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SOCIAL CONTROL OF PUBLIC ADMINISTRATION: TWILIGHT OR RENAISSANCE? OBSERVATIONS IN THE CONTEXT OF THE ADMINISTRATION PERFORMED THROUGH THE ALGORITHMS

Abstract

This article aims to analyse whether the social control over the administration will play any important role when the administration is going to be performed through the Artificial Intelligence algorithms. It seems that currently this method of controlling the administration is important to ensure that the administration is still integrated into a democratic state ruled by law. However, applying the Artificial Intelligence in the administration process may lead to the situation where the transparency of administrative process is significantly reduced. This may be due to the nature of algorithms. The humans are not able to “decode” or recreate the way the algorithm investigates and solves the given problem. Therefore there is a risk that democratic state may turn into the “technological anocracy” or even into the “technological authoritarianism”. In addition, reckless use of Artificial Intelligence in the administrative process may reverse the values of administrative law itself understood as the law which protects an individual against the abuse of administrative authority. The paper contains also the suggestions in changing the way of exercise the social control over the administration to ensure the democratic standards in the administrative process.

KEYWORDS

Artificial Intelligence, administration, administrative process, social control, technological authoritarianism

SŁOWA KLUCZOWE

sztuczna inteligencja, administracja, administrowanie, kontrola społeczna, autorytaryzm technologiczny

1. ADMINISTRATIVE LAW AND SOCIAL CONTROL

The issue of administrative control has been present in the science of administrative law basically from its beginnings. This statement may seem controversial – after all, administrative law in the perspective of ancient times can be understood as a law that while regulating the relationship between the authority and an individual is only one-sided in its nature, i.e. as an order from the authority (ruler) or a privilege conferred by him. In other words, the law was what the monarch (state) and its officials decided. Every individual was obliged to comply with this decision. Thus, there was no real mutual relationship between the authority and the addressee of the law. An individual could not, in principle, question the monarch's decision (or control his actions) except to ask for a change of decision – *via gratiae*. The settlement of this recourse was made by a higher authority, however, the individual was still absolutely subordinate to the ruler. He also did not have the possibility to demand some behaviour from the authorities. A ruler, who was irrevocable, could not be subjected to any form of control, and could not be punished in any way¹. This state of affairs lasted until – as a result of social changes and the resulting systemic transformations – the power was taken over by parliaments, and the laws established by them began to bind the power of the monarch as well as the representatives acting on his behalf. Of course, this process was taking place in individual countries at different stages and times, and the culmination in this regard was the adoption of the legalism principle, in the light of which the authority can act only when and only in the forms explicitly provided for by the law². It is, therefore, difficult to say unequivocally since when we have been dealing with administrative law in the modern sense, although Schwartz

¹ M. Zimmermann, *Pojęcie administracji publicznej a „swobodne uznanie”*, Warsaw 2009, pp. 53–55.

² *Ibidem*, pp. 58–65.

claimed, referring to French administrative law, that it developed after the French Revolution³. It was the time of appearance of the French *droit administratif*⁴, from which today's term "administrative law" is derived⁵. In a similar reference to the British system, it is indicated that modern administrative law was basically developed as a result of the Glorious Revolution of 1688. As pointed out by Wade, its effect was the collapse of the then royal administration. In consequence of the breach made by the Court of King's Bench, an era of judicial control of acts issued by the authorities began. The above, in turn, initiated the development of administrative law⁶. This "post-Revolutionary" administrative law obviously did not immediately cover such a wide range of social life as it does today, nor did it shape from the very beginning the institutions known today. It has been (and is subject to) constant evolution, and its scope is closely related to the implemented government policy and the established tasks of the state.

At this point, it should be noted that the issue of applying Artificial Intelligence algorithms in terms of the law application is being currently widely discussed in the world. Therefore, the author's intention is to address this message not only to the Polish but also to the foreign audiences – hence the publication of an English version of the study. However, such a procedure requires a brief explanation of the context (administrative law and social control) in which the analysed issue of (application of algorithms) Artificial Intelligence is embedded. Hence, it seems that, for the sake of clarity of the study, a short description of the administrative law itself, as well as the social control itself, is necessary.

Administrative law itself has not been uniformly defined. While explaining what it is, the first association due to the name of this branch of law leads to linking it with administration. From this perspective, it seems that administrative law is a set of legal norms that regulate the operation of the state administrative apparatus, define its competences and tasks, and regulate the organisation of this apparatus. Such an approach, referring directly to the tradition of *droit administratif*, was presented not only in civil law, but also in the literature of common law states⁷. It is aptly pointed out that such an approach defines a specific "law of administration" rather than administrative law⁸. Criticism of this view was also found in American literature⁹. As the aforementioned approach does not take into account the genesis of this law, which, by setting out clear rules and spheres of

³ B. Schwartz, *An introduction to American administrative law*, London–NewYork 1958, p. 2.

