up the traditional scholarly teaching, "The reconstruction of the fact and the qualifying activity placed at the basis of the magistrate's reasoning respond to two different logics: while the first is reflected in the brocardo *iudex non agnoscit factum*, the second recalls the ancient principle *iura novit curia*" and are not superimposable in terms of quality and characteristics. By contrast, the predictive algorithm can lead, on the one hand, to what has been called by a French doctrine the so-called "*factualisation*" of law (D. Cholet, *La justice predictive et les principes fondamentaux de procès civil*, in *Archives de philosophie du droit*, 60, 2018, 233) , since it places all the elements functional to the algorithmic calculation on the same level, transforming them into computer data, whether legal or factual data; on the other hand, it dissuades the judge from looking for the general rule to be applied, prompting him/her, instead, to check whether the solution presented corresponds to the one he/she has to judge. A. Garapon and J. Lassègue, *La giustizia digitale*, 173 and 175, have observed that, in the case of the use of artificial intelligence to support judicial decision-making, one "deliberately departs from legal reasoning in order to tie the elements together in a different way. Decisions are no longer considered according to an argumentative, syllogistic logic' operating a 'rewriting' corresponding to a 'new rationality that exerts a powerful de-symbolising effect' in which, replacing 'causality' with 'correlation', it is the numerical datum that prevails ('Quantitas non auctoritas facit legem'). This implies the "reshuffling of the categories of law" and, in particular, of the dichotomy "law/fact" (thus again A. Garapon and J. Lassègue, *La giustizia digitale*, 250).

[51] A. Bonafine*, L'intelligenza artificiale applicata al ragionamento probatorio nel processo civile. È davvero possibile e/o auspicabile?,* in R. Giordano, A. Panzarola, A. Police, S. Preziosi and M. Proto (eds.), *Il diritto nell'era digitale. Persona, Mercato, Amministrazione, Giustizia*, Milan, Giuffrè, 2022, 923.

[52] Of what is usually called the "calculability" of law. In a systemic scenario such as the current one of the crisis of the case, the "counting on what is to come" constitutes a "constitutive factor of capitalism" (N. Irti, *Un diritto incalcolabile*, Turin, Giappichelli, 2016, 5 in the wake of M. Weber*, Storia economica. Linee di una storia universale dell'economia e della società*, 1919-1922, Italian translation, Rome, Donzelli, 1993, 298 according to which capitalism needs "a right that can be calculated in a machine-like way").

[53] One thinks of the interpretative circuit that links simple sections and the plenary assembly under Article 99 of the Italian Code of Administrative Procedure. On this point see A.G. Orofino*, Riflessioni conclusive*, in *Id.*, O. Renaudie, *Le juge administratif et ses pouvoirs / The administrative judge and his powers*, Padua, Cedam, 2024, 141.

[54] It may, in fact, often happen that, even within the same judiciary office, one section (or even one of the possible compositions of the same panel) is not aware of the orientation espoused by the other (because it is too recent or dates back in time).

[55] The use of AI has also been hypothesised before and outside the trial. Thus F. Patroni Griffi*, La decisione robotica e il giudice amministrativo*, 9, according to which "the predictive function of the machine proves useful as an aid to the technical defence of the parties, at the time of taking an action or resisting it". The author goes so far as to affirm that "the robot, more generally, can constitute a segment of the judicial decision, both in quantitative terms (deciding a part of the case, for example in relation to the quantification of damages), and in qualitative terms (what could be the 'right decision' with reference to the abstract normative case and to the jurisprudential application of the norm, it being understood that it will then be the judge who will assess whether and to what extent the robotic solution is shareable and referable to the concrete case)".

