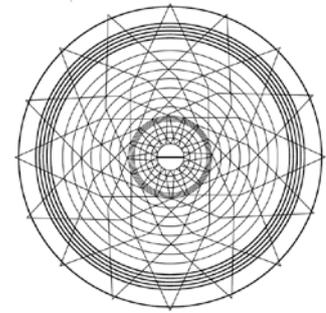


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OPEN GOVERNMENT IN ITALY AND IN THE SICILIAN REGION*

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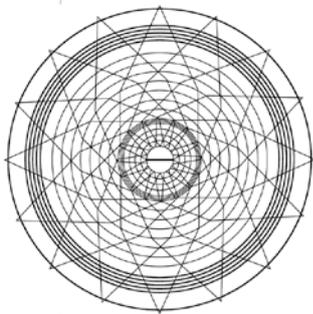
Abstract:

The web, if used in connection with Open Government practices, it becomes an extraordinary controlling method not only to attack inefficiencies, corruption and bad administration, but also to promote transparency and develop participation practices. Complete transparency and open data represents lawfulness and efficiency outposts which are absolutely necessary to public administrations, because they are the new frontier of citizenship rights and participatory democracy.

This paper argues in favour of the anti-corruption provisions applications and the subsequent applicator decree (Laws no. 190/2012 and 124/2015 and legislative decrees 33/2013 and now 97/2016) for the purposes of complete administrative transparency of Sicilian Government administration and the main regional governmental bodies (agencies and firms).

The Italian Government effectively, on the analogy on european rules and significant foreign experiences - first between all the "Open Government Initiative" by US Government dated 2009 on transparency, participation and cooperation principles - issued a set of rules on publicity and transparency acts by public administrations, providing important changes to the previous regulation and recognising a citizen's general right to the full disclosure and exploitation of administrative data, in open format.

Keywords: Open government, transparency, participation, open data, public administration, Sicilian Region



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*A popular government without popular information
or the means of acquiring it in but a prologue
to a farce or a tragedy or perhaps both
J. MADISON, Letter to W.T. Barry, 4 Aug. 1822*

1. Open Government: the new frontier of administrative transparency¹

The Open Government or open Administration aims to ensure full transparency of public administration and citizens' participation in public decision-making through measures that help responsibility, organizational performance, widespread control, the simplification and use of new information technologies, data reusing and "bidirectionality"².

Most of the Italy's e-government experiences have a one-way approach aiming at the information, where the citizen is passive, rather than at the active participation and interaction. By doing so *the Vision-transparency open access to government information on Voice-participation open access to decision-making arenas* prevails³. Meant in this sense, open administration goes beyond the traditional dichotomy advertising/transparency, which already framed transparency as an extra element both with respect to advertising and the same right of access, forcing the administration to act correctly, beyond mere formal requirements of the rule. Democracy needs an intelligible clarification of power, emphasizing the ability to offer a widespread control

¹ This short essay collects contributions and documentation relating to Rapporto sull'Open Government in Sicilia 2015 (the second Report on Open Government in Sicily), presented in March 31th, 2015 in the DEMS department lecture hall at the University of Palermo. It is the result of the research carried out in the course compendium of European Administrative Law of the academic year of 2014-2015 and of the master's degree in Science of administration and complex organizations.

The introductory essay was then presented in the form of a report 2014 to the Roundtable on Administrative transparency after the Legislative Decree no. 33/2013, which was organized at the Faculty of Law, University of Palermo, April 10th, 2014 as part of the conference supported by the 'Group of San Martino' on Administrative Transparency. Subsequently it was the subject of a lecture held on May 23rd 2014 for the Palermo University Master degree in Labour law and industrial relations within public administrations in collaboration with the INPS (National Social Security Institute) and the higher School of Economy and Finance Ezio Vanoni.

A heartfelt thank you goes to the Director of the Department, prof. Giovanni Fiandaca, to the staff and students of DEMS who have worked for the publication of the volume.

I am indebted to Marco Mazzamuto, Andrea Piraino and Riccardo Ursi for those comments that helped to improve this work for which I am the sole responsible.

I intend to dedicate my contribution to the memory of Antonio Romano Tassone, a professor of administrative law at the University of Messina, an educated and polite scholar, a leading figure of the Sicilian School of Public Law and among those who have welcomed me into it, who recently died prematurely.

² ENRICO CARLONI, Nuove prospettive della trasparenza amministrativa: dall'accesso ai documenti alla disponibilità delle informazioni, in *Diritto pubblico*, n. 2, 2005, 589.

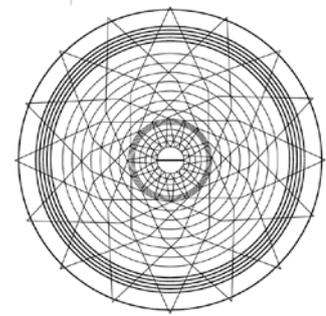
³ Cfr. ALBERT J. MEIJER, DEIRDRE CURTIN, MAARTEN HILLEBRANDT, (2012), see also U.N. Reports on e-government <http://www2.unpan.org/egovkb/global_reports/10report.htm>.

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on administrative activities and on the organization. This is a way to strengthen democracy in the perspective of a necessary participatory democracy (Manganaro, 2009).

It is possible to glimpse also a correlation with foreign experiences back to the Anglo-American legal systems⁴ (Battini, Mattarella, Sandulli, Coglianese, 2009), now followed also by Latin America countries⁵ up to Indonesia⁶.

The countries that undertook Open Government initiatives later joined the Open Government Partnership (OGP) and presented the achieved results at the 2013 London Summit⁷.

Articles 41, second paragraph letter b) and 42 of the Charter of Fundamental Rights of the European Union explicitly recognize the right of access to European law as a fundamental right and a formal confirmation of the reception in this regulations of the Open Government principle in virtue of which all decisions taken by the institutions must be made accessible of those who have an interest upon request (Della Cananea, Franchini, 2010).

In another profile, the open government initiatives are linked to the European expectations on the right to good administration (Article 41 CFREU), which has to be open, efficient and independent (Article 298 TFEU), prompted by the maximum transparency principle (Art. 15 TFEU) and the proximity to citizens (Articles 1 and 10 TEU) (Della Cananea, 2011) as well as:

- Directive 2003/98/EC of the EU Parliament 17th November 2003 on the reusing of public sector information, and to Council of Europe Convention of 18th June 2009, CETS no. 205 on access to public documents held by authorities.

- G8 leaders signed the Open Data Charter on 18 June 2013. The Open Data Charter sets out 5 strategic principles that all G8 members will act on. These include an expectation that all government data will be published openly by default, alongside principles to increase the quality, quantity and re-use of the data that is released. G8 members have also identified 14 high-value areas – from education to transport, and from health to crime and justice – from which they will release data. These will help unlock the economic potential of open data, support innovation and provide greater accountability⁸.