⁴ *Ibidem*.

⁵ E. Harriman, *The development of administrative law in the United States*, "Yale Law Journal" 1916, Vol. 8, p. 658.

⁶ W. Wade, C. Forsyth, *Administrative law*, Oxford 1994, pp. 16–17.

⁷ A. Dunshire, *Administrative law and control over government*, "Malaya Law Review" 1984, Vol. 1, p. 80.

⁸ J. Jagielski, (in:) J. Jagielski, M. Wierzbowski (eds.), *Prawo administracyjne*, Warsaw 2020, p. 38.

⁹ B. Schwartz, *op. cit.*, pp. 5–6.

operation, as well as a strictly defined possibility of administrative interference in the legal situation of an individual (administered entity), is in fact supposed to protect an individual from the state apparatus. As pointed out by Wade, “the primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse”¹⁰. This is the essence, the main cause of administrative law. If we assume that administrative law is also a law for the administration itself, then such a statement can only be made in the context of the existence of the principle of legalism. It seems to me, however, that this is of secondary importance and ancillary to the above-mentioned essence of this part of the legal system. The approach presented above does not take into account the fact that in modern administrative law an individual has a number of rights (claims) against the administration and to a specific behaviour of the authorities. The issues of defining the category of “administrative law”, however, go far beyond the scope of this study, and hence it must only be pointed out that administrative law regulates mutual relations between the authority and an individual. The authorities, acting in the public interest, may (which today seems obvious and necessary) interfere with the rights of individuals. On the other hand, an individual may defend themselves against disproportionate or even unlawful actions. Moreover, depending on the wording of the law, an individual may demand certain behaviour from the authorities. Griffith and Street describe this matter accurately, stating that the most important issue of administrative law is the relationship between public authority and the rights of an individual¹¹.

Administrative law constitutes, therefore, a part of the legal system which, established to protect an individual against the abuse of administrative authority against that individual in a state governed by the rule of law, regulates the relationship between the authorities and an individual, setting out in a state governed by the rule of law (under the principle of legality) a clear framework for the administration itself.

Another issue that requires clarification is the notion of “administrative control”. In American doctrine, this concept is understood rather as an operation of the administration itself. In other words, it is about the exercise of power (administering). In the civil law system, following the French doctrine, it was assumed that this formulation meant control exercised over the administration. In other words, the operation of the administration is subject to control (evaluation) by other entities¹². Writing about the control of administration in this study, I mean the meaning of this phrase, inherent in civil law.

It is also equally important to explain the role of legal and non-legal institutions of control over public administration in the assumed understanding, and what is their significance from the point of view of the essence of administrative

¹⁰ W. Wade, C. Forsyth, *op. cit.*, p. 7.

¹¹ J. Griffith, H. Street, *Principles of administrative law*, London 1973, p. 2.

¹² J. Jagielski, *Kontrola administracji publicznej*, Warsaw 2018, p. 18.

law. In my opinion, this relationship was best characterised by Jaworski, who wrote already in the 1920s that “we will call administrative law the law that regulates the activity of the state and the control over which belongs to an individual. We will understand the meaning of ‘control’ if we say that there is no administrative law in an absolute state precisely because there is no control over the activity of the state by an individual”. In other words, developing the thoughts (ideas) of administrative law makes sense only when there is a real possibility of checking and controlling whether the administration respects this law, and whether it is not abusing its power towards an individual when exercising the law¹³. It is necessary to realise that an individual, in a potential confrontation with the administrative apparatus of the state, which has numerous resources (material, human, infrastructure ones as well as actual possibility of using coercion) has no chance on their own. Possible abuse of power by the administration does not have to be deliberate¹⁴ – on the contrary – it seems that it most often occurs as a result of human error, ignorance of the law or incorrect arrangements. Nevertheless, it is a real and recurring phenomenon that threatens not only the interests of an individual, but also the interests of the community (collective interests)¹⁵. For this reason, as was indicated by Znamierowski, “in a well-organized state, the principle of distrust should penetrate the entire structure of the ruling body: a widely ramified system of control institutions should be based on it”¹⁶. At the same time, as pointed out by the above-mentioned author, the very execution of control is not aimed at detecting errors in the operation of administration and punishing, but rather its purpose is to detect errors and help eliminate them in the future¹⁷. It should also be emphasised that the essence of the control in the perspective of civil law system is not the authoritarian influence on the observed irregularities. It is, rather, about the very fact of making an assessment of a certain state of affairs. Examples of such activities include, for example, letters addressed to the administration, signalling irregularities and expressing dissatisfaction (complaints), or coverages in the media showing negative phenomena in administration, or social protests. This kind of activity of individuals, in a strictly legal aspect, cannot change undesirable behaviour on the part of the administration. However, they exert social pressure on governmental or local administration in order to eliminate negative phenomena. This does not mean, however, that the results of such an action will not then translate into actual actions aimed at forcing a change of behaviour or actions of the administration by organising a referendum aimed at

