

***Can “legal values” ever turn into “algorithmic variables”? Brief remarks on
jurimetry, algo-cracy and algor-ethics***

Today’s society is dotted with “engineering microcosms and macrocosms”, based on a very galloping development of technology in all fields of human existence, which is also constantly in search of an “electronic eudaimony”.

One of the sectors most influenced by innovation – the general expression by which we want to understand the set of new technological means – is *sine dubio* the legal one, and more specifically the branch of judicial decision.

There is talk, at this point, of a “robot” judge, that is to say of one who strips off the usual clothes of “legal *humanitas*” to wear those of an “unregulated machine”, which society, in its frenetic becoming, imposes. Think of the phenomenon of “deprocessualization”, whereby telematics is increasingly replacing fundamental human work activities. As long as technology serves man to “lighten” the attitudinal load of monotony, it could also be appreciated for its service, completely disputing its influence on human intellectual activities (think of the robotic judicial decision and the so-called “predictive justice”).

The law is investigating a lot, especially in recent years, especially after the adoption of the guidelines and guidelines on robotics and on the legal responsibility of automatons issued in Europe, the relationship between the legal system, steeped in fundamental values that they gave its shape and continue to be its “molding clay”, and the so-called ordering “electronic”, based on algorithmic variables of a computer nature that exclude the “transparent and egalitarian” scope.

With this last concept we mean that the machine, which works through an external “*deus*” – in itself the *homo informaticus* – which enters its contents, which for this reason can be defined as “heteroinput”, does not guarantee respect for values juridical – posed, instead, by *homo juridicus* – including the value of transparency of decisions and the supreme constitutional axiom of equality (article 3 of the Italian Constitution).

A factual confirmation can be found – in a very comparative view – in the well-known Compas case, where a robot judge issued automated judicial decisions in the possibility that it could be twice as likely that black men would commit crimes than whites. To this end, one wonders whether the judging machine has knowledge of the “ontological legal value” of equal treatment (*rectius* principle of formal and substantial equality), provided not only by art. 3 of the Italian Constitution, as well as – being part of a system of “legal monism” – among the best known sources, from arts. 20 and 21 of the Charter of Fundamental Rights of the European Union and by art. 14 of the European Convention on Human Rights (ECHR).

Another relevant case, of which jurists investigate its scope and perspectives, is represented by the possibility of admitting an electronic witness into the trial (see the case of Alexa, the smart device, Amazon’s voice assistant), as happened in a trial for femicide in Florida. The investigation, on this point, should focus on the trial capacity of the witness, analyzing their admissibility, possible limits, but above all reliability, strictly anchored to truthfulness. It is well known that the procedural rules on the subject of testimony are designed to ascertain the truth of the trial – which will never be true or real truth –, therefore, based on the figure of the witness as a man, not as a machine. The machine may

well be intelligent, but who can ever guarantee the neutrality and truthfulness of what is alleged in court? Ultimately, should a new category of “electronic testimony” be constructed – in terms of legal ontology, to which the rules of “human testimony” should be applied? It would not be possible to think of applying – especially analogically (articles 12 and 14 preliminary dispositions of Italian civil code) – the procedural rules in this circumstance. Should an electronic process code be created? They are certainly “superfetant” hypotheses, which could find entry into other systems of order, but certainly not ours, based on the centrality of the “human person” and not of the “robotic person”.

The speech becomes even more stimulating when it comes to “legal responsibility of the algorithm” (*rectius* robot, automaton), where – especially for civilians – there is the doctrinal shadow that reveals the dogmatic construction of a “legal personality electronics” which the machines would be equipped with and, for this reason, the legal system should recognize it. From the point of view of responsibility (and here it would also be necessary to investigate what legal nature it is: contractual, extra-contractual, pre-contractual, from social contact), it would be simpler, as it happens for the natural human person, who acquires legal capacity from birth (art. 1 Italian civil code) and the ability to act upon reaching the age of majority (art. 2 Italian civil code), attributing legal responsibility to an automaton with an electronic personality. Does the attribution of electronic personality also lead, in the abstract, to the attribution of “electronic dignity”? Can the car ever have *dignitas*?

