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# TRANSPARENCY AS A MEANS OF PREVENTING CORRUPTION IN PUBLIC ADMINISTRATION

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**The paper examines the issue of transparency as a tool for preventing corruption in public administration. The analysis is conducted by analysing the causes of the phenomenon and its main economic and social effects, in the decision-making processes of the public administration. Furthermore, the work focuses on the analysis of the main international legislative experiences and, in particular, the Italian one, which demonstrate the emergence of 'transparency rights' in order to curb administrative mismanagement behaviour (not only offences) and encourage virtuous behaviour.**

**Keywords: corruption, public administration, transparency, prevention, access to information.**

**Corruption in administrative law and its effects.** The notion of administrative bribery refers not only to conduct that may constitute violations of criminal law, but also to conduct that is in any case an expression of *maladministration*: conflicts of interest, clientelism, occupation of public office, 'nepotism' and all conduct involving the misuse of public power.

In the social sciences, the reconstructive analysis, focusing on the characteristics of the violation of legal norms, public interests, performance standards, with respect to the behaviour deemed acceptable for a public representative or official, has led to qualify the phenomenon, in general terms, as a form of abuse of power for private purposes by a public agent attributable to the principal-agent type relationship [1].

In public administration, in fact, there exists a relationship of a public or contractual nature between a subject entrusted with the task of making decisions, the agent, and the principal, the holder of the interests for which the same task has been delegated to the former; this coincides, in the systems of the liberal-democratic tradition, with the binomial made up of the set of members of the public that synthetically form the so-called 'sovereign people' and the political or career administrators chosen through different mechanisms (election, competition, appointment), entrusted with the care of common interests. Inevitably, each agent is also the bearer of private interests that may not adhere to the interests of the principal and from whom he may opportunistically conceal certain information concerning his own activities. Consequently, the delegation of tasks and powers is accompanied by a series of procedures and rules to limit the exercise of discretion, controls, and sanctions of various kinds and magnitudes in the event of non-compliance or poor exercise of the entrusted powers (disciplinary, political, social, administrative, penal, etc.) to defuse this potential conflict of interest.

A corrupt exchange takes place when this relationship becomes trilateral, i.e. when an additional subject is inserted: the corruptor. The latter, by means of bribes, promises and other forms of benefits, induces

the agent to circumvent the constraints imposed by the law: first and foremost, that of not accepting undue remuneration. The bribe-giver thus manages to obtain a series of advantages such as confidential information, favourable decisions or a kind of general protection for his own interests. The official and overt exchange between agent and principal is superimposed by a covert transaction between corrupt agent and corruptor that generates a 'genetic mutation' in the exercise of administrative discretion, leading it to safeguard its own and the corruptor's interests at the expense of public interests.

The normal processes are then replaced by '*a market of authority*' where corruptors seek to alter, to their own advantage, the structure of property rights over resources administered or regulated by the state through the activities of political or bureaucratic agents to whom powers and responsibilities are delegated. Public spending and the power of interdiction and licensing are manipulated in order to allow or disallow certain private activities over others. Artificial alterations in access to public benefits and enjoyment of private resources are produced. Annuity positions are thus created: property rights are attributed according to the outcome of procedures whose outcomes are decided or influenced by agents.

Any sector is permeable to corruption: *public procurement*, the sale or assignment of goods, services or rights to private parties at a price below the market price, *enforcement*, which gives public agents the power to selectively impose costs, expropriate or reduce the value of private rights. In this case, the agent secures a benefit for the addressee of the sanction or punitive measure for him by refraining from exercising his lawful powers [2].

Corruption is, therefore, '*rent-seeking*' where corrupt and corruptor share out, through covert exchange, the property rights to the rent created to the detriment of the community [3].