¹³ J. Jagielski, J. Piecha, (in:) J. Jagielski, M. Wierzbowski (eds.), *Prawo administracyjne*, Warsaw 2020, p. 385.

¹⁴ H. Wade, C. Forsyth, *op. cit.*, p. 5.

¹⁵ J.S. Langrod, *Kontrola administracji. Studja*, Warsaw, Cracow 1929, p. 13.

¹⁶ C. Znamierowski, *Wiadomości elementarne o państwie*, Poznań 1948, p. 92.

¹⁷ *Ibidem*, p. 73.

dismissing authorities, voting made during parliamentary or local elections, or they may contribute to taking action by the public prosecutor's office.

The last issue that needs to be clarified is the way of understanding the term "social control" also called (although imprecisely) "civil control"¹⁸. In the Polish science of administrative law, it is indicated that it is a control activity performed by the society, i.e. directly by individual entities, social organizations, media, etc. The key is to provide the society (most often within the legal system) with the possibility of checking and assessing the administration and its activities in the implementation of public tasks¹⁹. For this reason, it is necessary for the existence of social control to provide the individual with a guarantee connected to freedom in its nature (freedom of expression), as well as the possibility of obtaining information about the activities of this administration (access to public information, freedom of the press, radio, television or the Internet). Without these values, an individual (or social organisations) cannot actually control the operation of the administration. Institutions enabling the implementation of social control must, therefore, be based on law – both in terms of provisions guaranteeing certain freedoms, as well as provisions establishing institutions enabling obtaining information. It can be mentioned only as a side note that in the literature of common law countries, social control in question resembles "popular control" – whereas there is an impression that this issue is not treated as strictly legal one, but rather as a matter on the borderline of law and science politics²⁰.

2. ARTIFICIAL INTELLIGENCE – BLACK BOX – ADMINISTRATION

The discussion of the possibilities of using Artificial Intelligence (hereinafter AI) should be started by trying to explain what it is. Fundamental problems arise from the very beginning of defining this phenomenon. It should be noted that the very category of "intelligence" cannot be easily defined – science has many ways of understanding it, depending on the perspective taken, and there are many types of it. "Intelligence" is understood differently in everyday language (where understanding is very intuitive), and it is defined differently in science. In fact, the agreement to understand the phenomenon of "intelligence" concerns only

¹⁸ The problem with such a definition of this type of control activity stems from the fact that, in fact, social control may also be exercised by persons who are not citizens of a given state.

¹⁹ J. Jagielski, *Kontrola administracji...*, pp. 206–207.

²⁰ See e.g. Y. Allard-Tremblay, *Trust and distrust in the achievement of popular control*, "The Monist" 2015, No. 4; S. Ingham, F. Lovett, *Republican freedom, popular control, and collective action*, "American Journal of Political Science" 2019, Vol. 4, pp. 785–786.

certain fundamental aspects. It is indicated here that intelligence is “the ability to learn from one’s own experiences and the ability to adapt to the surrounding environment”²¹. There is no unanimity regarding further detailed issues²². Further definition problems arise with the second defined concept, i.e. the term “artificial”. Assuming the above-mentioned basic understanding of the category of “intelligence”, “artificial intelligence” should be referred to the ability to learn by artificial entities (artefacts) on the basis of their own experiences or the ability to adapt to the surrounding reality. Of course, the current state of knowledge and technology does not seem to be so advanced that AI understood in this way could arise (at least now). In the literature, regarding attempts to define AI, it can be observed that different perspectives are adopted²³. From the perspective we are interested in – i.e. the legal perspective – AI has not received many definitions. It is worth paying attention to the legal definition introduced in the USA. In accordance with sec. 238g John S. McCain National Defense Authorization Act for Fiscal Year 2019 (H.R.5515; Public Law No: 115-232; 13 Aug. 2018) AI is defined very broadly. In the light of this provision, the following should be considered AI:

1) artificial (within this meaning – not being a product of nature) system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets,

2) an artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action,

3) an artificial system designed to think or act like a human, including cognitive architectures and neural networks,

4) a set of techniques, including machine learning, that is designed to approximate a cognitive task,

5) an artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

The broad scope of these definitions allows, in principle, for covering all (or at least the vast majority) of the possibilities of understanding AI. It is worth noting that although this definition is included in the act on budget spending plans for a given year, it can be noticed that US federal law refers to it in other normative

²¹ Encyklopedia PWN, <https://encyklopedia.pwn.pl/haslo/inteligencja;3915042.html> (accessed 1.09.2021).

