

**THE RELATIONS BETWEEN CITIZENS AND PUBLIC
ADMINISTRATIONS THROUGH ELECTRONIC MEANS.
A COMPARATIVE LEGAL ANALYSIS**

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Introduction

The main aim of this paper is to identify some of the critical aspects connected to the right of access to the information held by Public Administrations, emerged with the spread of the electronic means of communications¹.

In dealing with this subject, it is also important to define what an informatic document is, as this concept varies, first of all, in relation to the degree of existing technological evolution and, secondly, does not refer to a homogeneous category². Taking the Italian context as an example, a description of “informatic document” is provided in the Legislative Decree n. 82/2005 (Code of the Digital Administration), which defines it as “the electronic document that contains the digital representation of facts, acts or relevant juridical data”³.

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¹ K. L. GIDLUND, *Makers and Shapers or users and choosers participatory practices in digitalization of public sector*, Cham, Springer 2015, pp. 222-232.

² T. B. HAHN, M. K. BUCKLAND, AMERICAN SOCIETY FOR INFORMATION SCIENCE, *Historical Studies in Information Science*, Medford, Information Today, 1998.

³ In order to better understand the path that many of the democratic States have followed during the past years in the attempt to define the electronic documents, here a brief chronological evolution of the concept in Italy is described. The Law 241/1990 offers the first juridical relevance at the section 22: “administrative document shall mean every graphic, film-based, electromagnetic or other kind whatsoever of representation of the content of instruments, including internal instruments and those not relating to a specific procedure, that

It is useful to underline that, considering the present technological development, two different types of electronic document produced by a Public Administration can be identified.

The former includes all those documents of the Administrations that are stored as paper records and have been digitalized (*i.e.* the transformation of printed documents in pdf documents); the latter refers to documents originally created as digital records.

This categorization allows to better understand the most critical parts of the digital transition of the Public Administration. On one hand, there is an impressive amount of data to be digitalized and, on the other, there is the urgent need to improve the national IT infrastructures to produce native digital documents and process them.

A complete transition to a native digital system is not possible because the Public Administration pre-exists the digital revolution. Furthermore, society is not ready for this type of transition, as not all the citizens have enough means and competence to use electronic instruments. A native digital Public Administration, today, would be against the principle of equality, granted by all the democratic constitutions.

In light of these considerations, it is clear that the most widely used model is the one called “digital first”, in which the digital procedures are promoted alongside the possibility to communicate with the Public Administrations in the traditional way. This approach allows the population to carry out most of the activities that connect them to the Public Administration online. Moreover, this could be a strategic asset for the Country, especially during the period of pandemic countermeasures we are all living in since 2020. The improvement of the electronic connection between citizens and Public Administrations becomes strategic. The current emergency has highlighted the importance of an updated IT infrastructure to face a situation that imposes interpersonal distancing and long periods of quarantine. Another crucial aspect regards remote

are held by a public authority and concern activities of public interest, independently of whether the substantive law governing them is public law or private law”. Until the Italian Decree-Law n. 357/1994 the Legislator has referred to the “electronic elaboration” of documents but at the end of the elaboration process the documents are printed on paper support, so under these conditions we do not have a dematerialized document. With the Laws nn. 59/1997, 127/1997, 191/1998 and 50/1999 (the so called Bassanini’s Decrees) we have in the Italian legal system a whole recognition of the electronic document, both in the private and public sector, as effective legal document.

work. Work from home has been largely introduced as a necessity during quarantine. Strengthening this model of work organization will drive the society towards a better implemented digital society.

1. *Definition of data, information and acquisition process*

In order to examine in depth the nature and the consequent utilization of digital data by the Public Administration, it is important to clearly define the nature of digital data and the technical and analytic meaning of data and information. Four stages can be identified in the process of digitalization: acquisition, storage, processing and communication⁴.

Accordingly, “the notion of ‘data’ usually denotes signs, patterns, characters or symbols which potentially represent something (a process or object) from the ‘real world’ and, through this representation, may communicate information about that thing”⁵. Data are often equated to “facts, quantities, or conditions derived from systematic observation or experimentation”⁶. In this sense, data have a representational dimension⁷. Information indeed appears “merely” as data that have been structured and organized in a meaningful way to achieve the purposes and goals of the machine learning task at hand. As one can see, the operation of giving meaning has little to do with the interpretative and cognitive processes that are at play in the context of information. In both cases, data and information are one and the same thing: symbols that are representative of specific features of real-world entities insofar as they are part of a bigger ensemble of such features⁸. It is clear that data are an immaterial good that is stored in a material support. So, a

⁴ G. CANDILIO, *Elementi di informatica generale*, Milano, FrancoAngeli, 2006, vol. 75.

