„Krytyka Prawa", tom 16, nr 4/2024, s. 373–390, ISSN 2080-1084, e-ISSN 2450-7938, © 2024 Author.

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A Truly Impersonal Body. Can an Algorithm Be a Public Administration Body?
(Comments from the Perspective of the Polish Legal System)[2]

Submitted: 18.07.2024. Accepted: 14.09.2024

Abstract

The article aims to determine whether, considering the current understanding (definition) of the term "public administration body," it would be possible for the personal substrate of such a body to be replaced by an artificial intelligence algorithm. In other words, it is a matter of discovering whether a public administration body can exist and operate without human beings. The inspiration for such an article is the issue of eliminating the "human factor" from public administration, which seems to be the most unreliable element of the public administration system. The analysis took into account the concepts of public administration body as viewed by legal scholars and commentators (impersonal and personalistic concepts), as well as the actual normative environment of public administration bodies. As a result of the analysis, four fundamental problems have been identified, which need to be solved beforehand in order to consider the possibility of replacing a human being within public administration bodies with an artificial intelligence algorithm.

Keywords: algorithm, administrative body, artificial intelligence, public administration.

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[2] The research in this article has not been supported financially by any institution.

 DOI: 10.7206/kp.2080-1084.739

„Krytyka Prawa", tom 16, nr 4/2024, s. 373–390, ISSN 2080-1084, e-ISSN 2450-7938, © 2024 Author.

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Prawdziwie bezosobowy organ. Czy algorytm może być organem administracji publicznej? (Uwagi z perspektywy polskiego systemu prawnego)[3]

Streszczenie

Opracowanie ma na celu ustalenie, czy na podstawie obecnego sposobu rozumienia (definiowania) pojęcia „organu administracji publicznej" byłoby możliwe, aby substrat osobowy takiego organu został zastąpiony przez algorytm sztucznej inteligencji. Innymi słowy, chodzi tu o ocenę, czy organ administracji publicznej może istnieć i działać bez człowieka. Inspiracją dla takiego opracowania jest kwestia wyeliminowania z administracji publicznej „czynnika ludzkiego", który wydaje się najbardziej zawodnym elementem systemu administracji publicznej. W ramach analizy uwzględniono doktrynalne koncepcje organu administracji publicznej (koncepcję bezosobową i personalistyczną), a także rzeczywiste otoczenie normatywne organów administracji publicznej. W wyniku analizy zidentyfikowano cztery zasadnicze zagadnienia problemowe, których uprzednie rozwiązanie wydaje się niezbędne, aby rozważać możliwość zastąpienia w ramach organu administracji publicznej człowieka algorytmem sztucznej inteligencji.

Słowa kluczowe: algorytm, organ administracyjny, sztuczna inteligencja, administracja publiczna.

[3] Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

The aim of the article

The aim of this article is an attempt to determine whether an artificial intelligence ("AI") algorithm, on the grounds of current legal regulations in Poland as well as the views of Polish legal scholars and commentators dealing with administrative law, could "perform" the function of a public administration body. In other words, it is about answering the question of whether a public administration body can be truly "impersonal."

I would like to make it clear from the outset that, given the limited length of this article in accordance with editorial requirements, its purpose is primarily to highlight the matters addressed – its essence is to diagnose the existing problems. I hope that this article will inspire the search for detailed proposals for solutions to the issues identified in other countries, especially in those where the civil-law system exist.

At the same time, I would like to stress that this article does not address issues related to defects in algorithms (or defects attributed to algorithms), such as bias and the related possible discrimination or lack of transparency of operation (the so-called black-box).

Why use algorithms in public administration?

At the beginning, it seems necessary to provide the context for the discussion that follows. The application of AI algorithms in public administration seems at first glance to be extremely promising. Algorithms are already being used in this setting, e.g. as support in creating administrative policies,[4] in selecting specific actions to be taken e.g. in the control of an individual,[5] and in issuing administrative

[4] See, for example, the algorithm used in the City of London (Ontario, Canada), which predicts which people are likely to be affected by homelessness, thus facilitating the allocation of prevention measures by public administration – see Ch. R. Liyanage, V. Mago, R. Schiff, K. Ranta, A. Park, K. Lovato-Day, E. Agnor, R. Gokani, *Undersanding Why Many People Experiencing Homelessness Reported Migrating to a Small Canadian City: Machine Learning Approach With Augmented Data*, "JMIR Formative Research" 2023, May 2; 7:e43511.

[5] See e.g. D D. F. Engstrom, D. E. Ho, C. M. Sharkey, M-F. Cuellar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, "NYU School of Law, Public Law Research Paper" 2020, pp. 20–54, pp. 30–37.

