GRUPPO di PISA
Dibattito aperto sul Diritto e la Giustizia Costituzionale

THE RIGHT TO RESPECT FOR PRIVATE LIFE AND THE REQUIREMENT OF TRANSPARENCY OF PUBLIC ADMINISTRATION IN THE ITALIAN LEGAL SYSTEM*

ANIELLO FORMISANO**

1. *Legal evolution of transparency in the Italian legal system*

Before analysing the relationship between transparency and privacy, we need to bring attention on the evolution of transparency regulation in our legal system[1]. The

* Articolo sottoposto a doppio referaggio anonimo.

** Phd student in Pubblic Law, University of Naples "Parthenope"; trainee at the Italian Constitutional Court.

[1] The scientific literature on the evolution of transparency in the Italian legal system is extensive. Without claiming to be exhaustive, on the constitutional basis of the principle of transparency, see G. DE MINICO, *Towards an "Algorithm Constitutional by Design",* in *BioLaw Journal – Rivista di BioDiritto*, 1/2021, 391 ff.; A. PATRONI GRIFFI, *Il fondamento costituzionale della legislazione in tema di trasparenza e di lotta alla corruzione: alcune riflessioni*, in *Forum di Quaderni Costituzionali*, 29 March 2016; S. FOA, *La nuova trasparenza amministrativa*, in *Diritto amministrativo*, 1/2018; M. OREFICE, *I big data e gli effetti su privacy, trasparenza e iniziativa economica*, Rome, 2018; G. ARENA, *Trasparenza amministrativa (ad vocem*), in *Enciclopedia giuridica*, XXXI, Rome, 1995, 1 ff.; P. TANDA, *La trasparenza nel moderno sistema amministrativo*, in *Nuove autonomie*, 1/2008, 161-166; G. ABBAMONTE, *La funzione amministrativa tra riservatezza e trasparenza, Introduzione al tema*, in AA.VV., *L'amministrazione pubblica tra riservatezza e trasparenza. Atti del XXXV Convegno di Studi di Scienza dell'Amministrazione - Varenna 1989*, Milan, 1991, 8 ff.; P. BARILE, *Il dovere di imparzialità della pubblica amministrazione*, in AA. VV., *Scritti di diritto costituzionale*, Padua, 1967, 198 ff.; S. COGNETTI, *Profili sostanziali della legalità amministrativa*, Milan, 1993; C. D'AGOSTINO, *L'attività della*

evolution of transparency involves a series of difficulties in defining the boundaries and providing an univocal definition of the same. Transparency is often linked to publicity in order to disseminate acts, documents and information to citizens, that is now possible and easier through Internet. Nevertheless, as has been opportunely noted[2], this is not the only element that characterizes transparency. In fact, the Administration must guarantee citizens access to information through tools for access to administrative documentation or through direct publication of data on websites that should be inserted in website sections not hidden but easily accessible.

In addition to these characteristics, transparency is linked to clarity and comprehensibility of information. If this did not happen, the citizen' legitimate expectation would be harmed by access to incomprehensible and "*equivocal*" information which would generate an erroneous conviction regarding the behaviours to be kept[3].

Based on what has already been mentioned previously, the analysis of transparency cannot be separated from the analysis of its evolution. Before the reforms of the 90s on the administrative procedure, the administrative activity was characterized by secrecy[4]. The public authorities were bound by the official secret and there was a very wide discretionary space to let the administration decide arbitrarily what to make secret or not[5]. From this it follows that the previously transparency regulation was not able to achieve the aims set forth in our Constitution.

---

pubblica amministrazione fra trasparenza e riservatezza nella legge n. 241/1990, in *Nuova legislativa dottrinale e giurisprudenziale*, 1996, 879 ff.; A. D'ANTONIO CASTIELLO, *La l. n. 241/1990 sul procedimento amministrativo e le sue disposizioni di principio*, Rome, 1993, 32; M. LUCIANI, *Nuovi diritti fondamentali e nuovi rapporti fra cittadino e pubblica amministrazione*, in *Rivista critica del diritto privato*, 1985, 61 ff.; P. MARSOCCI, *Gli obblighi di diffusione delle informazioni e il d.lgs. 33/2013 nell'interpretazione del modello costituzionale di amministrazione*, in *Istituzioni del federalismo*, 2013, 700-704; R. CARRIDA, *Principi costituzionali e pubblica amministrazione*, in *Consulta online*, 2014, 22 ff.

[2] R. MARRAMA, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, in *Diritto processuale amministrativo*, 1989, 418.

[3] On the issue of comprehensibility of administrative language to ensure citizen understanding, there have been a number of legislative actions such as the Code of Style, created by the Ministry of Public Administration in 1993 and 1997. See also the Directive of the same Ministry on the simplification of the language of administrative texts of May 2002. On this point, G. ARENA (edited by), *La comunicazione di interesse generale*, Bologna, 1995; A. FIORITTO (edited by), *Manuale di stile*, Bologna 1997; G. ARENA, *Comunicazione e amministrazione condivisa*, in S. ROLANDO (edited by), *Teoria e tecniche della comunicazione pubblica. Dallo Stato sovraordinato alla sussidiarietà*, Milan, 2002, 45 ff.; M. VIALE, *Studi e ricerche sul linguaggio amministrativo*, Padua, 2008.

[4] Article 15 of Presidential Decree 10 January 1957, foresaw that "*The employee must maintain the secrecy of office and may not give to anyone who does not have the right to do so, even if they are not secret documents, information or communications relating to administrative measures or operations of any nature and news of which he has become aware because of his office, when damage may result to the Administration or third parties. Within the scope of his duties, the employee assigned to an office issues, to those who are interested, copies and extracts of official acts and documents in cases not prohibited by law, regulations or the head of the department*".

For an accurate reconstruction about the discipline of official secrecy obbligation, see G. ARENA, *Il segreto amministrativo*, Padua, 1984; M. CLARICH, *Diritto di accesso e tutela della riservatezza: regole sostanziali e tutela processuale*, in *Diritto processuale amministrativo*, 3/1996; S. VACCARI, *L'evoluzione del rapporto tra la Pubblica Amministrazione e le persone nel prisma dello sviluppo della «trasparenza amministrativa»*, in *Jus-online*, 3/2015.

