CHAPTER 23

ARTIFICIAL INTELLIGENCE, ADMINISTRATIVE POWERS AND SAFEGUARDS: A COMMON BASIS?

Giacinto della Cananea[*]

Abstract

This chapter investigates whether a common substantive basis exists for governing the use of artificial intelligence in administrative action across diverse legal systems. Building on two hypothetical cases—access to the algorithm's source code and the reasonableness of AI-driven decisions—it examines how courts and legislatures respond to questions of transparency, human oversight, and judicial review in both EU and non-EU jurisdictions. The analysis reveals significant divergences in regulatory approaches, particularly where intellectual property protections and "black box" systems limit access and accountability. Yet it also uncovers shared structural principles: legality, due process, transparency, proportionality, and human supervision remain essential constraints on automated administrative power. Through this comparative functional method, the chapter shows that although administrative cultures and institutional designs vary widely, the foundational principles of administrative law continue to anchor and shape the governance of AI, suggesting the emergence—albeit uneven—of a common core of safeguards in algorithmic public decision-making.

TABLE OF CONTENTS

1. Introduction....397
2. A best-case or worst-case scenario?....397
3. Key regulatory and institutional data....399
4. The 'functional' analysis: the two hypothetical cases....401
5. Access to the algorithm's source code....403
6. The principle of reasonableness and black boxes....407
7. Common and distinctive features: reasons and implications....413

[*] Full Professor of Administrative and Public Law, Bocconi University.

1. Introduction

Consistent with the framework established in the opening chapter, the review of the most relevant regulatory and institutional data within the selected legal systems – conducted to compare the use of artificial intelligence by public bodies – must now be followed by an analysis of their shared and distinctive feature. It may be useful to begin by briefly summarising why the choice of topic is significant regarding the expected outcomes of a comparative analysis of a specific legal principle or institution, before illustrating some essential references to the characteristics of the 'functional' analysis to be undertaken.

This analysis focuses on a series of issues arising from two hypothetical cases. Both focus on principles that govern not only procedural matters but administrative action more generally. The first is the right of access, in this instance to the source code of the algorithm used by the authority. The second is the principle of reasonableness. After examining, for each of the two hypothetical cases, the solutions proposed by experts from the various legal systems considered, the discussion will then turn to the common and distinctive features that emerge, as well as to the implications they raise for the common core of administrative rights.

2. A best-case or worst-case scenario?

There are two main strands of theory that have, in the past, gained support with regard to the law applicable to public authorities[1]. They are considered here not from a historical perspective, but as assumptions underlying two comparative scenarios concerning the use of artificial intelligence by public administrations.

Under an initial approach, it is recognised that bodies of public administration have developed everywhere, particularly since the early nineteenth century. Their legal regime, however, is treated as relative, viewed as a variable specific to each State, rather than as a fixed standard. Administrative law, considered a branch of positive law, has thus

[1] I have examined them, from the dual perspective of the history of ideas and legal institutions, in various writings. I will limit myself to mentioning the piece in which various issues in methodology were discussed, that is, G. della Cananea, M. Bussani, *The Common Core of European Administrative Laws: A Framework for Analysis*, 26 Maastricht Journal of European and Comparative Law 217 (2019) and two monographs on the common core of European laws: G. della Cananea, *Il nucleo comune dei diritti amministrativi in Europa. Un'introduzione* (2019); *The Common Core of European Administrative Laws. Retrospective and Prospective* (2023).

become established, but not widespread, due to profound differences in institutional structures and morphology. As a scientific discipline, therefore, administrative law can only be concerned with comparisons within homogeneous areas, such as countries sharing a common English heritage due to historical and cultural factors. This approach was most clearly articulated by Albert Venn Dicey, the most renowned English constitutionalist of the Victorian era, who was nonetheless aware of the need to relativise and temper certain positions that conflicted with the main regulatory and factual evidence[2]. There has been no shortage of emulators, such as Peter Cane[3], though his contributions have been critically challenged by the well-reasoned objections of Paul Craig[4].

According to the opposing view, administrative law has become established within a variety of political systems through a continuous, though not always linear, process. These range from liberal democracies to variously authoritarian regimes and even dictatorships. It has thus become widespread through growth or diffusion, establishing itself as distinct from private law. The difference with respect to the principles and institutions of the latter is profound, because it is one of nature and not of degree. The powers exercised by authorities performing administrative functions are different because they are intended to protect the public interest. Over the course of a century and a half, this approach was developed by Alexis de Tocqueville, taken up and developed by Jean Rivero[5] and, more recently, by Sabino Cassese and Jurgen Schwarze, who extended it to the Community administration and its law[6].

The important and profound analytical difference does not only lie in the assumption that administrative rights are or are not comparable. The difference concerns the subject of the study and the arguments used to explain the common or distinctive features of different countries. It concerns the subject of the study because, just as proponents of the existence of a profound gap between the rights of continental Europe and those of English origin have highlighted the

[2] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

[3] P. Cane, *Controlling Administrative Power: An Historical Comparison* (2016).

[4] P. Craig, *Book Review: Comparative Administrative Law and Political Structure*, 62 Oxford Journal of Legal Studies 496 (2017).