If we want to dwell on the socio-economic reasons that favour the spread of the phenomenon, it is necessary to refer to three main interpretations: the first economic strand considers the choices of accepting or paying bribes, or advantages of various kinds, as the result of a rational calculation that depends on the costs, represented by the possibility of being discovered and the size of the penalties, and the probable benefits parameterised by a comparison with the available alternatives. The balance is inversely proportional to the opportunities for corruption offered by the political and institutional framework, with factors such as the inefficiency of the judicial system, the sensitivity of voters to possible political scandals, the public intervention of the state in the economy; the degree of transparency in the taking of decisions affecting public interests, the volume and formulation of regulatory texts, the effectiveness of political and administrative controls, and the competitive or collusive attitude of economic and political markets. The main variables can be summarised with the formula C=M+D-T-A: the level of corruption (C) is associated with the presence of monopolistic annuity positions (M) and the exercise of discretionary powers (D), and inversely related to the degree of transparency (T) and of accountability, or empowerment of agents (A), which depends on the circulation of information and the effectiveness of institutional and social controls on their actions [4].

A different socio-cultural approach [5] values variables such as ethical norms, cultural values, traditions, and the civic and state sense of citizens and officials. These factors represent the '*moral cost*' of corruption, the psychological distress associated with breaking the law. In this type of reconstruction, opportunities for corruption are mitigated where moral standards are more robust. The combination of economic benefits and the distribution of moral costs constitute the variants that make up a country's corruption rate.

In recent years, then, a third "*neo-institutionalist*" key to interpretation shows how the relevance of internal dynamics in corruption networks contributes to consolidate informal governance structures and mechanisms that guarantee the fulfilment of corrupt transactions, representing a further catalysing element of covert exchanges that fuels the trust of counterparts [6]. The evolution and stability of administrative corruption is, in essence, a *path depentent* process [7] in which high levels of dissemination of illicit practices lay the groundwork for increasing returns on the same activities in subsequent periods and which gradually becomes systemic.

In addition to 'direct' economic damage, the spread of corruption also entails 'indirect' costs that are less easy to quantify.

One only has to think of the delays in settling administrative matters, the malfunctioning of public apparatuses, the inadequacy, if not futility, of certain public works. In particular, there is an extraordinary rise in the cost of major works.

In a more generalised perspective, corruption undermines market and business confidence, leading to a loss of competitiveness: operators choose to invest in countries that provide greater guarantees in this respect.

In this regard, it has been calculated that each point drop in the ranking drawn up annually by the international non-governmental organisation Transparency International results in the loss of sixteen per cent of investments [8].

For example, according to Transparency International, in 2023, Italy ranks fifty-sixth out of one hundred and eighty countries analysed, while Ukraine is currently ranked one hundred and fourteenth [9].

If, then, one proceeds to a more detailed analysis of the impact of corruption on businesses, it can be seen that a low level of corruption is usually associated with regulations that favour the establishment of new businesses and a low average time to start a business, while excessively lengthy bureaucratic procedures are generally associated with high levels of corruption. As for the negative effects of corruption, similar assessments can be made regarding the cost of capital, the level of competitiveness and, more generally, the quality of the ***business environment*** [10]. A World Bank study conducted on a large number of countries shows that companies that have to deal with a corrupt public administration and have to pay bribes grow on average almost 25 % less than companies that do not face this problem. What is even more worrying is that it is small and medium-sized and younger companies that are most severely affected [11]. The World Bank Report, moreover, shows that small companies have a sales growth rate more than 40 % lower than large ones (small companies are defined as those in the lowest 25 % of distribution: large ones the highest 75 %).

Certainly no less important, even if not calculable in economic terms, are the further damages that affect the rate of trust of citizens in the legality and impartiality of the action of public apparatuses and that determine a progressive lowering of the social disvalue of the phenomenon. Moreover, the habit of resorting to these practices determines the alteration of free competition and the concentration of wealth in the hands of those who accept the collusive logic. In such an environment, a sort of 'Darwinism of corruption' is created: those with greater scruples, or lesser capacity to work in such a polluted political-administrative terrain, are destined to be eliminated from the game to the advantage of the more colluding operators.

The technological process is also compromised: companies have more incentive to invest in bribes than in innovation.