[56] U. Ruffolo*, Giustizia predittiva e machina sapiens*

However suggestive, the parallel in question does not convince because it ends up making the software an auxiliary of the judge (in a manner not unlike the technical consultant or the commissioner *ad acta*[57]), giving rise to a sort of personification of the same.[58] This is indeed incompatible with the now consolidated scholarly and caselaw acquisitions regarding its legal nature as a mere *instrumentum* (and not as an act or subject).[59]

It seems, therefore, that the algorithm should be framed as a technical mean supporting the decisional activity in the strict sense of the term of the court. Not a "mean of proof" pursuant to Article 63 of the Italian Code of Administrative Procedure[60] but, rather, an aid in the deliberation of the decision pursuant to Article 75 et seq. of the Italian Code of Administrative Procedure, provided in compliance with the fundamental principle of *iura novit curia.*[61] A peculiar function, to some extent unprecedented, that seems to find its closest archetype in Article 14 of the Law no. 218 of 1995 reforming the Italian system of private international law on the subject of "Knowledge of the applicable foreign law".[62]

However, the use of such an instrument must, in any event, remain possible and optional[63] and, as such, subject, in line with Article 14(4)(d) of the Regulation, to a discretionary assessment by the court as to the necessity or advisability of its use.

In terms of procedural forms, the legislator could provide that this power should be exercised by means of a special order[64] also requiring the judge to formulate the question of law to be submitted to the software.[65]

Such a solution has the twofold advantage of making the parties aware of the use of artificial intelligence (thus providing them with a first fundamental safeguard) but also of stimulating cross-examination between them as to the result of its use.[66] Again from a *de jure condendo* point of view, it seems appropriate that the answer to the question,

quale "ausiliario" del giudice umano, which calls for "the 'formalisation' of the role of algorithmic prediction in the decision of disputes, with an ancillary but ritualizable function".

[57] To which Chapter IV of the italian Code of Administrative Procedure "Auxiliaries of the Judge" is expressly devoted.

[58] In scholarship the idea has been circulating for some time now, but is still absolutely a minority one, that the algorithm can be constructed as an autonomous centre of imputation of legal rights and duties and, therefore, holder of a limited legal subjectivity (A. Narayanan and D. Perrott, *Can Computers Have Legal Rights?*, in *Artificial Intelligence. Human effects*, New York, Halsted Press, 1984, 52; G. Sartor, *Gli agenti software: nuovi soggetti del ciberdir diritto?*, in *Contr. impr.*, 2002 and D. Bourcier, *De l'intelligence artificielle à la persone virtuelle: émergence d'une entité juridique?*, in *Droit et société*, 2001, 847).

[59] The thesis of *software* as a "tool", the original intuition of A.G. Orofino, *La patologia dell'atto amministrativo elettronico: sindacato giurisdizionale e strumenti di tutela*, in *Foro amm. C.d.S.*, 2002, 2276 (taken up by the same author in A.G. Orofino, R.G. Orofino, *L'automazione amministrativa: imputazione e responsabilità*, in *Giorn. dir. amm.*, 12, 2005, 1300) is one of the theoretical foundations of the reserve of humanity in the procedural field. On this point, for a more in-depth examination (also with regard to the administrative judge's orientations on the matter), to G. Gallone, *Riserva di umanità e funzioni amministrative*, 87.

[60] As much as it is not aimed at "proving the truthfulness of the statements of fact" made by each party (according to the classic definition of investigation activity as "an activity aimed at identifying in the world outside the trial what the fact actually is" provided by C. E. Gallo, *La prova nel processo amministrativo*, Milan, Giuffrè, 1994, 90). This is contrasted with "the identification of the legal discipline" resulting from "an activity internal to the process insofar as the cognition of the sources of law is in itself institutional for the judge, even when it involves, obviously, a material activity" (again by C. E. Gallo, *La prova nel processo amministrativo*, 90).

[61] Fundamental principle of modern procedural law, carved out in Article 113 of the Italian Code of Civil Procedure, by virtue of which the parties may confine themselves to alleging and proving the facts constituting the right asserted in the action, whereas the law does not have to be proved to the judge, because he/she knows it regardless of any activity of the parties. He/she therefore has the power and duty to identify the sources, interpret the provisions in order to establish the rule applicable to the concrete case and to frame the case in a correct legal manner, even in defect or inconsistency with the rules referred to by the parties. On this principle see A. Pizzorusso, *Iura novit curia (Ordinamento italiano)*, in *Enc. Giur.*, XVIII, Rome, Treccani, 1990.