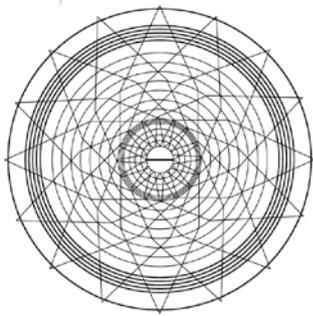
⁴ In USA Freedom of Information Act - FOIA 1966, Government in the Sunshine, 1976, Electronic freedom of information act, 1996, and after the Open Government initiative in 2008 and OG Plan of 2011; in U.K. Freedom of information act 2000, but see also similar legislation in France in 1978 and in Spain since 1958, in this country the principle of administrative transparency is recognized in the Constitution of 1978 (art. 105 b).

⁵ See, for example, Brasil, Mexico and Colombia and their programs Gobierno Abierto and Gabinete digital.

⁶ OECD, *Open Government in Latin America*, OECD *Public Governance Reviews*, OECD Publishing, (2014) in <<http://dx.doi.org/10.1787/9789264223639-en>>.

⁷ See in <<http://www.opengovpartnership.org>>.

⁸ DANIEL CASTRO, TRAVIS KORTE, *Open Data in the G8: A Review of Progress on the Open Data Charter* (Center for Data Innovation, 2015).



II. Administrative transparency after the Legislative Decree no. 33/2013

The legislative decree of 14th March 2013, no. 33⁹ and subsequent amendments (mainly by Legislative decree of 25th May 2016, no. 97¹⁰), come into force April 20th 2013. They contain provisions relating to the reorganization of the law regarding disclosure obligations, transparency and circulation of information by public administrations, by which has been given effect to the legislative mandate contained in art. 1, paragraph 35 of the Law of 6th November 2012, no. 190 (provisions for the prevention and repression of corruption and illegality in the public administration). The new regulation modifies the legal regime of administrative transparency (Law 241 of 1990 and subsequent amendments, Law no. 69 and Legislative Decree no. 150 of 2009 and subsequent amendments) by identifying it as the tool to fight against corruption and recognizing the citizens' right to full knowledge in the public decisions (*the right to know*) (Patroni Griffi, 2013; Orofino, 2013; Savino, 2013; Carloni 2014, Gardini, 2014).

The total transparency and open data represent in this way a secure obligation of legality and efficiency which administrations cannot escape, because they are the new frontier of citizenship rights and participatory democracy (democratic value against the democratic deficit)¹¹.

The decree no. 33/2013 and subsequent amendments codify disclosure and transparency requirements of public administration, by introducing major changes and amendments to the previous system, recognizing a general right of access of the citizen (so called civic - full disclosure) to administrative information and the usability of data, thus confirming the public administration characteristics as service structure for the community and the businesses.

It is thus established a close correlation between the strengthening of administrative transparency and anti-corruption regulations (Clarich, Mattarella, 2013), which identifies total transparency as a tool to combat corruption in one of the countries most afflicted by this phenomenon of the world¹², allowing Italy to conform to Conventions against corruption.

The problem of civic control of public administrations and the protection of citizenship rights had been, for some time now, properly framed as an effect of "*progressive concentration in the administrative report of the qualifying moments of citizenship and the consequent formation of the increasing instances of administrative democracy*" (A. Romano Tassone, 2002), reaction to the lack of decision-making capability of politics, and the pervading spread of corruption and mismanagement (Merloni, 2008).

⁹ G.U.R.I., April 5th 2013, no. 80

¹⁰ G.U.R.I., June 8th 2016, no. 132

¹¹ ENRICO CARLONI, L'amministrazione aperta. Regole strumenti limiti dell'open government, (Maggioli, Rimini, 2014), 43-75.

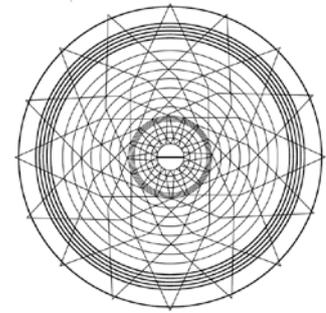
¹² See *Global Corruption Barometer 2013 - Transparency International's Global Corruption Barometer 2013*.

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It is well known that, the legislative decree no. 33/2013 and subsequent amendments, aimed to ensure all citizens the widest opportunity to gather information concerning the organization and activities of public administrations, in order to implement the *"principle of democracy and the constitutional principles of equality, impartiality, good performance, effectiveness and efficiency in the use of public resources for the realization of an open administration at the service of citizens "and" in order to encourage forms of widespread control on the pursuit of official duties and the use of public resources"*(Art. 1).

Qualifying features of the new discipline - based on the principles in art. 1 - that is, the elements that make up the transformation of the legal framework of administrative transparency are:

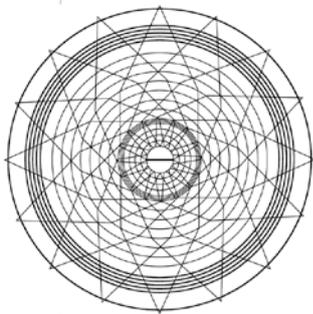
- the right to know the administrative information;
- civic access, also extended to data and documents additional to those published, and this in order to *"promote common forms of control over the pursuit of official duties and the use of public resources and to promote the participation in the public debate"*;
- the reconciliation of public administration with the protection of personal data and the privacy;
- reuse of open data;
- Access for scientific purposes to basic data collected for statistical objectives;
- strengthening of the government coordination functions.

It is recognized, in accordance with the general principle of full transparency, the right of citizens, social groups and companies to know the information in the administration's possession or which concern those who are called to public offices¹³. To this aim, generalized and extended obligations of the publication of a comprehensive set of information to public authorities are encoded. In addition, these obligations were accompanied by sanctions and constraints against bureaucracy (Carloni, 2009).

The route taken by the regulations towards a more effective transparency of information, as is known, went far beyond the fundamental rules, although modified and integrated over time, the Law no. 241/1990. However, this feature is found in the discipline of transparency since its genesis in 1990, when two provisions saw the light, the first one was contained in the last-mentioned law and art. 7, third paragraph of Law no. 142/1990 which have regulated the right of access in differentiated forms (Arena, 2006).

An effective change of model: hierarchical management , closed, secret, is a paradigm now superseded by criterion authorizing the normal functioning of institutions, as the transition is not complete and the opposite paradigm of government still appears in a drawing chiaroscuro (Carloni, 2014).

¹³ LORENZINO VACCARI, *Dati aperti della PA in Trentino: uno strumento di crescita economica*, (February 12th 2014), in *OPENdata Trentino*.



