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Artificial Intelligence and Discretionary Decisions (The Triumph or Loss of Commander Pirx?)

Introduction

Commander Pirx, the protagonist of Stanisław Lem's short story *The Inquest*, had to confront a robot.¹ Despite the machine's many strengths, Pirx won this duel. The reason for the robot's defeat was Pirx's behaviour, which did not correspond to the training and skills of a person acting as commander. It involved hesitation at a time when an order, which was necessary under the circumstances, had to be issued. It should be made clear that this order could only be effective if issued immediately. Thus, Commander Pirx's delay could *de facto* nullify the significance of such an order. It can be said that Pirx owed his victory to the most human reflex, i.e. having doubts.

At present, humans are beginning to lose to machines in many fields², with the defeat of Garry Kasparov's by the IBM chess program Deep Blue being a particularly clear example.³ Robots and other devices simply process information faster and take actions more efficiently in comparison to human decision – making.⁴ It is not surprising, there-

1 S. Lem, *The Inquest*, in *Tales of Pirx the Pilot*, S. Lem, Warsaw 1968.

2 D. Acemoglu, P. Restrepo, *Robots and Jobs: Evidence from US Labor Markets*, "Journal of Political Economy", vol. 128, no. 6, p. 2188–2244 ; A. Semuels, *Millions of Americans Have Lost Jobs in the Pandemic – And Robots and AI Are Replacing Them Faster Than Ever*, „Time”, 06.08.2020.

3 D. Decoste, *The Future of Chess-Playing Technologies and the Significance Kasparov Versus Deep Blue*, „AAAI Technical Report” 04.1997, p. 9–13.

4 S. Reardon, *Artificial neurons compute faster than the human brain*, “Nature” 26.01.2018.

fore, that particular types of equipment and, in a broader sense, computer programs or algorithms themselves, are becoming part of the landscape of justice.⁵ The question arises as to whether machines or programmes themselves can replace humans. In this context, it is worth recalling the words of Commander Pirx: “What is this humanity that they do not have. Perhaps it really is only the marriage of illogicality with this ‘good – heartedness’, this ‘noble heart’, and this primitiveness of moral reflex, which does not include the distant links of a causal chain?”⁶ The main character of Stanisław Lem’s short story seems to suggest that a human being can potentially achieve more than a machine, thanks to his or her illogicality. In this context, it is worth pointing out that in the opinion of IBM programmers, the aforementioned victory of the computer was most probably the result of an error in its software.⁷ In other words, the machine won because it malfunctioned, or, in human terms, it simply made a mistake.

Stanisław Lem’s intuition is confirmed by various authors, who point out that the flexibility of human action gives people a certain advantage over machines or their software.⁸ This raises the obvious question of setting limits to the introduction of particular devices/software into the justice system. In this context it is worth noting the extent to which the administration of justice in the USA has been handed over to so-called artificial intelligence, and, it would seem, without any clear top – down framework.⁹ As can be seen from individual analyses, while at first the process of reducing human participation in the administration of justice concerned individual procedural issues, at present

5 H. B. Dixon Jr., *Artificial Intelligence: Benefits and Unknown Risks*, “The Judges’ Journal” 15.01.2021.

6 S. Lem, *The Inquest*, in *Tales of Pirx the Pilot*, S. Lem, Warsaw 1968.

7 T. Hornyak, *Did a bug in Deep Blue lead to Kasparov’s defeat?*, „C|NET”, 27.09.2012.

8 M. Chui, J. Manyika, M. Miremadi, *Where machines could replace humans – and where they can’t (yet)*, „McKinsey Quarterly”, 08.07.2016.

9 H. Liu, Ch. Lin, Y. Chen, *Beyond State v. Loomis: Artificial Intelligence, Government Algorithmization, and Accountability*, “International Journal of Law and Information Technology” 2019, vol. 27, issue 2, pp. 122–141.

one can already encounter cases where almost all procedural actions are carried out on the basis of an algorithm.¹⁰

A comprehensive and reliable study of the subject of this handover would require the preparation of at least one monograph. Therefore, this study will only undertake an analysis in the context of the so-called discretionary decision.

The notion of artificial intelligence

To some extent, the introduction of modern technological facilities into the justice system can be equated with the moment when typewriters began to be replaced by computers in courtrooms. It should be noted, however, that despite the fundamental difference in terms of the level of technical sophistication, the function of both these devices is the same, namely taking minutes and drawing up procedural documents. The differences were therefore limited to the issue of speed and the ease of correcting documents.