[62] Which, as it is well known, states in paragraph 1 that "The foreign law shall be ascertained by the judge ex officio. To this end he/she may avail himself/herself not only of the instruments indicated by international conventions, but also of information acquired through the Ministry of Justice; he may also consult experts or specialised institutions".

[63] In this sense, there does not seem to be a "right to the use of artificial intelligence in the process" for the parties.

[64] Decree or collegial order depending on whether it precedes or follows the establishment of a cross-examination at the hearing.

[65] In order to facilitate the use of the tool, it might be appropriate to develop standardised questions that would standardise the *prompt* and, to the effect, lead to comparable *output* outcomes.

[66] This is the approach also suggested by R. Cavallo Perin, *Ratio decidendi ed intelligenza artificiale*, 309.

rendered in natural language, should, in fact, be included in the acts of the trial so as to submit it to the remarks and observations of the parties.[67]

Such step would have the effect of "humanising" the contribution made by the software before it is subjected to the scrutiny of the human decision maker.

4. *The new challenges of the trial to come: the relationship between person and algorithm and the danger of an automation bias*

A profile that cannot be overlooked but must, on the other hand, be duly pondered when regulating the use of artificial intelligence in the field of litigation is that of the relationship bein the final analysis) and the algorithm.

If, in fact, the use of the algorithm to support the judicial decision could potentially prove to be very useful in containing and managing dangerous traps and cognitive interference in the legal rectween the person of the decision-maker (the judge construction,[68] there is, however, at the same time the danger of an '*automation bias*' and, in particular, of the tendency of the individual to uncritically rely on the computational result by flattening himself/herself to the solution suggested by the *software.*[69]

It has been pointed out, in this sense, that there is the risk of emptying out of the reserve of humanity in the field of procedure that can transform it into a "dull simulacrum", into a merely formal and apparent control of the person over the work of the machine.[70] A risk that is accompanied by that of consolidation of the case-law,[71] with the following inability

[67] They could express their compliance with one or the other solution by pointing out and criticising the arguments underlying them and the conference of the *regulae iuris* to the concrete case under consideration.

[68] In fact, thanks to the decisive contribution of behavioural psychology, the illusion of man as an "ideal rational agent" has long since waned in favour of the model of "bounded rationality" theorised by H. Simon, *Models of man. Social and rational*, New York, John Wiley & Sons, 1957). The judge, like any other human being, naturally tends to follow mental shortcuts (the so-called 'heuristics') that guide towards automatic and quick decisions but that can result in systematic and prolonged errors over time (the so-called 'biases'). These include, for example, the "availability heuristic" (which occurs when judgements are made based on information that is immediately available and more easily recalled on the basis of personal experience) or the "anchoring heuristic" (with the consequent *status quo bias*, which leads one to seek confirmation of one's initial impression rather than objectively analysing the new information received). It is evident that such mental mechanisms (for a taxonomy of which see F. Vella, *Diritto ed economia comportamentale*, Bologna, Il Mulino, 2023, 23) are capable of heavily conditioning the performance of the jurisdictional function by favouring, for example, the transactional preservation of consolidated orientations or by limiting the range of analysis of facts and theses in the field (on this point see P. Castellani, *Psicologia del ragionamento giuridico*, in *Psicologia del giudicare - Quaderni della Scuola Superiore della Magistratura*, Roma, 32, 2024, 17). In this sense, even in the context of legal knowledge, awareness of cognitive limits becomes the fundamental tool for improving decisions (G. Pascuzzi, *Avvocati formano avvocati*, Bologna, Il Mulino, 2015). On the management of metacognitive limits with regard to the performance of the judicial function see M. Bertolotti, *Bias e strategie di debiasing*, in *Psicologia del giudicare - Quaderni della Scuola Superiore della Magistratura*, Rome, 32, 2024.
The use of artificial intelligence can ultimately serve as a useful counterbalance to the phenomenon of cognitive interference from so-called "noise" theorised by D. Kahneman, O. Sibony and C. Sunstein, *Rumore. Un difetto del ragionamento umano*, Turin, Utet, 2021. It differs from bias because it is linked, upstream, to the unreliability of the measuring instrument we apply to reality that can lead to an unintended divergence in judgements that should, instead, be identical. On this point, see the reflections of A. Ferrara and M. Ramajoli, *La giustizia amministrativa nell'era della digitalizzazione. Dialogo tra informatica e diritto*, in M. Ramajoli (ed.), *Una giustizia amministrativa digitale?*, Bologna, Il Mulino, 156.