The case brought to the attention of the Italian Council of State is also of great importance, regarding a computer system (*rectius* software) used for the assignment of teaching in Italy. The high administrative jurisdiction has been able to clarify that the algorithmic processing and the automated procedure followed by a software can only be used if the principles of neutrality and transparency are respected. Can you ever think that the machine knows what is meant by “transparency”? Man, who “tames” it from the outside, should know how to insert the “variable” transparency within it, but from a universally understood perspective and not from a personalistic vision of the introducer. In addition to the biases (*rectius* prejudices) of which an automaton is physiologically endowed, there would be the risk of creating further biases of “induced human nature”, the so-called “bias of bias”. In the latter case, therefore, will the responsibility for an incorrect procedure lie with the machine or the inducing man? Could it also be from the manufacturer of the machine itself if there are intrinsic defects? Certainly hot topics to investigate. Just think of smart contracts, telematic methods of transmission of money (bitcoin, blockchain), driverless cars.

Returning to the robotic decision, what will be the procedure followed by the machine to reach the final result? Who will teach the deciding machine, the decision maker, what are the human procedural values to be respected in order to reach a decision in accordance with the “constructive principles” of our legal system? Only *homo informaticus*? Surely the latter will not be able to do so because he will need external expertise. Can we ever talk about “electronic due process”? It will never be possible to change the regulatory and consequently hermeneutic coordinates circumscribed in the bed of what is established by the “table of procedural values” provided for by articles 111 of the Constitution, 6 ECHR and 14 International Covenant on Civil and Political Rights?

How will the impartiality of the judge be guaranteed? Is the machine impartial? Does the one who enters the variables into the system know exactly what is meant by impartiality and independence of judgment?

Basically, a robot judge will never find constitutional legitimacy in our legal system, where art. 101 of the Italian Constitution establishes that “judges are subject only to the law”? Obviously our Constitution makes express reference to the natural person judge. Again, can a decision issued by an automaton, in terms of procedural prejudice, be used by a human judge for the purposes of his decision?

Refer – also to anchor ourselves to the historical context we are going through – to the so-called application “Immune”, functional to social distancing, in which data – even sensitive ones – of citizens must be collected for the ultimate purpose of “two-way and multi-purpose” protection of public health. Or the robots “dogs” used – not in our country – among people in order to enforce the distancing. Or, again, think of the drones – admitted in this significant epidemiological crisis by the National Civil Aviation Authority also in Italy – used to “find” citizens who are not compliant with the rules issued for the containment of the virus. It is no longer the man who controls man, as someone said. Will we get to the point – as already happens in some ways – where the machine will control the man? The man will always have to check the machine. We cannot think that the automaton can do it alone. It must be “supervised”. At this point, like the *quis custodiet ipsos custodes*, who will control the human controller of the machine? If there is the achievement of the fundamental juridical value of the psycho-physical well-being of the human person and of his self-determination, then technological inventions are welcome. Take care, for example, of robots in the field of medicine, whose issue also involves bioethical issues, the applications used in the health sector and in public administrations to ensure the speed of carrying out medical examinations and diagnoses and the efficiency-effectiveness combination of administrative action.

The decision-making process must be human, otherwise it would lose its essence. It may perhaps become automated in some of its phases, but not as a whole. Who or what can ever replace the intellectual and argumentative work of the judge? Basically, in the “dignity of man”, which is the highest value of being, the “dignity of decision” which, on the other hand, is the highest value of the intellect, is fully included. Technology “serves” man and man can never become a “servant” of the machine. The “dehumanization of man through the machine” cannot be allowed; it would rather be desirable, always in terms of “functional and serving” technology to man, a “humanization of the machine through man”.

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