However, a real significant qualitative change came with the introduction of software (algorithms) that made it possible to replace humans in at least some of the tasks related to the administration of justice. This “replacement” should be understood strictly, i.e. where decisions used to be made by humans before the current technological revolution, now these decisions are entrusted to algorithms. At the same time it should be pointed out that there is no one type of algorithm or one common way in which they all operate. The basic difference between them consists in the scope of human interference in their functioning while they perform the tasks entrusted to them.

First of all, one can point to algorithms that perform their tasks fully “independently”. The “independence” consists in the fact that human intervention in the operation of an algorithm is limited to delegating

10 A. M. Carlson, *The Need for Transparency in the Age of Predictive Sentencing Algorithms*, “Iowa Law Review” no. 103, p. 303–329.

a particular task. This means that the way a given task is performed, e.g. the selection of necessary data for a case, is performed by an algorithm independently of human intervention. In the case of such “independent” algorithms, we can speak of artificial intelligence *sensu stricto*. If a human intervenes in the performance of a given task, e.g. by determining the meaning of the data which an algorithm has access to, then one can speak at most of artificial intelligence *sensu largo*. In addition, in my view, it seems that interference in the way an algorithm performs its tasks means that in such cases we should not speak of artificial intelligence (even *sensu largo*), since it can be argued that, at a certain level of human interference, considering a case on the basis of an algorithm can be similar to solving tasks in Excel. These are cases where a human determines both the data itself and how it is used. It therefore seems reasonable to assume that the use of an algorithm in a fully human – dependent manner represents the same qualitative leap in the performance of individual tasks as the previously mentioned replacement of typewriters by computers.

Taking this into account, a real change in the use of algorithms in the administration of justice, and therefore also in administrative proceedings, will be the use of artificial intelligence *sensu stricto* and *sensu largo* where human intervention will not reduce a particular mechanism (software) to the above – mentioned excel function. It is on these categories of artificial intelligence that I will focus henceforth. However, in order to simplify the discussion, a single term – “artificial intelligence” – will be used, with the idea that it covers both categories of algorithms specified above.

Discretionary decisions

At the outset, it is necessary to clarify that the term “discretionary decision” is used mainly in two contexts, i.e. in relation to the institution of administrative discretion and the so-called “constrained decision”.

It should be noted that none of the three cited concepts (i.e. “discretionary decision”, “constrained decision” and “administrative discretion”) has been given a legal definition.¹¹ What is more, none of these concepts were mentioned in legal texts; their names do not even appear. Only legal scholarship and court rulings have contributed to them being distinguished and established in the field of legal studies.

In order to explain the meaning of a discretionary decision itself, one should first refer to the term “administrative discretion”. To begin with, it should be pointed out that the understanding of this term has been subject to changes over the years. “Initially the term ‘free discretion’ was used, denoting the scope of administrative action, which had not yet been constrained by law.”¹² As a consequence, authorities could resolve the matters entrusted to them in a discretionary manner.¹³

The approach presented above cannot be accepted. If considered only from the perspective of an administered entity, “free discretion” would mean that a given authority could, for example, freely deprive an individual of rights or impose obligations. Undoubtedly, in such a case one could not speak of legal certainty or even a democratic state ruled by law¹⁴. The perception of “administrative discretion” (in the past, “free discretion”) therefore had to change. There has thus been a “shift away from (...) a discretionary assessment of the facts to the adoption of the structure of the rule of law and to making the possibility of acting under administrative discretion subject only to an explicit legal basis”.¹⁵

11 On lack of definition and its consequences: J. M. Biłasz, *Sądowa kontrola decyzji uznaniowych wydawanych przez organy administracji*, “Rocznik Samorządowy” 2015, no. 4, p. 28.

12 M. Jaśkowska, *Instytucje prawa administracyjnego System Prawa Administracyjnego 1, in Uznanie administracyjne a inne formy władzy dyskrecyjnej administracji publicznej*, eds. R. Hauser, A. Wróbel, Z. Niewiadomski, Warszawa 2015.

13 K. Radzikowski, *Zasady podejmowania i kontroli sądowej decyzji w sprawie umorzenia zaległości podatkowych w świetle uznania administracyjnego*, „Kwartalnik Prawa Publicznego” 2006, no. 6/4, p. 157.