[69] One also speaks, in this respect, of an "*effet moutonnier*", i.e. a natural tendency to conform to the majority, 'like sheep' (A Garapon and J. Lassègue, *La giustizia digitale*). The judge, knowing from the machine that, for example, 70% of his colleagues would decide the case within his/her jurisdiction in a certain way, could be induced to conform uncritically to the result provided by the software, avoiding the responsibilities that could arise from an autonomous choice. This is an implication of the 'overwhelming practical force of the algorithm', which would end up inducing the judge to follow the choice suggested by the computer, thus conditioning the motivation evoked by A. Simoncini, *L'algoritmo incostituzionale: intelligenza artificiale futuro delle libertà*, in *BioLaw Journal - Rivista di BioDiritto*, 1, 2019, 81 in that "once an automatic decision-making system is introduced within a human decision-making process, the automatic system tends, over time, to capture the decision itself" and this "not for reasons of scientific value, predictive accuracy or technical reliability of the automatism, but eminently for reasons of practical convenience". In S. Foà and G. Montedoro, *Diaologo sulla nuova oggettività*,, 35, they speak of "faith in the algorithm" evoking the Weberian "legal-rational" model of bureaucracy to explain the relationship between the physical person and the machine in terms of "heterocephaly of the power command and the coercive apparatus".

[70] G. Gallone, *Riserva di umanità e funzioni amministrative*, 201.

[71] A. Garapon and J. Lassègue, *La giustizia digitale*, 184, speak in this regard of "reinforcement of majoritarian tendencies" and the "petrification in time" of law.

to evolve even along minority and rupture paths and routes.

Moreover, it cannot be overlooked that similar concerns also appear in the IA Act itself.

In particular, para. 4 of the aforementioned Article 14, in defining the characteristics that a high-risk AI system must have, requires that the natural person entrusted with supervision be able to "properly understand the relevant capacities and limitations of the high-risk AI system" and to "duly monitor its operation" (sub-paragraph a), to "correctly interpret the high-risk AI system's output" (sub-paragraph c) and, above all, to "remain aware of the possible tendency to automatically rely or over-rely on the output produced' (sub-paragraph b). c) and, above all, to "remain aware of the possible tendency of automatically relying or over-relying on the output produced" (sub-para. b)[72] especially where, as it is the case in procedural automation, the instrument is used "to provide information or recommendations for decisions to be taken by natural persons".

It is, however, clear that the Regulation, with these provisions, rather than outlining specific technical solutions, identifies objectives to be pursued, leaving, once again, a certain margin of flexibility as to the choice of measures to be adopted (and their possible combination), always guided by the canons of expediency and proportionality.[73]

It follows that the measures to be adopted to ensure human oversight of the operation of the AI system will have to be calibrated, bearing in mind the causes underlying the *automation bias*[74] as well as the peculiar requirements of litigation. They may, moreover, be of a purely "technical" nature (concerning the processing and implementation of the software) or of a "formal legal" nature (relating to the discipline of the trial).

Without claiming to be exhaustive and in the knowledge that the debate on this new and delicate topic is still in an embryonic state and requires the contribution of sciences other than the legal one (*primarily* behavioural psychology), some basic measures for containing *automation bias* can nevertheless be hypothesised.

The first *de-biasing* strategy is to keep, as already suggested, only optional and eventual use of AI in the trial, leaving to the judge the fundamental choice of whether or not to use the tool.