⁵ L. A. BYGRAVE, *The body as data? Biobank regulation via the ‘Back Door’ of data protection law*, in “Law, Innovation and Technology”, n. 1, 2010, pp. 1-25.

⁶ L. A. BYGRAVE, *Information concepts in law: Generic dreams and definitional daylight*, in “Oxford Journal of Legal Studies”, n. 1, 2015, pp. 91-120.

⁷ R. GELLERT, *Comparing definitions of data and information in data protection law and machine learning: A useful way forward to meaningfully regulate algorithms?*, in “Regulation & Governance”, 2021.

⁸ R. GELLERT, *Comparing definitions of data and information in data protection law and machine learning: A useful way forward to meaningfully regulate algorithms?*, cit..

database can be regarded both as a traditional archive and as an instrument to collect organized information. The necessity of a physical structure to store data is stressed in the definition of IT system provided by the Code RENEUAL (Research Network on EU Administrative Law): an informatic system⁹ with “specific software or an informatic infrastructure or an organizational structure which supports the exchange of administrative information or the creation of a database”¹⁰.

2. *The right of access in digital context: what is happening around the world*

In the last decade, the right of access has been constitutionally guaranteed in many democratic States¹¹. In those Countries where there is not a constitutional provision norm on the right of access, it is possible to identify clear values regarding transparency. We can identify, at least, a clear path set by Courts affirming that transparency is one of the basic principles of a modern Constitutional State¹². The codification of the

⁹ P. P. CRAIG, H. HOFMANN, J.-P. SCHNEIDER, J. ZILLER, *RENEUAL model rules on EU administrative procedure*, Oxford, Oxford University Press, 2017.

¹⁰ J. ZILLER, *Alternatives in Drafting an EU Administrative Procedure Law*, in “Policy Department C: Citizens’ Rights and Constitutional Affairs”, 2011.

¹¹ Albania (Art. 23 Cost. 1998), Austria (Art. 20. 3 e 20.4 Cost. 1920), Belgium (Art. 32 Cost. 1831), Bulgaria (Art. 41 Cost. 1991 modified in 2007), Estonia (Art. 44 Cost. 1992), Finland (Sec. 12 Cost. 1999), Greece (Art. 5A Cost. 2001), Hungary (Art. VI.2 Cost. 2011), Republic of North Macedonia (Art.s 16.2, 16.3 e 18 Cost. 1991), Moldova (Art. 34 Cost. 1994), Spain (Art. 20 Cost. 1978); in Latin America: Bolivia (Art.s 21.6 e 242.4 Cost. 2008), Brazil (Art.s 5 XXXIII, 37 § 3 II, e 216 § 2 Cost. 1988), Costa Rica (Art. 30 Cost. 1949), Ecuador (Art.s 18.2 e 91 Cost. 2008), Guatemala (Art. 30 Cost. 1993), Mexico (Art. 6A Cost. 1917 as amended in Feb. 2016), Nicaragua (Art. 66 Cost. 1987), Panama (Art.s 43 e 44 Cost. 1972), Paraguai (Art. 28 Cost. 1992), Peru (Art.s 2.4 e 5 Cost. 1993), Dominican Republic (Art. 49.1 Cost. 2010) e Venezuela (Art. 143 Cost. 1999); in Asia: Afghanistan (Art. 50 Cost. 2003), Armenia (Art. 23, 27, 33.2 e 83.5 Cost. 2005), Azerbaijan (Art. 50 I, II e III Cost. 1995), Democratic Republic of Georgia (Art.s 24 e 41 Cost. 1995 as amended in 2006), India (Art. 19.1 Cost.), Kazakhstan (Art.s 18, 20 e 31 Cost. 1995 as amended in 1998), Maldives (Art. 27, 28 e 29 Cost. 2008); in Africa, Burkina Faso (Art. 8 e 101 Cost. 1991), Cape Verde (Art. 29 e 48 Cost. 2010), Democratic Republic of Congo (Art. 24 Cost. 2006), Egypt (Art. 31 e 68 Cost. 2014), Eritrea (Art. 19.3 Cost. 1997), Ethiopia (Art. 29 Cost. 1994), Ghana (Art. 21 Cost. 1992), Guinea Bissau (Art. 34 Cost. 1996), Kenya (Art. 35 Cost. 2010), Malawi (Art. 37 Cost. 1994); e in Oceania: Fiji (Art.s 17, 24 e 25 Cost. 2013).