14 M. Jędrzejczyk, *Koncepcje ograniczające swobodę organu w ramach uznania administracyjnego*, “Przegląd Prawniczy, Ekonomiczny i Społeczny” 2012, no. 3, p. 4.

15 P. Janiszewski, *Aksjologiczne uwarunkowania uznania administracyjnego*, “Folia Iuridica Universitatis Wratislaviensis” 2020, vol. 9, 1, p. 104.

In other words, the possibility of resolving a case within the framework of “administrative discretion” is allowed only if the relevant provision so stipulates.

Moving on to the current understanding of the concept of administrative discretion, one may cite the position of E. Ochendowski, who points out that “administrative discretion exists when the administration may choose between different solutions in order to implement a legal status. Discretion occurs when a legal norm does not unequivocally determine a legal effect, but clearly leaves such a choice to an administrative body”.¹⁶

A. Błaś proposes to define “administrative discretion” as “the autonomy granted to a public administration body by a blanket legal norm, most often constructed in such a way that, when the hypothesis is fully developed, the disposition has a disjunctive form, which means that the administrative body in the conditions specified in the hypothesis has a choice between different ways of behaviour”.¹⁷

As regards the way of understanding “administrative discretion” adopted in court rulings, one should refer to the study by M. Jaśkowska. On the basis of the analysis of administrative courts’ judgments, the author stated that “in the light of court rulings, administrative discretion is as a separate, fully – formed legal institution, characterized by specific features. It is treated as a particular form of authorization of public administration bodies to shape the content of administrative acts”¹⁸.

Summarizing the above, it may be said, in a simplified manner, that “administrative discretion” should be understood as a situation in which a body may choose the manner of settlement, provided that the provision of law so provides. It should be noted that such an understanding of “administrative discretion” is referred to as a narrower approach. In legal scholarship one can encounter the position that the notion of

16 E. Ochendowski, *Prawo Administracyjne. Część ogólna*, Toruń 1998, p. 182.

17 A. Błaś, *Prawne formy działania administracji publicznej*, in *Prawo administracyjne*, ed. J. Boć, Wrocław 1997, p. 287.

18 M. Jaśkowska, *Uznanie administracyjne w orzecznictwie sądów administracyjnych*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2010, no. 5–6.

“administrative discretion” “also includes the interpretation of vague notions”¹⁹. Such an understanding of “administrative discretion” is referred to as a broader approach. At the same time, it should be pointed out that “modern legal scholarship and court rulings have adopted a narrower understanding of this term, permanently departing from the concept of identifying administrative discretion with the interpretation of vague terms and phrases”²⁰. Such a trend in the doctrine and judicature should be assessed positively, as it should be noted that the use of imprecise phrases by the legislator does not mean that an authority may interpret them in an arbitrary manner, or freely choose one of the possible interpretations in a given factual state. It may also be pointed out that within the framework of substantive legal regulations there are numerous provisions containing such imprecise phrases. Thus, if one were to accept the existence a broader approach to “administrative discretion”, there would be a danger that authorities would even be able to freely assess the facts. Consequently, there could be an indirect return to the concept of free discretion.

As an aside to the above remarks, it should also be noted that the institution of administrative discretion, and, as a consequence, also of a discretionary decision, is present also in legal systems other than the Polish system. For example, “administrative discretion in the German legal system does not mean discretion to make decisions in the sense of unlimited activity of the administration, as it is subject to legal regulation. Discretion is an authorisation for the administration, but at the same time it establishes its obligation to make a decision taking into account the legal boundaries of discretion and the criteria of purposefulness”²¹. As a result, it can be said that administrative discretion is an indispensable element of administrative law, regardless of the specific solutions in national regulations.

19 A. Szot, *Słuszność a uznanie administracyjne*, „Studia Iuridica Lublinensia” 2011, no. 15, p. 176.

20 *Ibidem*.

21 K. Gębala, *Uznanie administracyjne w systemie prawa niemieckiego*, „Państwo i Prawo” 2011, no. 1.

In the light of the above comments, it should be clarified that a constrained decision should be understood as the opposite of a discretionary decision. Thus, in the case of issuing a related decision, the authority does not have the discretion to decide.

The admissibility of taking discretionary decisions by artificial intelligence

Firstly, attention should be drawn to the current legal status. Neither the Polish Code of Administrative Procedure nor any other act regulating in part or in whole the proceedings conducted by public administration bodies contains a regulation directly prohibiting the use of algorithms during the performance of particular procedural actions, even issuing decisions. It also seems that on the basis of the text of the Constitution it is not possible to formulate a thesis on the prohibition of replacing humans by artificial intelligence units in the administration of justice. However, to paraphrase F. Bastiat²², what is important is not only what is explicitly written in a legal text, but also what can be discovered through the interpretation of individual provisions.