[5] On the configuration of transparency as a "regime of visible power", see N. BOBBIO, *La democrazia e il potere invisibile*, in *Rivista trimestrale di scienze politiche*, 1980, 181 ff.

The evolution of transparency regulation, as well as being an implementation of constitutional principles to prevent corruption and maladministration, also tends to achieve an effective participation of citizens in decision-making control over public powers, becoming a real instrument of democratic participation. In this scenario, the citizens do not assume a position of mere expectation but acquires awareness and actively participates in the public decision-making processes[6].

In light of this, a non-static notion of transparency emerges in Italian legal system but a dynamic one that evolves and changes over time. In fact, there is a change from an originally vertical interpretation of transparency[7], founded within a ministerial pyramid, to a horizontal vision of Administration, as elaborated by Filippo Turati. This paradigm shift is witnessed by the guaranteed possibility for all citizens to access information except for the limits fixed by the public law[8] «*whose legitimacy ultimately lies precisely in the vote expressed by the same administered as voters*» capable to uncover the veil of secrecy and guarantee an universal access to information.

The Italian Constitution of 1948 does not expressly provide the notion of transparency but shares Turati's reconstruction, constitutionalizing the aspects that characterize it: *advertising* and *accessibility*. These can be derived from the interpretation of general principle of good administration, contained in article 97 of Constitution. This gives rise to a notion of transparency in which advertising and accessibility are strictly inter-linked. If not, otherwise, one of the aims pursued by transparency – e.g. the repression of corruption phenomenon – would be lost. For example, we can consider the publication of a call for tenders on the notice board or on a website, in a holiday period, which has been cleverly concealed becoming «*equivocal, obscure and therefore non understandable to the citizens*»[9].

It seems appropriate to ask ourselves what legal discipline have been introduced in the Italian legal system.

The epochal turning point is represented by law no. 241 of 1990, which introduced in our system the institution of administrative procedure as a general rule of public action and the right of access to public administration documents. It has been observed that with this law: «*the wall of impenetrability towards the outside has begun to gradually crumble*»[10]. The foundations have been laid for creating a notion of transparency that tends to approach the glass house, theorized by Filippo Turati.

---

[6] G. TERRACCIANO, *La trasparenza amministrativa da valore funzionale alla democrazia partecipativa a mero (utile?) strumento di contrasto della corruzione*, in *Amministrativ@mente*, 11-12/2014, 9.

[7] The concept of vertical transparency is due to H. CHARDON, *L'Administration de la France: les fonctionaires*, Paris, 1908.

[8] In this regard G. ARENA, *Trasparenza amministrativa*, cit., 5946-5947, according to which the transition from a vertical concept to a horizontal concept of transparency and therefore open to the citizens draws its own «*legitimization precisely in the vote expressed by the same administrators as voters*». According to the Author «*the administration understood as servant apparatus of political power is not necessary to be transparent to the eyes of public opinion, indeed from the point of view of certain governed it is better that it is not at all; hence the long persistence in our system of official secrecy*».

[9] R. MARRAMA, *La pubblica amministrazione*, cit., 421.

[10] Expression used by L. CALIFANO, *Trasparenza e privacy nell'evoluzione dell'ordinamento costituzionale*, in *Giornale di storia costituzionale*, 31/2006, 80.

The internet's future brings, as already mentioned, a change of transparency that is no longer seen in the *one-to-one* or *peer-to-peer* relationship between citizen and administration because administration expresses the interest that actions become visible to all, through an *open data dissemination*[11]. Thus, transparency paradigm changes. The ultimate aim is to ensure an open government in order to pursue a number of different interests, all aimed at achieving the good performance of Public Administration (e.g. the prevention of corruption phenomena; the repression of abusive practices; the resolution of interest conflicts; an immediately access guarantee to those who are in a difficult situations to the data of their interest). All these interests have an ultimate common purpose, namely to guarantee the principle of good administration through an open government.

1.1. *From transparency as a publication requirement to transparency as freedom of access to data and documents: the generalized civic access*

The legislator's goal is to create an open government was pursued with the Madia Reform, announced as the "*Italian Foia*"[12]. In fact, the legislator limited himself to introduce a series of publication requirement on Public Administration. On this point, it has been observed that this reform is far from giving citizens full access to information,

[11] On this point we see M. OREFICE, *Gli open data tra principio e azione: lo stato di avanzamento*, in *Forum di Quaderni costituzionali*, 25 May 2015.

[12] The Freedom of Information Act (FOIA) was born in USA in 1966 to give effect to "the right to know" (expression used for the first time by K. COOPER, *The Right to Know: An Exposi1ion of the Evils of News Suppression and Propaganda*, New York, 1956), expression of free speech and, more importantly, freedom of information. Essentially it claimed the right to contest «*arbitrary political power, preparing the way for the revolutionary concepts of popular sovereignty and the people's right to know, which were eventually embodied in the American Constitution*» (H.N. FOERSTEL, *Freedom of information and the right to know*, Greenwood press, Westport, Connecticut, 1999, 8). For a valid historical excursus on American FOIA, see M. OREFICE, *I Big Data*, cit., 39-45.

About Italian FOIA see the Explanatory Report attached to the Legislative Decree revising and simplifying the provisions on the prevention of corruption, publicity and transparency correcting the law of 6 November 2012 no. 190 and the legislative decree of 14 March 2013 no. 33, pursuant to article 7 of the law of 7 August 2015 no. 124, on the reorganization of Public Administrations.