¹² K.-P. SOMMERMANN, *La exigencia de una Administración transparente en la*

right of access can be attributed to two historical facts: the end of the most dictatorial regimes and the dissolution of the Soviet Union. These two events led to a democratization process in those areas. At the same time, we can recognize a growing importance of the right of access at the international level with specific norms¹³. In addition, the developed economies have moved towards an expansion of the tertiary sector, based on the Internet and on the exchange of digital data. This has caused a global transformation indeed, the massive use of the Internet has led to a society based on the exchange of information and on interactivity, highlighting the necessity of a proper regulation for the protection of every user¹⁴. For these reasons we can register a stable normative framework, arising worldwide, towards a better accessibility of the data held by the Public Administration¹⁵.

It is interesting to analyse what happened, and is happening, in Brazil to safeguard the fundamental right to access to information.

The Access to Information Bill in Brazil is a result of a six-year advocacy campaign of civil groups and organizations. The Brazilian Freedom of Information Law was passed only in 2011, even though bills (Projeto de Lei - PL) providing rights to information have been discussed in the Chamber of Deputies for eight years. The oldest one was the PL 219/2003, written by Deputy Reginaldo Lopes, Workers' Party (PT). Four other bills were proposed in the following years, but there was no indication these proposals could pass¹⁶. Brazil was the 14th Country in Latin America and the 91st in the world to approve a freedom of information law¹⁷.

In 2020, Brazilian President Jair Bolsonaro signed the Provisional Measure 928, which suspends deadlines for public authorities and in-

perspectiva de los principios de democracia y del Estado de Derecho, in “Derecho administrativo de la información y administración transparente”, 2010, pp. 11-26.

¹³ Cfr. Art. 19.2 of International Covenant on Civil and Political Rights-ICCPR, Art. 10.1 of 'European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁴ H.-J. BLANKE, R. PERLINGEIRO, *The Right of Access to Public Information: an International Comparative Legal Survey*, Berlin-Heidelberg, Springer-Verlag, 2018.

¹⁵ I. RUBINSTEIN, *Big data: the end of privacy or a new beginning?*, in “International Data Privacy Law”, n. 2, 2013, pp. 12-56.

¹⁶ K. FURTADO RODRIGUES, *The politics of Brazil's access to information policies: history and coalitions*, in “RAP: Revista Brasileira de Administração Pública”, n. 1, 2020.

¹⁷ <https://www.rti-rating.org>.

stitutions to respond to requests for information submitted under the Country's freedom of information legislation and forbids appeals in cases of denied requests. By suspending those requirements, the new provisional measure potentially violates the constitutional right of Brazilian citizens to have access to information of public interest, according to a joint statement issued on March 24, 2020 by a group of local and regional civil society organizations¹⁸. According to those reports, the Supreme Court will vote on either lifting that suspension or scrapping the measure, but a date for the vote has not been announced yet. Alexandre de Moraes, Justice of the Brazilian Supreme Court, also subpoenaed the National Congress and the presidency for more information on the measure, according to the Supreme Court's website. On September 26, 2020, the Supreme Brazilian Court validated the request of unconstitutionality.

The Provisional Measure 928 is a clear step back for democracy both in Brazil and all over the world. Moreover, it sets the condition for reducing personal freedom in Brazil.

Moving to the US, we can find the same *ratio* of most of the Freedom Information Acts. The US e-Government Act of December 2002 aims “[t]o enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using internet-based information technology to enhance citizen access to Government information and services, and for other purposes” and “enhance the access to and delivery of Government information and services to the public”¹⁹. The Act also states that all the information held in public servers must be treated under a regime of publicity and be accessible on the Internet even without an explicit request of access. Considering that this Act dates back to 2002 and that it has been one of the first laws of this type, severe criticisms have been raised by doctrine, especially for the social division associated with the so-called digital divide²⁰. In general, a great obstacle to a com-

¹⁸ <https://artigo19.org/blog/2020/03/24/nota-conjunta-so-venceremos-a-pandemia-com-transparencia/>.

¹⁹ Public Law 107-347.