It is therefore worthwhile to look at the whole of the analysed issue from the perspective of two particularly important constitutional regulations. These are the principle of a democratic state of law and the protection of inherent and inalienable human dignity, which is the source of human and civil liberties and rights. In simple terms, the Polish state, through its bodies, should not apply the law in a way that is inadequate to the changing requirements of reality and leave the individual in a kind of “no – win” situation. Thus, from this perspective one should look at the administrative, tax or other proceedings conducted by public administration bodies, which end with issuing a discretionary decision. In order to better illustrate the presented issue, one can recall

22 F. Bastiat, *Dzieła zebrane*, 1, Warszawa 2009.

Article 48 of the Tax Ordinance Act²³ (further Tax Code), i.e. the regulation providing for the possibility to grant the postponement of deadlines. In accordance with Article 48(1) of the Tax Code, a tax authority may, at the request of the taxpayer, in cases justified by an important interest of the taxpayer or by the public interest, defer the time – limits provided for in tax law (...). In the assessment of legal scholarship, this regulation provides grounds for assuming that “a tax authority is only obliged to properly determine the factual circumstances, i.e. the conditions for tax deferment referred to in Article 48 § 1 of the Tax Code. Therefore, it must clarify all the factual circumstances that are relevant to the issuance of a decision in this case. Even if it establishes the existence of such conditions, it may still, in the exercise of its administrative discretion, refuse to defer the deadline”.²⁴ Thus, the authority may, as it were, arbitrarily decide to defer the deadlines binding on the taxpayer.

The freedom of an authority presented above is limited in an indirect way, just as in the case of issuing other decisions. On the basis of the abovementioned provision, court rulings indicate that “when issuing a decision, a tax authority is bound by the general rules of tax proceedings. In the “decision – making process”, when examining the presence or absence of conditions justifying the granting of a tax relief under Article 48 § 1(2) of the Tax Code, the authority should exhaustively collect evidence (Article 187 § 1 of the Tax Ordinance), thoroughly explain the factual situation (Article 122 of the Tax Code) and assess, based on the collected evidence, whether a given circumstance has been proven (Article 191 of the Tax Code)”.²⁵ In this respect, however, there are no fundamental differences between proceedings concluded with a constrained or discretionary decision. What makes it possible to distinguish the two decisions is the requirements in the literature and court

23 Journal of Laws of 2020, item. 1325.

24 A. Mariański, *Komentarz do art. 48*, in *Ordynacja podatkowa. Komentarz*, ed. A. Mariański, Warszawa 2021.

25 Judgment of the Voivodship Administrative Court in Opole of 19 March 2004, I SA/Wr 3478/01.

rulings ascribed to the manner and scope of their justification and the judicial review carried out in relation to them.

Both in the case of decisions issued on the basis of the above – cited Article 48 of the Tax Code and other procedural regulations, it is assumed that the justification for such a decision should be extensive. Thus, it is pointed out that “discretionary decisions should be convincingly and clearly justified, as regards both the facts and the law, so that there is no doubt that all circumstances relevant to the case have been comprehensively assessed and considered, and the final decision is a logical consequence thereof.”²⁶

In the second place, it should be pointed out that, in contrast to the scope of the verification of constrained decisions, “an administrative court’s review of the lawfulness of a discretionary decision is limited to examining whether the administrative body deciding the case did not exceed the limits of its discretion and whether it properly justified its decision.”²⁷

Bearing the above in mind, it is worth noting that a unit equipped with artificial intelligence, and above all in its variant *sensu stricto*, will, by definition, be able to perform its tasks only according to a paradigm specified top – down, as even possible changes in resolving cases will only constitute an evolution as regards the initially adopted decisions. Therefore, it may be argued that the adopted solutions will, as a rule, only fit within the spirit of the assumptions of static interpretation.

Taking into account the above – mentioned requirements as to a discretionary decision, as well as the scope of control over such decisions, it may be safely assumed that the courts will not be able to propose the modification of the adopted position. Thus, it may be said that “surrendering” proceedings ending in discretionary decisions to artificial intelligence makes it impossible to handle administrative cases adequately

26 Judgment of the Voivodship Administrative Court in Wrocław of 17 October 2019, IV SA/Wr 296/19.

27 Judgment of the Voivodship Administrative Court in Białystok of 06 November 2019, I SA/Bk 305/19.

from the perspective of Articles 2 and 30 of the Constitution, especially those that may be classified as so-called precedents.

