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ACADEMIC ACTIVITIES

Conclusions from the I International Seminar on Administrative Law and Artificial Intelligence*

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Published in: July 2019

* This is a translation of the original Spanish text (available for example at: https://transjusblog.wordpress.com/2019/04/17/conclusiones-del-i-seminario-internacional-derecho-administrativo-e-inteligencia-artificial/ and at: https://blog.uclm.es/ceuropeos/2019/04/17/conclusiones-del-i-seminario-sobre-derecho-administrativo-e-inteligencia-artificial/).
This document has been translated into English by Ona Lorda, who holds a Law degree from the University of Barcelona and is a collaborator at the TransJus Research Institute of the University of Barcelona. Professor Juli Ponce has also collaborated with a final review of the translation.
The first draft of the Spanish text was written by the scholars entrusted with the task of presenting the conclusions of the I International Seminar on Administrative Law and Artificial Intelligence (DAIA): Lorenzo Cotino, professor of Constitutional Law at the University of Valencia, and Julián Valero, professor of Administrative Law at the University of Murcia.
The seminar's organisers and the participating speakers also collaborated on drafting the final version: Juli Ponce, Isaac Martín, Agustí Cerrillo, Luís Arroyo, Luciano Parejo, Ignacio Alamillo, Clara Velasco, Andrés Boix and David Restrepo-Amariles.
The three institutions that spurred the creation of the network Administrative Law and Artificial Intelligence (the Center for European Studies Luis Ortega Álvarez of the University of Castilla-La Mancha, the TransJus Research Institute of the University of Barcelona and the Open University of Catalonia), as well as the DerechoTics network and the Idertec research group, which have also joined the network, agree with these conclusions.

I.- General comments

1. Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with a certain degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or applications for the Internet of Things).[1]

Generic references to AI include the use of algorithm systems, machine learning and deep learning systems, neural networks, intelligent robotics and big data as the source for AI. Artificial Intelligence has been identified as one of the five emerging technologies that can transform our society in the upcoming decades and is the foundation of the fourth industrial revolution.

2. **The public sector in Spain is already using AI** in carrying out its operations and providing public services. However, there are serious problems in identifying and controlling the AI that is currently operating or is going to be implemented in the near future. Generally, the information available is merely of an informative nature - journalistic or institutional - and very superficial. Therefore, it is important to actively raise awareness of these initiatives and projects in order to categorise, analyse and evaluate them. While specific public actions using AI can already be identified with potential legal repercussions, so far the situation is essentially experimental, primarily based on behavioural patterns and automatic classification systems, as well as image and spatial recognition. In any case, **there is a striking lack of algorithmic transparency, while the Public Administrations have not adequately perceived the need to approve a specific legal framework**. Only a certain amount of concern regarding compliance in the sphere of data protection is available, which is considered a limitation.

According to an initial analysis of the experiences in the public sector in Spain, AI is used, still in a very nascent manner, to analyse data (fire risk, locations to be inspected), process natural language (reviewing requests made by citizens or detecting irregularities and fraud in public tenders), identify images (counting people in public spaces or detecting possible offenders), take decisions or facilitate decision-making (allocating state subsidies, determining the streets for police patrolling, identifying schools that may have a higher drop-out rate or providing treatment for a particular disease) and customise public services (providing information services, counselling and attention to citizens).

3. The benefits of the use of AI in the public sector administration notwithstanding, **it is important to consider the risks, tension and violations the use of AI may entail** for the purposes of legal certainty and fundamental rights such as equality, privacy and personal data protection as well principles of the administrative procedure. This is the case, for example, with regard to the inviolability of the duty of motivation as a consequence of machine learning , as well as the decreased effectiveness of the right to formulate claims if the operation of the personal data protection algorithm is unknown when Public Administrations use big data or elaborate profiles or, where appropriate, if minority groups are discriminated against.

4. The Public Administration of the future will not only be electronic but also intelligent and **will require a very different profile for its public servants**. We need to reflect on and ensure that current and future civil servants are properly trained, and that the civil service selection systems are suitable.

5. This requires research on the impact that AI may have on Public Law and fundamental rights as well as **promoting new mechanisms to guarantee these principles and rights by default and by design**. Public Law must, so to speak, be

1. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Artificial Intelligence for Europe {SWD(2018) 137 final}: https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:52018DC0237).

embedded in the source code. This is also a key element in the development of AI in the European Union.[2]

6. The Law is responsible for formalising the so-called Governance and Ethics of AI and its essential principles: the protection of dignity and human rights; the five basic principles of beneficence and non-maleficence, justice, freedom, human autonomy versus artificial "autonomy" and justification and transparency. Regulatory compliance, respect for dignity and fundamental rights, privacy by design, compliance with the requirements of the law on fair competition and other goods and ethical-legal values should be inserted in the AI design code and development, especially in the public sector.