[5] J. Rivero, *Cours de droit administratif compare* (1957).

[6] See S. Cassese, *La construction du droit administratif: France et Royaume-Uni* (2000) and J. Schwarze, *Europaisches Verwaltungsrecht* (1988), English translation *European Administrative Law* (1992). On this latter work, see the Book review of F.G. Snyder in 55 Modern Law Review 885 (1992) (for the remark that this was “one of the most important fields of contemporary legal scholarship”).

distinctive features concerning the judicial review of administrative activity and the liability of public officials, so too have proponents of largely shared principles and institutions emphasised the importance of the legislative regulation of procedure and fundamental rights. Therefore, depending on whether the analysis is based on one or the other of the two schools of thought mentioned, various issues are raised and resolved in significantly different ways. By way of example, the main issues regard the existence of 'exorbitant' powers, the importance of procedural guarantees, and the boundary between legitimacy and merit in judicial review.

For the purposes of this paper, it is not necessary to take a position in favour of either approach. Rather, one may ask whether the subject of the research presented here is one that, at first approximation, can be considered among the best-case scenarios, either for functional reasons or because of the adoption of standards by the European Union and the Council of Europe. The very fact that the Council of Europe has adopted a convention could be seen as proof that at least some basic principles are shared among the Member States. Alternatively, one could conjecture that the use of artificial intelligence by public administrations constitutes a worst-case scenario, more likely than others to falsify the proposed conjecture[7], due to the relevance of established background theories, which are bound to influence the way public administrators, lawyers, and judges approach various issues, even before attempting to resolve them.

3. The main regulatory and institutional data

Before isolating the specific issues to be explored in depth, it is necessary to briefly outline the implications drawn from the main regulatory data concerning the legal systems selected for the comparative study.

It is a static analysis, so to speak, but not without its usefulness. It is useful, first of all, because it shows that the trend in the area under consideration here (and, in general, throughout the world) is moving towards overcoming the initial dividing line between the public and private sectors. This dividing line is being crossed in both directions: public institutions determine standards of organisation and conduct that private individuals must comply with. In doing so, institutions must take into account current and foreseeable trends within the private sector;

[7] M. Shapiro, *Courts*: *A Comparative and Political Analysis* (1980), vii.

moreover, they turn to the latter, for example, to prepare algorithms used in their selection and decision-making activities, whether for the distribution of teachers among various locations of an educational institution[8] or the selection of individuals eligible for particular welfare benefits.

This analysis is also useful because it shows that, while no country has any fundamental objections to automated decision-making, the overwhelming tendency is not to legislate systematically in this area, but to defer to soft law. Exceptions to this are Germany and Italy, where legislators have limited themselves to adopting legitimising rules to resolve, once and for all, the question of the validity of automated decisions. A different situation can be found in the Spanish legal system, which has legislated through the general law on the legal regime of the public sector, providing a rather broad definition of automated administrative action, characterised by the absence of intervention by employees[9]. Then there is the European Union (EU) legal system, which, with Regulation No. 2024/1689, has adopted primary legislation on artificial intelligence.

Lastly, precisely because of the limited nature of the legislation in most of the legal systems considered, many issues concerning not only the validity of automated decisions and their controllability, but also the intervention of private individuals in administrative proceedings have been addressed and resolved by case law. Among the first to do so was the *Conseil d'État*, the highest court in the French administrative system. The Italian *Consiglio di Stato* has done so too. On the one hand, it confirmed in a series of rulings the full admissibility of the automation of the procedure in view of the principle of good administrative practice, which requires the achievement of public objectives with the least expenditure of means and resources; on the other, it reiterated the need to respect the general principles of transparency and accountability[10].

The very act of referring to case law entails a warning that should not be overlooked. Although the hypothetical cases – which will be discussed shortly – are theoretically configurable within a variety of legal systems and correspond in practice to their functioning, it should not be forgotten that there are significant differences between them. These differences do not depend solely on the variable decisions of a political majority or a president (as is the case in the USA). They are caused by

---

[8] See the ruling of the Regional Administrative Court of Lazio, Section III-bis, 22 March 2017, no. 3769.
[9] See the Chapter on Spain in Part II, in particular the answer to the first question.
[10] See the judgment of the Council of State, 13 December 2019, no. 8472.

profound structural differences between liberal democracies and other political regimes that can be described as well-ordered, even if they do not recognise all the fundamental rights enshrined in the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights, and, lastly, authoritarian governments[11]. For example, it can be expected that the use of artificial intelligence will entail no exceptions to the procedural and substantive guarantees designed to protect individual rights within liberal democracies and political regimes that respect the rule of law. The fact that Chinese general law requires compliance with general criteria of procedural fairness and transparency is further proof of the progress made towards the rule of law[12] , although it is essential to verify empirically whether that law is considered applicable and with what effects.

4. The 'functional' analysis: the two hypothetical cases

Having outlined the abstract scenarios and the initial findings drawn from an examination of the main regulatory and institutional data, we now turn to the functional analysis.

