



Administrative due process when using automated decision-making

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Introduction

- Increasing used of automatized decision-making in public administration
 - Mass decisions
 - Expectations of speedy decision-making -> impact: saving resources
- Few explicit requirements placed on ADM of public authorities
 - GDPR: opting out possible until law makes the procedure compulsory
 - Few national requirements
 - Sweden: explicit provision in the Administration Act allowing ADM
 - Finland: old provisions apply, but new legislation underway
- Difficult to know what it is that happens inside the automatized decision-making process
 - GDPR: right to know the logic -> What is the extent of "the logic"?
 - Rule-based ADM v. ADM based on machine-learning



”But you can always complain to a court of law”

- Errors are bound to take place
 - Example: ADMs at the SII and the Tax Authority communicate
 - Four different persons were unable to explain
 - However, accurate decision-making when programming is good
 - Chancellor of Justice: Social Insurance Institution: manual 4 %, ADM 0.4 %
- Preventive (*ex ante*) and corrective (*ex post*) guarantees of legality
 - Relevant distinction in most countries, although the example is Finnish
- Section 21 of the Constitution of Finland
 - Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice.
 - Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.



Preventive guarantees of legality: often made redundant by ADM-applications

- Preventive: before the decision is issued in the first instance -> Section 21(1) of the Constitution
 - Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent (...) authority
 - The decision by the public authority
- Section 21(2): the right to be heard, the right to receive a reasoned decision and other guarantees of good government shall be provided by an Act
 - A large number of Acts: Administration Act, Act on the Publicity of Public Agencies, Act on
- Much of the legislation on preventive guarantees becomes inapplicable in ADM-applications
 - Some *desuetudos* are welcome, such as the rules on conflict of interest, which become redundant in ADM-environments

Corrective (ex post) guarantees of legality

- Corrective (ex post): after the decision is issued in the first instance -> Section 21(1) of the Constitution
 - Everyone has the right to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice.
 - Complaints to the Administrative Court, with further complaints to the Supreme Administrative Court
- Section 21(2): Publicity of proceedings, the right of appeal, as well as the other guarantees of a fair trial shall be provided by an Act
- Administrative Judicial Procedure Act



Rule of Law: Section 118 C on official accountability

- A civil servant is responsible for the lawfulness of his or her official actions. He or she is also responsible for a decision made by an official multi member body that he or she has supported as one of its members.
- A rapporteur shall be responsible for a decision made upon his or her presentation, unless he or she has filed an objection to the decision.
- Everyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a civil servant or other person performing a public task shall have the right to request that the civil servant or other person in charge of a public task be sentenced to a punishment and that the public organization, official or other person in charge of a public task be held liable for damages, as provided by an Act. However, there is no such right to bring charges, if, under the Constitution, the charges are to be heard by the High Court of Impeachment. (1112/2011, entry into force 1.3.2012)



Parts of Section 118 made obsolete by taking into use automatised decision-making

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What remains of Section 118 after implementing automatised decision-making

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Is the law technology neutral?

- When automatised decision-making is taken into use and a live person is not anymore in charge, the function that is automatised slips outside of such legal provisions and frames that require the involvement of a human being -> AI sets aside provisions of the law
- Explicit provisions in law that require a physical decision-maker -> Section 118, but also other examples
- Misunderstanding about the technology neutrality of administrative law -> underlying assumption in public law that the decision-maker is a human being -> principle established by the Constitutional Committee
- Provisions that require human decision-makers -> Section 91 of the Local Government Act, 2015
 - "The Council may delegate decision-making powers in the bylaw to the other organs of the municipality and to appointed decision-makers and civil servants."
 - Delegation to algorithmic decision-making systems actually not possible

Rule of Law Issues for the Use of ADM

- How should an algorithm be held accountable or liable?
- "Rule of Algorithm" may turn code into law -> need for supervision, oversight and transparency
- Some problems
 - The ADM-solution has to be modified when amendments in legislation take place and when courts make determinations about the correctness of the AD-decisions and perhaps overturn decisions
 - Use of rule based ADM vs. machine-learning ADM
- Use of AI in society may eradicate or at least blur the difference between public and private
 - Private corporations using AI may increasingly take over the role of the state

What should go into law about automatized decision-making in public authorities?

- Preventive guarantees of legality: Section 21 of the Constitution
 - Designate a civil servant with responsibility over the ADM-system -> A human being always designated as a responsible party for the use of a particular algorithm
 - Define what good government means in an ADM-environment -> specific ADM provisions in law (e.g., right to be heard)
 - Determine the provisions in existing law that are applied in ADM-situations
 - Require identification in the decision of those public registers that the ADM-system has used when making the decision and how the external register information has been used
 - Establish principles for purging information in the ADM-system
 - Delineate the principles of transparency in the ADM-systems as concerns the algorithm and the code ("the logic") as well as the information used
 - Only rule-based ADM, not machine-learning ADM
 - Define when ADM-systems shall not be used (such as in relation to children; according to the preambular para. 71 of the GDPR, procedures for revisiting or correcting decisions, etc.)

Conclusions

- Regular appeals procedures -> courts may have to open up the "Black Box"
- The "Black Box" should be open already prior to ADM-decision-making is taking place
- Should the provisions become part of an existing Act or should a new Act on Automated Decision-making be enacted? -> an ADM-APA?
- Establish legal grounds for ADM-applications -> exclude the opt out possibility of GDPR
- Future perspective: regulation at the EU level -> draft AI Act -> risk levels; algorithm as a commercial product