 DOI: 10.7206/kp.2080-1084.739

decisions.[6] The literature dealing with the subject matter points out that administration is established to perform a specific function – administration, which consists, among others, in the ongoing performance of public tasks, the organisation of social life (including through policing and rationing), as well as the execution of law.[7] However, administration (as a primarily abstract creation – brought into being by the law) requires human action to serve its purpose. Although today it is difficult to imagine administration without human beings,[8] it is still possible to venture a claim that in an administrative structure, the influence of a human – whether as an office holder of a body or as an official acting under the authority of a body (the so-called human factor) – is important for the final outcome of administrative activities.[9] This is a consequence of the nature of human beings, who have their own sympathies, preferences, prejudices, experience various emotional states, but also give in to simple fatigue. This, in turn, may translate into the final outcome of public administration's activity. The legislator obviously tries to limit the situations in which a given person might not remain objective,[10] but such regulations will not always prove effective – it is difficult, after all, to regulate the obligation to remain objective in a situation of bad mood or fatigue.[11]

The literature on the subject matter implies that the use of AI algorithms in administration has a number of indisputable advantages, such as the speed of decision-making, the relatively low cost of operation,[12] and the increase in precision

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6 E.g. the algorithm determining the right to social support in the Swedish municipality of Trelleborg – in this regards, see: A. Kaun, *Suing the algorithm: the mundanization of automated decision-making in public services through litigation*, "Information, Communication & Society" 2022, 14, p. 2048 *ff*.

7 See J. Jagielski [in:] J. Jagielski, M. Wierzbowski (eds.), *Prawo administracyjne*, Warszawa 2022, pp. 32–34; See also J. Boć [in:] J. Boć (ed.), *Prawo administracyjne*, Wroclaw 2010, p. 13.

8 The literature points out that "dehumanisation" of public administration should never take place – see G. Noto la Diega, *Against the Dehumanisation of Decision-Making. Algorithmic Decisions at the Crossroads of Intellectual Property, Data Protection and Freedom of Information*, "Journal of Intellectual Property, Information Technology and E-Commerce Law" 2019, 1, pp. 8–11.

9 M. Grodzins, *Public administration and the Science of Human Relations*, "Public Administration Review" 1951, 2, p. 94.

10 For example, these include the institution of exclusion of an employee – Art. 24 of the Act of 14 June 1960 – Code of Administrative Procedure (consolidated text, Journal of Laws of 2023, item 775, as amended; hereinafter: the CAP); exclusion of a councillor from participation in voting – Art. 25a of the Act of 8 March 1990 on Municipal Self-Government (consolidated text, Journal of Laws of 2023, item 40, as amended).

11 Research shows that fatigue during decision-making has a very significant impact on the contents of decisions. Such conclusions arise from studies on judges in the USA – see S. Danziger, J. Levav, L. Avnaim-Pesso, *Extraneous factors in judicial decisions*, "Proceedings of the National Academy of Sciences" 2011, 17, p. 6892. doi: 10.1073/pnas.1018033108.

12 M. Zalnieriute, L. Bennett-Moses, G. Williams, *The Rule of Law and Automation of Government Decision-Making*, "Modern Law Review" 2019, 3, p. 454. Similarly: F. Geburczyk, *Automatyzacja załatwiania spraw w administracji samorządowej a gwarancje procesowe jednostek. Uwagi de lege ferenda w kontekście ogólnego rozporządzenia o ochronie danych (RODO)*, „Samorząd Terytorialny" 2021, 5, p. 22.

(accuracy) of decisions made.[13] In addition, the obvious pros of algorithms also include the fact that the length of their use does not adversely affect the accuracy of their decisions; they do not become ill and do not feel emotions that can interfere with objectivity.

Therefore, it is justified to ask at least the following questions: Can AI algorithms can replace human beings in public administration? Is it possible for an algorithm to replace a human being as the office holder of a public administration body? In the light of the aforementioned advantages, the vision in which it is an AI algorithm (in place of a human being) that heads a public administration body seems to be, in a sense, the fulfilment of an ideal state in which state administration performs its functions in a fast, objective, efficient manner, guided without emotion, driven only by legal norms, facts, and large data sets. In a sense, this would realise Max Webber's vision of perfect administration (bureaucracy). He actually claimed that perfect administration (bureaucracy) was a utopia, but nevertheless, if it actually existed, it would be the most rational form of organisation.[14]

While the current technological development allows us to dream of visions in which administration operates as an ideal structure, the question remains open as to whether the current legal regulations – as well as the way in which certain legal institutions are perceived (understood) – would allow such a solution. In other words, is the current understanding of the category of a public administration body (reconstructed on the basis of legal literature as well as the relevant legal regulations) sufficiently capacious to allow for a solution in which an algorithm acts as such a body?