²² An overview of the definitions is provided in S. Legg, M. Hutter, *A Collection of definitions of intelligence*, (in:) B. Goertzel, P. Wang (eds.), *Advances in artificial general intelligence: Concepts, architectures, and algorithms*, Amsterdam 2007, p. 17 et seqq.

²³ See e.g. J-Ch. Pomerol, *Artificial intelligence and human decision making*, “European Journal of Operational Research” 1997, Vol. 99, pp. 3–4.

acts. This leads to the recognition (at least to a certain extent) that this definition aspires to be a universal one.

A slightly different, less formalized approach to defining AI can be seen in Europe. It seems that due to the difficulties in defining, the complexity of the issue, and also due to the fact that AI has not yet been sufficiently recognized, legal regulations do not contain a universal definition of it. Most often in European countries, the issue of AI is defined in various types of programs constituting directives or directions of administration activities in this context. Such a definition is not provided for by legal acts of the European Union, which does not mean that this issue is a stranger to the EU. The analysis of the available materials shows that the EU deals with the issues of AI at the policy level, identifying possible directions for the development of this technology, possible applications as well as ethical and security requirements. These works are carried out, among others, by the High-Level Expert Group on Artificial Intelligence set up by the European Commission. The Group in the document “A definition of AI: Main capabilities and disciplines”²⁴ took as a starting point the definition proposed by the European Commission, according to which the concept of AI “refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some 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 Internet of Things applications)”²⁵. At the same time, the aforementioned document translates to a very broad extent in descriptive terms and expands the presented definition, simultaneously taking into account various divisions of AI itself – for example, introducing a distinction between weak (narrow) AI and strong (general) AI²⁶. Taking into account the relevant elements, there was finally adopted a very broad definition, in the light of which AI systems “are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous action”²⁷.

²⁴ *A definition of AI: Main capabilities and disciplines*, Brussels 2019, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60651 (accessed 1.09.2021)

²⁵ *Ibidem*, p. 1.

²⁶ *Ibidem*, p. 5.

²⁷ *Ibidem*, p. 6.

When comparing American and European definitions, some similarities are noticeable. Undoubtedly, both refer to a certain system, which is in the form of a special computer program (algorithm) that can act as software itself, but also in an external form – in a situation where the program is responsible for the operation of the connected hardware. This hardware can be robots or other devices that function in the outside world, and in this field the effects of this action can be really experienced. Moreover, in both cases it is about an artificial being made by a human being directly (written program) or indirectly (e.g. in a situation where the program creates another program, music, story, etc.). The similarities also include the fact that AI is programmed to solve specific problems or perform specific activities, and that this action (finding solutions) can be based on various techniques, with a strong emphasis on machine learning. At the same time, in my opinion, both presented definitions, although in the end they concern the same defined object, are slightly different. It is not about the degree of detail, but about the adopted perspective of defining AI. It seems that the first American definition refers to AI from a perspective external to the algorithm itself. The federal legislator is basically not interested in how certain goals are achieved, but rather in specific externalities. Only in point 1 of the definition it was indicated that it was about data sets or a manifestation of machine learning (point 4). In turn, the European definition takes a deep look into the algorithm itself (internal perspective). This perspective is reflected in the statement that AI systems achieve their goals “through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data”. In both definitions, we deal with different emphasis (a change in the centre of gravity) in the perception of AI itself.

Apart from the definition aspect, which can only highlight what AI is, it is worth noting that these algorithms work basically on the analysis of Big Data sets, looking for similarities in them. What constitutes the advantage of AI over humans is the ability to perform many millions of operations in a very span of short time, as well as relatively high precision in recognizing similarities and drawing conclusions. At the same time, advanced algorithms have the ability to learn (machine learning), which means that on the basis of a specific set of data, an algorithm can predict or make decisions without being programmed in a specific case. For example, primary data set (input, e.g. database of court judgements) allows for learning specific decisions and in a completely new case (not necessarily the same as one of the judgements provided within the input), the program can predict or decide on the content of the judgement.