²⁰ J. KLIMA, *The E-Government Act: Promoting E-Quality or Exaggerating the Digital Divide?*, in “Duke Law & Technology Review”, n. 3, 2003, pp. 1-9.

plete digitalization of society consists in the rate of people aged over 60 years. Hence, the most important factor to consider when evaluating the digital divide is the mean age of the population. We can find the highest percentage of aged people in the most developed countries²¹; indeed, in the U.S. a huge part of society is excluded from the digitalization process, especially (and not surprisingly) the population aged over 60 years²². This consideration is very important to understand the necessity to maintain both the analogical and digital access to documents, even in one of the most advanced societies of the world such as the U.S. We can find this approach in the above-mentioned U.S. e-Government Act at Section § 3501 c.2 on the subject of “Avoiding diminished access”, where it is stated that “[the Government will] pursue alternate modes of delivery that make Government information and services more accessible to individuals who do not own computers or lack access to the Internet”.

With the entry into force of the *loi pour une République numérique* in France in 2016, we can register a new definition of administrative document and a different approach to the access to documents.

The French Law of 2016 establishes the obligation for the central and local administration as well, for the public and private actors that perform a public service to make public all the data held by their servers²³. This approach, the so-called “open government data” aims to minimize and simplify the work of the French Public Administration by reducing the number of specific requests and allowing citizens to search and download documents by themselves.

3. *Digital Administration in Italy*

The use of the term “digital administration”, rather than “administration”, is necessary to discuss the ways in which the public adminis-

²¹ E. BLIT-COHEN – H. LITWIN, *Elder participation in cyberspace: A qualitative analysis of Israeli retirees*, in “Journal of Aging Studies”, n. 4, 2004, pp. 385-398.

²² E. DAVISON, S. COTTEN, *Connection discrepancies: Unmasking further layers of the digital divide*, in “First Monday”, n. 3, 2003.

²³ I. GRAS, P. MOURON, *La loi pour une République numérique du 7 octobre 2016 et la notion de postprint*, in “Journée Open Access à Aix-Marseille Université”, Aix-en-Provence, 2017.

trations organize, manage and publicize the data in their possession after the introduction of IT in the public organization²⁴. The legal doctrine has produced several studies aimed at identifying the main features of this notion, resorting to both a substantial and dogmatic approach²⁵. Regarding the former, the digital transition takes place through the introduction, in the organizational structure, of the tools offered by informatic and communication technologies, such as the ICT²⁶.

At first glance, it can be affirmed that the digital Administration is that Administration that functions and engages with citizens via IT technologies²⁷.

However, assumed that the path towards a complete digital transition is surely complex, an uncertain and fragmentary legal process can be described. It is important to observe that the digital administration in Italy has proceeded with a chaotic and fragmented evolution. The Legislative Decree 7 March 2005 has been emended more than 30 times, lastly through the Law Decree 30 December 2019.

Moreover, the legislative decree 7 March 2005 and subsequent modifications and integrations are mainly dedicated to the subject in general and do not complete the legal framework of digital administration.

One of the problems of this decree is the attempt to systematically organise the different bodies of the public administration through the existent structure, surely obsolete in comparison to the present ITC market. In fact, “the current public network hardly adapts to a society whose needs are very dynamic and localized. Rethinking the network becomes thus fundamental [...]”. The analysis of the national legal context highlights how the path is ever-changing and uncertain. The reasons of this difficulty can be connected to a series of factors.

One of the most important aspects to be taken into consideration is surely the speed of technological innovation. Law does not evolve at the same speed of technology, therefore we are often in a paradoxical

²⁴ F. BENVENUTI, *Il nuovo cittadino: tra libertà garantita e libertà attiva*, Venezia, Marsilio, 1994.

²⁵ D. SORACE, L. FERRARA, S. C. MATTEUCCL, L. TORCHIA, *A 150 anni dall'unificazione amministrativa italiana: La tecnificazione*, Firenze, Firenze University Press, 2017, vol. 163.

²⁶ C. BATINI, *Un'introduzione ai servizi di "eGovernment"*, in “Amministrare”, n. 1, 2013, pp. 37-58.

²⁷ G. CARULLO, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale e funzione amministrativa*, Torino, Giappichelli Editore, 2018.

situation in which billions of users of the Internet can disseminate and acquire sensible data through ordinary devices, while legal provisions are based on the typical models of the pre-digital world.

As noted in legal doctrine, “il costante mutamento della rete – determinato dalla rapidità del progresso tecnologico e dalla diffusione delle nuove applicazioni – fa sì che il legislatore tenti affannosamente (e spesso inutilmente) di disciplinare l’assetto dei rapporti e degli interessi emergenti e che le regole giuridiche si delineino e assumano consistenza attraverso decisioni amministrative e giurisdizionali”²⁸. This aspect highlights even more the necessity of an innovative configuration of the functioning of the public administration, rather than continuously chasing technology introducing new definitions in the existing normative framework.