Artificial intelligence algorithms

At this point, I would like to briefly clarify what I mean by the category of "artificial intelligence algorithms." Present-day science has not developed a uniform understanding of these terms.[15] For the purpose of this article, I use the category of AI algorithms to refer to those tools that are able to derive certain rules (regularities, relationships) from historical data and, on their basis, draw conclusions or predict

13 D. Baryse, S. Roee, Algorithms in the court: does it matter which part of the judicial decision-making is automated?, "Artificial Intelligence and Law" 2023, 32, p. 118.

14 K. P. R. Bartels, *The Disregard for Weber's "Herrschaft": The Relevance of Weber's Ideal Type of Bureaucracy for the Modern Study of Public Administration*, "Administrative Theory & Praxis" 2009, 4, p. 450.

15 The issue is problematic in that there is not even a consensus on what intelligence itself is. An overview of definitions is given by 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 *ff.*

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e.g. specific behaviours. These systems operate on the basis of machine learning algorithms (based, for example, on artificial neural networks, genetic algorithms or Bayesian networks).[16] Therefore, these are systems which are capable not only of processing large data sets (big data), but also of searching for and finding correlations (sometimes invisible to humans) between individual pieces of data and drawing conclusions from them. We can also speak here of the phenomenon of "knowledge development" of an algorithm itself.[17] In other words, when I speak of AI, I am referring to those algorithms that exhibit the ability to learn and adapt, which in turn (to some extent) characterises intelligent entities.[18]

A public administration body

Answering the question posed in the title requires establishing the meaning of the category of a public administration body. However, the reconstruction of this concept cannot be limited to an analysis of the normative state itself. It is crucial to remember that the lack of a "general part" of administrative law is filled precisely by reflections and observations made by legal scholars. The studies and literature dealing with administrative law fill in the content of normative categories, which the legislator generally treats as certain existing concepts.[19]

The category of an "administrative body" is a legal concept found across many different legal acts, but it is not a legally defined notion. Administrative law scholars deal with explanation of and an attempt to define this concept. As J. Jagielski points out, the understanding of the notion of "administrative body" is still, in fact, shaped by theory and reflections of legal scholars, founded "on the grounds of legal regulations and extracting from these regulations the elements (properties) which allow make it possible to construct this type of entity."[20]

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16 M. Zalnieriute, L. Bennett-Moses, G. Williams, *op. cit.*, p. 433; See also: S. Haddadin, D. Knobbe, *Robotics and Artificial Intelligence: the present and Future Visions*, [in:] M. Ebers, S. Navas (eds.), *Algorithms and Law*, Cambridge 2020, p. 21 *ff.*

17 See e.g. J. Turner, *Robot Rules. Regulating Artificial Intelligence*, Cham 2019, pp. 71–73.

18 So-called expert systems are sometimes included in the category of „artificial intelligence" but as Karnow states, they can only be described as "intelligent" in a honorific way. See: C. E. A. Karnow, *Liability for Distributed Artificial Intelligences,* "Berkley Technology Law Journal" 1996, 1, p. 156.

19 Cf. in this aspect the discussion by W. Jakimowicz on the understanding and need for interpretation in administrative law scholarship: W. Jakimowicz, *O potrzebie wykładni doktrynalnej w prawie administracyjnym*, [in:] L. Staniszewska, M. Szewczyk, J. Zimmermann (eds.), *Myśl Mariana Zimmermanna a współczesne prawo administracyjne* (eds.), Warszawa 2020, pp. 351–352.

20 J. Jagielski, *Z problematyki organów administracyjnych*, [in:] J. Dobkowski (ed.), *Problemy współczesnego ustrojoznawstwa. Księga jubileuszowa Profesora Bronisława Jastrzębskiego,* Olsztyn 2007, pp. 262–263. It is worth pointing out that the contents of the category of an "administrative body" have been discovered (given or defined) through scholarly reflection since the 19th century, i.e. basically since the beginning

At the basic level of defining the category of "public administration body," legal scholars unanimously agree that such a body is:

- a legally distinct organisational unit (i.e. the establishment of the name and structure of a body),
- a unit which acts in the name of and on behalf of an administrative entity (of state or a local self-government entity),
- and in doing so, pursues objectives, (public) tasks and competences in the field of public administration.[21]