The use of AI algorithms in the field of administration or in a wider public sphere is not a theoretical or futuristic issue. In some countries, such algorithms already work, significantly accelerating and simplifying the functioning of administration or courts. For example, in Estonia, AI algorithms resolve civil disputes

with a value lower than 700 euro²⁸. In Australia, on the other hand, solutions are implemented that enable the automated imposition of fines using AI for traffic violations²⁹. The case of the COMPAS system (Correctional Offender Management Profiling for Alternative Sanctions), which was used in the United States, cannot be ignored either. This system, on the basis of Big Data sets, assessed the possibility of applying conditional release in convicts sentenced to imprisonment, assessing (predicting) the chances of the convict committing an offence again. This system, however, due to the introduced data set (input), was considered discriminatory against, among others, African Americans³⁰.

When it comes to the use of AI in the area closely related to public administration and the administration process itself, despite the difficulties, this technology is consistently implemented in various areas.

According to the AI Watch report regarding the use of AI in public services in EU Member States, solutions based on AI algorithms are implemented, for example, in the field of automated control of agricultural activities related to subsidies paid out. SATIKAS system functioning in Estonia and using “deep learning methods and convolutional neural network approaches to analyse the satellite data (...) to automatically detect whether mowing has taken place on the Estonian grasslands”³¹. Such activities facilitate taking the decision to control specific areas in the country. Interesting and very advanced solutions can be observed at the local administration level in Sweden. In Uppland-Bro municipality, Tengai algorithm is used in the recruitment process for work in public administration. It is indicated that it is less biased than a human being, while the employment process itself is “faster, cheaper, and more unbiased, freeing up crucial resources to be spent on other tasks”³². A more advanced algorithm was used in another Swedish municipality of Trelleborg, which issues administrative decisions (Automated-Decision-Making) in the field of social assistance. It should be noted, however, that in the event of refusal to accept the individual’s request, the matter is decided by an official³³. Various possibilities of implementing AI in the activities of public administration have been performed in the USA. As indicated in the Government by Algorithm report³⁴, such technology is used in agencies such as Securities

²⁸ J. Parker, *Your Honor, AI*, “Harvard International Review” 2020, Vol. 41, issue 2. p. 46.

²⁹ *Ibidem*, p. 47.

³⁰ These issues are discussed in more detail in T. Mbadiwe, *Algorithmic injustice*, “The New Atlantis” 2018, Vol. 54, p. 5 *et seqq.*

³¹ G. Misuraca, C. van Noordt, *AI Watch: Artificial Intelligence in public services. Overview of the use and impact of AI in public services in the EU*, Luxembourg 2020, p. 42.

³² *Ibidem* G. Misuraca, C. van Noordt, *AI Watch...*, p. 45.

³³ *Ibidem*, p. 43.

³⁴ <https://www.sipotra.it/wp-content/uploads/2020/10/Government-by-Algorithm-Artificial-Intelligence-in-Federal-Administrative-Agencies.pdf> (accessed 1.09.2021).

and Exchange Commission, Customs and Border Protection, and Social Security Administration³⁵.

The above-indicated examples allow for assuming with high probability that in the near future AI will be more and more often used in administration – whether in the field of identifying threats or frauds, or in determining the content of individual policies, or in issuing administrative decisions specifying rights or obligations of individuals.

However, the identified key issue related to the use of AI in public administration concerns the problem of explainability. More advanced algorithms based on machine learning perform a significant number of operations as a consequence of which a result (solution) is obtained. As already mentioned before, these systems learn from the data set presented to them, and then apply the “acquired knowledge” to solve new issues. However, they are unable to answer one of the key human questions – “why?”. Discovering the way of “reasoning” of the algorithm is much more difficult for a human (if possible at all). Man is not able to “decode” or recreate from the sequences of numbers the way the algorithm investigates a given problem and solves it. This situation is known as the “black-box”³⁶. This problem is important not only in legal applications³⁷, but also in other areas of AI application, for example when using such technology in the security sector³⁸ or in medical diagnostics³⁹.