As a natural corollary, then, it would probably be appropriate to make it explicit at the regulatory level, without leaving this to the work of case law, that, consistently with the provisions of Article 14(4)(d) of the IA Act,[75] failure to transpose the proposal or the provisions of the machinery cannot in itself constitute a defect in the judgment or provide grounds for appeal. And to complete this picture, it might perhaps be possible to specify, by means of an amendment to law no. 117 of 1988, that the deviation in the decision from the computational result can never integrate *ex se* a hypothesis of liability for willful misconduct or gross negligence on the part of the judge. This would help to relieve, in part, the judge from the burden of a confrontation with the machine and prevent

[72] Article 14(4)(b) of the Regulation expressly refers to the phenomenon of "automation bias".

[73] Thus verbatim the opening words of paragraph 4 of the aforementioned Article 14 ("as appropriate and proportionate"). The measures identified in sub-paragraphs (d) ("to decide, in any particular situation, not to use the high-risk AI system or to otherwise disregard, override or reverse the output of the high-risk AI system") and (e) ("to intervene in the operation of the high-risk AI system or interrupt the system through a 'stop' button or a similar
procedure that allows the system to come to a halt in a safe state") have a more precise content.

[74] At the basis of this tendency to flatten out on the computational result there are, indeed, heterogeneous factors that combine with each other. First of all, what has been acutely defined as the "convenience" in judging by means of algorithms (the expression is by E. Gabellini, *La "comodità nel giudicare": la decisione robotica*) but also the natural temptation to shy away from the responsibility (juridical but also moral) linked to an "autonomous" decision; lastly, the deference that can be felt towards a tool that is reputed to be much more efficient than human reasoning. With regard to this last profile, A. Garapon and J. Lassègue, *La giustizia digitale*, 243, sharply observe that the computer has become "the idealised fetish object' that 'gives substance to the myth' of calculability and of a world 'completely digitisable and digitally structured, from the brain to matter, passing through society". It should not be forgotten, however, that an increasingly widespread attitude in the collective consciousness of "aversion to algorithms" seems to be gaining ground (mentioned, among others, by H. Fry, *Hello World. Essere umani nell'era delle macchine*, Turin, Bollati Borlinghieri, 2018, 29) and that can lead, if not governed, to a preconceived closure towards the use of the tool by operators.

[75] According to which, as seen, in high-risk AI systems, the possibility of "decide, in any particular situation, not to use the high-risk AI system or to otherwise disregard, override or reverse the output of the high-risk AI system "must be ensured.

the use of artificial intelligence from becoming a factor for the defensive administration of justice.

Another expedient to prevent (or at any rate reduce) the "anchorage" to the computational proposal could be to introduce a ban (if necessary sanctioned by disciplinary action) on the use of generative artificial intelligence for the drafting of the part in law and the operative part of the judgment,[76] This would, in fact, have the consequence of keeping the motivation (with the calibration of the *rationes decidendi* also in the fundamental perspective of the conformation of power) an authentically human act and of eliminating, at the same time, the fascination that a 'pre-packaged' sentence can exert, in terms of lightening the judge's daily work.

Related to these considerations is the question of whether or not the court must expressly give reasons for not accepting the machine's proposal.

This seems to be ruled out not only because such an aggravation of the motivational burden could discourage a decision in dissimilarity by feeding the anchorage to the computational proposal, but above all because it would not be consistent with the consolidated orientation on the motivation of judicial measures according to which the judge is not required to take a position on all (and each) of the arguments put forward in court, being, on the contrary, sufficient that the logical-legal procedure that led towards the chosen solution be congruously explained.[77] Otherwise one would end up surreptitiously acknowledging the authority of the algorithm's reconstructive suggestion as a value at the trial level, even greater than the parties'.

Lastly, the containment of the *automation bias* can also pass, as anticipated, through technical expedients in the construction of the *software*.

Upstream, mechanisms could be devised for the construction of the basic *dataset* and the subsequent implementation *inputs* that are not self-referential, for instance by providing for the use of not only case law but also scholarship[78] for software training.

Another plan of intervention to correct the anchoring phenomenon could be that *of output* modulation. In order to preserve the neutrality of the tool, a solution could be to ask the

[76] While the use of such tools could be employed for the drafting of the other parts of the judgment (the factual part and, above all, the accessory parts including the heading), the revision of the text by the magistrate also being reserved for these.