In order to avoid the above problem, only such artificial intelligence units that were programmed to adapt to the changing reality could be employed in administrative proceedings. In such a case, it can be said that the decisions taken will, at least in principle, be made in the spirit of dynamic interpretation. However, two circumstances should be noted.

First, the way in which an artificial unit is to “develop” will be designed by people who, for the sake of simplicity, can be called engineers. These engineers, by creating a developing unit of artificial intelligence, become at least indirectly responsible for the direction in which the interpretation of legal provisions will follow, including those that underlie the issuing of discretionary decisions. It seems that such a state of affairs is incompatible with the principle of a democratic state ruled by law, insofar as it states that only individuals designated by the legislator may be responsible for the shape and development of the legal system.

Secondly, it can be asserted that the development of an artificial intelligence unit is a kind of learning. Two other problems should be emphasized here. First of all, it should be noted that, as has been described before, administrative courts cannot correct discretionary decisions to the extent that a specific decision is made under administrative discretion. Consequently, there is no significant benchmark for the further development of artificial intelligence. It can also be said that the individual preferences of engineers designing specific units of artificial intelligence cannot be adjusted.

Secondly, it should be pointed out that an artificial intelligence unit will “learn” when issuing decisions on the rights, freedoms and obligations of people. Therefore, it can be assumed that at least some of this science will be based on identifying and analyzing mistakes made, e.g. on too creative or too conservative approaches to the interpretation of legal provisions. Obviously, a human being also makes mistakes when issuing discretionary decisions. It seems, however, that human error is not the same kind of error as that committed by the device.

It should also be pointed out that the development of an artificial intelligence unit is not the same as human development. Among other things, the point here is the different selection of messages and the lack of human sensitivity in units of artificial intelligence. Therefore, it is worth noting that the legislator creates individual regulations with a human approach to the interpretation of legal provisions in mind. In turn, “dehumanizing” the process of interpretation also leads to the fact that the result of the interpretation may also be “dehumanized”. Therefore, one can at least express concern as to whether the replacement of humans by artificial intelligence units in the process of issuing discretionary decisions will be detrimental to human dignity.

In response to the above accusations, it could be said that artificial intelligence units should be controlled by a human, both with regard to the manner of conducting the proceedings and in the scope of issuing final decisions. It is worth noting, however, that in this approach, the use of artificial intelligence units in administrative matters is in fact the same activity as the use of Excel, mentioned at the beginning of the discussion.

Conclusions

On the basis of the presented considerations, it can be said that giving artificial intelligence units the competence to issue discretionary decisions is a bit like Alice’s jump into the rabbit hole. It is not known whether this will lead to opening a Pandora’s box, or whether the process of issuing discretionary administrative decisions will be improved – or maybe it will simply be a box of Forrest Gump chocolates, where you never know what you will end up with.

It should be noted, however, that in the situation in question it is not about a chess match with a computer, but about making decisions which affect the rights, freedoms and obligations of individual people. Taking into account the above – mentioned limited power of courts over discretionary decisions, it seems that entrusting the issuing of decisions to artificial intel-

ligence units would constitute an unacceptable experiment, the conduct of which would attack the foundations of a democratic state ruled by law.

It also seems that replacing people with artificial intelligence units in the process of issuing discretionary decisions would be associated with indirect transfer of influence on the application of the law to persons not authorized by the legislator.

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SUMMARY

Artificial Intelligence and Discretionary Decisions. The Triumph or Loss of Commander Pirx?

The aim of the considerations is to determine whether artificial intelligence units can take the place of humans in administrative proceedings ending with the issuance of discretionary decisions. The author starts from presenting the essence of discretionary decisions and guide the scope of judicial control over them. The presented considerations relate primarily to the potential placement of such devices in the “administrative justice system” that can be defined as artificial intelligence units in the strict sense. Therefore, this concerns devices for which human intervention is usually limited to switching on and technical supervision. However, the considerations can also be applied to such devices where human interference in their operation is slightly greater. It should be emphasized, however, that it this does not concern devices that are fully or almost fully controlled by humans.

Keywords: artificial intelligence, discretionary decisions, human being.

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