It is often additionally pointed out that public administration bodies perform their tasks on the basis and within the limits of the law.[22]

Some authors question the fact that a public administration body should be explicitly distinguished by the law. This is by no means to say that a public administration body can be created in some other way than by the law itself. Nevertheless, the legislator itself prescribes to treat certain entities "as if they were an administrative bodies," e.g. in the procedural aspect. An example can be found in Article 5 § 2(3) of the CAP in conjunction with Article 1(2) of the CAP. This is, therefore, a case of so-called functional bodies, in which the very existence of administrative law competence comes to the fore.[23]

Yet another problem in defining an "administrative body" arises in terms of the involvement of the human factor. There is a difference of opinions as to whether the constitutive element of a body is its staffing (the existence of the office holder of a body). A personalistic concept of a public administration body was supported by e.g. J. Boć, who argued that a public administration body is a person (or a group of people) who (1) is in the organisational structure of an administrative entity, (2) is appointed to implement the norms of administrative law – and this implementation takes place in a manner appropriate to this law, and (3) acts within the limits of the competences conferred the law.[24] The problem is addressed somewhat differently by B. Adamiak, who perceives a body from the "realistic" standpoint, claiming

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of the modern academic study of administrative law or the study of administration – cf. G. Smyk, *Początki ewolucji podstawowych pojęć i definicji w europejskiej nauce administracji*, „Studia z Dziejów Państwa i Prawa Polskiego" 2014, XVII, p. 114.

21 J. Zimmermann, *Alfabet prawa administracyjnego*, Warszawa 2022, p. 159; see also: J. Jagielski, *Z problematyki…*, p. 263.

22 W. Bochenek, *Pojęcie organu administracji publicznej w świetle koncepcji „personalistycznej"*, „Przegląd Prawa i Administracji" 2005, 2918, p. 38; see also: J. Zimmermann, *Alfabet…*, p. 159.

23 Such a view seems to be presented by M. Wierzbowski & A. Wiktorowska [in:] J. Jagielski, M. Wierzbowski (eds.), *Prawo administracyjne,* Warszawa 2022, p. 186.

24 J. Boć, *op. cit.,* p. 133.

 DOI: 10.7206/kp.2080-1084.739

that, in essence, the action of a body (the fulfilment of tasks or competences) is carried out by officials. Thus, the action of administration is carried out by a clerical corporation run by a body, the individual links of which are assigned a specific range of tasks.[25]

The "personalistic" theory of a body converges with the theory of legal persons presented in civil law. This is important insofar as, on legal-administrative grounds, the structure of a body has been undoubtedly inspired by solutions from the realm of private law – essentially, it is associated "primarily with the concept of a legal person."[26] In civil law, it is pointed out that "in the normative sense, a legal person has bodies only when there are not only grounds for identifying this element [i.e. a body – author's note] in its structure, but when it can also be established who holds the office of this body."[27] The close connection between the existence of a body and the existence of a person appointed to perform its function, in the sphere of private law, is also confirmed in the normative aspect. In accordance with Article 42 § 1 of the Civil Code,[28] if a legal person cannot be represented or manage their affairs due to the lack of a body or a shortage in the composition of a body, the court should appoint an administrator for it. The phrase "the lack of a body" contained in the provision is understood – both in the literature and in judicial decisions – as implying that there are no natural persons capable of acting as a body of a legal person.[29]

On the other hand, some administrative law scholars point to an impersonal concept of a body, emphasising the lack of identity of a body and the office holder of this body (a person).[30] In light of the above, a body – as an abstract construct – exists from the moment it is provided for (created) by a given legal norm (body as a legal institution[31]), insofar as that norm has provided for its identification and conferred competences.[32]

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25 B. Adamiak, *Uwagi o współczesnej koncepcji organu administracji publicznej*, [in:] E. Ura (ed.), *Jednostka, państwo, administracja – nowy wymiar.* Międzynarodowa konferencja naukowa, Olszanica 23–26 maja 2004, p. 172–173.

26 M. Stahl, [in:] R. Hauser, A. Wróbel, Z. Niewiadomski (eds.), *Podmioty administrujące, System prawa administracyjnego Vol. 6*, Warszawa 2011, p. 60.

27 J. Frąckowiak, *Osoby prawne*, [in:] M. Safjan (ed.), *Prawo cywilne – część ogólna, System Prawa Prywatnego*, Warszawa 2012, p. 1146; see also: Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa 2023, p. 202.