In accordance with the established research methodology referred to at the beginning of this volume, the functional analysis is grounded in a series of hypothetical cases prepared by the research group. The essential prerequisite, without which it is not even possible to begin comparing the various legal systems selected for comparison, is that the hypothetical cases are, in theory, suitable for all of those legal systems. Upon confirmation that this condition is met, the national reports can be prepared. It is at this point that the actual comparison can begin[13].

Hypothetical cases, as previously remarked, focus on violations of procedural sequences, rules governing the various obligations incumbent upon public authorities, and formal requirements. They serve to ascertain whether, among the legal systems chosen for comparison, there are common and connecting features – in addition to countless distinctive ones – that are not general maxims or constraints but have

[11] On this distinction, see J. Rawls, *The Law of Peoples* (1999), 5. See also E. Ip, *Administrative Justice in Authoritarian States*, in M. Hertogh, M. Kirkham, R. Thomas *et al* (eds.), *The Oxford Handbook of Administrative Justice* (2021), 263 (for the remark that in these forms of government administrative justice may never evolve into a threat to the regime security).

[12] See the Chapter on China in Part II, in particular the answer to the first question.

[13] On these methodological aspects, see M. Bussani, G. della Cananea, *À la recherche du fonds commun des droits administratifs européens*, 75 Revue Internationale de Droit Comparé 7 (2023).

specific legal significance. The assumption is that all the prerequisites and conditions that must be met for public authorities to exercise their powers validly are relevant to the law, even though not all deviations from the regulatory paradigm are necessarily unlawful.

In abstract terms, hypothetical cases may concern various types of proceedings: instrumental proceedings, such as disciplinary proceedings, or final proceedings, i.e. those directed outside the administrative apparatus. There is a wide range of these: from regulatory proceedings[14] to contractual proceedings, from proceedings through which economic benefits or status are granted to proceedings that, on the contrary, limit the rights of individuals and groups, such as the prohibition of assembly in public places, as well as expropriation and other measures affecting the right to property[15]. Activities that are not fully proceduralised, such as the exercise of certain powers by the police, such as requests to show documents and inspections[16], may also be considered.

In concrete terms, the hypothetical cases included in our questionnaire cover all these forms of administrative action. There are instrumental administrative procedures – such as the recruitment of civil servants – and final procedures. The latter include procedures to adopt measures with beneficial effects for the recipients (such as authorisations and granting bonuses during the pandemic), as well as others that may have unfavourable effects. There is also a case that envisages the use of an algorithm that could lead to discrimination in the exercise of police powers. Until a few years ago, this idea would have appeared only in a dystopian novel, but now it holds particular relevance for public law scholars engaged with the realities of their time. In fact, many public authorities now use tools like these, even in liberal democracies.

The two hypothetical cases examined in the following pages concern two forms of action that fall, so to speak, within the scope of ordinary administration. The first case does not concern the recruitment of new school teachers, but their subsequent assignment to various

[14] G. della Cananea, A. Ferrari Zumbini (eds.), *Administrative Rulemaking and Planning in European Laws* (2025).

[15] Various examples can be found in the volume on expropriation proceedings: M. Conticelli, T. Perroud (eds.), *Procedural Requirements for Administrative Limitations of Property* (2022).

[16] On the consequences of police control conducted with excessive force, see O. Pfersmann, *Austria, Germany, and Switzerland*, in G. della Cananea, R. Caranta (eds.), *The Liability of Public Authorities in European Laws* (2020), p. 318, and G. della Cananea, *Hungary, Poland, and Romania*, *ivi*, p. 330 (pointing out the reluctance of some courts to enforce liability in these cases).

institutions; the second case concerns the reorganisation of a public bus transport service, which entails disadvantages for some users.

Before analysing them more closely, it should be noted that the two hypothetical cases present very different scenarios, not only in terms of the nature of the functions performed by public authorities but also with regard to the relevant regulatory parameters. In fact, in the first case, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 takes on particular significance. Article 1 reiterates that natural persons have the right to the protection of their personal data. Consistent with this basic criterion, Article 22 establishes that "the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her" Among the minimum requirements established by the Regulation is "at least the right to obtain human intervention on the part of the controller, to express one's point of view and to contest the decision". In the other case, the relevant rules of law are those of national law, although the EU and the Council of Europe have defined some general standards regarding access to public services. It cannot therefore be ruled out that in this case there may be a clearer gap between the solutions that may be adopted in the various legal systems.

5. Access to the source code of the algorithm

Let us now take a closer look at the hypothetical case, the problems it presents and the proposed solutions. The starting point is quite similar to the cases that have recently occupied the administrative and ordinary courts in Italy and Spain, respectively[17]. It consists of a legislative provision establishing an extraordinary recruitment procedure for school teachers. The existence of a legislative provision is important in itself because it eliminates at source the doubts about legitimacy that have been raised in some legal systems regarding the possibility of adopting a fully automated decision. In fact, new teachers are classified and assigned to their location by an algorithm. Under the law, they express their preferences regarding the positions for which they wish to be hired, with particular regard to the level of education, the skills required, and the school's geographical location. The algorithm then assigns each teacher a role, matching their ranking position to their

[17] See the Spanish reconstruction of the hypotetical case n. 3, in Part III, and the ruling of the Council of State cited in note 10. The EU report notes that no such event has occurred to date.

preferences and ensuring that the preferences of those at the top of the ranking are satisfied first, until all positions have been filled.