For an in-depth study of legislative decree no. 33/2013, see F. LOMBARDI, *La problematica definizione dell'ambito soggettivo di applicazione degli obblighi di pubblicità, trasparenza e diffusione di dati, informazioni e documenti previsti dal d.lgs. 33/2013*, in *Federalismi.it,* 15/2019; M. AVVISATI, *L'accesso civico universale nell'emergenza: dal bilanciamento fra diritti alla mission di servizio pubblico*, in *Astrid-Rassegna*, 4 November 2020; S. MILAZZO, *Trasparenza nella Pubblica amministrazione e accesso civico: analisi degli elementi di innovazione e di criticità della disciplina del FOIA italiano, di cui al D.lgs. 25 maggio 2016, n. 97*, in *Il Diritto Amministrativo,* 2016; P. CANAPARO, *L'ampliamento dell'ambito soggettivo di applicazione della trasparenza e l'introduzione del limite generale della compatibilità della disciplina*, in ID. (edited by), *La trasparenza della pubblica amministrazione dopo la Riforma Madia*, Rome, 2016; M. SAVINO, *Il FOIA italiano. La fine della trasparenza di Bertoldo*, in *Giornale di diritto amministrativo*, 5/2016; F. GIGLIONI, *I soggetti obbligati alla disciplina sulla trasparenza*, in B. PONTI (edited by), *Nuova trasparenza amministrativa*, cit., 69 ff.; P. ADAMI, *Specificità, progressi e limiti delle autorità indipendenti verso un'amministrazione più aperta*, in A. NATALINI - G. VESPERINI (edited by), *Il Big Bang della Trasparenza*, Naples, 2015; D.U. GALETTA, *Accesso civico e trasparenza della Pubblica Amministrazione alle luce delle (previste) modifiche alle disposizioni del Decreto legislativo n. 33/2013*, in *Federalismi.it*, 5/2016.

being compared to an embryonic version of the American FOIA[13] and not to the recent developments that have taken place[14].

The main innovation of legislative decree 25 May 2016 no. 97 is represented by the introduction of a new form of access – the generalized civic access – which is added to the two already present in our legal system: the access to the simple acts – governed by the already mentioned law no. 241 of 1990 – and the simple civic access, introduced by article 5, legislative decree no. 33 of 2013[15]. The latter, in particular, assumes a sanctioning value consisting in providing anyone requesting it with deeds, documents and information subject to a requirement to publish.

The generalized civic access is a new type of access that becomes autonomous and disconnected from a publication requirement, placing on the citizen the obligation to request access to *closed data*, i.e. those data on which there is no obligation to publish by the public administration. Therefore, the Madia Reform undoubtedly represented an improvement on the active side of transparency because beyond the so-called *proactive disclosure* – i.e. the Administration's requirement to publish a series of public information considered relevant by the Legislator – has introduced the so-called *reactive disclosure*, that is the possibility for everyone to request any kind of information to public administration[16].

---

[13] G. DE MINICO, *La trasparenza della P.A. costruita sull'asimmetria,* in *Il Sole 24 ore*, 21 maggio 2017, 13 «[...] *Internet time has suggested to Americans the more advanced philosophy of open data. With it, the information, created by the administration with the data provided by the citizens, is acquired to the concept of common good: a good shared and sharable between citizens and administration. Therefore, its legal regime no longer follows the Foia model, and therefore does not repeat the drawback of tyrannical and singularly privileged information. It translates into a simple obligation for the administration to publish every piece of data in its possession, and to this generalized duty for object and addressee corresponds a real right of anyone to the knowledge of the informative patrimony of the public subject, with the exception of the various state secrets and similar*». See also L. CALIFANO, *Trasparenza e privacy*, cit., 93.

[14] The literature on the subject of FOIA is broad, among the various contributions on the subject especially in a comparative key see M. OREFICE, *I Big Data*, cit.; R. TARCHI, *Il diritto d'accesso nella prospettiva comparata,* in C. COLAPIETRO (edited by), *The right of access and the Commission for access to administrative documents twenty years after the law n. 241 of 1990* , Naples, 2012, 141 ff.; R. VLEUGELS , *Overview of all FOI laws,* 30 September 2012, 2 (*www.right2info.org*), in which, in 2012, Zimbabwe and Italy are also included among the 93 FOIA systems in the world, specifying, however, that the respective laws are less advanced; G. SGUEO, *L'accessibilità ad atti e informazioni nell'Unione europea: un percorso in divenire,* in A. NATALINI – G. VESPERINI (edited by), *Il big bang della trasparenza*, Naples, 2015, 163 ff.

[15] Article 5, paragraph 1 of Legislative Decree no. 33/2013 establishes: "*The requirement established by the current legislation for public administrations to publish documents, information or data entails the right of anyone to request the same, in cases where their publication has been omitted* ". Second paragraph of the recalled article, provides, instead, that " *anyone has the right to access the data and documents held by the public administrations, other than those subject to publication pursuant to this decree, in compliance with the protection limits of legally relevant interests in accordance with article 5-bis* ". With regard to the limits of this institute, it may refer to D. U. GALETTA, *Accesso civico*, cit., in the part in which it states: «[The] *civic access is limited in two ways: firstly, it is limited only to documents, information and data subject to the publication obligations imposed on the administrations by the Decree; secondly, it is not identified as an autonomous right, but as a sanction with respect to failure to comply with publication obligations*».

[16] A. PORPORTO, *Il "nuovo" accesso civico "generalizzato" introdotto dal d.lgs. 25 maggio 2016, n. 97 attuativo della riforma Madia e i modelli di riferimento,* in *Federalismi.it*, 12/2017. It is worthwhile to recall the judgment no. 515/2016, 77, rendered by Italian Council of State on the Madia Reform that highlights the positive aspects of the reform. In fact, it underlines that «*The passage from the need to*

However, authoritative scholars have highlighted the various obscure points of Madia Reform, especially the lack of widespread access to information. In this regard, in fact, the private accessibility to the so-called closed data requires an access request that the citizen must submit from time to time (i.e. a qualified interest). Therefore, the Administration will not make *ex-officio* data available to citizens, since there is no general administrative requirement to make data available to citizens. This means that this reform moves away from an administration model aimed to create an Open Data Policy, expression of the highest form of democracy.

For the reasons analysed above, it emerges that the regulatory evolution of transparency appears unable to guarantee the citizens right to be adequately informed. The question, however, that underlies all the reasoning so far carried out is the following: does Italian Constitution recognize a «*right to administrative information*?»[17].

On this point, some scholars have observed[18] how the right to information is recognized under the active aspect – i.e. the freedom of expression – but not for the passive aspect – i.e. being informed or anxious to inform oneself – that is not evaluated by our Constitution. In fact, article 21 of Italian Constitution only provides that "*everyone has the right to freely express their thoughts by speech, in writing and by any other means of communication*". Indeed, with reference to the passive aspect, the Italian Constitutional Court with judgment no. 105/1972 has highlighted the co-essential between freedom of expression and freedom of enterprise and democratic state form.