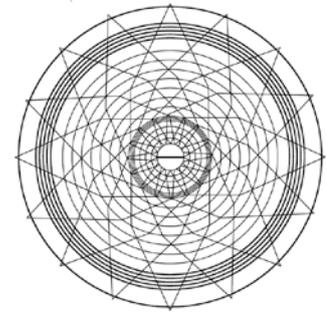
For this reason it should be recalled:

- Articles. 2, 12 and 50 of the Legislative Decree of 7th March 2005 no. 82 and subsequent amendments (*digital administration code*); and art. 50, paragraph 1 *bis* of the same Decree, introduced by the so-called third correction (Legislative Decree of 30th december 2010 no. 235), which contain both definitions and publication requirements, now they merged into the Legislative Decree no. 33/2013 and subsequent amendments;
- Art. 2 of Legislative Decree 12th April 2006 no. 163, which recognizes transparency among the general principles of the discipline in public contracts;
- Art. 10 of the Law of 18th June 2009 no. 69, that by intervening to amend art. 22 of Law no. 241 of 1990, has explicitly linked the right of access to the principles of impartiality and transparency, as well as art. 21 of the call-back no. 69/2009, which introduces obligation for public administrations to publish on their own website "*annual salaries, curricula vitae, the e-mail addresses and phone numbers of municipal and provincial managers and secretaries, as well as to make public, by the same means, the rates of absence and presence of personnel, separated for executive level offices*"; and to make public:
 - a) an indication of their average payment relating to purchases of goods, services and supplies, called "indicator of payment timeliness";
 - b) the average time of definition of the processes and service delivery with reference to the preceding financial year;
- Art. 11 of Legislative Decree 27th October 2009, no. 150¹⁴ and subsequent amendments, which offered a definition of "*transparency*", described as '*total*', even larger than the one ratified by the discipline on access to administrative documents, relating it to the information regarding every aspect of the organization, of the indicators connected to management trends, and of the resource use in the pursuit of official duties, of the results of measurement and evaluation activities carried out by the competent bodies, in order to encourage widespread forms of control on observance of the principles of fairness and good performance planning the publication, in institutional sites of public administrations, of all information relating to the organization and utilization of resources for the performance of official duties in order to embody "*full accessibility*" (Sartori, 2013). In this sense, transparency is considered a basic level of performances under Article 117, second paragraph, letter m) of the Constitution. The same law, Art. 3, indicated among the general principles: "*the transparency of the public administration results and the employed resources to implement them,*" and the need to ensure "*full transparency of information concerning the measurement and evaluation of performance*";

¹⁴ See ALESSANDRA SARTORI, "*La pubblica amministrazione: da castello inespugnabile a casa di vetro?*", in MARIO NAPOLI, ALESSANDRO GARILLI, (eds), *La terza riforma del lavoro pubblico tra aziendalismo e autoritarismo*, (Padova, Cedam, 2013) 279 et seq.

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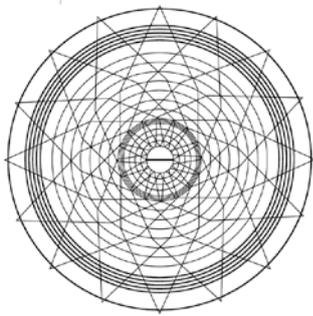
- Art. 18 of the Decree Law of 22th June 2012 no. 83, entitled "*Urgent measures for the growth of the Country*", converted with amendments by Law 4th April 2012, no. 35, which provides that "*notwithstanding any other provision of law or regulation*", and consequently the rules on confidentiality, stated the obligation for public administrations to publish on their respective institutional websites "*name of the company or other beneficiary and their tax information; the amount; the norm or title on which is based the attribution; the office and the responsible officer or manager of the administrative proceeding; the followed procedure for the identification of the beneficiary; the link to the selected project, to the in charge subject curriculum, as well as to the contract and specifications of the provision, supply or service*";
- Art. 9 of Decree-Law of 18th October 2012, no. 179 "*Further urgent measures for the growth of the Country*", converted with amendments by Law of 17th December 2012 no. 221, which introduced the open data model and digital inclusion, has prescribed further publication requirements on institutional websites;
- And also the already mentioned Art. 1, paragraphs 15, 16 and 29 of the Law of 6th November 2012, no. 190, which - as part of a regulations that combines useful measures to those appropriately referred to as "*unrealistic*" (Clarich, Mattarella, 2013) - has laid down the criteria for the exercise of the delegation on the basis of which Legislative Decree no. 33/ 2013, and subsequent amendments, was issued;
- Article 14 applies to all members of both political and administrative bodies ("*State, Regions, Local governments*") in office on the date of entry into force of the legislative decree, n. 33/2013, or 20 April 2013. At the expiration of the mandate or the data remain posted for three years following the date of termination , together with the statements of art. 4 of Law 441/1982 , except for information relating to the balance sheet and , where permitted, the declaration of the spouse not separated and relatives within the second degree¹⁵;
- Resolution no. 148 of December 3rd, 2014 Attestations OIV, or structures with similar functions, on progress of the obligations of publication for the year 2014 by the government and activities of supervision and control of the Authority (Published in the Official Gazette no. 5 of January 8th 2015)¹⁶.

III. Right of Access and civic right of access – in the paradigm of the right-to-know of administrative procedure.

As it has been pointed out, the right of access (art. 22, paragraphs 3, 1 letter *b* and 24, paragraphs 3 Law no. 241 - 1990 and subsequent modifications and supplements) has

¹⁵ About Societies and Private-law bodies owned or participated by Public Administrations, they have to put into effect the obligation of transparency of art.14 according to all the members of the political-administrative bodies (Determines N.A.C.A no. 8/2015).

¹⁶ In, <http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?id=76ccc9080a77804270d585dc0d04b1cf>.



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been amended by the new right of civic access (Pajno 2013, Merloni 2013, Carloni 2014).

And actually, the latter guarantees the implementation of publication of a series of documents on Public Administration institutional websites, legislating a right to directly and automatically enter these websites, without any authentication and identification¹⁷. In case of omitted publication, according to the art. 5 legislative decree it is possible to exercise the so-called civic access consisting in a request, without any justification being given, to free implement this right, and, in case of insolvency to appeal to the courts under administrative process code (art. 116 legislative decree no. 104/2010 and subsequent modifications and supplements).

Before to recourse to the judicial process, the applicant can submit a review request to the responsible of the prevention of the corruption and the transparency, which decides with a reasoned decision, within a period of twenty days.

In case of acts of regions or local authorities administrations, the applicant can also appeal to the ombudsman responsible for territorial area, if constituted. If this body has not been established, the competence is attributed to the ombudsman immediately above responsible for the territorial area.

Thus, a new balance towards privacy (public and private) is fulfilled. A system more oriented and favorable to openness since it guarantees the right of access to information and more restrictive than models inspired by *FOIA* (Savino, 2013, Gardini 2014, Galetta 2016), as regards information indicated in the legislative decree no. 33/2013 and subsequent modifications and supplements)

Thus, on the one hand, with the exception of information subject to the publication requirement, there is still the traditional right of access even with its limitations and relevant needs for reconciliation with the various forms of confidentiality, in the case of information required under the legislation in question (about 270). On the other hand, the balance is solved by the legislator, in a direct and generalized way, and in this context, the peculiar figure of civic access plays an active role (Ponti, 2013).

On this matter, a recent case shows is relevant. According to the administrative judge¹⁸, the access to administrative documents is: “*a general principle of the administrative activity aiming at fostering openness and impartiality*”. It is also true that access requests “*a direct, concrete and existing interest corresponding to a juridical protected situation and connected to the document you request to access to*” and that “*requests of access are not receivable if they aim to supervise government actions*”, since it is not in compliance with the (art. 22, paragraphs 3, 1 letter b and 24, paragraphs 3 l. no. 241/1990 and subsequent modifications and supplements).