As already mentioned before, AI (including machine learning based AI) is increasingly used in the public administration sector. One can also imagine a situation in which such a system is used, for example, to make political decisions for which the public administration is responsible in terms of shaping the policy in a specific area, e.g. determining whether the priority for the development of a given local community should be tourism or rather service activities, or whether it will be better for the country’s development to make a quick decision to close hard coal mines or whether such a process should be spread over a longer period. Moreover, the algorithm can be useful in determining the gradation (prioritisation) of different policies in the context of limited budgetary resources. Transferring this type of activity to an algorithm (even if it is only intended to support the administration) may lead to attempts to limit or completely eliminate

³⁵ See D. Freeman Engstrom, D.E. Ho, C.M. Sharkey, M. Cuellar, *Government by algorithm: Artificial intelligence in federal administrative agencies*, 2020, p. 22 *et seq.*

³⁶ M. Cateleta, *The fragility of human rights facing AI*, East-West Center 2020, p. 20, <https://www.jstor.org/stable/resrep25514> (accessed 1.09.2021).

³⁷ A. Deeks, *The judicial demand for explainable Artificial Intelligence*, “Columbia Law Review” 2019, Vol. 119, issue 7, pp. 1829–1830.

³⁸ L. Antebi, *Artificial Intelligence and national security in Israel*, Tel Aviv 2021, pp. 100–101, www.jstor.org/stable/resrep30590.17 (accessed 1.09.2021).

³⁹ M. Horowitz, P. Scharre, R. Work, *Artificial Intelligence. What every policymaker needs to know*, Center for a New American Security (CNAS), <https://www.cnas.org/publications/reports/artificial-intelligence-what-every-policymaker-needs-to-know> (accessed 1.09.2021).

the responsibility of officials or government. Since the algorithm has chosen one development path or another or prioritised the performance of tasks in a given manner, there can be no question of the responsibility of these people. Therefore, a legitimate question arises how to control what is happening in such an “administrative black-box”?

3. ARTIFICIAL INTELLIGENCE AND SOCIAL CONTROL OF ADMINISTRATION

There is no need, as it seems, to convince anyone of the advantages of using AI in public administration. The algorithm is able to analyse an extremely extensive set of data (Big Data) in a short span of time, it is impartial, there is no risk that it will be biased towards a specific individual, nor will it be empathetic. The weakness of the algorithm (apart from the accuracy of predictions or results – this one depends on many variables) is the aforementioned unexplainability⁴⁰.

The grounds of reason for a decision on the application of the law is nowadays a generally accepted standard of a democratic state ruled by law and an indicator of good administration⁴¹. One cannot ignore the fact that the grounds of reason for an administrative decision or the grounds of reason for adopting such and not another policy or prioritisation (gradation) of policies as activities of relatively high social importance, carried out within the administrative authority, is actually nowadays one of the fundamental conditions, the existence of which is necessary for the exercise of control over the administration. In other words, the ability to know the motives of any decision significantly affects the ability to control it.

A question arises at this point about how to control the administration in a situation where the decision is made independently by an unexplained algorithm, or it is indeed made ultimately by a human, acting, however, based on the recommendation of such an unexplained algorithm?

It can be imagined that in such cases the control over the administration will be exercised by very specialised units who will be able, with the help of other algorithms, to “understand” the premises for reaching such and not another result⁴². However, such action may have a negative impact on the very legitimacy

⁴⁰ While research is underway to create “Explainable Artificial Intelligence” (“xAI”) – see e.g. A. Deeks, *op. cit.*, pp. 1834–1835.

⁴¹ See e.g. foundations of “duty to give reasons” in English law: M. Elliot, *Has the common law duty to give reasons come of age yet?*, University of Cambridge Faculty of Law Research Paper, 2012, No. 7, p. 51 *et seqq.*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041362 (accessed 1.09.2021).

⁴² There are two possible approaches to explaining AI: “exogenous approach” or “decompositional approach”, see A. Deeks, *op. cit.*, p.1835.

of the authority's actions, as well as on its validity, since both the decisions made and the explanation of the motives for such decisions will be non-transparent and incomprehensible for an individual.

However, referring to the issue outlined in the title of this study, the question arises whether social control can still be performed with administration functioning in such manner? In other words, in a situation where the administration actually becomes a "black box", is the society able to control the administration, or does it mean the end of such control?

The answer to this question is not a purely theoretical matter, in the light of which one aims to determine whether a given legal and political institution would continue to exist and play an important role in society. These issues are of course important, but in this case, there is something much more significant. The possibility of exercising control (i.e. checking and assessing) over the administration by individuals, social organisations or media, as well as the right to be criticized by these entities, is a determinant of a democratic state. The inability to perform such control, in principle, may lead to a decrease in trust in the state and its administration, and, consequently, to the loss of the state's legitimacy to manage public affairs. Administration is defined as "public" precisely because its activities are important to everyone, and it is subject to the evaluation by the society⁴³. This issue was accurately identified by Jagielski, who wrote that if one looks at the administration, for example, "as a mechanism providing public services and meeting social needs, and at an individual as a consumer and customer of these services, it seems obvious that this customer must be provided with 'the right to complaint' against the actions of the government apparatus. Thus, an individual (...) cannot do without the possibility of controlling public administration"⁴⁴. A state in which citizens, for various reasons, are unable to assess the functioning of the administration loses its "democratic" attribute. If the decisions of public authorities are the result of the operation of AI algorithms and, as a consequence, the legitimacy to exercise this power is subject to erosion, it tends towards "technological anocracy" or even "technological authoritarianism".