The approach adopted by our Constitution cannot be that a transparency notion understood in one-dimensional sense, very limited, which would clash with the International Human Rights Declaration[19]. It follows that the passive aspect of the right to information deserves protection as strong as the active one[20].

The absence of an explicit recognition of the right to be informed does not concern other legal systems. For example, the Spanish Constitutional Charter of 1978, much more "*recent*" and modern than the Italian Constitution, not only states the right "*to freely communicate or receive truthful information by any means of communication"* [article 20], but explicitly recognizes the "*right of citizens to access the archives and administrative registers, except in matters concerning the security and defence of the State, investigation into crimes and the privacy of persons*" (article 105).

From the Madia Reform, a notion of transparency emerges, un-linked to the right to be informed, which does not encourage the formation of a critical awareness of citizens as they will not have a full access to administration data. Making the glass

---

know to the right to know (from need to right to know, in the English definition FOIA) is for the national law a kind of Copernican revolution, being able to really evoke a familiar image, dear to Filippo Turati, Public Administration transparent as a glass house?».

[17] G. GARDINI, "*La nuova trasparenza amministrativa: un bilancio a due anni dal "FOIA Italia*", in *Federalismi.it*, 19/2018.

[18] G. GARDINI, "*La nuova trasparenza*, cit.

[19] UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), article 19; PACT ON CIVIL AND POLITICAL RIGHTS (1966), article 19; ECHR (1950), article 10; TEU, art. 6, §§ 1-2 TEU; CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000), articles 11, paragraph 2, 42.

[20] In this regard see G. GARDINI, *La nuova trasparenza*, cit.

house, of which Turati spoke, means that the Administration should provide as much information as possible to the citizens without placing conditions or constraints to access it. Nevertheless, even an unconditional access to the news poses a series of risks, especially the right to respect for private life, such as the possibility of providing the authorities with great opportunities for surveillance does not produce a more democratic system without an adequate explanation regarding the content of these[21].

2. *Privacy and transparency: a difficult coexistence*

The expansion of the right to transparency, also for the new technological capabilities, raises the problem of how this right can be reconciled with the right to a private life. It is therefore necessary to achieve a correct balance between the implementation of transparency and privacy.

A possible solution of this problem can be derived from the analysis of European Union law sources, especially article 4 of EU Regulation no. 679/2016 states that privacy *"is not an absolute prerogative, but it must be considered in the light of its social function and must be reconciled with other fundamental rights, in compliance with the principle of proportionality"*, while transparency must be ensured consistently with the personal data protection[22]. In particular, we move from a model based on the right to propriety to one based on right to privacy in the technological scenario, as proposed by Rodotà[23], attracted in the area of fundamental freedoms in which the development of technology unfolds and spreads outwards in an increasing quantity of data.

In the technological era, the data dissemination requires the need to find the right tools to guarantee and protect the personal data held by citizens. The right to privacy has the status of individual fundamental right and it is protected by articles 2, 3, 13, 14 15 of Italian Constitution and by article 8 of the ECHR.

The internal framework for the processing of personal data derives from that of the European Union[24], substantially contained in the Regulation no. 679/2016 of the European Parliament[25] that from 2018 has taken the place of Directive no. 46/95/EC on personal data protection. In this system, the right to private life is constructed as an "*informational self-determination*" in which citizens are given a full right to check their information tending not to forget them (i.e. the right to be forgotten)[26]. The individual

[21] F. MERLONI, *Trasparenza delle istituzioni e principio democratico*, Milan, 2008, 8.

[22] Article 1, paragraph 2 of Legislative Decree no. 33 of 2013, which in solemnly affirming the numerous constitutional references of transparency principle. It states that this must be ensured "*in compliance with the provisions regarding the protection of personal data*".

[23] S. RODOTÀ, *Tecnologia e diritti*, Bologna, 1995.

[24] The reference text in our system is the "Codice in materia dei dati personali", the legislative decree no. 196/2003, which transposes the European Union legislation.

[25] REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 APRIL 2016 about the protection of natural persons concerning the processing of personal data, as well as the free circulation of such data and repealing Directive 95/46/EC.

[26] It is fitting to note that this evolution was achieved through a progressive evolution of the legitimacy jurisprudence. See for example: Cass. civ., section I, no. 2129/1975; Cass. civ., section I, no.

choice to make his/her data available, takes place through a contract with which they decide to give a specific consent to the data processing, subject to informative without prejudice to the right of access to him/her information well as rectification and erasure right in case of errors and breaches.

Right to privacy evolves as an inviolable and essential right for the development of an individual personality, establishing a bilateral relationship between data subject and data controller. The relationship covers subjective legal situations where each individual is the owner of his data.

However, when a citizen makes this huge amount of data available, he or she does so without giving free and informed consent before involving his or her data. In this way a situation of obscure uncertainty is realized where consensus tends to turn into a "*non-consensus*"[27] which, especially in economic relations, becomes and remains indispensable for access to the essential services of everyday life. In this way the protection of privacy, originally based on consent and assisted by the guarantee of autonomy and awareness, can no longer be invoked. On this point, a number of doubts have been highlighted about the purpose to use these data from those who collect them in massive form. As these data are anonymous, the data controller will not have to indicate the reasons to collect them and nothing would prevent their use for different reasons from the initial ones. Neither a similar risk is avoided by the rules of privacy that in article 35 of Italian Data Protection Code guarantees the privacy protection through an *ex ante* assessment of the risks that would involve the aggregation of data "*for the interests and freedoms of individuals*". Referring to this, some critical points have been highlighted of such a well-conceived system could work in the case of data referable to a data controller but not in the case of Big Data – which are anonymous – where nobody could give any legal grounds for grievance because no one can be identified except through cross-checks[28]. The same impact assessment, in reality, would appear to be a completely inadequate remedy and would lead to unsuccessful results, as the Privacy Guarantor, through its approval, delivers a semi-legal immunity[29].