¹⁷ FEDERICO MORANDO, *Legal interoperability: making Open Government Data compatible with businesses and communities*, (2013, vol. 4, n. 1) in *JLIS.IT*, 441-452.

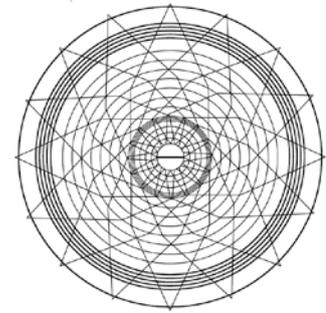
¹⁸ Consiglio di Stato, VI, 20th november 2013, no. 5515, (2013, II, 11), in *Foro amm.- CdS*, 3166.

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There, the new regulation established by the legislative decree 14th March 2013, no. 33 and subsequent modifications and supplements, on publicity, transparency and dissemination of information by public authorities regulate neither interchangeable situations compared to ones that allow the access to administrative documents, under articles 22 and following of the law 7th August 1990, no. 241 as subsequently amended and supplemented.

The decree under consideration also recognizes the right to re-use the information that must be displayed through open data. In this way, information is made public and represents a basis for new data processing of public administration.

Thus a *dynamic knowledge system* based on publicity is fulfilled and where the achievements in the field of open data re-use are of paramount paradigm importance to ensure the full implementation of the decree no. 33/2013 and subsequent modifications and supplements¹⁹.

The *Open data* system requires high quality public and usable data and this implies:

- a) the creation and protection of data by public bodies and officers;
- b) the implementation of back office processes so as to guarantee production, publication, upgrading, re-use, preservation and oblivion.

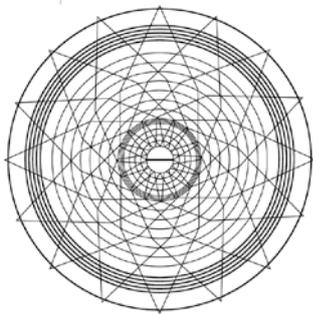
As Italian doctrine point out "*the concept of transparency in the direction of OpenData systems implies a change in the paradigm: it is no more intrinsic, top-down and connected with competitive values/interests in an authoritative way, but rather a dynamics starting from users, socially diffused, plural, often unplanned, starting different kinds of processes and not only aiming at reinforcing their presentativeness and participation circuits. It is a challenge whose results are unexpected (because unplanned) and there for every interesting and involving*"²⁰.

Public Administration Department, in collaboration with the Department for Computerization and Technology Innovation of Public Administration, the Ministry of Education, Universities and Research, the Ministry for the Territorial Cohesion, the Independent Committee for the Evaluation, Integrity and Openness of Public Administration - CIVIT (now transformed into Anti-corruption National Authority)²¹ and with the contribution of FORMEZ PA, has developed the Italian *Action Plan*, launched in 2012 at OGP.

¹⁹ In accordance with article. 9-bis, moreover, public administrations which hold databases publish datas, contained in these, corresponding to the publication requirements of the decree, also in the form of external hyperlink

²⁰ BENEDETTO PONTI, *Open Data and Transparency: A Paradigm Shift*, in *Informatica e diritto/Un nuovo concetto di OpenGovernment*, (2011), 305 et seq.

²¹ The Independent Commission for Evaluation, Integrity and Transparency (CIVIT) as the new national anti-corruption authority; according to the Law no. 125, approved by Parliament on the 29th of October 2013 the name CIVIT has been changed to: Anticorruption National Authority and for evaluation and transparency of public administrations (A.N.AC.)



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The paper summarizes, in a unified framework, the various initiatives undertaken in the field of Open Government and identifies the main lines of development to be realized²².

In 2016 the Italian government launched the program 2016-2019 that includes actions for the country to become more open, in line with the OGP values of access to government-held information, civic participation, accountability and digitalization of public administration, and, as a result of the adoption of the Freedom of Information Act (FOIA), under the reform of public administration (decree n.97 of 2016), that Action plan announced the aim *"to enact the right to civic access and monitor its implementation, since we want to understand how to further strengthen it in the future"*²³.

IV. The administrative transparency system in the Sicilian Region

As regards the administrative transparency system in Sicily, it is worth mentioning that it is based on regulations only partly different from the Government law, and we should stress the following laws:

- the regional law 30th April 1991, no. 10 and subsequent modifications and supplements, law on administrative process and the right of access that has partly repeated in the regional system the legal provisions of the above mentioned law no. 241/1990 and subsequent modifications and supplements. (Mazzamuto, 1993, and, reference allowed, Armao, 1993);
- the decree of the President of the Sicilian Region 16th June 1998, no. 12, on provisions concerning the right of access, subsequently modified by the art.7, second paragraph of the regional law no. 5 (decree of the President of the Region no. 352/1998 and subsequent modifications and supplements);
- the decision of the Regional government 4th December 2009, no. 514, '*Codice antimafia ed anticorruzione della pubblica amministrazione*', developed by 'Vigna

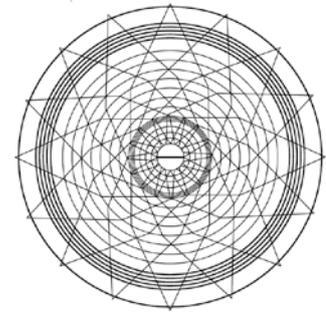
²² See,

<<http://www.funzionepubblica.gov.it/media/968937/piano%2011%20aprile%20%20%20opengovpartnership%20Oper%20consultazione.pdf>> *"Transparency is not only a right of citizens and business, but also an opportunity for the administrations themselves, as the latter have to account not only for "what" they do but also for "how" they do by ensuring accessibility of data on organization and staff, services, payments, as well as performance measurement and assessment. Moreover, PA's commitment to transparency and accessibility will provide a useful tool to better identify areas in need of reform, rationalize resource allocation, identify areas to implement anti-corruption and simplification measures and to promote a competitive exchange between public entities"*

²³ See Ministry for Public Administration and Simplification, *Open Government in Italy*, 3rd Action Plan, 2016 - 2018, in http://www.opengovpartnership.org/sites/default/files/Italy_NAP3_2016-2018_EN.pdf

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Committee', that has anticipated the national legislator introducing innovative solutions included in the executive decrees of the law no. 190 of 2012²⁴;

- the regional law 5th April 2011, no. 5 that has amended and complemented regulations on administrative process and right of access, under the digital Administration (decree 7th March 2005, no. 82 and subsequent modifications and supplements) making a reform of the regional law on this issue and, better defining the dynamic reference to state legislation (Immordino, 2012);
- the regional law 11th May 2011, no. 7 (art. 13) that has envisaged to immediately publish the decisions of the regional government online (apart from presidential acts, or councillor acts, now envisaged by art. 23, subject to the disclosure requirements of the above mentioned legislative decree;
- the PITRE (*Plan for the Region Technology Innovation*)²⁵, required by the provision that fully adopted the digital administration code into regional regulations (art. 3 regional law no. 5/2011)²⁶;
- the regional *Open data*: in 2011-12 the Open Data platform was launched after the approval of the draft law dn. 851 on *open data* by the regional Government (on these initiatives being allowed refer Armao, 2013).