28 Consolidated text: Journal of Laws 2023, item 1610, as amended.

29 K. Mularski [in:] M. Gutowski (red.), *Kodeks cywilny. Komentarz, Vol. I*, Warszawa 2021, p. 364; See also: The decision of the Regional Court in Toruń of 21 May 2013, file no. VI Ga/41/13 (LEX 1796770).

30 J. Jagielski, *Z problematyki…*, p. 263.

31 Z. Szydłowski, *Teoria organu administracji państwowej*, Szczecin 1985, pp. 33–53.

32 J. Zimmermann, *Alfabet…*, *op. cit*., p. 158; Also W. Dawidowicz, *Zagadnienia ustroju administracji państwowej w Polsce,* Warszawa 1970, pp. 20–24.

Such a conclusion is also indirectly confirmed by the views of administrative courts concerning the issue of authorisations to handle cases issued pursuant to Article 268a of the CAP. This is because courts indicate here that even if the office holder of a body ceases to perform their function, this does not cause the expiry of the administrative authorisation,[33] and therefore it should be assumed that the body still exists.

The "impersonal" concept of a body, however, can be called into question when confronted with the normative domain. An example of this is the situation of a departmental minister in Poland. The existence of a body here depends on the prior appointment of a specific person as a minister,[34] what occurs here, therefore, is a reversal of the order in which a body is created – first, a person is appointed as a minister and then, the Prime Minister creates a body by assigning them a department.[35]

It is not my goal to resolve scholarly disputes concerning the essential nature of a body. For the purpose of further analysis, I adopt an impersonal concept of a body, in light of which a public administration body (i) is a separate part of the public administration apparatus, (ii) is created on the basis of the law, (iii) acts on behalf of an entity of the administration, (iv) is entitled, if permitted by law, to make use of coercive measures, (v) performs public tasks in the field of administration, (vi) acts within the framework of powers granted (including competences).[36]

Nevertheless, I believe that, when assessing the possibility of replacing a human being by an algorithm in the function of the office holder of a body – or the actual possibility of equating the category of a body with an AI algorithm, it is necessary to take into account both of the aforementioned concepts of a public administration body.

Can an artificial intelligence algorithm be a public administration body?

By adopting the impersonal theory of a body, the answer to the question seems obvious. Indeed, since a public administrative body exists only because the legislator so provides, there is no obstacle for the legislator to provide for the possibility

[33] See, for example, the judgments of the Supreme Administrative Court of: 20 August 2020, file no.. II FSK 1458/18 (LEX 3047418); 20 June 2013, file no. II GSK 476/12 (LEX 1558821).

[34] Article 33(1)(1) in conjunction with Article 33(1a)(1) of the Act of 8 August 1996 on the Council of Ministers Consolidated text: Journal of Laws 2022, item 1188, as amended.

[35] J. Jagielski, *Z problematyki…*, p. 264.

[36] W. Bochenek, *op. cit.*, p. 38.

 DOI: 10.7206/kp.2080-1084.739

of an appropriate algorithm to perform the functions of a body. An uncritical adoption of such a view would fail to take into account many aspects that currently both legally and factually determine a broadly understood administrative body and the operation of the administration apparatus itself. In particular, such an approach would not take into account aspects such as:

- the structure of a system of law in which the ultimate addressee of a norm is a human being,
- the normative complexity of tasks carried out by public administration bodies,
- the issue of liability for maladministration.

Moreover, if one were to adopt a "personalistic" concept of a body, i.e. to consider that a body in essence is a person (a group of persons), then, in attempting to attribute a function to an algorithm (which is basically a code), it would be difficult to speak of a body at all.

The problem of the construction of a legal system in which the real, ultimate addressee of a norm is a human being

Despite the fact that one of the assumptions adopted for this analysis is the concept of the so-called "impersonal body," J. Filipek aptly pointed out that "an administrative body is not the same as a person acting on its behalf, nevertheless, without a person performing the functions of a body, there is no administrative body."[37] This view stems from two interrelated issues. First, law is a product of man and a manifestation of culture. Second, due to the lack of appropriate technological solutions, it has so far been difficult to consider that the ultimate addressee of a norm is a non-human being. For, regardless of whether the addressee of the norm will be a legal person, an administrative body, a court, etc., in the end, it is up to a human being (performing a specific function) to decode a norm from the legal provision(s).[38] This view is (has been?) invariable, irrespective of the accepted conception of law, although it seems to be most evident in the conceptions of legal realism in the broadest sense – especially within the sociological theory of law. Indeed, L. Petrażycki argued that the essence of law is human experiences, emotions, which are

[37] J. Filipek, *Prawo administracyjne. Instytucje ogólne, cz. I*, Kraków 2003, p. 306.