[77] In this sense, a useful clue may come from the parallel with the constant Italian administrative caselaw on the subject of revocation for error of fact pursuant to Article 395, paragraph 1, no. 4 of the Italian Code of Civil Procedure and Article 106 of the Italian Code of Administrative Procedure, according to which, also in the light of the duty of conciseness pursuant to Article 3 of the Italian Code of Administrative Procedure, it is sufficient that the grounds of the judgment give an account of the logical-legal procedure followed by the judge without the latter having the duty to take a slavish position on each individual defence deduction (thus, ex multis, ex, it is sufficient for the grounds of the judgment to give an account of the logical-legal procedure followed by the judge without the latter having the duty to slavishly take a position on each individual defence argument (so *ex multis* Cons. Stato, sez. VI, 5 March 2024 no. 2161). This is because "the proceeding judge is free to draw his/her own conviction from the evidence or results of evidence that he/she deems most reliable and suitable for forming the same, since it is not necessary to give account, in the grounds, of the examination of all the allegations and prospects of the parties and all the evidence acquired at the trial: It is in fact sufficient for the judge to set out - in a concise but logically adequate manner - the factual and legal elements on which his/her decision is based and the evidence considered suitable to support it, with the consequence that all the arguments, theses and remarks which, even if not expressly examined, are incompatible with the solution adopted and with the argumentative process carried out, must be considered implicitly disregarded" (cf. *ex multis* Cass. civ. sez. V, order 29 December 2020, no. 29730 but also Cons. Stato, sez. IV, 28 June 2021, no. 4894).

[78] Which consequently opens up the related issue of sources from which to draw data. A problem that, as far as caselaw is concerned, could be solved by resorting to the database of Italian administrative-justice pronouncements and, as far as scholarship is concerned, by developing a pool of journals with the character of scientificity from which to draw. An innovative solution could also be traced in the use, for the maintenance of the dataset, of the distributed ledger technology (so-called *blockchain*) now regulated by the well-known Article 8 ter of the so-called competitiveness decree for the year 2019 (Decree-Law no. 135, converted by Law No. 12 of 11 February 2019 of "Conversion into law of Decree-Law No. 135 of 14 December 2018, containing urgent provisions on support and simplification for businesses and public administration", published in G.U. No. 36 of 11 February 2019). On the applications of *blockchain* technology to the public sector M. Atzori, *Blockchain technology and decentralised governance: is the state still necessary?*, in *Journal of governance and regulation*, 2017, 6(1), 45, G. Gallone, *Blockchain, procedimento amministrativo e prevenzione della corruzione*, in *Dir. Ec.*, 3, 2019, 196, M. Allena, *Blockchain technology for environmental compliance: towards a choral approach*, in *Enviromental Law Review*, 4, 2020, M. Macchia, *Blockchain e pubblica amministrazione*, in *Federalismi*, 2, 2021 and G. Gallone, *Blockchain e big data nel settore pubblico: spunti in tema di G.D.P.R. compliance*, in *Federalismi*, 14, 2022, 67.

algorithm to offer a plurality of solution proposals to the question (and not a single one), if necessary graduating them according to the number of possible precedents in support.

The use of artificial intelligence would thus be transformed from a factor potentially stiffening the regulatory system into a driver for legal evolution and a vehicle also for minority and innovative reconstructions.[79]

5. *A look into the near future: towards a judgement with "augmented" humanity.*

What we have seen in the previous paragraphs prompts some, tentative, systemic reflections.

It seems, first of all, necessary to be aware of the fact that the advent of AI will change, to some extent, the work of legal practitioners (and first and foremost judges). A change that, in all likelihood, will be qualitative (and not merely quantitative, in terms of accelerating the response of justice).[80]

The challenge on the horizon is, therefore, to make the most of what the instrument can offer without distorting the fundamental features of the trial and, in particular, its human dimension.

In order to do this, it is necessary to be wary, more than of the machine,[81] of the use that men can make of it.[82]

It is on the latter that one must, first of all, focus.