In order to successfully implement the *Open Government*, the Regional Administration has identified the following objectives:

1. digitizing the administrative system, simplifying procedures, and ensuring the management of the administrative information;
1. ensuring the plan governance through the establishment of a body responsible for their implementation and monitoring;
1. initiating and sustaining the process of technical architecture standardization, both hardware infrastructures and application services;
2. fostering a systemic approach so that information become interoperable among different government areas and public administrations;
3. promoting and implementing on-line services, safe applications and content based on a widely available broadband infrastructure available in the Region;
4. providing for extensive training of all users of the services available on the web;
5. involving service recipients (citizens, businesses, stakeholders, internal operators, other public administrations) in the administrative and

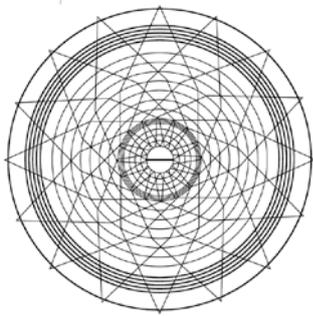
²⁴ See,

<http://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_Ammtrasparente/%20PIR_Altricontenuti/PIR_Corruzione/PIR_Pianoprevenzionecorruzione/Codice%20Vigna.pdf>.

²⁵ See

http://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_AssessoratoEconomia/D%20A%20%2037Gab%20del%208%2011%202012%20%20PITRE.pdf.

²⁶ Issued by the outgoing regional government and then abolished by the incoming government in november 2012.



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governance processes so that the Administration could benefit from collective knowledge;

6. implementing transparency principles of public administration in terms of “*total disclosure*”;
7. divulging and promoting the exploitation of public data in accordance with the principles of “*Open Government*” and “*open data*”;
8. using the process of dematerialization of data and administrative action to better involve regional staff employed in peripheral structures in order to initiate and support a model of cooperation among different departments.

It has to be mentioned that we believe it is necessary to guarantee the full implementation of the right of access to information so that all citizens could be informed (art. 3 d.lgs. 33/2013 subsequent modifications and supplements) above all in important fields (planning, public procedures and contracts, appointments) even reaching those areas affected by *digital divide* and where citizens are not allowed to easily enter the web. In view of the above, the full implementation of transparency principles and access can be fulfilled through both innovative and traditional communication tools (paper and online publications).

With reference to the above mentioned 2013 regulations on transparency, it is worth stressing their direct implementation in the Sicilian region, as stated in the art. 1 third paragraph, decree no. 33/2013 and subsequent modifications and supplements. The provisions of this Decree, as well as the implementing rules adopted under Article 48, extend the identification of the essential level of benefits paid by public authorities for the purposes of transparency, prevention, combating corruption and maladministration, pursuant to Article 117, second paragraph, letter m) of the Constitution and also constitute exercise of the function of coordinating statistical and computerized data of state, regional and local level, referred to in article 117, second paragraph, letter r), of the Constitution.

On this issue, the Regulation of the President of the Region (6th June 2013, no. 9679) has taken note of such direct enforceability in the Sicilian Regional legal system. Anti-corruption and Transparency Officers have been appointed by the President of the Region.

However, despite recent efforts (see “*Three-year Plan*” for anti-corruption prevention, *PTPC* and the three-year program for transparency and integrity approved by Decree of the President of the Sicilian Region 28th January 2014, no. 53), there are clear indications that regulations on total transparency and right of access are not properly implemented, as evidenced by the Report below cited.

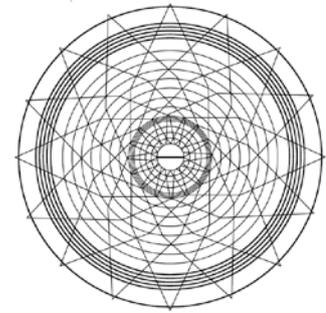
With the aim to implement transparency, presidential and Government decrees, simultaneously with the publication in the Official Journal of the Sicilian Region, to be published in full on the website of the Sicilian Region, directors of departments and

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offices decrees must be fully published on the website. If isn't published within 48 hours, the action is invalid.

It's also important to point out the art. 68 of the Regional Law n. 21 of 12 August 2014 (Rules on transparency and publicity of administration) that prescribe that Government is obliged to publish on the website of the Region of Sicily in full, including any attachments, within 48 hours of approval, final deadline, the deliberations of the Regional Council. The provision continues "the administrative decisions takes effect after its publication that has to happen within five days, on pain of invalidity".

V. The implementation of the legislative decree 33/2013

Sicily, as well as Italy, is not at the fore in implementing the *Open Government*, leading not only to a breach of the rights established by the law on transparency and documents disclosure and administrative decisions but also to a serious bias against citizen's rights and democratic participation²⁷.

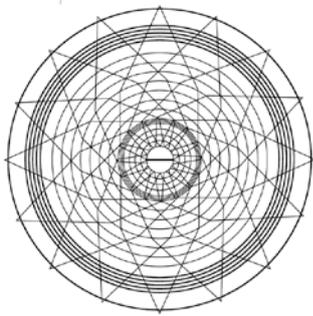
This is demonstrated by the report on *Open Government in Sicily 2015*²⁸ that examines the implementation of the above mentioned issue in every Department of the Sicilian Regional Government and in some public bodies (IRSAP, Chamber of Commerce Enna, the Municipality of Messina and Catania, Regional District of Ragusa, Palermo Health Authority) and subsidiary companies (IRFIS S.p.A., AST S.p.A., Sicilia & servizi S.p.A.) (up to 31-12-2014).

The analysis shows a scarce and confused framework in which many administrative departments are defaulting, despite the penalties to be enforced under legislation pursuant to the directive.

²⁷ In particular this is pointed out by Open Government Partnership - Independent reporting mechanism Italia 2012-13, in <[http://www.opengovpartnership.org/sites/default/files/Italy_OGP_IRM_Public_Cmment_\(Ita\).pdf](http://www.opengovpartnership.org/sites/default/files/Italy_OGP_IRM_Public_Cmment_(Ita).pdf)>. Italy, officially began participating in OGP in September 2011, when the Minister for Public Administration and Innovation declared the government's intent to join. The Department of Public Administration (DPA) and the Presidency of the Council of Ministers lead the OGP in Italy. Although senior staff of the DPA coordinated the implementation of Italy's OGP commitments, other key government actors with their own budgets and mandates had a certain amount of discretion over the implementation of the action plan, including the Agency for Digital Italy; the Ministry of Education, Universities and Research; the Departments for Communication, and Economic Development and Cohesion; the Ministry of Economic Development; the Independent Commission for the Evaluation, Transparency, and Integrity of Public Administrations; the National Anti-Corruption Authority; and, the Centre of Services, Assistance, Studies and Training for Modernizing Public Administration (Formez PA).