[38] When talking about the law, it is pointed out that ultimately the law sets the rules for the behaviour of people in their interactions with one another – see J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa*, Warszawa 2007, p. 26.

the actual motives for the conduct of the subjects of law.[39] For this reason, the law is formulated in the natural language.

One should realise that an algorithm does not "think" in the same way as a human being does. In other words, it is not able to perceive a message resulting from a provision in the same way as a human. Artificial intelligence, through an algorithm, is able to find similarities in the learning set and give an answer or make a prediction, but it does not demonstrate understanding in the sense that it does not perceive the context "behind" the words.[40] An algorithm works according to the stored code.

Changing an actual secondary addressee of a legal-administrative norm (at present it is, for example, a body acting with the help or mediation of a human being – the office holder of a body or an official) would therefore require a change in the way the law is formulated. However, it should not be forgotten that a primary addressee of a legal norm is (most often) a human – and a human will remain such an addressee. Thus, it would be necessary for the legislator to encode legal norms not only in regulations by means of the natural language (understanding by a primary addressee), but also in a given programming language (for the algorithm). This would thus require the adoption of a kind of new concept of "multicentricity of law" – not in the sense of multicentricity of the creators of norms or of entities applying the law,[41] but multicentricity (or at least bicentricity) of the ultimate addressees of norms, i.e. humans and non-humans (algorithms).

The problem of normative complexity of tasks carried out by public administration bodies

Artificial intelligence algorithms are not multi-tasking algorithms, despite contrary appearances. What is at issue here is the conventional division into weak/strong AI or narrow/general AI.[42] As a rule, "designers of artificial intelligence systems do not attempt to simulate general intelligence."[43] Efficiently functioning AI algorithms are programmed to perform a specific task (provide answers in a specific sphere).

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39 In this respect, see: T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa,* Warszawa 2011, p. 12.

40 K. Hao, *AI still doesn't have the common sense to understand human language*, "MIT Technology Review" 2020, 31 January. Available from: https://www.technologyreview.com/2020/01/31/304844/ai-common-sense-reads-human-language-ai2/ (accessed: 20.06.2023).

41 On the multicentricity of a legal system: E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, „Państwo i Prawo" 2005, 4, p. 4 *ff.*

42 For more, see: T. Walsh, *To żyje! Sztuczna inteligencja. Od logicznego fortepianu po zabójcze roboty*, Warszawa 2018, pp. 107–109.

43 M. Flasiński, *Wstęp do sztucznej inteligencji*, Warszawa 2018, p. 224.

 DOI: 10.7206/kp.2080-1084.739

For example, the COMPAS system,[44] used in the USA, only predicts the possible probability of a so-called serious crime (felony) being committed again by a defendant. However, it is not able to assess whether the possible offence is going to be committed within 1 year or within the next 5 years. The system will also not give an answer as to what the probability of a minor offence (misdemeanour) is.

If, therefore, an algorithm were to be created to be responsible for issuing a weapon permit,[45] it would only be able to analyse the conditions for issuing (or not) such a permit. Thus, assuming that such an algorithm could be a public administration body would lead to such a body only being competent to issue (or not) weapon permits. The normative reality, however, is more complex. The competent authority does not only issue decisions with regard to the granting of this permit. While we are dealing with a generically single decision, there are a number of sub-types of these permits.[46] Moreover, such a body is also competent in other matters, e.g. the revocation of a permit,[47] refusal to register a weapon,[48] cancellation of an air weapon registration card.[49] Although these cases are generically related, from the perspective of algorithm development they are completely different sequences of action. In other words, they would be different algorithms. In view of this, there would be a problem of the number of the necessary administrative bodies, since each type of action would require a separate algorithm. In such a case, should there be many thousands (or perhaps tens of thousands) of administrative bodies?

The issue becomes even more complicated when one considers that public administration bodies are not only established to exercise competences (coercive shaping of the rights and obligations of individuals), but also carry out a number of different tasks in non-coercive forms. It seems that under the current law, there is no public administration body which would be tasked only with the exercise of competences by issuing administrative acts. For example, the Polish Financial Supervision Authority not only exercises supervision over the financial market (and in this respect it

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44 *Correctional Offender Management Profiling for Alternative Sanctions* – a system developed by Equivant (formerly Northpointe), which was originally intended as a system to assist judges in adjudicating alternative penalty measures or the possibility of early (conditional) release for convicted persons. For more on this system, see: J. Skeem, J. Eno Louden, *Assessment of Evidence on the Quality of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)*, Center for Public Policy Research, University of California, (2007) Davies, p. 8 *ff*. Available from: https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/0/1149/files/2013/06/CDCR-Skeem-EnoLouden-COMPASeval-SECONDREVISION-final-Dec-28-07.pdf (accessed: 21.06.2023).