It is also assumed that one of the teachers, Caio, who is ranked very high at the end of the recruitment process, is assigned to a school other than those he selected and very distant from his home, while some teachers ranked lower are assigned to their first-choice school. Since, as noted, the process involves no human intervention, Caio requests access to the algorithm's source code. However, the public authority that manages the process denies such access. Caio challenges the algorithm's decision before the competent court on three related but distinct grounds: first, he requests access to the source code of the algorithm; second, he questions the legitimacy of the automated assignment because the criteria and parameters used by the software to process the solutions have not been published; and third, he claims that there should have been human oversight of the automated decision, at least at the end of the assignment process. This is what is known in some legal cultures as the 'human reserve'. Overall, the use of this type of algorithm poses a high risk under the EU Regulation on Artificial Intelligence.

A number of specific questions arise: first of all, whether the competent court (either an administrative court or an ordinary court, possibly in a specialised section) is willing to accept these arguments; if this is the case, whether the court is willing to accept Caio's request, allowing him access to the source code of the algorithm or the criteria and parameters used; finally, whether it is willing to annul the contested decision or, at least, to disapply it.

Firstly, the preliminary question concerning the legal basis of the automated decision can be considered definable based on the EU Data Protection Regulation – in sofar as it has been resolved with regard to the need for a legislative basis or the consent of the data subject. The existence of either is an essential precondition for the legal systems of States making up the Council of Europe. This is particularly the case in Austria, where the absence of an adequate legislative basis would be sanctioned by the Constitutional Court, rendering administrative decisions invalid. The situation is different in the Chinese legal system, due to the absence of a legislative framework, which is partly compensated for by directives issued by the executive branch.

Secondly, the issue of the accessibility of the algorithm's source code can be considered definable under the general principles of law common to the legal systems of the Council of Europe. The general requirement, universally recognised, is to protect and promote transparency. This is a good in itself and indispensable. It also serves to

ensure respect for the rights and interests protected by the legal system and to achieve equal treatment of individuals and legal entities. Naturally, transparency entails, at the very least, the possibility of ex-post verification of the conformity of the activities, acts, and operations carried out by public administrations with clear general *ex-ante* criteria. This is particularly important in relation to the right to effective judicial protection under Article 13 of the European Convention on Human Rights. It can therefore be expected that the courts or other competent public institutions (e.g., an *ombudsman*) will resolve the issue in favour of the applicant.

This expectation is generally met within the legal systems of EU Member States, such as Spain, where the guidelines established by independent bodies responsible for access to documents play a particularly important role. In other legal systems, such as France, national legislation sets out detailed provisions on the minimum requirements that public authorities must meet, including the parameters used for automated decision-making and, where possible, their relative weight. However, there are variables, particularly because it is not sufficient to consider only national legislation; rules established by individual federal states or regional authorities also apply, as is the case in Germany and Italy, respectively.

More significant are the differences relating to what the French call *le fond du droit*. Three main variants can be identified. The first can be found in the Estonian legal system, where the source codes of public decisions that use artificial intelligence are accessible online through tools available to all citizens. The second variable can be found in legal systems where interested parties can obtain a court ruling ordering a 'recalcitrant' administrative authority to grant access relatively easily[18]. This variable can be found, for example, in Italy, where the Council of State has pointed out that the fact that the computer programme was developed by a private company is not in itself an impediment to access to the source code. This is because, according to the Council, "the use of such tools actually involves a series of choices and assumptions that are far from neutral: the adoption of predictive models and criteria on the basis of which data are collected, selected, systematised, ordered, and collated; their interpretation; and the consequent formulation of judgments are all operations resulting from precise choices and values,

[18] In Italy, the Ministry of Education denied access to the source codes of the software used on the grounds that it was not an administrative document and that the software was protected as intellectual property, but the administrative court did not agree with these reasons: see the ruling of the Lazio Regional Administrative Court cited in note 8.

whether conscious or unconscious. It follows that these tools are called upon to make a series of choices that depend largely on the criteria used and the reference data employed, in relation to which it has often proved difficult to obtain the necessary transparency"[19]. Similarly, EU courts can also be expected to censure the lack of transparency.

In contrast, in another liberal democracy, the US, it is at least debatable whether the data subject can obtain a court order allowing access to the algorithm's source code. This is particularly true because of the protection afforded to intellectual property. It is also due to the federal courts' restrictive approach. An appeal based on the need to assess the intrinsic adequacy of the automated decision and on judicial protection against its effects could yield a different outcome, but these guarantees are provided by a soft law act that is not binding outside federal agencies. It is interesting to note, for purposes of comparison, that in the Chinese legal system, the protection of intellectual property can also be considered an obstacle to granting a request for access, even though it should be included – together with the individual and collective interest in the transparency of decision-making processes – in the balancing of interests that the court is called upon to carry out.