The independent reporting point out "Italy's action plan was highly ambitious and included several commitments with high transformative potential. Most notably, the commitments on open data have strong potential in the coming years. Italy can make progress on its commitments on transparency and anti-corruption by taking a more proactive role in adopting a comprehensive freedom of information law that meets international standards".

²⁸ The Report is available on <portale.unipa.it/dipartimenti/dems>, completed with the collaboration of the students of the course of European administrative law 2014-2015 of the Faculty of Political Science-University of Palermo.



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In other words – paradoxically - a region that aims at achieving free zones to encourage economic development, fails because of the strong compression affecting financial autonomy²⁹, creating a powerful deterrent to attracting investments in areas where the bureaucratic burden is more serious and the corruption and pollution are higher. This led to the creation of "zero bureaucracy zones" in those areas characterized by low development indicators in order to attract new investments. It turns out a scenario characterized by non-transparency and intelligibility of information delivered by regional administration, public companies and public regional bodies, by the huge under-use of *open data*, and an absolute shortage of "bidirectionality" in almost every public administration³⁰.

At a regional level, many of the above mentioned requirements are then disregarded, and when they are complete they are not upgraded (dated to 2012 or 2011). As it has already been mentioned, decisions by regional government are completely published under the decree no. 33/2013 (art.13 of Regional Law no. 7/2011). However, Regional government websites, except for a few cases, do not include any publications of the decrees of the President of the Region or of the members of the regional government (art. 12, 23, 35 legislative decree no. 33/2013 and subsequent modifications and supplements).

Information on policy costs: both for the Regional Parliament and Government.

Particularly alarming is the situation of subsidiary companies that violate the implementation of the law on transparency and the discipline on *whistleblowers* (art. 54 *bis* of the legislative Decree 165/2001 and subsequent amendments updated by the art. 1, paragraph 51, Law no. 190/2012 and subsequent amendments).

An example: the site of *Interporti siciliani* S.p.A. company, is basically illegible, and this happens nevertheless there is a supervision body nominated and paid on purpose.

As evidenced by the attached summary records, it is equally hermetic the situation of the following sites companies: *Irfis* S.p.A., *AST* S.p.A., *Irsap*, *Sicilia & servizi* S.p.A.

In particular, the part of site relating to remuneration and tax statements for the administrators who, right of the decree of 2013, follows the inability of the Administration to respond in any way to the company's financial resources and institutions (it is not possible to find out, for example, the remuneration received by directors of certain companies or declarations subject to mandatory publication).

In particular, concerning the subjective definition of application field of transparency rules, referred to in Legislative Decree 33/2013 and subsequent amendments, an interpretative direction was offered to administrations and bodies through the recent Circular no. 1/2014 by the Ministry for Public Administration and simplification³¹.

²⁹ See, e.g. my work, *L'attuazione dell'autonomia differenziata della Regione siciliana*, (Liguori Editore, Napoli, 2013) 30 et seq.

³⁰ The Municipality of Palermo (<www.comune.palermo.it/opendata.php>) and the healthcare sector (Asp Palermo cf. <<http://www.asppalermo.org/copertina.asp>>), are exceptions to this trend.

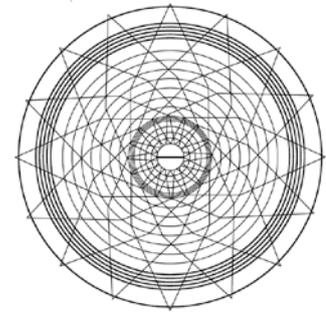
³¹ See in <http://www.funzionepubblica.gov.it/media/1158262/circolare_1_2014_trasparenza.pdf>.

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The circular authorizes a broad interpretation of the category of subjects referred to in article 22 of Legislative Decree no. 33/2013 (as well as in former article 11, now abolished by article 43 of Legislative Decree no. 97/2016) and , to whom these provisions apply. It is to be expected, therefore, that among the subjects required to comply with the transparency requirements government-owned businesses and other private entities must be included; they, beyond their legal form, play "*activities of the public interest*"; the entities which constitute this category are the bodies that perform the same activity by virtue of a controlling relationship, which determines the total application of the transparency rules, and those who play under a minority report, for which the rules of transparency shall apply with respect to activities carried out in the public interest.

Fulfillments problems in the regional administration are also recorded with regard to the provisions of Legislative Decree of 8th April 2013, no. 39 laying down "*Provisions of unappointable and incompatible positions in government and in private organizations under public control*", about the delays on discipline replacement intervention in the exercise of powers of appointment. The region neglected to regulate the exercise of powers of appointment in case of injunction against the President or the Councilors, legitimizing in this way the substitution intervention by the state.

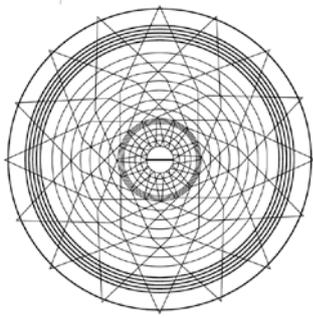
In this regard, It should be noted that the Legislative Decree no. 39/2013, which was also issued in implementation of the so-called anti-corruption law (Law 6th November 2012, no. 190), that in conformity with art. 22, first paragraph, has to be considered directly applicable in the Sicilian Region as its provisions "*bear implementing rules of Articles 54 and 97 of the Constitution and prevail on different provisions of regional regulations concerning unappointable and incompatible positions in public administrations, public bodies and private entities under public control.* "

With the result that the provisions of that legislation introduced in the regulations integrate those contained in Regional Law no. 19/1997 and subsequent amendments which regulates the appointment of positions in regional institutions and companies within Sicily. The direct and immediate applicability of Legislative Decree no. 39/2013 is, on the other hand, recognized by the Sicilian Region in the circular dated 10th June 2013, no. 28913, signed by President of the Region itself.

It should be noted the delay in implementing article 18, third paragraph, of the legislation, according to which: "*regions, provinces and municipalities shall, within three months from the entry into force of this decree, adapt their legal systems by identifying the internal procedures and bodies that can proceed to the appointment of positions in its stead during the period of disqualification of the holder bodies.*"

In this regard, it seems appropriate to point out that not only the Regional Government has not drawn any bill on the subject, but not even the Regional Assembly has approved the planned regional discipline of replacement interventions.

The reported delay depicts the conditions for the start of the process for the exercise of replacement powers by national government, under art. 8 Law 5th June 2003, no.



131, towards the Sicilian Region, in particular since the fourth paragraph of article 18 of the aforementioned Legislative Decree no. 39/2013 states that "*after the period referred to in paragraph 3 it applies the replacement procedure under Article 8 of the Law of 5th June 2003, no. 131*", even if it is not known that such action has been initiated by the competent state structures.