45 Pursuant to Article 10(1) of the Act of 21 May 1999 on Arms and Ammunition (consolidated text: Journal of Laws of 2022, item 2516, as amended).

46 Depending on the nature of a weapon.

47 Article 18(1) of the Act on Arms and Ammunition.

48 Article 13(9) of the Act on Arms and Ammunition.

49 Article 20(1) of the Act on Arms and Ammunition.

uses coercive forms of influence), but it is also supposed to engage in educational and informational activities with regard to the functioning of the financial market – or create opportunities for conciliatory resolution of disputes between financial market participants.[50] It is difficult to imagine that this kind of task would be performed by an algorithm alone.

The normative reality in which public administrations operate is very complicated and complex, and a number of activities of authorities at the current stage of development cannot be performed by algorithms.

The problem of liability for defective administrative activities

Artificial intelligence algorithms are not infallible. Incorrect results can be a consequence of, for example, incorrect data entered as a training set – or errors in the code.[51]

In the current normative state, in addition to the compensatory liability of an administrative entity,[52] there is also a mechanism of financial liability of public officials for gross violation of the law.[53] Liability under the latter, in the case of replacing a human being with an algorithm, would be difficult to enforce because it is based on the principle of guilt,[54] which is a state/quality impossible to attribute to an algorithm. This raises the question of who should be liable. The European Union has adopted the AI Act.[55] In the regulation, liability for the actions of AI algorithms would be based on the principle of risk, and would be structured in a similar way to liability for a dangerous product (Articles 24-27 of the AI Act). However, the question arises as to whether such a liability model (producer-importer-user) is going to be adequate for a situation in which the algorithm still acts on behalf of an administrative entity (i.e. the state or a local government).

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50 Article 4 of the Act of 21 July 2006 on Financial Market Supervision. Consolidated text Journal of Laws 2023, item 753, as amended.

51 E.g. incorrect assignment of a values/weight to individual elements.

52 See in Articles 417-417[2] Act of 23 April 1964 – the Civil Code. Consolidated text: Journal of Laws 2022, item 1360, as amended.

53 The Act of 20 January 2011 on Financial Liability of Public Officials for Gross Violations of the Law (consolidated text: Journal of Laws 2016, item 1169). Under this liability regime, more than PLN 213 million was awarded from officials until 2019. See: https://www.rp.pl/urzednicy/art8658371-czy-i-ile-urzednicy-placa-za-swoje-bledy-oto-dane (accessed: 27.06.2023).

54 See Article 5(2) of the Act on Financial Liability of Public Officials for Gross Violation of the Law.

55 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L of 12.07.2024, no. 1689, p. 1.

 DOI: 10.7206/kp.2080-1084.739

The problem of the "personalistic" concept of a public administration body

A separate problem in recognising an algorithm as a public administration body arises in the case of the "personalistic" concept of a body. As already mentioned, in light of this concept, an administrative body does not exist as long as it is not staffed (a personal substratum does not appear) – until such staffing has taken place, one can speak, at most, of the existence of an "office of a body."

If such a concept were to be adopted, it would, in principle, be necessary to completely exclude situations in which an AI algorithm would be a public administration body.

A way out of such a situation could be to extend the "personalistic" concept to a "subjective" concept of a body. This extension would assume that a body could be not only a human being (a person or a group of natural persons), but also some other legal subject. At the same time, it would be then necessary to consider the possibility of recognising the legal subjectivity (at least to some extent) of an AI algorithm itself. The discussion regarding this matter is taking place especially in the sphere of private law, where the creation of a category of synthetic (artificial) or electronic legal personalities is being considered.[56] Still, it seems reasonable to add that in 2017, the authorities of the Kingdom of Saudi Arabia granted citizenship to Sophia, a robot manufactured by Hanson Robotics. Upon being granted citizenship, Sophia responded by stating: "I am very honoured and proud for this unique distinction."[57] It seems, therefore, that the issue of legal personality of AI is (and will continue to be) further discussed and developed.[58]

In this vein, the creation of mixed collegial bodies can also be considered. The substrate of a body here would be a human (or a group of humans) and an algorithm. This could lead to a balancing of the influences of technology and the human view of performing administration. In this aspect, however, it should not be forgotten that humans may be very susceptible to the solutions suggested by AI and unreflectively accept all the decisions prepared by an algorithm.[59] The participation of the

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[56] See e.g. J. Bryson, M. Diamantis, T. Grant, *Of, for and by the people: the legal lacuna of synthetic persons*, "Artificial Intelligence and Law" 2017, 25, pp. 282–288; D. Osborne, *Personhood for synthetic beings: legal parameters and consequences of the dawn of humanlike artificial intelligence*, "Santa Clara High Technology Law Journal" 2021, 3, p. 282 *ff.*; M. Jankowska-Augustyn, *Podmiotowość prawna sztucznej inteligencji?*, [in:] A. Bielska-Brodziak, *O czym mówią prawnicy, mówiąc o podmiotowości*, Katowice 2015, pp. 187–192.