**Administrative transparency as a means of preventing corruption in public administration**. Traditionally, in State legislations, the problem of preventing corruption in public administration has always been tackled with the traditional 'weapon' of criminal repression. In other words, in order to combat corruption, States have always intervened at the already 'pathological' moment of the commission of offences, without bothering to introduce instruments capable of deterring and preventing the commission of such offences.

However, the evolution of political relations in the international sphere has led to the emergence of a consensus towards a right to administrative transparency, which was only rooted in certain national spheres.

In the mid-1980s, the model of transparency took on a clear regime connotation: *Glasnost*, promoted by Michail Gorbačëv in the run-up to the dissolution of the Soviet Union, became a process that delegitimised the Soviet regime itself through opacity and inaugurated a transformation in a democratic direction. European democratic administrative arrangements, the offspring of modern state bureaucracy and competition with the neighbouring Soviet regime, are also being pushed – in a phase of world equilibrium that seemed unipolar – towards the US Freedom *of Information Act* (FOIA) model. In this case, the direction of the reforms is the administrative transformation of democratic regimes that have historically developed along different trajectories, and the intention is to bring them closer to a common model.

Transparency has therefore been assigned a function of preventing administrative corruption, on the basis of the underlying assumption that by illuminating what is obscure, by making it visible, illicit behaviour is prevented. Hence, a 'multifunctional' transparency, a flexible instrument at the disposal (at the same time) of democratic requirements, widespread control, and guarantee of rights. In the perspective of widespread control to guarantee the legality and correctness of public action, the basic idea is basically that there is a sort of 'inverse relationship' between corruption and knowability: where there is maximum transparency, maximum enlightenment, corruption will be minimal, and so on [12].

This function of transparency became a common principle at international level at the 2003 Conference in Merida, Mexico (at which the 2003 UN Convention against Corruption was signed), which identifies it as one of the main tools for preventing corruption.

Specifically, Art. 9 requires the contracting states to adopt transparency measures with regard to the conclusion of public contracts and the management of financial resources, while Art. 10 calls for the dissemination of information "*enabling users to obtain, where appropriate, information on the organisation, functioning and decision-making processes of the public administration*".

In this sense, the dissemination of information held by public administrations also has the advantage of a high dissemination capacity. The scandals that run through the increasingly weak state systems exacerbate citizens' disaffection and increase widespread support for a project of administrative transparency that goes hand in hand with the fight against corruption. With this meaning, on the one hand, support for the ideal of administrative transparency has the opportunity to spread, on the other hand, the objective becomes more specific and circumscribed, even though sociological and non-legal definitions of corruption may dilute it.

Over the last thirty years, therefore, almost all liberal democracies have introduced a second generation of transparency rights, in a democratic function, through *freedom of information acts*, modelled, as outlined above, on the US model.

Specifically, the Freedom of Information Act (FOIA) is the Freedom of Information Act that was enacted in the United States on 4 July 1966 during the term of President Lyndon B. Johnson. The law imposed a set of rules on public administrations to allow anyone to know what the PA does, through total or partial access to classified documents, without the need to prove an interest in knowing the requested information (e.g. to defend oneself in a court case).

In this wake, even in Europe, the rules on "procedural" transparency have gradually been joined by laws in which the *right to know*, understood as an indispensable tool for the proper functioning of a democratic order, has become a fundamental right, to be guaranteed to everyone, with the sole limitation of confidentiality requirements related to certain public and private interests, such as, for example, information concerning military secrets or trade secrets.

After the early affirmation of the '*liberté d'accés aux documents administratifs*' as '*droit de toute personne à l'ìnformation*' in France (1978), laws modelled on Foia were adopted in the Netherlands (1980, 2005), Portugal (1993), Ireland (1997), the United Kingdom (2000), Switzerland (2004), Germany (2005) and in many Eastern European countries, as well as by the European Union (2001).

In the comparative context, therefore, innovations in access to documents emerge (reactive transparency), as well as new duties for public administrations to disseminate information, documents and data (proactive transparency). A right to know is generated (*right to know*) of which anyone is the bearer (*any person*), as distinct from the right to information motivated by a specific legal situation of the interested party (*need to know*). As will be seen, in the Italian case the accessibility process has seen two new legal institutions added over time to the twentieth-century documental access (*need to know* for a specific legal situation): civic access (a right to react if the proactive transparency of PAs is lacking) and generalised civic access (*right to know granted to any person*), under the influence of the *Freedom of Information* Act.