VI. Concluding Remarks

Contemporary democracy is itself multifaceted and polyarchic (remembering the definition by R.A. Dahl³², recently passed away). The characteristic shape that democracy has taken in the twentieth century, in which citizenship is extended to the majority of the community adult members, while the rights of citizenship provide the opportunity to object to the holders of government offices.

However, in it coexists not only strongly differentiated political, social and cultural components, but also democratic and non-democratic ones which through the more and more extensive direct and/or indirect participatory tools contribute to the formation of public decisions.

If, as recently pointed out, democracy is "*the opinion-based government*" which is a diarchic system where next to "*will*" (which takes the form in the representative democracy institutions and in procedures of binding or sovereign decisions) there is the opinion (extra-institutional sphere of political opinions, which as monads influence each other without ever merging) - democratic societies can be so defined not only when they provide free elections, or democratic participation mechanisms, but also because they ensure "*that opinions contribute both to the rightful functioning of institutions and their evaluation and critical control*" (Urbinati, 2014).

In this sense, the examined legislation, as it gives the right to total transparency and the knowledgeability of administrative decisions, it is a defining feature of public administration democratic progress³³.

As the Italian Administrative Procedure Act (law 241/1990) pointed out under the art.1 (General principles underpinning Administrative Action) "*Administrative action shall pursue the objectives established by law and shall be founded on criteria of economy of action, effectiveness, impartiality, publicity and transparency, in accordance with the modes of action provided for both by the present Law and by the other provisions governing individual procedures, as well as by the principles underpinning the Community's legal order*" and that "when adopting measures that are not authoritative,

³² See ROBERT A. DAHL, *Polyarchy: participation and opposition* (Yale University Press, New Haven, September 10, 1972).

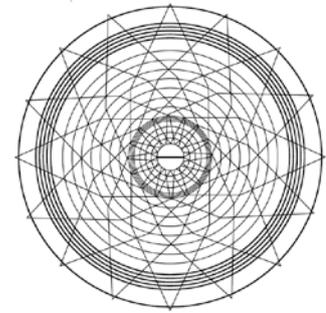
³³ Presidency of the Council of Ministers and Ministry of Simplification and Public Administration, *Open Government Partnership National Action Plan 2014/2016*, December 2014, in <http://www.euroinfoscilia.it/programmazione-20142020/open-fesr-percorso-di-consultazione-pubblica-online/>.

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the public administration shall act in accordance with the rules of private law save where the law provides otherwise". In this perspective "private parties responsible for carrying out administrative activities shall ensure that the criteria and principles referred to under subsection (1) are observed", and "the public administration shall not make a procedure more onerous unless extraordinary and justified requirements during the preliminary fact-finding activities make such action necessary".

As explained above Legislative decree n. 33/2013 renewed the entire legal framework on transparency in Italy based on law n. 241/1990: it sets forth the duty of public administrations to publish on their own web site a relevant number of documents, information, data and provides through the so called "civic access", the right for anyone to ask for such documents, when the publication is omitted.

On another hand the right to good administration, as well as the right of access to documents, was included in the Charter of Fundamental Rights of the European Union. Article 41 was based upon case law that had enshrined different principles of good administration. It is worth noting that the right to good administration is treated as a category of rights rather than as a right in its own.

Open government in Italy is based on these different principles of the administrative action but, at the same time, is the goal of "*good administration*".

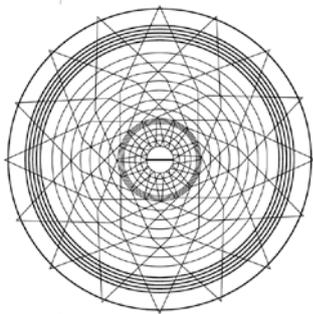
While in Italy on full transparency legislation it has increased the level of implementation, as we have seen in Sicily the implementation of the new regulation on total transparency proceeds very slowly. Sicilian regional administration, unfortunately, has until now disregarded the full respect of the law on total transparency and that both for the central regional government also for society and regional institutions. Italian Government, in the last years, has been implementing policies for a more open public administration within the framework of broader administrative modernization policies and the digital agenda program whit the objective to increase efficiency and effectiveness of public sector activities, supporting the integrity of institutions and thus improving the relation between Public administration and citizens by increasing their confidence.

But as evidenced by the Italian "*Open Government Partnership National Action Plan 2014-2016*"³⁴ the dissemination of data produced by the State an Regions are still limited and, in the various administrative areas, it is based on extremely variable rules and practices, the quality of published data is generally low and the possibility of their reuse is often undermined by the use of non-open formats and licenses that do not allow for their re-use for commercial purposes, although there are not regulatory barriers, public authorities find it difficult to publish open data (and update them).

The new law no. 124/2015 on administrative reform is an important step towards the modernization of public administration structures and procedures. In particular this law provide the recognition of freedom of information by means of "*the right to access*,

³⁴ See,

<http://www.opengovpartnership.org/sites/default/files/Second%20OGP%20National%20Action%20Plan.pdf>.



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*even over the internet, anyone, regardless of ownership of legally relevant situation, to the data and documents held by public authorities", in any case without prejudice to the disclosure obligations and except in cases of secret or prohibition of disclosure provided for by law and subject to the limits relating to the protection of public and private interests, in order to encourage widespread forms of control over the pursuit of institutional functions and the use of public resources (art. 7, c.1, h).*³⁵

Sicily, as we have seen, after the limited changes made to the rules on open government in 2011, has been unable to select a coherent regulatory framework with state reforms such as to apply them when they self-executing under the constitutional rules and the implementation of the rules on transparency is late with serious damage to the rights of citizenship³⁶.

Therefore, what makes 'open' institutions is not the presence of citizens in the places in which decisions are taken (direct or in streaming as somewhere promises), but rather the fact that elected institutions and elected representatives, every level public administrators can be judged by concomitant forms of control, by people, associations, companies using the tools of Open Government and total transparency³⁷.

In this way the Open Government, even in its germinal meaning that emerges from the Italian legislation, contributes to change the traditional paradigm that has initially focused on the election, then even on the instruments of direct participation, the mechanism of control of public institutions³⁸.

The control and the participation of citizens in decision-making through administrative bidirectionality become so concurrent with the political action and administrative institutions in a sort of interactive system of which social control becomes an integral part, and not external or assigned to a specific phase of a procedure to progressive formation³⁹.

Thus, it deals with making the institutions growing that activate the judgment on decisions and decision-makers next to political participation in the decisions of a 'government by discussion'. It because the demand for publicity or transparency and the election of representatives (representative democracy is still the only chance) are the only political rights that citizens continue actually to enjoy (Urbinati, 2013).

³⁵ The Constitutional Court, with the Decision n. 251/2016, declared the illegitimacy of some rule of the Law 124/2015, apart from article 7 (on the base of which was adopted the Legislative Decree n. 97/2016) .

³⁶ NIKOLAOS I THEODORAKIS, *The UNCITRAL Rules on Transparency as a tool against institutional corruption*, (Brighton, Issue 102, Summer 2015), in *Amicus Curiae - Journal of Society for Advanced legal Study*.