[57] https://www.livescience.com/60815-saudi-arabia-citizen-robot.html (accessed: 5.07.2024).

[58] V. Kurki discusses this in depth, *Theory of Legal Personhood,* Oxford 2019, pp. 175–190.

[59] This issue is raised in the context of the use of the COMPAS algorithm by judges. See C. Engel, L. Linhardt, M. Schubert, *Code is law: how COMPAS affects the way the judiciary handles the risk of recidivism*, "Artificial Intelligence and Law" 2024.

human factor would then become illusory. On the other hand, it is the "human" office holder who could realistically be held accountable – which could translate into a real evaluation (not verification – as this may not be possible) of the performance of AI.

Obviously, this seems to be the most debatable of the issues raised in this article. However, it seems that it will also come to be faced in the realm of administrative law in the near future.

Conclusion

It seems that the current way of defining a public administration body, considering both the normative level and the contributions at the theoretical level, does not provide enough space or capacity to consider that an AI algorithm could be a public administration body.

As I mentioned at the outset, even if the legislator were to introduce a legal solution indicating that an office holder of a specific public administration body is not a human being (without at the same time regulating the other issues raised in this article), the far-reaching doubts as to the possibility of the actual functioning of such an entity would arise.

These difficulties to be considered are multifaceted. First, the adoption of such a solution, assuming that such an established body would not benefit from any human assistance (even within the office serving such a body), would require a change in the way law is made. It would be important for the law to be "bilingual" so to speak – on the one hand, it should be written in the natural language for the primary addressee, which is ultimately always a human being (whether as an individual or a, for example, the office holder of a body of a legal entity), and on the other hand, it should be simultaneously written in the language of an algorithm (as a code), since the secondary addressee would be an algorithm itself.

Second, it would be necessary to change the perspective of how an administrative body is perceived. Currently, in the "impersonal" concept, it is reduced to an organisational separation and granting it competences (powers) and tasks. In the case of an algorithm-authority, such a perspective would most likely change significantly. On the one hand, an AI algorithm is usually designed to provide the resolution of a specific type of issue, whereas in the current normative reality, a body is usually granted a significant number of competences to adjudicate the legal situation of individuals in a coercive manner (a set of competences). Moreover, a body does not only exercise coercive powers, but is usually additionally vested with obligations to carry out tasks by means of non-coercive measures, the performance

 DOI: 10.7206/kp.2080-1084.739

of which often requires interacting with entities outside the public administration apparatus. It is difficult to expect an algorithm to engage in, for example, activities involving public health awareness campaigns or educational activities.

Third, the recognition of an AI algorithm as a public administration body seems extremely difficult due to the lack of an established practice of enforcing liability for malfunction. A far-reaching loophole would thus arise, given that even the creator of an algorithm cannot fully predict the direction of their algorithm's learning. The phenomenon of the creators of such algorithms evading responsibility has been quite common and noticeable, which is based on the argument that the algorithm works independently of the creator – for the creator has no influence, ultimately, on what dependencies the algorithm perceives in the learning set.[60] At the same time, the issue of the regulation of liability requires deep reflection – especially in the context of the effects that an overly strict model of creator liability may have.

Finally, the fourth problem identified pertains to the adoption of a "personalistic" concept of a body. If the existence of a public administration body is closely linked to the staffing of the office of a body, the possibility of considering that an algorithm can be a body would currently have to be completely ruled out. In this aspect, it would be necessary, on the one hand, to change the definition of a body (moving away from a strictly personalistic formula to accepting that an office holder of a body should be a legal subject – not necessarily a natural person) and, on the other hand, to grant AI some form of legal subjectivity.

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[60] H. A. Unver, *Artificial Intelligence, Authoritarianism and the future of Political Systems*, "Center for Economics and Foreign Policy Studies" 2018, July, p. 6. Available from: https://www.jstor.org/stable/resrep26084 (accessed: 28.06.2023).

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