Analysing the instruments that the administrations possess, the transition towards a digital context requires developments regarding several aspects (how the procedure takes place, the discipline regarding the acts, their legitimacy). The EU has coherently released the document for the e-Government, affirming that “public administrations must transform their back offices, reconsider and redefine the existent procedures and services, and guarantee free access to their data and services to other administrations and, as far as possible, to business and civil society”. In this definition, it is possible to find the essence and the conceptual basis of a model that aims for universal or generalised access.

With the so-called Madia Act (Law 124/2015 regarding “delegation to the government on reorganization of public administrations”), also defined as “Italian FOIA” (Freedom Of Information Act), transparency is defined as the freedom of access to data and documents in possession of public authorities. This is realised guaranteeing, first, the access to these data and documents (so-called civic access) and, second, publicizing documents, information and data in possession of the same public administrations²⁹. This provision establishes also limitations regarding the case of protection of national and private interests, as disciplined by Article 5-bis of the legislative decree 97/2016, which regulates the “exclusions and limit to civic access”.

²⁸ F. J. LACAVA, P. OTRANTO, A. URICCHIO, *Funzione promozionale del diritto e sistemi di tutela multilivello*, Bari, Cacucci, 2017.

²⁹ D. U. GALETTA, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del D. Lgs.*, in “Federalismi.it”, n. 33, 2016.

Finally, as Birkinshaw notes, it is possible to measure the quality and the functioning of a law on Freedom of Information by looking at the extension and the correct application of the limit to the freedom of access to administrative documents³⁰.

This aspect is important also in light of the level of evolution of the Italian system of infrastructure and digitalization. The DESI 2020 report (Digital Economy and Society Index)³¹, which will be discussed below, highlights the critical situation of Italy regarding these topics.

4. *Digital Administration in Spain*

In the last few years, Spain has undertaken an important reform on the theme of e-Government. The two laws that regulate the new administrative procedure are the Law 39/2015 “Administrative Procedure Act” and the Law 40/2015 “Legal System applicable to Public Administration”. This choice highlights the aim of the Legislator to reform two complementary sectors of the State with a harmonic, but separated in two different acts, reform.

The Law 39/2015 regulates the relation between the Public Administration and citizens, while the Law 40/2015 organizes the relationship between the different sectors of the Public Administration. It is clear that the choice of the Spanish Legislator to reform the whole sector of the administrative procedure using two different acts aims at separating the aspect of the relations between the Public Administration and the citizen (the *ad extra* relations) from the relations between the different branches of the Spanish Administration (the *ad intra* relations)³².

³⁰ P. BIRKINSHAW, *Freedom of Information: the Law, the Practice and the Ideal*, Cambridge, Cambridge University Press, 2010.

³¹ <https://ec.europa.eu/digital-single-market/en/desi>.

³² Law 39/2015 “is the first of these two axes, to establish a complete and systematic regulation of “ad extra” relations between the Administrations and the administered citizen, both in relation to the exercise of the right to independence and in whose virtue enacting administrative acts that directly affect the sphere of legal stakeholders, and as regards the exercise of regulatory powers and legislative initiative. It thus brought together in a single legislative body the regulation of authorities ‘ad extra’ relations with citizens as administrative law of reference that must be complemented by provisions in the budget legislation with respect to the actions of public authorities”.

This represents a change in the organisation of the State: in fact, the two topics were previously regulated in a single act, the Law 30/1992. This two-pronged approach was already present in the Spanish legal order in the 1950s; this approach gives the Legislator the possibility to better focus on the digital reshape of the means of communication between the citizens and the State.

The two Laws of 2015 are designed on two core themes. First of all, we can find a great attention to the improvement of the internal asset of the Public Administration, with particular focus to the aspects of economic efficiency. This is related, on one hand, to the introduction in the Spanish Constitution of a budgetary constraint through the implementation of the *Ley Organica 2/2012*, that has emended articles 134 and 135 of the Spanish Constitution³³. On the other hand, it is related to the role of the “*Comisión para la Reforma de las Administraciones Publicas (CORA)*” presented to the Council of the Ministers in 2013³⁴. It should be highlighted, with regard to budgetary issues, that the attention given to the simplification and the digitalization of the Public Administration and its means is, with no doubt, the proper way to reach the target of reducing the expenditure and improving economic efficiency.