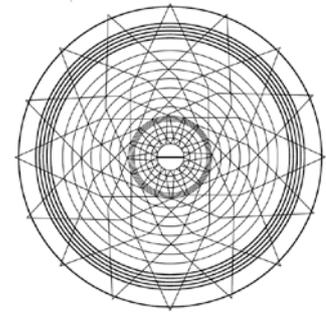
³⁷ Italy has increased number of datasets catalogued in the portal <www.dati.gov.it>: although the portal increased the number of datasets however, the total number of datasets available is still limited.

³⁸ *Open Fesr – Final Report* (July 30th 2014), *Consultazione on line sul Documento di Programmazione FESR 2014-2020*, (Formez PA).

³⁹ DANIEL LATHROP and LAUREL RUMA, *Open Government. Collaboration, Trnsparency and Participation in Practice* (Mountain View, California, 2010).

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* When this work was finished entered into force the legislative decree which incorporated the previous version of transparency regime. After a strong public debate, the decree no. 97/2016 introduce a new type of access named "*accesso civico*" (art.5.2) that Italian doctrine defined "*general*" ("*generalizzato*") (Gardini 2016). After this reform of the civic access we can find a type of access closer to the "*freedom of information act*" model (Carloni 2016, Ponti 2016; Villamena 2016; Savino 2016).

In order to promote widespread forms of control over the pursuit of official duties and the use of public resources and to encourage participation in public "*everyone has the right of access to data and documents held by public authorities, other than those covered by publication in accordance with this decree*" within the limits for the protection of legal interests.

As verified the failure of the Italian approach to transparency, which introduced hundreds of obligations to ensure the publication belief so that the administration would become a "*glass house*" "*the new adheres discipline FOIA model, just the European Union and many liberal democracies*"(Savino, 2016).

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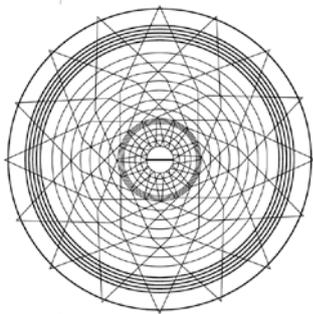
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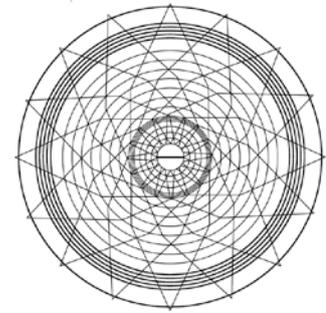
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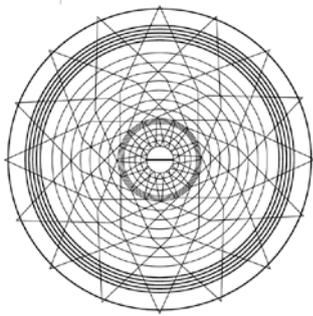
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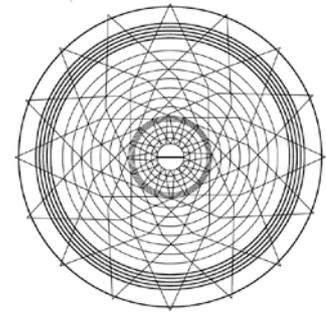
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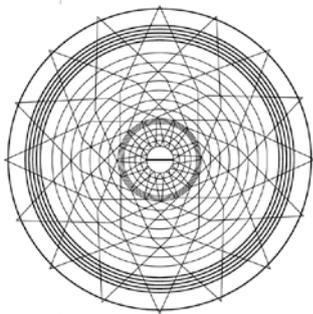
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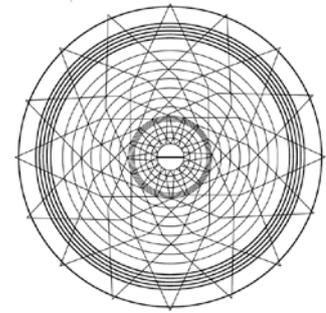
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ОТКРЫТОЕ ПРАВИТЕЛЬСТВО В ИТАЛИИ И РЕГИОНЕ СИЦИЛИИ

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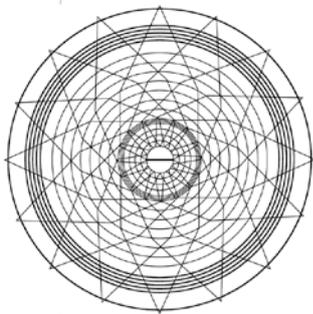
Аннотация:

Интернет, когда он используется вместе с практиками Открытого Правительства, становится необычайно эффективным контролирующим инструментом в борьбе против коррупции, плохой администрации и неэффективности, но и инструментом повышения прозрачности властных институтов, а также развития гражданских практик соучастия.

Полная прозрачность и открытый доступ к данным служат признаком законности и эффективности, что абсолютно необходимо для общественной администрации, так как именно она является новым рубежом гражданских прав и демократии культуры соучастия.

В статье подробно анализируется и доказывается польза нескольких законов, касающихся открытого правительства и принятых в регионе Сицилии в последние годы. На примере Сицилии показано, как Италия успешно внедряет практики открытого правительства.

Ключевые слова: открытое правительство, Италия, Сицилия, прозрачность, соучастие, открытые данные, государственное управление



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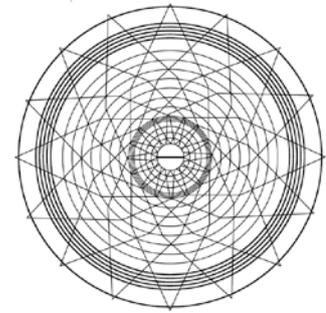
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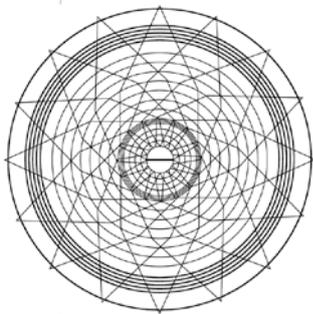
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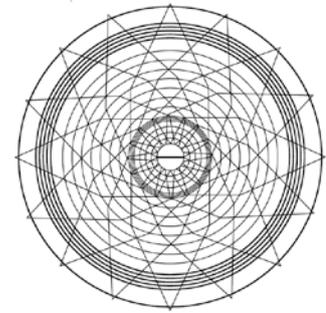
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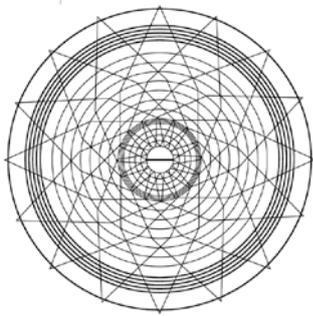
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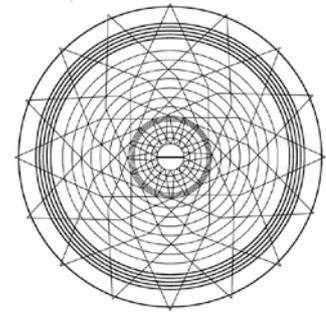
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