Of course, control over the administration takes various forms – we can talk here mainly about judicial review, control performed by Supreme Audit Institutions independent of the administration or public prosecutor's control. Nevertheless, it seems that only adding to these institutions the possibility of exercising control (understood as the process of establishing the actual state, comparing it with the desired state and drawing conclusions) by the members of society themselves, leads to the creation of actual control system that ensures the legitimacy and democratisation of the administrative authority. What distinguishes control exercised by society (social control) from control performed by the aforemen-

⁴³ E. Knosala, *Rozważania z teorii nauki administracji*, Tychy 2004, p. 74.

⁴⁴ J. Jagielski, *Kontrola administracji...*, p. 215. See also M. Tabernacka, *Kontrola społeczna administracji publicznej*, "Kontrola Państwowa" 2013, Vol. 2, p. 314 *et seq.*

tioned specialised institutions is its versatility. This feature is of multifaceted nature. Firstly, such control may be carried out by an individual, social organizations (associations of individuals) or by the mass media (multi-subjectivity). Secondly, control is a process that is not focused on a specific object, on the contrary, it may apply to every aspect of the administration's operation – resource management, correctness of decisions, the rule of law, the manner of performing public tasks, ensuring the quality of public services, etc. (multi-objectivity). Thirdly, it is not limited (as is the case with specialised institutions) to a specific criterion, e.g. legality, purposefulness, economy (multi-criteria). In addition, social control is an informal process – it is not necessary for the controlling entity to have specialist knowledge. The most important role in social control is, therefore, the assessment of whether the administration acts in accordance with the social interest, and whether it meets social needs, thus protecting, first of all, the public interest and the actual interest of an individual⁴⁵. The key role of the state, as mentioned before, is to provide legal solutions that allow an individual to become familiar with the actual state of affairs (e.g. by guaranteeing access to public information), to provide legal instruments for reporting observed irregularities (e.g. through a legal procedure obliging the administration to become familiar with the complaint or application), as well as to provide a guarantee under which person reporting irregularities may not be discriminated against or punished on this basis.

However, it is necessary to go back to the following question: is social control over administration understood in this manner (as a legal and social institution) feasible at all if the decisions of the administration are directly the result of the operation of AI or are based on such results? Is the question asked in the title of this paper, regarding the decline of social control, really likely?

At first glance, the answer to this question may seem to be affirmative. Because how to control the administration that adopts a specific policy, or prioritises the implementation of public tasks on the basis of an algorithm, in a situation where we only know the result (decision) and cannot assess any motives or premises? In fact, the only option in such case is to express dissatisfaction with this manner of making decisions. It is not, however, possible in such situation to constructively refer to the raised problem or possible irregularity.

Therefore, the traditional institutions of social control over the administration (complaint or rationalisation motion) are unlikely to achieve the desired effect. Since a given decision was made on the basis of a Big Data set, and the algorithm was properly designed, it should be assumed that this decision is the best possible one. Apart from the predictability and accuracy of AI in this respect, the key to the control of the decisions issued by the algorithm is the ability to examine two fundamental issues affecting the decision. Firstly, it is the control of the algorithm itself, including the values assigned to individual elements, which AI

⁴⁵ J. Jagielski, *Kontrola administracji...*, pp. 213–215.

“pays attention to” while learning. Secondly, it is the control of the data that was included in the training set (i.e. the data set that was the basis for the algorithm learning).

It seems that when algorithms are used in administration, the institution of social control requires (just like the legal system itself and the public administration) an appropriate adjustment. In my opinion, only the provision of new legal or non-legal solutions, either by the legislator or the administration itself, will allow the administration to maintain social, democratic legitimacy in the tasks performed and decisions issued.

Adapting the possibility of exercising social control to the requirements of the changing world, taking into account the aforementioned key issues of AI control, could be implemented within the framework of two mutually complementary solutions, which together could be described as opening a “black-box”.