Lastly, the outcome of judicial review may be influenced by the fact that the algorithm did not function correctly, as highlighted in the Dutch report. This case is a good test of the importance attached by the various legal systems to procedural guarantees and, in particular, their actual relevance in the presence of legislative provisions, such as those established by the general laws on administrative procedure in force in Germany and Italy, which rule out the annulment of the final measure on account of formal and procedural 'flaws'[20]. In fact, the Italian report points out that, in the absence of an express legislative basis or the consent of the person concerned, the automated decision is voidable and that, in the case in question, it is possible to assume that the principles of

[19] Council of State, Judgment no. 8472 of 13 December 2019, cited above, § 7.2.

[20] Section 46 of the German Federal Administrative Procedure Act (VwVFG) (1976); Article 21-*octies* of the Italian Administrative Procedure Act (1990). On Italian law, F.G. Scoca, *I vizi formali nel sistema di nullità delle provvedimenti amministrativi*, in V. Parisio (ed.), *Vizi formali, procedimento e processo amministrativo* (2004), 55; on the German legislation, D.U. Galetta, *Introduzione*, in Id., *La legge tedesca sul procedimento amministrativo* (2002), 15. For a comparison with Spanish legislation, J. Garcia Luengo, *Formal infringements as grounds for invalidity of administrative acts* (2016). It may also be interesting to compare this with EU law, given that since the Treaty of Rome, judicial review has been limited to 'substantive violations': L. Hering, *Procedural defects in the legal framework of the direct administration of the European Union, between correction and irrelevance*, 1 Ceridap (2021).

participation and motivation have been violated. In similar terms, the German report rightly points out that it is reasonable to expect that the court will not consider the error committed to be 'clearly irrelevant' for the purposes of the final decision. The British report points out that the final ranking, at least at first glance, gives candidates with fewer credentials a more favourable position, which seems to be at odds with the principle of equality and one of its corollaries, namely, reasonableness. This is a general point of importance that will be revisited in the examination of the other hypothetical case.

In the meantime, it should be noted that it is not a foregone conclusion that the court, once the legitimacy of the applicant and the relevance of the general criteria invoked have been recognised, will be willing to reach the outcome desired by Caio. This is not a foregone conclusion in the English legal system, as it is for the court to assess whether there is a right to appeal if Article 6 CEFU. Nor is it a foregone conclusion in the German legal system, where Caio must prove that the other party is less suitable for the position to which he has expressed his preference. Furthermore, when assessing the exercise of discretionary power by a public body, the court does not normally annul the challenged measure but requires the authority to re-exercise its power – obviously without relying on the algorithm deemed invalid. A similar situation can be found in the Austrian legal system.

In short, the question of whether the algorithm's source code is accessible can generally be answered affirmatively. Although access to documents generally requires supervision, the other question, concerning the possibility of seeking the remedies provided for by law (requesting a review of the automated decision by officials and judicial review), is particularly complex. Although access to documents generally requires supervision, the other question, regarding the possibility of pursuing legal remedies, such as requesting a review of the automated decision by officials or seeking judicial review – is particularly complex.

6. Principle of reasonableness and 'black boxes'

So far, we have examined various issues related to the transparency of the algorithm used by public administration. The solutions are inevitably shaped by the broader guidelines that courts follow as gatekeepers in deciding the admissibility of appeals against decisions made by public administrations, as well as in determining the scope and impact of judicial review. This is especially true for more

complex algorithms, such as those with self-learning capabilities, which cause difficulties for data subjects trying to fully understand the underlying logic. The concept of *a black* box highlights the difficulties data subjects face. However, from a legal perspective, there is certainly no less need to protect their rights[21]. The question that arises is whether the automated decision taken by the administration meets the criteria of logic, rationality, and reasonableness and, if not, whether and by which public institution it can be reviewed.

Even if we assume that the difficulties faced by the parties involved can be resolved in accordance with the established guidelines of various public administration courts on the principle of reasonableness, it should be noted that the exact scope of this principle varies. First of all, in continental Europe, administrative and constitutional courts have long recognised the principle of reasonableness as a general criterion that public authorities must follow in the performance of their public functions. They identify its essence in the development of the fundamental principle of equality, which requires treating equal situations equally and different situations differently, thus avoiding irrationality, inconsistency and, ultimately, arbitrariness[22].

Thus understood, it is a tool for controlling discretion. In the English legal system, too, reasonableness is a standard of judicial review. However, firstly, it has traditionally been understood in negative terms, as a barrier to irrationality and illogicality[23]. Secondly, it is a high threshold, in the sense that it can be used to quash administrative decisions only if they are so unreasonable that no reasonable authority acting reasonably could have made them. To borrow the words of Lord Diplock, unreasonableness arises when a decision is 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'[24]. It is such a high threshold that it is difficult to reach it. Concretely, while some commentators have juxtaposed reasonableness and proportionality, others – including Paul Craig – have argued that

---

[21] As the Dutch report accurately points out in the reconstruction of the hypotetical case n. 3, in Part III, while the EU report states that this hypothetical case does not pose a high risk.