In other words, with these laws, a broader vision of administrative transparency has been affirmed: the citizen does not only have the right to see the information that concerns him, but becomes an 'active operator', an observer and witness of the good performance of the administration. The calls for accountability

of public activities and their control by the citizen are related to the aim of curbing administrative mismanagement (not only crimes) and to encourage virtuous behaviour. Conceiving administrative transparency as an activator of the ***accountability*** principle, accountability would not only unveil officials' betrayals, but also prevent them, nurturing an attitude of dedication, and generating, over time, a relationship of trust.

**The means of protection of administrative transparency in the Italian legal system**. In the Italian case, the accessibility process has seen two new legal institutions added over time to the twentieth-century documental access (***need to know*** for a specific legal situation): civic access (a right to react if the proactive transparency of public administrations is lacking) and generalised civic access (***right to know*** granted to ***any person***), under the influence of the US *Freedom of Information Act*.

The institution of 'classic' access to administrative documents constitutes an indispensable tool to ensure administrative transparency, i.e. the possibility of a check on the compliance of the ***agere publicum*** with the principles of good performance and impartiality under Article 97 of the Constitution.

In reality, transparency is a canon that was affirmed rather late in positive law, probably due to the fear that, through ostention, a power of indiscriminate verification would be recognised ***erga omnes***, with obvious repercussions on the efficiency and speed of the 'administrative machine'. In other words, the risk was that of subjecting administrative power to a generalised control, even by subjects not directly affected by the exercise of the power itself.

This reluctance has progressively disappeared, 'under the blows' of an incessant legislative work, eminently characterised by a perspective of fruitful dialogue between the bureaucracy and the administered. In fact, the centrality in our legal system of the issue inherent to the relationship between private citizens and the Public Administration is now unquestionable, and in recent years it has undergone a veritable Copernican revolution, implemented with the introduction of essential institutes and figures such as the person in charge of the procedure, the publicity of administrative acts, the justification of measures, the publicity of the meetings of collegiate bodies and, last but not least, access to the acts.

This evolution has affected, as a consequence, the position of the citizen, who from being a passive spectator to the originally unilateral activity of the Public Administration has become the active and central fulcrum of the ***agere publicum***, whose ***modus operandi*** is now characterised by a tendency towards public-private parity and reflects a new conception based on transparency, from the Latin ***trans parere***, i.e. letting citizens see the ***res publica***, so that they can know the reasons behind administrative measures. The outcome of this evolutionary path has led to elevating access to administrative documents to a true 'social right' of the citizen vis-à-vis the Public Administration. Moreover, recently, the institution of access has taken on a further connotation of public interest, aimed at affirming a 'widespread control of legality' and the fight against corruption in the Public Administration.

The substantive regulation of the right of access is contained in Articles 22 et seq. of Law No. 241 of 7 August 1990, amended by Law No. 15 of 11 February 2005 and Law No. 80 of 14 May 2005. Before the introduction of the Administrative Process Code, this law also contained the procedural provisions.

Article 22 of Law No. 241/1990 states that the right of access means the right of interested parties to inspect and take copies of administrative documents. It is exercised by extracting copies of administrative documents (see Art. 25(1) of Law 241/1990). Subsequent paragraph 2 of Article 25 specifies that the request for access must be reasoned, so that the receiving Administration can concretely assess the existence of the interest in the protection of legally relevant situations, which is an essential prerequisite for access to administrative documents. If the request is not made within thirty days, it is deemed to be refused (see Article 25(4) of Law No. 241/1990). Paragraph 1 of Article 24 provides for a series of limitations to the exercise of the right of access in relation to requirements of secrecy and confidentiality concerning certain administrative documents and placed both in the public interest and in the interest of third parties.