For these reasons, at this initial phase it is essential **to ask legal experts to participate in the design, implementation and use of AI systems**.

7. We are aware of the great difficulties in generating a single regulatory framework, given that the Law is slow in adapting to technological realities, while new regulatory techniques and procedures are also needed. Drafting a new common European framework and adapting the norms and rules of Spanish law are inevitable. **Regulatory action and good practices are required at every level**, while currently applicable regulations and standards must be implemented.

The Law must enable and encourage innovation, create conditions, structures and institutions that allow for technological development while avoiding undesirable risks. The Law must also seek to redistribute the benefits and costs in an equitable manner.

We must be aware that Law in these areas tends to act in a reactive rather than proactive way, not in a way to stimulate the development of AI. Likewise, peremptory Law may motivate non-compliance, failing to encourage initiative in society. Private Law may be best to address some of these challenges, as it takes self-interest into consideration and allows for creativity, but this may negatively affect the public interest of society as a whole. The aim is to know the extent of what is socially tolerable and **to promote Public Law that enables innovation in this area.**

8. We also consider that it is necessary to positively assess and **be open to introducing techniques for a *biodegradable Law* on the matter, experimental and in a continuous beta state,** while developing legal solutions that are already available, such as the so-called regulatory sandboxes or sunset clauses. In spite of the criticisms that may be directed at them, we consider it necessary to move towards innovation in regulation. It is also essential to make progress in including computer scientists and legal specialists in several regulatory forms within the technological sector. Similarly, we need to be alert and adopt safeguards against the dangers of the lack of legitimacy, capture and algorithmic manipulation by regulators. We also believe that mechanisms and techniques related to the principles of precaution and responsibility should be evaluated.

9. In any case, **the fundamental principles of transparency and good governance as well as the legal obligations deriving from the citizens' right to good administration must be reshaped** in order to address the requirements of transparency, accountability and justification. A number of fundamental and constitutional rights already impose these requirements: the right of access to information, due process and judicial and administrative guarantees and the right to data protection, among others. The justification includes the access to algorithms and the systems into which the algorithms are integrated, the data and its quality, and the identification of the person accountable for the operation. Furthermore, this includes the reasons for a public decision that affects a specific person or group, in order to avoid violating the constitutional principle of the prohibiting arbitrary treatment.

Moreover, we need **to have transparency and justification from the outset on the design that generates verifiable**

2. It is important to recall the European Commission's "Coordinated Plan on Artificial Intelligence" of 7 December 2018 and its Annex on "Made in Europe" and "reliable" AI. To this end, the High Level Expert Group on Artificial Intelligence published the "Draft Ethical Guidelines for Reliable AI" on 18 December 2018, which was submitted for public consultation. The final version has recently been approved: Ethics Guidelines for Trustworthy AI, available at <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=58477>. The most distinctive feature of this Europa trademark is the "Ethics & Rule of law by design (X-by-design)". This includes compliance with basic ethical principles, the creation of ethics committees and delegates in all types of projects and corporations, the development of rules of professional conduct, information technology, users, and so forth.

data: intelligent systems must be designed in such a way that they can be supervised and monitored either by humans or by other intelligent systems. Likewise, a guardian AI is needed. In short, the Law needs intelligent tools to deal with intelligent tools.

10. **The rights to equality and non-discrimination must be reinforced** in order to avoid the damage that the intense use of big data and AI technologies can generate as they permit citizen control and monitoring systems with more or less spurious intentions. Voluntarily or involuntarily, the fact is that handling poor-quality data or a poor design can generate biases and discrimination, which must be minimised. At the same time, it is necessary to ensure that the intelligent system does not lose its effectiveness through minimisation. It is also essential to apply the techniques of the anti-discriminatory law to correct possible biases.

11. **The doctrinal contributions and case-law techniques related to the oversight of the Public Administration's discretional powers and its approach to ensuring the effectiveness of the right to good administration** (with its corresponding obligation to provide motivated decisions) **must be modulated and adapted** to the use of predictive tools that support decision-making or which replace human activity. This is necessary, since it may reduce the scope of discretion conferred on the administration and its human decision-makers. Nevertheless, properly developed AI has numerous future possibilities and the use of algorithms may lead to greater objectivity in the administrative decision-making process.