[22] L. Paladin, *Esiste un «principio di ragionevolezza» nella giurisprudenza costituzionale?*, in *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale* (1994), 163.

[23] The usual reference is to the judgment of the English Court of Appeal in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

[24] House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

they are distinct standards of review and that the latter should be applicable in right-based cases[25]. The latter view looks preferable also from a comparative perspective. As a matter of fact, proportionality has an autonomous configuration elsewhere – especially in Germany, Austria, and Switzerland – due to the triple test (adequacy or appropriateness, necessity, and proportionality in the strict sense) to which public rules and decisions are subject. It has it, too, in Italy.

In the light of these essential references, we can now examine the other hypothetical case. It concerns the use of an artificial intelligence-based programme to optimise bus routes in a city's urban area. The relevant factual and regulatory information can be summarised as follows: the municipal administration has decided to reorganise the bus routes in the city centre to optimise routes, stops, and connections. In accordance with current regulations, it has launched a public consultation, allowing all interested parties to submit briefs and documents through an online platform. A woman who has been a longtime bus user submitted comments asking that the bus stop near her home remain in its current location.

Her comments, along with documents and submissions from other users, as well as all materials prepared by the public administration regarding bus routes, frequency, population, and other relevant factors, are analysed by an artificial intelligence-based program. The program uses a Large Language Model (LLM) provided by an external company that holds the patent on the code, thus making it a black box. Based on the information fed into the platform, the artificial intelligence program develops a plan for new bus routes. The competent body adopted the plan without modification, considering the artificial intelligence-based solution efficient, rational, and sustainable. When the plan is implemented, the woman discovers that the bus stop near her home has been moved to 900 metres away.

This hypothetical case raises several complex and sensitive questions. First of all, one might ask whether the woman can make use of traditional procedural and trial guarantees, beginning with a request to access all documents uploaded to the platform. One might also wonder whether she can access the program code, even though it is protected as a trade secret. Furthermore, since the program operates as a black box, the next question is how the woman can demonstrate that the

---

[25] P. Craig, *Proportionality, Rationality and Review*, New Zealand Law Review 265 (2010), 268 (for the remark that "proportionality inquiry requires the relevant interests to be identified, with some ascription of value to those interests, since this is a condition precedent to any balancing operation").

decision made by artificial intelligence is irrational. Similarly, one might wonder how public bodies can demonstrate the rationality of decisions based on artificial intelligence. Last but not least, the vexed question of judicial review must also be considered in this case. One must ask whether the woman has any remedies available and whether they could lead to the annulment of the automated decision that harms her interests.

Moving from the problems to the solutions devised to remedy them, a quick glance at the national reports is enough to realise that the points on which the various legal systems agree and those on which they diverge are intricately intertwined. An attempt at synthesis can be made by combining the various 'legal formants' – laws and regulations, judicial decisions, doctrine – and *'le fond du droit'*. The solutions that emerge in relation to the legal systems included in our comparative study can be traced to three basic models.

In the first model, which is common in English legal practice, the role of the law is virtually non-existent. However, the government and its administrations are not exempt from external constraints concerning general principles, such as transparency, and the way in which they must conduct their activities. Custom and principles commonly accepted in the context of natural justice form the basis of these criteria. Applied to the hypothetical case, the suspicion that the administration has deviated from the standards of participation and rationality that guide its actions must be taken very seriously, especially given that the decision-making process culminates in a decision made by a program functioning as a black box. It is unclear how the public decision-maker could have taken all the elements that emerged during the consultation into account.

The above observation is also useful for another purpose, namely to highlight the problem that this way of proceeding poses with regard to the understanding of discretion that is typical of the English experience. In various legal systems in continental Europe, the emphasis is on the need for public bodies to allow discretion through directives and instructions, when not limited by the law. In contrast, the general criterion followed in English administrative law is encapsulated in the no-fettering rule, according to which, if a public authority has been given discretionary power to exercise on a case-by-case basis, it cannot divest itself of that power by deciding once and for all[26].

[26] On this judicial doctrine, see P. Daly, *Understanding Administrative Law in the Common Law World* (2021), 56 (observing that the no-fettering rule implies that "where the legislature vested a discretionary power in an administrative decision- maker it would be inconsistent with this considered legislative choice for the administrative decision-maker to bind itself as to how the power will be exercised in future cases").

Lastly, the way the municipal administration acted is incompatible with the principle of equality, which requires that different situations be treated in a reasonably differentiated manner. In the present case, the reasons why the person concerned requested that the usual bus route be maintained were not taken into account. However, it is not a foregone conclusion that those reasons will be accepted in court. It will be up to the judges, in their role as gatekeepers, to decide.