2.1. *Risks and consequences of uncontrolled data dissemination on the Constitutional rights: data mining and algorithmic governance*

8889/2001; Italian Constitutional Court, no. 81/1993. In this regard, see among the various contributions on the subject S. RODOTÀ, *Technologies and Rights*, Bologna, 1995; A. CERRI, *Riservatezza* (right to), in *Enciclopedia giuridica*, III, Rome, 1995, 1-4; S, RODOTÀ, *Tecnologie e diritti,* cit., 18-27; G. FAMIGLIETTI, *Il diritto alla riservatezza o la riservatezza come diritto. Appunti in tema di riservatezza ed* intimidad *sulla scorta della giurisprudenza della Corte costituzionale e del Tribunal Constitucional. Intervento al seminario Bio-tecnologie e valori costituzionali: il contributo della giustizia costituzionale*, Parma, 19 March 2004.

[27] W. KERBER, *Digital markets, data and privacy: competition law, consumer law and data protection*, in *GRUN int*, 2016, 641 ff.

[28] In this regard see. G. DE MINICO, *Libertà in rete e libertà dalla rete*, Turin, 2020, 235 ff.

[29] Always see G. DE MINICO, *Big data e la debole resistenza delle categorie giuridiche. Privacy e* lex mercatoria, in *Diritto pubblico*, 1/2019, 96, which in this regard states that an «*oxymoron of impact assessment*» would be realized.

The problem of balancing privacy and transparency is also intertwined with the methods concerning the use of data and the consequences that an uncontrolled dissemination of the same can entail.

The data could be used as a starting point for predictive analyses (i.e. all predictive activities carried out in order to anticipate the behaviour of entire categories of subjects that presumably will assume in according to the projections of algorithm models, so-called *data mining*[30]*).* In particular, this form of processing is made possible through the use of current technologies which have a computing power such as to allow not to work on samples but on a whole mass of information. This is precisely one of the aspects for which the need to provide adequate privacy protection arises, in order to avoid not only the right to privacy but also discrimination and violation of other constitutional rights.

The problem of algorithmic governance is linked to the danger of discrimination inherent in data mining which, if it occurs, can have repercussions on society as a whole especially on the possible violation of fundamental rights[31]. Especially, an application of the predictive model is the investigation of jihadist terrorism: if it turns out that the terrorists are mostly young male men, coming from certain countries, automatically, based on what is revealed by the algorithm, anyone who presents these characteristics will be under special surveillance[32].

At this point it becomes necessary to guarantee the knowability of algorithm operation in order to evaluate the predictive investigations since the algorithm may present errors that can have detrimental effects for the subjects involved[33].

Another case is represented by sensitive health data collected anonymously about a serious incapacitating disease spread in a specific area of the country. Therefore, these persons who are discriminated against, could incur due to the error of the algorithms[34]. These technologies make possible to exploit the power of Big Data to

---

[30] FEDERAL TRADE COMMISSION, *Big Data. A Tool for Inclusion or Exclusion? Understanding the Issues, ftc Report, January 2016,* in *https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data rpt.pdf.*

[31] C. NARDUCCI, *Intelligenza artificiale e discriminazione*, in *Rivista del Gruppo di Pisa*, 3/2021.

[32] F. BIGNAMI, *European Versus American Liberty: A Comparative Privacy Analysis of Anti-Terrorism Data-Mining*, in *Boston College Law Review*, 48/2007, 637; B. GOOLD, *Privacy, Identity,* cit., 12-25; A. MANTELERO, *Personal data for Decisional Purposes in the age of Analytics: From an individual to a Collective Dimension of Data Protection*, in *Computer Law & Security Review: The International Journal of Technology Law and Practice*, 2/2016, 10-11; S. RODOTÀ, *Tecnologie e diritti*, cit., 90-91.

[33] In this regard, WP29 itself considers that: *"profiling and automated decision-making can entail significant risks for the rights and freedoms of natural persons, who require adequate guarantees. These processes may be non-transparent. Individuals may not know that they are profiled or do not understand the consequences. Profiling can perpetuate stereotypes and social segregation. It can also confine a person to a specific category and limit it to the preferences suggested for that category. This can undermine people's freedom to choose, for example, certain products or services such as books, music or newsfeeds. In some cases, profiling can lead to inaccurate forecasts, in others to the denial of services and assets and unjustified discrimination*", in *Guidelines on automated decision-making concerning individuals and profiling for the purposes of regulation 2016/679*, WP 251 rev .01, 6; see also A. MORETTI, *Algoritmi e Diritti fondamentali della persona. Il contributo del regolamento (UE) 2016/697*, in *Diritto dell'informazione e dell'informatica*, 4/2018, 802 ff.

[34] This issue is part of the broad concept of the "*risk score*", i.e. the tendency to assign a score to the citizen on the basis of which to provide or not a certain service. Again, we are in the area of

increase the data base on which performs one's own analyses, profiling the habits, preferences, trends of the insured in order to determine the relative insurance risk. If we entrust the assessment carried out not by a human but by an algorithm, that is to say to a fully automated procedure, which, in a more efficient and faster way, will assess: the insurance risk relating to a specific person; the convenience or otherwise the assumption of the risk; the amount of insurance premium; other elements of the insurance contract. Therefore, it becomes necessary that the algorithm operations are knowable, at least the source code of the algorithm, in order to carry out a check on the functioning.

On this point, the need to disclose how the algorithms work becomes instrumental to its justice. In particular, with reference to the appeal of authoritative acts based on algorithms, the administrative jurisprudence has stated appropriateness to admit the appeal of administrative acts for algorithmic errors[35] .

---

discriminations operated by algorithms, starting from the so-called *predictive police* to the calculation of creditworthiness, or the risk of using algorithms from Public Administration for the performance of restricted activities. In this regard see A. BONFANTI, *Big data e polizia predittiva: riflessioni in tema di protezione del diritto alla privacy e dei dati personali*, in *MediaLaws*, 3/2018, 206 ff.