Legislative Decree No. 33/2013, the so-called Consolidated Law on Transparency of Public Administrations, subsequently reformed by Legislative Decree No. 97 of 25 May 2016 (the so-called Transparency Decree), introduced the institutes of simple and generalised civic access into the system.

The first (prior to the 2016 reform) is regulated in Article 5(1) of Legislative Decree No. 33/2013 and provides for the obligation of public administrations to publish certain documents, information or data, with the related right of anyone to request the same, in cases where their publication has been omitted.

The second, introduced by the 2016 reform and inspired by the so-called FOIA (Freedom of Information Act, of US matrix), is governed by Article 5(2) of Legislative Decree No. 33/2013 and allows anyone to access the data and documents held by the Public Administrations, in addition to those subject to publication, even in the absence of a substantive legitimising position.

In Italy, therefore, there is a systemic coexistence of three models of access to documents held by public administrations (and equivalent).

These institutions are equally ordered and, in their reciprocal relations, each operates within its own sphere, without absorption of one case into another and without tacit or implied repeal by the subsequent provision in time.

In order to align the procedural provisions with this new set-up, Article 52(4)(c) of Legislative Decree No. 33/2013 amended the access procedure, introducing some provisions aimed at extending the use of this procedure also for "the protection of the right of civic access related to the non-fulfilment of transparency obligations", as stated in the current text of Article 116(1).

Civic access is ontologically different from 'traditional' access.

First of all, a widening of the mesh of subjective legitimacy to access should be highlighted, since the institution of civic access (both simple and generalised) guarantees a much broader ***erga omnes*** protection, without the need for a prior demonstration of the ownership of a legally protected situation, as required for access under Law No. 241/1990.

In addition, there has been an extension of objective legitimacy (especially after the 2016 legislative change), since the protection can be enforced by anyone without the prior demonstration of a personal, concrete and current interest in connection with the protection of legally relevant situations and without the burden of justifying the request to that effect.

For the sake of completeness, it should be noted that the general legislation is flanked by specific disciplines regulating the right of access in certain areas, such as the matter of public contracts (see art. 53, legislative decree no. 50 of 18 April 2016), in environmental matters (see legislative decree no. 195 of 19 August 2005) and in the matter of access for councillors of local authorities (see art. 43, paragraph 2, legislative decree no. 267 of 18 August 2000).

**Conclusions**. Administrative corruption manifests itself when "*the public function is performed not in the interest of the public, but in the interest of private individuals, in order to ensure their gain*" so that administrative power "*is no longer perceived as an impersonal and neutral power, but rather as a partisan tool*" (S. Cassese). This phenomenon has devastating effects on almost all aspects of public and private life, undermining the economic, social and political development of a country.

In this context, transparency is the most effective tool to fight corruption and rebuild the relationship of trust between citizens and institutions, in a path to protect democracy. The crisis in which the latter finds itself does not stem from technological development per se, but from the use that has been made of technology, seen as a form of de-empowerment of power and reduction of participation. On the contrary, in order to revitalise the democratic system, it seems inescapable to bring the organisation and actions of the public administration out of opacity, since knowledge is a necessary condition for the conscious exercise of citizenship rights and the full realisation of the human person within society.

In other words, administrative transparency constitutes an instrument of rebalancing in the power relationship between citizens and administrators of public affairs, attributing to the former – to the benefit of democracy – a new resource of power, of the information type.

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### ПРОЗОРІСТЬ ЯК ЗАСІБ ЗАПОБІГАННЯ КОРУПЦІЇ В ДЕРЖАВНОМУ УПРАВЛІННІ

**У статті розглядається питання прозорості як інструменту запобігання корупції в державному управлінні. Аналіз проводиться за допомогою аналізу причин виникнення цього явища та його основних економічних і соціальних наслідків у процесах прийняття рішень в органах державного управління. Крім того, робота зосереджена на аналізі основного міжнародного законодавчого досвіду, зокрема, італійського, який демонструє появу "прав на прозорість" з метою стримування адміністративних зловживань (а не лише злочинів) та заохочення доброчесної поведінки.**

**Ключові слова: корупція, державне управління, прозорість, запобігання, доступ до інформації.**