In an increasingly digitised trial, an expression of this season of "new objectivity",[83] society (and, in particular, the legal community) increasingly needs the contribution that "natural" intelligence can provide.[84]

If software can be a useful tool for judges to know themselves better (their own orientations, positions),[85] they must, in fact, be prepared to relate virtuously to the tool.

And to do so, they must cultivate specific skills, some new, some old, that are the

[79] And to avert the risk pointed out by L. Torchia, *La giustizia amministrativa digitale*, in *Una giustizia amministrativa digitale?*, 52-55, of "not predicting the future, but rather projecting the past" thus betraying the creative role that the judge has always had in the history of Italian administrative law.

[80] As sharedly pointed out by F. Santagada, *Intelligenza artficiale e processo civile*, in R. Giordano, A. Panzarola, A. Police, S. Preziosi and M. Proto (eds.), *Il diritto nell'era digitale. Persona, Mercato, Amministrazione, Giustizia*, Milan, Giuffrè, 2022, 837, the aim is not so much to free the judge from the "burden" of his/her work, but rather to "provide more efficient justice services than those provided by the judge-person".

[81] In an "algoretic" dimension (P. Benanti, *Oracles. Tra algoretica e algocrazia*, and by the same author *Le macchine sapienti. Intelligenze artificiali e decisioni umane*) the fundamental ethical imperative for the *machina sapiens* becomes "doubt yourself". This postulates the need for a new declination of Cartesian methodical doubt in an artificial key, introducing, especially when facing judgements that have obvious moral implications, through the contribution of the human factor, an uncertainty that is normally alien to computational reasoning.

[82] As sharply argued by A. Garapon and J. Lassègue, *La giustizia digitale*, 261, the effort required of legal practitioners is to escape the influence of a myth such as that of the integral calculability of the legal (and its infinite and hegemonic extension). In this regard, it is observed that "one does not fight a myth by demonstrating its falsity, but by establishing a sufficient distance to interpret phenomena in another way". Moreover, notes M. Luciani, *La decisione giudiziaria robotica*, 893, "the problem is not one of legislative innovation or scientific revolution, but of cultural approach. And we legal scholars can control (and criticise) the culture of a judge much more easily than we can do with the culture of an engineer, a mathematician, a programmer. To be clear: if I have to choose someone not to trust, personally, I choose the judge. And I choose a human being. Human and aware of the importance, certainly, but also of the limits, of his/her function". M. Heidegger, *Essays and Discourses*, Milan, 1991, 21, already observed, "The danger is not technique. There is nothing demonic about technique; rather, there is the mystery of its essence. The essence of technology, insofar as it is a destiny of unveiling, is danger [...] The threat to mankind does not come from machines and technical apparatuses, which can also have deadly effects. The real threat has already reached men in their essence. The domination of imposition threatens by founding the possibility that men may be denied the possibility of gathering themselves by returning to a more original unveiling and thus experiencing the appeal of a more principled truth".

[83] S. Foà and G. Montedoro, *Dialogo sulla nuova oggettività*, identify the implacable force of digitalisation processes as one of the (probably most powerful) factors in the "decline of what is called the modern subject" even in the field of public law.

[84] So also V. Tenore, *L'intelligenza artificiale può sostituire un giudice?*, 87.

[85] Like a mirror. The exhortation "know thyself" (in ancient Greek γνῶθι σαυτόν, gnōthi sautón, or also γνῶθι σεαυτόν, gnōthi seautón) is an ancient Greek religious maxim inscribed in the temple of Apollo at Delphi. In Aeschylus' Prometheus Chained, with a similar sentence Oceano advises Prometheus: 'θέλω τὰ λῷστα, καίπερ ὄντι ποικίλῳ. γίγνωσκε σαυτὸν καὶ μεθάρμοσαι τρόπους νέους: νέος γὰρ καὶ τύραννος ἐν θεοῖς" ("I see yes, Prometheus, and I want to give you the best advice, even though you are already cunning. You must always know who you are and adapt yourself to new rules: for new is this tyrant who rules among the gods"). An even more profound warning if one thinks that it is addressed to the one who, in classical mythology, stole fire from the gods to give it to mankind, marking the beginning of the age of technology.