First of them is public availability of the algorithms. In other words, knowledge about them should be available to everyone, since on the basis of them decisions are made both in individual cases and in general matters relating to the public interest. Making the algorithm available for inspection allows people specializing in new IT technologies to verify the method of operation, including the methods of inference. This issue, however, turns out to be controversial⁴⁶. It is worth pointing out that the administration tries to avoid sharing the code of a given technology or information about it. Such a situation took place both in Sweden in relation to the previously mentioned algorithm used in Trelleborg⁴⁷, as well as in the case of the algorithm used in Poland, which enables profiling of the unemployed⁴⁸. In the latter case, the details of the algorithm turned out to be at least controversial, and in the literature it was explicitly stated that “it did not meet even the most basic methodological standards”⁴⁹, which, moreover, resulted in the abandonment of its application. Such a finding would not have been possible had the parties concerned not ultimately obtained the information regarding the algorithm.

Second element of opening a “black-box” is access to data on the basis of which AI learns (training set) or based on which it functions. Searching for errors and irregularities in the data itself allows for eliminating duplication of such errors by the technology itself. By receiving source data, AI is not able to verify it

⁴⁶ See A. Deeks, *op. cit.*, pp. 1840–1842.

⁴⁷ See A. Kaun, *Suing the algorithm: The mundanization of automated decision-making in public services through litigation*, Information, Communication & Society, DOI: 10.1080/1369118X.2021.1924827 (accessed 1.09.2021).

⁴⁸ See Judgement of the Voivodeship Administrative Court in Warsaw dated 5 April 2016, file ref. No. II SAB/Wa 1012/15, CBOSA.

⁴⁹ K. Sztandar-Sztanderska, M. Kotnarowski, M. Zielińska, *Czy algorytmy wprowadzają w błąd? Metaanaliza algorytmu profilowania bezrobotnych w Polsce* [Are the algorithms misleading? Meta-analysis of the algorithm of profiling the unemployed in Poland], *”Studia Socjologiczne”* 2021, Vol. 1, p. 108.

on its own and simply considers it true. Public access to source data would allow for their analysis, searching for irregularities and, subsequently, elimination of erroneous assumptions underlying the algorithm's "reasoning".

Such an approach to social control of administration performed with the help of AI could be supplemented with actions modelled on "bug-bounty" programs. These are the announced programs aimed at encouraging the society or people dealing with new technologies to search for errors and test software, network security, etc. Programs of this type were run (or are run) by entities such as, among others, Facebook⁵⁰, Google⁵¹ or Microsoft⁵². As part of programs of this kind, prizes (usually in cash) are offered in return for finding errors that threaten the safety of a user using products provided by a given entity. Such a program was also launched by the European Commission⁵³, and in the early 2021 at the level of the national administration (as a pilot) by the Spanish Catalan authorities⁵⁴. These programs can, in the light of the development of the use of AI in administration, bring mutual benefits – both for individuals who exercise social control over public administration and the administration itself – as it would receive information about errors and irregularities. As a result, it is possible to constantly improve and perfect AI in administration, as well as perform in better manner public tasks by this administration.

Such an approach would allow for further implementation of the primary role of administrative law, understood not as "law of administration" but as a law that protects an individual against excessive interference of the authorities in their life.

4. CONCLUSIONS

The above considerations allow for some final conclusions.

It seems that whether social control over the administration is coming to an end, or whether we will deal with its renaissance, depends paradoxically on the administration itself and the state. Of course, both ways are possible, and the detachment of two elements – administration and social control over this administration may have a very negative impact on the administration's legitimacy to govern. In any case, this would contradict the fundamental values on

⁵⁰ <https://www.facebook.com/whitehat> (accessed 1.09.2021).

⁵¹ <https://www.google.com/about/appsecurity/reward-program/> (accessed 1.09.2021).

⁵² <https://www.microsoft.com/en-us/msrc/bounty> (accessed 1.09.2021).

⁵³ https://ec.europa.eu/info/news/european-commission-launches-new-open-source-bug-bounties-2021-jan-25_en (accessed 1.09.2021).

⁵⁴ <https://www.toastybits.com/post/first-bug-bounty-of-a-public-administration-in-spain-15-hackers-against-the-catalan-government/> (accessed 1.09.2021).

which a democratic state is based. As a result, it is possible to slowly transform a democratic state into a specific technological authoritarian structure.

Undoubtedly, however, current institutions of social control are not sufficient, and they will not be effective in the future against the administration based on AI solutions, which will certainly be increasingly used in administration processes. This, however, means that today we should look for possible new institutions for exercising social control.

Therefore, the question included in the title of this study about the “twilight or renaissance” of social control remains valid. At present, all options are possible, and only the future will bring the answer.

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