In this sense, **it may be helpful to "pierce the veil" of automated or algorithmic decisions** until we reach decisions made by humans. Current regulations only establish rules and guarantees in relation to automated decisions that have an impact upon people. This excludes semi-automated or decision support systems from any protection. Therefore, we must be especially aware to the fact that humans regularly follow the decision proposed by the automated system.

It is also important to reflect on the need **to preserve spaces and generate safeguards to ensure human-made decisions in the areas of administrative and judicial discretion.** In this sense, we must value the recognition of a right to a significantly human decision. Likewise, we need to study the possibility of incorporating safeguards to ensure the need for humans to justify not following up the decision using algorithms. Equally, there must be contexts that enable humans to not automatically follow the algorithm's decision.

12. We also consider that **there is a need for structural and conceptual changes** which includes: determining the nature of algorithmic systems, including their consideration as a possible source of Law; reflecting on what an administrative record is and what belongs to it, and the need to respond to informality and automated actions. It is also appropriate to assess the validity of the administrative body's theories and the administrative decisions with respect to the public sector's AI activity and the limits to how far these systems can be extended.

All of this also affects key elements of Public Law, such as the guarantees in the approval and verification of intelligent systems, related to the responsibility in adopting the decision-making process; the distribution of roles from the perspective of the democratic State; the displacement of decisions and the burden of proof; the minimisation of human beings' historical tendency towards fascination and confidence in machines (which dates back to before the Age of Enlightenment); the role of the collegiality in human decisions in the context of the progress of AI; and the revision and monitoring of the systems.

13. We also consider it **essential to adapt the legal framework on public procurement** in order to put the intense **public-private collaboration** in the development of algorithmic tools, AI and the creation and management of big data at the service of the general interest, while avoiding it from being taken over by Public Administrations. Thus, public procurement must integrate the requirements of transparency and justification, as well as non-discrimination and compliance with privacy regulations. Furthermore, this must allow for equality of bidders in contracting decisions to satisfy these principles in its design.

14. Special attention should be paid to the specific aspects of implementing AI in the context of **smart cities**, which is an important area of experimentation at the local level that involves many specific legal questions and challenges.

15. It is essential to address **the issue of how the ownership of the data and AI systems is configured** and how it is possible to treat "data as commons". In this sense, it is necessary to assess assumptions in which we need to

demand that the system is not only a service provided to the public sector, but it is also owned by the public.

16. We need to take into account the fight against a new divide: the divide derived from the **difficulties regarding the ability to read and exploit big data**, since only organisations with sufficient human and economic resources are able to benefit from all the advantages of these new tools.

In recent years, several research groups from different Spanish universities have begun to develop projects, which have addressed the opportunities and risks that can be generated using AI in the public sector from a variety of perspectives. Certain answers have been proposed to facilitate the use of Artificial Intelligence in Public Administrations in accordance with the foundational principles of Public Law. We understand that it is necessary to continue working in this direction, expanding academic collaborations between these groups and bringing in new groups in the future.

II.- Guidelines for work in the future

On the basis of the premises above, we can identify certain important guidelines that could serve to provide guidance for legal discussions and for how these technologies are applied in the public sector.

1. In general, we need to make a **conceptual effort to help clarify the technological reality** we are referring to when using expressions such as AI or algorithms. To this end, it would be advisable to promote inter/transdisciplinary working groups that help to specify and, where appropriate, prioritise the technical aspects that raise relevant legal implications, generating clear and precise documents that serve as a reference. It is also necessary to prioritise the technological issues that require an immediate legal response in the context of Public Administrations, distinguishing them from those that, on the contrary, require a medium-term analysis as they are less urgent.

2. Any attempt to tackle the analysis of the legal challenges posed by AI in the public sector should be based on **an exhaustive catalogue of the experiences and initiatives already operating in reality**, in which a series of minimum standardised data would be specified beforehand from the perspective of legal guarantees.

3. Apart from the great interest presented by the doctrinal analysis of their possible nature as a source of Law (regulation) and with regard to the legal nature of algorithms, priority should be given to **establishing due administrative procedure with adequate guarantees**. In addition, the existing and applicable legal requirements (data protection, automation of administrative procedures, etc.) and any others should be precisely defined.