Finally, the Legislator continues to modernize the concept of electronic Administration, incorporating important innovations on this matter. The transition from a paper administrative culture to a new complete electronic one, however, is designed not to modify the relationship between the Public Administration and citizen, but to update it³⁵.

The reform of October 2015 reshapes the fundamental roots of the administrative procedure. As we can read in the text of the norm: “the development of information and communication technologies has also been deeply affecting the shape and content of the management of the relations with citizens and businesses”. Even though the Law 30/1992,

³³ D. FUSCHI, *I vincoli di bilancio in alcuni ordinamenti degli Stati europei e negli Stati Uniti*, in “Costituzione Economica e Democrazia Pluralista”, Bologna, il Mulino, 2017, pp. 83-93.

³⁴ A. B. C. MARCOS, *Novedades en materia de Administración electrónica en la nueva legislación administrativa básica*, in “Revista jurídica de Castilla y León”, 2016, pp. 61-100.

³⁵ J. M. B. LEÓN, *La reforma del procedimiento. Viejos problemas no resueltos y nuevos problemas no tratados*, in “Documentación Administrativa”, n. 2, 2015.

of November 26, was already aware of the impact of new technologies on the administrative relations, it was with the Law 11/2007, of June 22, that electronic access of citizens to public services has been legally established. However, in the current social environment, electronic processing is still a special form of management of the administrative procedures, even though it should constitute the usual way to access Public Administration. A paperless administration, based on fully electronic operations, not only best serves the principles of effectiveness and efficiency, saving costs to citizens and businesses, but also strengthens the guarantees of stakeholders. Indeed, the record of documents and actions in an electronic file facilitates compliance with obligations of transparency, as it allows to offer timely, flexible and up-to-date information to stakeholders³⁶. In any case, the real and effective incorporation reached set a paradigmatic change in the conception of the relation between citizens and administration. Not surprisingly, both front offices and back offices are affected by the administrative use of computer, electronic and telematic means.

So, the adoption and use of the innovations in the field of IT should lead to a new model of Public Administration, which will be based on the triple axis of electronic administration, transparency and reuse of the information held by the public sector. To reach the complete effectiveness of the norm, from administrative organization to the rights of citizens, from the constitution and operation of collegiate bodies to the notification of resolutions, from transparency to public contracts³⁷, a change not so much in the final result but in the procedure to reach it should be imposed³⁸.

The European Union has also referred to this necessary development when it has expressly defined electronic administration as “the use of information and communication technologies in public administrations, combined with organizational changes and new skills, in

³⁶ Parlamento Europeo, *El Papel de la Administración Electrónica en el futuro de Europa*, 2003, p.7.

³⁷ L. D. F. DE MARCOS, M. Á. D. RODRÍGUEZ, *La Administración electrónica en la Ley 39/2015 de Reforma de la Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, in “Actualidad administrativa”, n. 2, 2016, p. 6.

³⁸ I. M. DELGADO, *La reforma de la administración electrónica: una oportunidad para la innovación desde el Derecho*, Madrid, Instituto Nacional de Administración Pública (INAP), 2017.

order to improve public services, democratic processes and strengthen support for public policies”³⁹.

The Spain reform in object offers many starting points for analysis, because it opens up new possibilities, if not authentic obligations, and offers a new model of organization between the Public Administration and the administered⁴⁰.

The Law 39/2015 structures the obligation of citizens to use electronic means in their relations with public administrations at various levels. Indeed, this kind of regulation was criticized by the General Council of the Judiciary⁴¹, which underlined that the *ex lege* imposition of this obligation does not seem to be possible without any consideration to the principles of necessity and proportionality, proclaimed by article 1.2 of the Law itself. This obligation as well ignores the requirements of the principle of equality, of constitutionality and of the integrating nature of the *acquis* of European Union Law⁴².

In any case, article 14 of the Spanish Law 39/2015 imposes, in the first place, the exhaustive obligation to interact with public administrations via electronic means (for the performance of any administrative procedure) to the following categories of subjects: (a) entities without legal personality, (b) those who exercise a professional activity requiring compulsory membership, [...], (c) those who represent a person who is obliged to interact electronically with the administration, (d) employees of public administrations [...]. Moreover, the point 3 of article 14 establishes that: “administrations may establish the obligation to interact with them via electronic means for certain procedures and for certain groups of individuals that are accredited on the basis of their economic, technical ability, professional

³⁹ I. M. DELGADO, *La reforma de la administración electrónica: una oportunidad para la innovación desde el Derecho*, cit..