A further example can also be represented by the use of algorithms in the field of Banking-Financial Law. On the point see M.T. PARACAMPO, *FinTech tra algoritmi, trasparenza e algo-governance*, in *Diritto della banca e del mercato finanziario*, 2/2019, 213 ff.; G. BIFERALI, *Big data e valutazione del merito creditizio per l'accesso al peer to peer lending,* in *Diritto dell'informazione e dell'informatica*, 3/2018, 487 ff.; C. ALVISI, *I trattamenti nel settore bancario, finanziario e assicurativo*, in L. CALIFANO-C. COLAPIETRO (edited by), *Innovazione tecnologica e valore della persona. Il diritto alla protezione dei dati personali nel Regolamento UE 2016/679*, Naples, 2017.

[35] The judge makes an assessment that will not be of merit but a review of the technical discretion that also concerns the accuracy in if and for himself of the selected parameter. The administrative judgment, in this case, will not be based on a mere review of discretion but it will be possible to review the correctness of the chosen parameter. In this way, the judge will carry out an assessment which will not be one of merit but a review of technical discretion which also concerns the correctness of the chosen parameter. He will not go into the merits of the case but will be able to reveal whether the algorithm has discriminatory aspects that must be eliminated. So, in this way, the Administration proceeds to correct the algorithm and create a new one.

In this sense, see the judgment Cons. State, section VI, 8 April 2019, no. 2270, relating to one of the first Italian disputes relating about the use of an algorithm by an administration – in this case the Ministry of Education – for the management of an administrative procedure aimed at the assignment of positions to tenured Professors. This judgment addresses the delicate problem of the automation of administrative procedures, establishing key principles regarding the interpretation and declination of the measures adopted through them and the consequent profiles of administrative responsibility. In this sentence it is established that the result deriving from the application of the algorithm implies that the administrative act is considered as an IT administrative act. In particular, the judgment states that: «*the absence of human intervention in some administrative procedures, totally delegated to Artificial Intelligence, is not only legitimate but also desirable, because it strengthens good performance and impartiality. However, the computerized administrative procedure must use algorithms that are transparent, to admit the union by the administrative judge*». From this judgment it emerges, therefore, that in any case the algorithms must be submitted to the full review of the administrative judge. The judgment in question overcomes the dictum that emerged from the judgment of TAR judgment no. 9227/2018 in which the need of a human procedure to the administrative procedure was affirmed. The reform of the administrative process, among other things, has expanded the means of technical evidence, so it is possible not only to verify the reliability but also challenge the legitimacy of the algorithm.

From the analysis emerges the critical point of the new Privacy regulation which between the option of visibility and secrecy, states to choose the latter. This interpretation derives from article 34, paragraph 9, establishing only the faculty, not the obligation of the holder to collect the opinions of the interested parties "*if appropriate*". Therefore, the author is free to grant or deny access to the algorithm. Therefore, there is a degradation of the right to know the algorithm, given the situation of digital darkness (G. DE

3. *The role of the Italian Regulatory Authorities in balancing privacy and transparency: the relevance of the guidelines*

After analysing the difficulty of guaranteeing an effective balance between transparency and privacy and the risks deriving from an uncontrolled dissemination of data, it is necessary to analyse how to bring together two regulatory systems: first is represented by the national regulatory discipline of privacy and the new European regulation, characterized by the presence of a sector Authority (Privacy Guarantor) and various organizational models; second is a transparency system that presents its own rules[36], in which the role of the National Anti-corruption Authority (ANAC) tends to build up a model aimed to prevent and reduce the risk of maladministration.

But is it possible to create a coexistence between these two systems?

This balance must be achieved by the ordinary legislator who should define the methods for achieving this objective. Therefore, the legislator would enjoy a great discretion which should, however, be assessed in accordance with European rules[37]. Especially, it is necessary that the privacy restriction represents "*a necessary and proportionate measure*" considering the other public interests[38].

Among the risks inherent the publication of an enormous amount of data on the public administration websites, according to modalities that allow indexing and traceability through search engines, brings a violation of citizens' right to privacy as it will be enough to type on Google the name and surname of the interested party and find all the published data of the Administration that can be linked with them[39].

The danger of the various models of transparency would therefore result in emptying the concept of privacy, also with the denial of the right to be forgotten.

MINICO, *Towards an Algorithm*, cit., 393-398; ID., *Fundamental rights, European digital regulation and algorithmic challenge*, in *MediaLaws*, 1/2021, 28 ff.).

Another problem is the form of responsibility of algorithm programmer is subjected where the error of the predictive analysis can be understood only after having access to the algorithm code. A possible solution is offered by G. DE MINICO, *Big data e la debole resistenza delle categorie giuridiche. Privacy e* lex mercatoria, cit., 96, that brings the algorithm back into the dangerous activities and the danger is not considered in the activity but in relation to the effects that it produces towards third parties, applying the normative discipline foreseen by article 2050 Italian civil code, which is a form of objective responsibility that does not depend on malice and guilt.

[36] Legislative Decree no. 33/2013 is currently also known as the "*code of transparency*". See G. GARDINI, *Il codice della trasparenza: un primo passo verso il diritto all'informazione amministrativa?*, in *Giornale di diritto amministrativo*, 2014, 875 ff.; on the Code of Transparency after Legislative Decree no. 97/2016 see B. PONTI (edited by), *Nuova trasparenza amministrativa e libertà di accesso alle informazioni*, Rimini, 2016.

[37] E. CARLONI – M. FALCONE, *L'equilibrio necessario. Principi e modelli di bilanciamento tra trasparenza e privacy*, in *Diritto pubblico*, 3/2017, 737 ff.

[38] On this point, reference is made to art. 23 of the EU Regulation 2016/679.

[39] In this regard, see the reports to the Privacy Guarantor regarding union orders concerning the subjecting of some persons to mandatory medical treatment (ex *multis* Prov. Guarantor 21 February 2013, in *www.garanteprivacy.it*, doc. web no. 2355041), or in the case of data (names, surnames and results expressed in numerical terms) relating to the intermediate tests taken by participants not admitted to the oral examination of a competition (Prov. Guarantor 6 December 2012, in *www.garanteprivacy.it*, doc web no. 2223278).

Therefore, it will be necessary to identify the various strategies that can be adopted by legislators to achieve an adequate balance between these two constitutional values[40], on which several proposals have been made[41].