4. In particular, special attention should be paid to the **division of responsibility in adopting decisions**, clearly distinguishing technical aspects of an executive nature from those which, on the contrary, may affect the definition of public interest. There are three requirements in this respect:

a) It would be very useful to distinguish **what types of decisions and actions would allow complete automation by means of AI techniques** from other decisions and actions that should be assumed by a person. In accordance with the current Spanish legal reservation to civil servants with a specific legal status for exercising authority, it should be explored whether there should be a correlative "human reservation" for certain decisions. In this sense, we should explore if the selection and future training of public employees could reinforce aspects related to AI, including the possible creation of specialised algorithmic intervention bodies.

b) On the other hand, **control mechanisms should be established outside of the decision-making processes**, which should also perform periodical reviews. In this respect, we should consider the need to create **public bodies specialised in monitoring AI.**

c) Finally, **the role of collegiality should be further examined**, taking into account the uniqueness of each of the levels mentioned above.

5. **The influence of these technologies on discretionary powers and other similar concepts** (undefined legal concepts, technical discretion, legal obligations for good administration, etc.) are particularly significant from the perspective of the **control and administrative decision-making motivations**. This means that ethical perspectives must inevitably be conferred an important role.

6. Likewise, **it is essential to delve deeper into the scope of the legislative requirements concerning data protection in**

the public sector. In particular, clearly establishing the legal consequences of non-compliance with such requirements in the context of the AI is a priority, in particular, concerning:

a) privacy by design and by default,

b) the principle of minimisation,

c) impact assessment and risk analysis,

d) the adoption of measures to ensure adequate security in the processing of information.

7. **The influence of the principle of transparency** on the specific characteristics of this technology takes on a **special significance,** although its limits are still to be defined. It is essential **to establish appropriate mechanisms to ensure its effectiveness and respect for the rest of the general interests in conflict** (public security, oversight and inspection functions, etc.), at least at a threefold level:

a) in the context of the approval procedure for the use of the corresponding algorithm,

b) in relation to the specific decisions to be taken,

c) in the control and review processes.

8. **Public entities must take an active role in managing public procurement** regarding the use of AI, by assessing beforehand what conditions should be respected by the private contracting entities and also by taking into account the specific aspects of the public sector. In particular, consideration should be given to the transparency and access to the programming regime and the conditions under which ownership or the rights to use the algorithms could be made available.

9. **Special attention** should be paid to the implementation of AI in **smart city** ecosystems given the singularity of the information processing undertaken in these areas and their impact on rights and freedoms, which can be particularly intense.

10. Legal prerequisites should be established to **strengthen the oversight functions of public entities** which are based on AI-based technologies[3].

In relation to each and every one of these ten guidelines for the future, we should underscore and promote the role of specialists and academics in public and private AI research and projects.

In this sense, taking into account the reflections and proposals listed above, **we consider the creation of the Administrative Law and Artificial Intelligence Network to be a timely necessity**. This network will allow knowledge generated by the different research groups to be shared concerning the impact of the use of artificial intelligence by the public authorities on Public Law. In addition, this will allow a permanent space to be created for discussion in order to explore the legal responses that can be offered to the challenges of AI and the risks posed by its use in the public sector. The aim is also to facilitate the development of the use of artificial intelligence in the public sector in Spain in accordance with the requirements and parameters of a democratic state governed by the rule of law. This need is especially pressing in light of the complexity of AI and the multitude of challenges that it poses for Public Law, which requires an interdisciplinary response and the participation of large teams of researchers.

Universities have always been generators of knowledge. Their collaboration with the rest of the public sector and with the private sector must facilitate safe channels of innovation. An academic, multidisciplinary and integrated network can effectively contribute to facing some of the challenges that AI presents.

3. In this sense, it is necessary to highlight the new automated system created by the recent Act 22/2018, 6 November, from the Valencian Parliament, regarding the General Inspection of Services and the Alert System to Prevent Bad Practices in the Valencian Administration.

Recommended citation

CENTRO DE ESTUDIOS EUROPEOS LUIS ORTEGA ÁLVAREZ, INSTITUTO DE INVESTIGACIÓN TRANSJUS BELTRÁN DE HEREDIA RUIZ (2019). "Conclusions from the I International seminar on Administrative Law and artificial intelligence". *IDP. Revista de Internet, Derecho y Política*. no. 28, pp. 1-7. UOC. [Accessed: dd/mm/yy]
<http://dx.doi.org/10.7238/idp.v0i29.3203>

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