⁴⁰ Z. S. SÁNCHEZ, *Las nuevas leyes de régimen jurídico y procedimiento administrativo: afianzamiento de la administración electrónica en las relaciones internas de la administración y con los ciudadanos*, in “Instituciones de procedimiento administrativo común: novedades de la Ley 39/2015 del Procedimiento Administrativo Común de las Administraciones Públicas”, 2016, pp. 43-66.

⁴¹ Consejo General del Poder Judicial (CGPJ).

⁴² A. B. C. MARCOS, *Novedades en materia de Administración electrónica en la nueva legislación administrativa básica*, in “Revista jurídica de Castilla y León, n. 40, 2016, pp. 61-100.

status, or other reasons to have access and availability of the necessary electronic means.”

With this brief description of the asset of the Public Administration in Italy and Spain, we can see that both Countries have reached a good level of digitalization. Even though Italy started earlier than Spain, as underlined before, now it has a confused and non-harmonic regulation. Spain, instead, had the courage to reform its administrative procedure from the roots, shaping a system ready to implement new technologies.

Conclusions

The growing use of IT systems in the Public Administration, now promoted by all the Countries of the European Union, is an opportunity both to make the work of public offices more efficient and to protect citizens' rights with greater intensity.

If the notion of “[...] the widest possible access to the documents of the institutions” must be privileged, the discretion in the interpretation of “digital document” does not seem to enhance the potential offered by the transition towards a full digitalization of the Public Administration. Therefore, a clear definition, in line with technological development, is necessary in order to not create asymmetries within the EU Member States.

In addition to these general considerations, an assessment of the degree of evolution of the digitalization of the Public Administration is necessary.

The lockdown imposed by the explosion of the epidemic of SARS – COV–2, has highlighted how much the Internet and the services that can be carried out through it are important for the resilience of a Country. In a matter of days, completely new and unexpected situations have had to be handled. With no access to the Internet, the school year would have been cancelled in every school and the state administration would have been completely paralyzed. However, talking about the Italian context, we face a significant degree of digital backwardness. The DESI 2020⁴³ annual report highlights a tragic situation: third to last in the

⁴³ <https://ec.europa.eu/digital-single-market/en/desi>.

general ranking among all European Countries and last, if the indicator relating to the diffusion of basic digital skills among the population and the presence of ICT specialists is analysed individually.

Despite the declared intent to improve the Italian digitalization status, the only figure in line with the European average is the one regarding the infrastructures necessary to connect to the Internet. Italy obtained the score of 50 points (close to the European figure of 50.1 points), occupying the 17th place, however lower than the result of DESI 2019⁴⁴ (12th place, score of 48 points compared to the European figure of 44.7 points), but a clear improvement compared to DESI 2018 (25th place, score of 35.1 points compared to the European figure of 39.9 points)⁴⁵.

IT skills of the users have the greatest impact on the full realization of what our administrative system already offers. The lack of know-how of the employees of the Public Administration limits further developments of the system. In fact, “the IT procedures applied to administrative procedures must be placed in a necessarily subsidiary position to them, since it is not conceivable that, due to technical problems, the orderly process of relations between the private sector and the Public Administration and between Public Administrations in mutual relations is hindered”⁴⁶. We also have to underline that the possibility for IT to be an obstacle in the relationship between citizens and Public Administration has led the jurisprudence to identify positions that prefer the use of analogical means to the more innovative ones in order to avoid the impossibility to benefit from a certain service. As the Italian administrative Judge said: “a manifest unreasonableness, injustice and irrationality of a system for submitting applications to participate in a competition which, due to mere technical malfunctions, comes to impersonally exercise substantial administrative activity, providing for exclusions *de facto* attributable to mere IT anomalies”. Furthermore, it is emphasized that “*pro-futuro* the Administration must prepare, together with telematic tools to simplify document flows in

⁴⁴ <https://ec.europa.eu/digital-single-market/en/news/digital-economy-and-society-index-desi-2019>.

⁴⁵ <https://www.agendadigitale.eu/cittadinanza-digitale/desi-2020-il-punto-piu-basso-per-litalia-tutti-i-problemi-da-risolvere/>.