In order to achieve this balance, primary importance is assumed by the guidelines of Privacy Regulatory Authority in the transparency field. Especially, the Guarantor guidelines tends to achieve the principles of *minimization*, *relevance* and *not excess*[42]. The Privacy Code specifies the task entrusted to the Guarantor, that means: "*to take care of the knowledge among the relevant public discipline concerning the processing of personal data and related purposes as well as data security measures*[43]". However, this provision indicates the aim to be pursued but not the purpose with which to achieve it.

The Guarantor's guidelines, however, establish a first unitary framework regarding the devices that public subjects must keep in the activity of spreading personal data in order to maintain balance between privacy and transparency[44]. First, it is established that the administrations must make available only the exact personal data that are updated and contextually evaluating the purpose envisaged by the sector discipline for which there is a requirement to publish.

Therefore, even if the legislator is required to publish a series of data, he must assess, case by case, which data may be published, and which ones may be obscured. The identification work of the legislator must be inspired by an interaction of a series of principles including the necessity and relevance established by the code, the indispensability to prohibit the data publication which reveals the state of health[45].

As regards the realization of this balance, an important role is also played by the ANAC, called to monitor compliance with the publication requirement. The competence of the ANAC is automatically intertwined with that of the Privacy Guarantor, playing a fundamental role in the implementation of a good coordination between the two Authorities. This coordination can be appreciated by article 3, paragraph 1-bis that recognizes the possibility for ANAC, after having "*heard the Privacy Guarantor about the events that personal data are involved"*, even "*for the exclusive purpose to reduce charges*", to "*identify the data, information and documents subject to mandatory publication pursuant to the regulations in force for which publication in its entirety is replaced by that of summary information, processed by aggregation*".

Even ANAC guidelines regarding generalized civic access, approved on 29 December of 2016, seek to achieve this balance.

---

[40] The need to avoid a conflict between "*transparency and privacy*" is well recognized by M. VIGGIANO, *I limiti alla pubblicità dell'azione amministrativa per finalità di trasparenza,* in L. CALIFANO – C. COLAPIETRO (edited by), *Le nuove frontiere della trasparenza*, Naples, 2014, 241.

[41] Among the various strategies and models to be used, see E. CARLONI – M. FALCONE, *L'equilibrio necessario*, cit, 741 ff.

[42] L. CALIFANO, *Trasparenza e privacy*, cit.

[43] Legislative Decree no. 196/2003, article 154, paragraph 1, lett. h).

[44] Guidelines on the treatment of personal data which also acts and administrative documents, made for aim of advertising and transparency on the web from public and other entities obliged subjects (Prov. Guarantor 15 May 2014 in *www.garanteprivacy.it*, web document no. 3134436).

[45] In this sense, you see. L. CALIFANO, *Trasparenza e privacy*, cit.

First, the Administration, before proving the existence of a prejudice to confidentiality, must demonstrate the existence of a specific causal link between access and damage and also that such prejudice has been caused by the dissemination of the requested information. The assessment, therefore, becomes a form of prognostic evaluation which brings the damage in a causal link, understood as a high probability of the prejudice deriving from the publication of the documents[46]. In assessing the existence of such prejudice, which will have to be evaluated concretely, the role of the procedure in which the administration will have to involve the counterparts, whenever the data minimization and anonymization techniques will be ineffective and so it will gain particular importance. In such a scenario, the dialogue with the other parties will be necessary, becoming an index from which to infer the existence or not of a concrete prejudice.

But what are the limits of the current system and how would it be possible to achieve a balance between the two rights?

It has been observed that in the Italian legal system we need to strengthen the role of the regulatory authorities[47]. It highlights that there are still serious doubts to assign regulatory powers to the independent Administrative Authorities, for the lack of a legal basis[48]. On this point, we must mention the two main orientations: first strictly applies the rule of law and therefore denies the regulatory power of Administrative Authorities to the extent that these powers can only be granted by law; second enhances, instead, the theory of implicit powers according to which although there are powers not contemplated by the law. These must however be conferred as long as they are instrumental to the achievement of the assigned institutional aims. In this way a real blank cheque would be given to the Authorities[49] .

Administrative jurisprudence has shared the first orientation, rejecting a weak interpretation of the rule of law. In this regard, we quote the judgment of the Council of State no. 4874/2014 in the part where it states that: «*in the areas characterized by particular technicality [...] the sector laws attribute to the individual independent administrative Authorities [...], to ensure the pursuit of the legislative objectives set, not only individual administrative powers but also regulatory powers in the broad sense*».

---

[46] In this regard, reference is made to the FOIA GUIDELINES, pt. 5.2, 11, which states: "*The administration, is required to verify, once ascertained the absence of absolute exceptions, if the exposition of the acts can determine a concrete and probable prejudice to the interests indicated by the legislator. In order for access to be refused, the prejudice against the interests considered by paragraphs 1 and 2 must be concrete, therefore there must be a precise causal link between access and injury.*

The administration, in other words, cannot limit itself to prefiguring the risk of a bias in a generic and abstract way, but will have to:

a) clearly indicate which - among the interests listed in art. 5 bis, co. 1 and 2 - is affected;

b) to assess whether the (concrete) prejudice envisaged depends directly on the disclosure of the information requested;

c) assess whether the prejudice resulting from the disclosure is a highly probable event, and not only possible".

[47] For a precise analysis on the limits of generalized civic access, see G. GARDINI, *La nuova trasparenza,* cit.

[48] The literature on the subject is extensive, among all see M. FOGLIA, *I poteri normativi delle Autorità amministrative indipendenti*, in *Quaderni regionali*, 2008, 569.

[49] S. FOA, *I regolamenti delle autorità amministrative indipendenti*, Turin, 2002, 119.

A corollary of the legal uncertainty framework is represented by the value to be assigned to the guidelines and in general the exercise of regulatory power. Especially if they can be assimilated to soft law or hard law instruments[50]. From the framework outlined, it emerges that in our legal system lacks a single control system, endowed with autonomy and independence, on civic access as well as powers of regulation and supervision. The Italian scenario differs from the other European realities where we find specific Authorities, also endowed with decision-making powers, in the matter to solve disputes regarding civic access. Just think to Great Britain, where an Information Commissioner was established; to Spain, which set up the *Comisión de Transparencia y Buen Gobierno* in 2013; to Germany which, in 2006, chose to grant the *Bundesbeauftragter für den Datenschutz und die Informationsfreiheit* supervisory powers on transparency.