In this respect, there is a certain similarity to the situation in France. It is acceptable for the data subject to have access to the algorithm code, provided this does not involve a breach of commercial confidentiality. Once it has been established that the documents to which Mrs. Fritz intends to access do not constitute personal data, and that the interest Mrs. Fritz claims has been infringed is among those specified in the orderly manuals prepared by the European administration, the only recourse left is judicial remedies – that is, the tried and tested mechanism of *recours pour excès de pouvoir*. This constitutes the archetype of the control exercised by administrative courts. It is therefore not surprising that clear similarities can be discerned with the control exercised by Italian and Dutch administrative courts. In the Italian legal system, judicial control can be invoked both from a procedural point of view, concerning the correctness of the algorithm's construction, and from a substantive point of view, regarding its intrinsic rationality. In the Dutch legal system, the lack of transparency is also relevant in relation to the obligation to give reasons enshrined in the General Administrative Law Act (GALA). In the Dutch legal system, the lack of transparency is also relevant in relation to the obligation to provide reasons as enshrined in the General Administrative Law Act (GALA).

An example of a model focused on legislation is that of Germany, where the law regulates planning procedures, transport services, and access to information (*Informationsfreheitsgesetz*). It may be surprising that the solution proposed for the Chinese legal system emphasises transparency, requiring the administration, even without providing access to the algorithm code, to explain the logic behind the decision. Planning fulfils this function and is therefore subject to a procedure that allows public consultation. However, the German case confirms the limitations of legislative-based systems, due to their rigidity. In principle, the woman dissatisfied with the decision to change the bus route, which is detrimental to her interests, can request access to the documents and briefs filed during the proceedings. However, she cannot avail herself of the protection provided by the European GDPR regulation, because documents and briefs do not constitute personal data. Similarly, she can

question the decision's rationality, but since it is complex, there is no absolute best solution. The possibility of seeking judicial remedies is also limited, because they require the applicant to have a subjective public right. In the case in question, however, the obligation imposed by law is focused on the interests of the community. In this respect, there is an analogy with the Austrian legal system, where no judicial remedy is available against an automated decision such as the one envisaged.

There is also a partial analogy with the US legal system, because it would be extremely difficult to link the woman's claim to the injury to life, liberty, or property that constitutes the basis for invoking the protection guaranteed by the Due Process Clause, established by the Fifth Amendment[27]. Alternatively, it can be assumed that the person concerned will seek to avail herself of the procedural guarantees enshrined in federal law on administrative proceedings or similar regulations within the various federal entities. As for the foreseeable outcome, the analogy is instead with the Dutch legal system: the impossibility for the artificial intelligence program, as a black box, to provide explanations for the reasons on which the final decision is based is in clear contrast with the obligation to give reasons. That decision can therefore be appealed because it is arbitrary. Conversely, in the Chinese legal system, the necessary conditions for exercising the right to judicial protection are not met.

Lastly, the solutions proposed regarding the Spanish legal system differ from the previous ones in two respects. First, the legal framework distinguishes between the legislative level, which lays down general principles, and the regulatory level, which is set by the administration itself. In more than one case, it is the municipal administration that, through its own regulations, regulates how citizens and other users of public services can challenge violations of their rights or contest the unsatisfactory state of public services. Second, given the type of legal situation envisaged in the hypothetical case, the person concerned may lodge a complaint. This is, of course, neither an administrative nor a judicial appeal. A similar solution is envisaged in the Estonian case, where the 'political' aspects of the mechanism are increasingly emphasised.

[27] To determine whether government action affects an individual's "life, liberty, or property," requiring fair procedures (that is, notice and hearing), the Supreme Court defined in *Mathews v. Eldridge* (1978) a test balancing private interest, risk of error, and government interest. For a critical analysis of this approach, see J. Mashaw, *Due Process in the Administrative State* (1985).

7. Common and distinctive features: reasons and implications

The hypothetical situations presented in this book differ from traditional ones (such as the revocation of a concession, expropriation for public use, and the imposition of a personal or financial penalty), for which it is, all things considered, fairly easy to give a positive answer to questions similar to those considered so far. This is because the administration is required to comply with a series of procedural and substantive constraints and, if it fails to do so, exposes itself to the dual risk of annulment or declaration of nullity, as well as to liability for unjustified damage to private individuals[28]. First of all, there is a fundamental difference: replacing the public decision-maker with a software that automates the decision. Sometimes – as in the second hypothetical case examined above – the authority uses more complex algorithms, characterised by their ability to self-learn. It is even more difficult for those concerned to fully understand the logic behind the algorithm. The concept of the black box is indicative of these difficulties.

Secondly, there is uncertainty about the criteria and procedures to be followed in performing administrative functions. These are not exhaustively set out in primary and secondary legislation. As is often the case in such situations, reference must be made to general principles. Another distinctive feature of these forms of action concerns the mechanisms for monitoring the correct and transparent performance of administrative activities. Those affected do not always have access to judicial remedies: sometimes they can lodge an administrative appeal; at other times, they can only submit a complaint to a public authority that lacks the power to annul or amend the automated decision, but only to request its review.