⁴⁶ Tar Lazio III bis n. 08312/2016; in termini cfr. anche Cons. Stato, sez. VI, 7 novembre 2017 n. 5136.

the event of mass insolvency procedures, also parallel traditional administrative procedures that can be activated in case of emergency, in the event of incorrect functioning of the IT systems”⁴⁷. An evaluation of this type highlights how, in the balancing of values, we acknowledge the impossibility, *rebus sic stantibus*, of a complete transition to a digital administration model and the significant degree of backwardness of the “Italian digital administration”. It is certainly necessary to maintain traditional access procedures to the services of the Public Administration for those persons who do not have the necessary tools for digital services. However, the infrastructural limit of a state cannot slow down the evolution of this process. The use of pre-digital tools must be a choice to accommodate the requests of part of the population and not a way to justify the lack of adaptation of a country.

The use of huge economic resources, deployed following the health emergency, will make it possible to strengthen the infrastructural sector and the dissemination of basic digital knowledge among the population. Finally, we begin to see encouraging side effects caused by the contingent need to establish a digital relationship with the Public Administration. In fact, in Italy, in order to take advantage of the concessions and reimbursements provided by the so-called Cura-Italia Decree, it is necessary to have a SPID identity (Public Digital Identity System) to interact directly with the Public Administration online. In fact, between February and March 2020 there was an increase in requests for activation of Digital Identities of over 60% compared to the same period of 2019⁴⁸.

In Spain the situation is very different than in Italy we can see only a parameter that is similar in both Countries, the one about human capital. This can be related to the aged population and the presence of some areas with a low level of education.

⁴⁷ cfr. Tar Puglia, Bari, n. 896/2016.

⁴⁸ In the month of March 2020, the average weekly growth rate of digital identities supplied, which in 2019 stood at around 50.000 units, doubled. At the same time, also following the Covid 19 emergency, the SPID services made available by the Public Administration have increased. In one month, an average of 100,000 SPID credentials were issued per week. The total number of active digital identities thus increased from 5 million 900 thousand in February to over 6 million and 300 thousand in March.

See <https://www.agid.gov.it/it/agenzia/stampa-e-comunicazione/notizie/2020/04/22/spid-aumento-sostenuto-identita-digitali-100mila-settimana>.

Spain places 11th out of 27 EU Member States in the 2020 edition of the DESI based on data prior to the pandemic. Spain ranks 2nd in the EU on digital public services thanks to its well-timed implementation of a digital-by-default strategy throughout its central public administration. The Country performs well also in the area of connectivity. Despite its improving scores, almost half of the Spanish population still lacks basic digital skills and 8% of the population has never used the Internet. Spain ranks 13th on integration of digital technologies; its score is in line with the EU average, although Spanish small and medium enterprises have yet to fully unlock the potential of e-commerce⁴⁹.

Riassunto - Lo scopo di questa ricerca è quello di individuare alcuni degli aspetti critici che interessano il diritto di accesso dei cittadini alle informazioni in possesso della Pubblica Amministrazione in seguito al processo di digitalizzazione di quest'ultima. L'area di indagine del contributo, quindi, si riferisce esclusivamente all'analisi delle questioni inerenti allo scambio di dati tra Pubblica Amministrazione e cittadini e non allo scambio di dati e informazioni che avviene tra pubbliche amministrazioni. Aspetto importante ai fini della trattazione è quello relativo alla definizione stessa di documento informatico poiché il concetto inoltre è mutevole in relazione al grado di evoluzione tecnologica e, inoltre, non si individua una categoria omogenea di tipologie di documenti. Una innovazione completa del-

l'amministrazione pubblica avverrà quando questa sarà reinventata completamente dal suo interno, ripensandone le regole e i processi e, dall'esterno, nei rapporti con il cittadino, in una dimensione che vada oltre la mera semplificazione dei processi e l'erogazione dei servizi e dei procedimenti amministrativi. Tuttavia, è pacifico che una trasformazione verso un c.d. modello *native digital*, non possa essere attuato *tout court* poiché l'amministrazione, quale organizzazione storicamente esistente, si origina in epoca predigitale. Infine, l'utilizzo di ingenti risorse messe a disposizione per fronteggiare l'emergenza sanitaria permetterà anche di potenziare, da un lato, il comparto infrastrutturale e, dall'altro, la diffusione di conoscenze digitali di base tra la popolazione.

⁴⁹ J. PARRA, M.-E. PÉREZ-PONS, J. GONZÁLEZ, *Study Based on the Incidence of the Index of Economy and Digital Society (DESI) in the GDP of the Eurozone Economies, International Symposium on Distributed Computing and Artificial Intelligence*, Cham, Springer, 2020, pp. 164-168.