Some indication in the perspective of an intervention by Italian legislator, is provided by the judgment of the Italian Constitutional Court no. 20/2019 concerning the constitutional illegitimacy of article 1-bis, paragraph 14 of Legislative Decree no. 33/2013 that provides Administration's requirement to publish data indicated in article 14, paragraph 1, letter f) for all holders of managerial positions[51]. Well, the Constitutional Court observed that the publication of a such large quantity of data must pass a proportionality test since it does not facilitate the implementation of anti-corruption purposes but creates an "*opacity due to confusion*" which hinders an effective control by individual citizens on administrative action.

---

[50] On this point see E. GROSSO, *Autorità indipendente o autorità onnipotente*?, Bari, 2002, 159, with reference to the publication of codes of ethics, reproaches the guarantor of playing a role in the rules of production; P. BILANCIA, *Riflessi del potere normativo delle Autorità indipendenti sul sistema delle fonti*, in *Diritto e società*, 1999; S. MORETTINI, *Il soft law nelle Autorità indipendenti: procedure oscure e assenza di garanzie? I paper dell'Osservatorio sull'Autorità di impatto della Regolazione*, in *Osservatorio AIR*, 4/2011.

It should be noted that the power exercised by the Administrative Authorities, in particular the Privacy Guarantor, takes on a normative value according to the type of act adopted, which may or may not have normative value. On the normative value of the guidelines of the Guarantor of Privacy of June 25 2009 on the publication of health data on websites, see A. RUBINO, *Nota alle linee guida del Garante per la protezione dei dati personali "in tema di trattamento di dati personali per finalità di pubblicazione e diffusione nei siti web esclusivamente dedicati alla salute*", in *Osservatorio sulle fonti*, 1/2012, 3, according to which the Guarantor exercises «*a power comparable to the regulatory one. However, there have been occasions when the same jurisprudence of merit has denied the preceptive value of the acts posed by the Guarantor, in particular on the point we can see Trib. Civ. Rome, section I, 2 October 2009, with reference to the value of the guidelines of the Privacy Guarantor regarding the data carried out by experts and technical consultants, issued on 31 July 2008, according to which "these are indications peacefully devoid of a preceptive value"*».

[51] O. POLLICINO – F. RESTA, *Trasparenza amministrativa e riservatezza*, in *Agenda digitale*, 25 Febraury 2019; O. POLLICINO – G. REPETTO, *Not to be pushed aside. The Italian Constitutional Court and the European Court of Justice*, in *Verfassungsblog*, 27 February 2019; A. CORRADO, *Gli obblighi di pubblicazione dei dati patrimoniali dei dirigenti alla luce delle indicazioni della Corte costituzionale*, in *Federalismi.it*, 27 February 2019; G. BRONZINI, *La sentenza n. 20/2019 della Corte costituzionale italiana verso un riavvicinamento all'orientamento della Corte di Giustizia?,* in *Questione giustizia*, 2019; A. RUGGERI, *La Consulta rimette a punto i rapporti tra diritto eurounitario e diritto interno con una pronunzia in chiaroscuro (a prima lettura*), in *Consulta online*, 1/2019, 113 ss.; R. CONTI, *Giudice comune e diritti protetti dalla Carta UE: questo matrimonio s'ha da fare o no?,* in *Giustizia insieme*, 4 March 2019; G. VITALE, *I recenti approdi della Consulta tra Carte e Corti. Brevi considerazioni sulle sentenze nn. 20 e 63 del 2019 della Corte costituzionale*, in *Federalismi.it*, 22 May 2019; S. CATALANO, *Doppia pregiudizialità: una svolta opportuna della Corte costituzionale*, in *Federalismi.it*, 10/2019.

With reference to the implementation of a balance between privacy and transparency, the judge points out what might be the legislator's solutions for compliance with the proportionality test: the predefinition of income thresholds (the exceeding of which is a necessary condition to trigger the requirement to publish); the dissemination of data covered by anonymity; publication in nominative form of information following predefined scales; the simple lodging of personal declarations with the competent supervisory authority. The Court emphasizes, however, that it is for the legislature, in view of its wide discretion, to choose the most appropriate remedy[52].

Another indication provided by the Italian Constitutional Court in judgment no. 20/2019 is to ensure an adequate protection of personal data. So, it must be ensured by indexing or by easily retrieving through search engines[53]. Therefore, although the objective is to ensure an open government, we should consider the risk of a "crystallization" of information in the network. For this reason, we have a duty to find a valid balance between indexation of data and privacy[54].

[52] Point of law no. 5.3.2., Italian Constitutional Court judgment no. 20/2019.

[53] Point of law no. 5.3.1., Italian Constitutional Court judgment no. 20/2019.

[54] To achieve this goal, a solution envisaged could be those of the guidelines of Privacy Guarantor no. 243/2017, which allows a consultation of data published on-line not through external search engines but through search features inserted within the sites where personal data are stored. In this regard M. MACCHIA – C. FIGLIOLIA, *Autorità per la privacy e Comitato europeo nel quadro del General Data Protection Regulation*, in *Giornale di diritto amministrativo*, 4/2018, 423; A. PATRONI GRIFFI, *L'indipendenza del garante*, in *Federalismi.it*, 4/2018.

Precisely the enhancement of the principle of proportionality and the need to achieve a balance between privacy and data indexing led the legislator, with Decree Law No. 162/2019, converted into Law No. 8/2020, to undertake a legislative intervention linked to the canon of proportionality of European derivation. In this way, proportionality becomes a tool to achieve that further reform in the field of administrative transparency in implementation of the judgment no. 20/2019 with reference to holders of executive positions. The hope is that the legislature will take action to implement interventions aimed at providing a clear and sufficiently decisive framework in the field of transparency (V. FANTI, *La trasparenza amministrativa tra principi costituzionali e valori dell'ordinamento europeo: a margine di una recente sentenza della Corte Costituzionale (n. 20/2019*), in *Federalismi.it,* 5/2020, 57).