It would therefore not have been arbitrary to assume that the comparative study could only have drawn up a report on the numerous and significant differences between the various legal systems considered. In this case, at most, it would have been possible to verify the specific relevance of the factors that account for the diversity in administrative rights. Among these factors are, first and foremost, history, culture, and legal tradition established over time. Dicey referred to these factors in particular to explain that the administrative law that had become established in France could never have existed in England because of its conflict with the principles of the rule of law, in particular the equality of citizens before the law. Equal responsibility was given ethical value,

[28] H.W.R. Wade, *Administrative Law* (1961), Italian translation *Diritto amministrativo inglese* (1964), 245.

leading to the belief that the two legal systems were based on very different values, a conclusion that has lost support over time. However, there are also differences arising from policy choices made by the institutions responsible for determining political and administrative direction, or, sometimes, by other institutions. A good example is the decision of the French *Tribunal des Conflits* in the *Blanco affair*, which ruled that the provisions of *the* Civil Code concerning tortious liability did not apply to the State and its officials, because state liability differs from that of a private body and thus requires its own justification and rules[29].

Nevertheless, the results of the comparative study show that, despite numerous and significant differences, there is more than one characteristic common to the legal systems considered, and that the common and distinctive features are so closely intertwined that it is difficult to define them precisely. A first common feature is the importance attached to automated decisions. It might be said that this is 'natural' insofar as it responds to the possibilities offered by technological development. A more sophisticated way of developing this line of reasoning is to argue that the full admissibility of the new tools meets the criteria of efficiency and cost-effectiveness of administrative action. They require public bodies to achieve their goals with the least expenditure of means and resources and by speeding up the procedural process[30].

However, it is precisely in the case of administrative activities carried out in ways that differ from the usual ones that there is a need to ensure they are conducted according to the criteria and methods that distinguish them, involving differences – depending on the case, in either nature or degree – compared to activities carried out by private individuals. In particular, administrative activities must comply with a series of very general criteria, follow the pre-established sequence of stages (with the consequence that the omission of a stage may jeopardise the successful conclusion of the entire sequence), and be verifiable for the purposes of transparency and legality.

---

[29] Tribunal des conflits, 8 February 1873, *Blanco*, English translation available at *https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1021.* For further analysis, see J. Bell & F. Lichère, *Contemporary French Administrative Law* (2022), 140.

[30] See, for example, the ruling of the Council of State, 13 December 2019, no. 8472, § 9.1, which refers both to the constitutional principle of good governance (Article 97 of the Constitution) and to the general criteria established by Article 1 of the law on administrative procedure.

This line of thinking is reflected in the fundamental choice made by all the legal systems considered, which was already noted in the analysis of the main regulatory and institutional data and confirmed by the factual analysis: the need for human supervision. This observation requires qualification, since, as noted in Chapter XXI, human supervision is required in very different forms and intensities, especially in non-European legal systems, such as those of the US and China. For those in the EU, on the other hand, human supervision is mandatory under its rules, which are immediately applicable in Member States. This is further proof – if any were needed – of the importance of harmonisation resulting from membership of supranational legal systems[31]. A further consequence is that it confirms the conjecture put forward at the beginning of the comparative study of which this research is a continuation, namely that the European legal area has distinctive features and requires suitable analysis[32].

In addition to the direct influence of supranational legal systems, another common feature is particularly relevant: the use of general principles of administrative and public law. To understand its importance, we need to retrace the reasoning judges use to resolve issues raised by automated decisions. The courts called upon to settle disputes concerning public administrations show full awareness of the unique nature of new digital tools. It is precisely because of their unique nature that they are able to provide a number of advantages: lower expenditure of means and resources, an accelerated decision-making process, and even the exclusion of interference by the human factor. However, while the unique features of new technological tools and the advantages they offer explain an authority's decision to use them, this cannot lead to the circumvention, let alone the open violation, of the general principles governing administrative action[33].

These include broad principles such as legality, due process, and transparency, as well as mid-level standards – principles that are still general but less abstract – such as compliance with established

[31] See S. Cassese, *Le probléme de la convergence des droits administratifs: vers un modèle administratif européen*, in *L'État de droit - Mélanges en l'honneur de Guy Braibant* (1996), 47; R. Widdershoven, *Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?*, 7 Rev. Eur. Adm. L. 5 (2014), (distinguishing 'natural' converge from that 'imposed' by the EU).

[32] G. della Cananea, M. Bussani, *The Common Core of European Administrative Laws: A Framework for Analysis*, cit. at 1, 230.

[33] Court of Justice, Judgment of 21 January 1999, case C-120/97, *Upjohn v Licensing Authority*, § 36, according to which the national court hearing the case brought by the individual must be able to effectively apply the principles of Community law.

procedures, the right to defence, the right of access, and the obligation to provide reasons. In both respects, administrations are subject to ex-post verification to ensure that their activities and actions conform to clear general criteria and meet at least the minimum requirements of essential procedures[34]. These principles sometimes give rise to obligations with variable rather than invariable content[35]. However, as with traditional activities, being flawed, new forms of action that violate those principles are not suited to achieving the results the legal system attributes to 'valid' activities.

The conclusion that can be drawn is that the range of activities carried out by public administrations continues to expand, particularly in the institutional and procedural methods used. However, these activities always remain within the framework of the principles and rules governing administrative actions, considering the public interests involved.

[34] E. Schmidt-Assmann, *Recenti sviluppi del diritto amministrativo generale in Germania*, 1 Dir. pubbl. (1997), 57.
[35] For this distinction, see H.L.A. Hart, *The Concept of Law* (1961), 133.