indispensable prerequisite for consciously experiencing the digital transition.[86]

Not only technical skills[87] but, first and foremost, the traditional legal skills, which are eminently humanistic.[88]

"Judge of the algorithm" will be called upon to cultivate, even with respect to the computational result, the critical sense that is the essence of their task. And, in doing so, they will have to manage the algorithm's *biases* as well as their own. And, again, before sifting through the solutions (and answers) proposed by the parties to the algorithm, they must be able to ask the right question.[89]

But, above all, they will have to retain awareness of their role, not as an act of self-referential closure, but as an act of conscience, the true last differential attribute between persons and machines: awareness of the context of one's decision and the impact it is bound to have on the lives of fellow human beings.[90]

Only in this way can the humanity of the decision (understood as the ascribability to a physical person of the ultimate manifestation of judging) as well as the very humanity of the decision-maker[91] be guaranteed in the trial.

A decision-maker who is the bearer of a new "augmented" humanity[92] who cultivates "slow" and profound thinking in confrontation with technology.[93]

[86] On this point see, among others, the reflections of G. Pascuzzi, La *cittadinanza digitale. Competenze, diritti e regole per vivere in rete*, Bologna, Il Mulino, 2021, 41, and, in particular, 84, where, after offering a taxonomy of the new skills required of the citizen, he dwells on the specific ones related to artificial intelligence.

[87] How to broadly understand the underlying logic and structure of the AI system employed, the relationship between *input* and *output*, and be aware of the heuristic limitations that software can have.

[88] According to A. Garapon and J. Lassègue, *La giustizia digitale*, 275, what justifies the need for a human (albeit fallible) contribution in the exercise of the jurisdictional function is the properly human quality represented by "practical wisdom, Aristotelian phronesis" understood as the capacity to "promise, to commit oneself to change".

[89] It is the importance of the *prompt* in the *input*, which inevitably conditions the performance of the algorithm. And, then, knowing how to ask questions remains a basic, eminently humanistic skill, indispensable for the legal scholar and practitioner.

[90] The necessary and enduring centrality of mae in the decision-making process appears to be linked precisely to the observation of the existing split between artificial intelligence and consciousness. In perspective, it is not certain that this diaphragm will remain firm (thus Y.N. Harari*, Homo Deus. Breve storia del futuro*, in the translation of M. Piani, Milan, Bompiani, 2017, 484, according to which, with the development of forms of artificial intelligence, "intelligence is becoming detached from consciousness"; these are reflections taken up recently by M. Chiriatti, *Incoscienza artificiale. Come fanno le macchine a prevedere per noi*, Rome, Luiss University Press, 2022, observing that "we thought that with AI something was born, instead someone is being born").

[91] In this sense, V. Giabardo, *Il giudice e l'algoritmo (in difesa dell'umanità del giudicare)*, proposes a procedural use of emotions as opposed to the positivist dream of robotized decision-making. M. Sciacca, *Algoritmo e giustizia alla ricerca di una mite predittività*, 78, referring to the teaching of G. Zagrebelsky*, Il diritto mite*, Turin, Einaudi, 1992, 213 and his idea of a judge called to a "role of guaranteeing the structural complexity of law in the constitutional state, that is, the necessary, mild coexistence of law, rights and justice".

[92] L. Floridi, *Etica dell'intelligenza artificiale*, 283-284, speaks of AI as a form of "augmented intelligence" capable of "improving and multiplying the possibilities of human action". In S. Foà and G. Montedoro, *Dialogo sulla nuova oggettività*, an "augmented anthropomorphism" in which "our cognitive capabilities are augmented by the machine" is advocated in this sense.

[93] So that the contribution of the algorithm, rather than acting as a "shortcut" for the decision of the dispute (through a reactive and automatic mental mechanism), is rather a stimulus for the use of our reflexive and analytical system (according to the well-known dichotomy elaborated by Nobel Prize winner D. Kahneman*, Pensieri lenti e veloci*, Milan, Mondadori, 2012).