

PARTICIPATION IN RULEMAKING IN ITALY*

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Abstract

In Italian law there are no general statutory provisions requiring participation by interested parties in rulemaking procedures. However, specific provisions requiring various forms of participation for certain kinds of procedures or authorities are increasing in number. After describing some relevant features of the Italian legal system and accounting for the legal regime of rulemaking, this paper provides a short overview of the relevant law, and considers the reasons for the lack of general statutory provisions and for the rise in participation practice. In conclusion, it focuses on some recent developments that could restrict or jeopardize participation in rulemaking.

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1. The administrative nature of rulemaking.

As in other European countries, the principle of division of powers is not fully operational in the Italian legal system. As for rulemaking, however, its inferences are quite relevant, as they produce two clear-cut distinctions: the first is the distinction between statutory law and administrative acts; the second is the

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one between judicial functions and administrative functions. On both distinctions, administrative rulemaking lies entirely on the administrative side. Firstly, regulations issued by administrative bodies (including the Government itself) are deemed to be administrative in nature, unlike the acts issued by the Parliament and by the Government in their exercise of legislative powers. Secondly, the Constitution firmly states that the judicial review of any act of a public agency may never be prevented nor limited: public agencies decide, courts review their decisions.

These features produce important effects on rulemaking. On the one hand, the legal framework of administrative regulations is the one provided by the law for administrative acts, although with some important variations. On the other hand, such regulations are subject to judicial review like any other administrative act, with a few procedural peculiarities arising from the structure of the administrative court procedure. Courts are bound by legislative acts, but they may void administrative acts, including regulations issued by agencies. Remarkably, as administrative procedures are conceived as being different in nature from legislative and judicial ones, their general rules reflect neither democratic concerns, typical of legislative activity, nor the adversarial design of judicial proceedings.

Two further remarks are necessary. Firstly, however strict the distinction between legislation and administration may be, rulemaking questions the distinction between lawmaking and law enforcement. The difference between "*regolamenti*" (regulations) and "*atti amministrativi generali*" (general administrative acts) is meaningful in this regard. The former are considered "*atti normativi*" (regulatory provisions) and are included among the sources of law, they thus participate in the corresponding legal framework: they must be complied with by other administrative acts, their infringement is a breach of law, the court is required to know them. The latter are simple administrative acts, even if they are addressed to many people or to all citizens. The difference between the two types is often very uncertain or left to the decision of the issuing authority, which may often freely select the procedure to be followed.

Secondly, Italian public law is quite "court-oriented". Unlike other countries, where the principle of the division of powers gives rise to limitations to court powers on administrative

decisions, the Constitution establishes the courts as the paramount, if not only, instrument for the protection of individuals from the administrations. The protection of individual rights, which can be granted by administrative authorities – including independent ones – is never deemed to be enough: in opposition to their decision, one can always ask for judicial review. Moreover, the Constitution prohibits the establishment of special courts different from those envisaged by the Constitution itself. Therefore, the distinction between judicial authorities and administrative ones is very strict. As for rulemaking, this means that there are no limits to the scope of judicial review of regulations and general administrative acts.

2. Participation in rulemaking: an overview.

Apart from the said provisions, the Italian Constitution does not say much about administrative action. Issued in 1948, when the principles of administrative procedures were not very “trendy” in Europe, the Constitution does not state any as such and does not regulate administrative rulemaking either. The only relevant provision, introduced in 2001, concerns the distribution of the power to issue “*regolamenti*” (the regulations that are legal sources) among national, regional and local authorities.

With the lack of constitutional provisions, one has to refer to the ordinary legislation. As opposed to the original project that produced it in 1990, the general statute on administrative procedure does not provide for participation in rulemaking procedures. In fact, it does put forward a number of provisions concerning participation by interested parties: they have to be informed when the procedure begins, have the right to access files, and may submit written statements and documents. However, the statute explicitly excludes the procedures for the issue of regulations and general acts from the scope of these provisions. Therefore, in general terms, participation is granted in adjudication and not in rulemaking. This exclusion is meaningful in terms of the concept of participation embraced by the general statute: participation is a tool for the protection of individuals and also a channel for the cooperation of citizens in the actions of agencies, but it is not an instrument of democracy, nor a way for citizens to take part in administrative decisions.

Participation in rulemaking is therefore not a general principle of the Italian law. It is, however, a general principle adopted by a number of Italian regions, which have their own general statutes on administrative procedures. Moreover, in national law, participation is the rule for some types of rulemaking procedures and for specific sectors – forms of participation are established both in statutes issued before 1990 and in statutes issued later.

As for regional law, after the constitutional reform of 2001, it is still unclear to what extent Parliament may set out general rules on administrative procedures and to what extent regional parliaments may set out different rules. It is not disputed, however, that regions may provide a general statute and that the latter can provide for increased protection of interested parties, even in terms of increased participation; some regional statutes do, with provisions contained either in their general statutes on administrative procedure, or in other statutes. The main example is the Tuscan statute issued in 2007, which both recognizes in broad terms the right to participation in regional policymaking, establishes a regional authority for the protection and promotion of these rights, requires a public debate for important projects, and sets general rules for regional rulemaking and planning.

As for pre-1990 statutes, the main example is the land planning act, issued in 1942. It entitles all citizens to access planning projects and to submit written statements, and allows for stronger forms of participation by interested parties. As an example, the provisional urban development plan of a town has to be published, and anybody may submit “observations”; similarly, real estate owners may submit “oppositions” against the provisional detailed plan for their area. Of course, these provisions appeared very modern in 1942, but show their limits today: participation may only take place in written form and is allowed only at a very advanced stage of the procedure, thus it is quite unlikely to substantially affect the administrations’ decisions. These flaws are however corrected by the statutes of many regions, which use their legislative power in this field in order to introduce different instruments of participation, such as: “planning conferences” in which private parties are admitted; the publication of early projects, open to citizen contribution; statement of reasons, in which the agency must account for the

agreement or rejection of the proposals of interested parties; and various forms of agreements between the proceeding agency and the interested parties. Moreover, local authorities often adopt further mechanisms of participation, which are regulated by specific regulations (this happens for example in the largest cities, such as Rome).

As for post-1990 statutes, participation in rulemaking is largely the outcome of the influence of global or European law. This is the case, for example, in environmental law, where former Italian statutes provided for access to information, but not for participation in administrative procedures. Many recent statutes, on the contrary, offer many forms of participation in such procedures: a good example concerns strategic environmental assessment. However, these forms of participation are often simply mentioned by legislation, without any specific rules or procedures, and they are not mandatory (this is the case, for instance, for public enquiries).

The main field of participation in rulemaking, however, involves the regulatory powers of independent regulatory authorities, which in the last decades spread across Italy as well as other European countries. Some of them – especially the ones established lately – have almost spontaneously set quite good rules on participation. For example, on the basis of a vague provision of a wide-ranging statute on public utilities, the two existing authorities (one for energy, one for telecommunications) developed sound rules of procedure, which make intensive use of the notice and comment format, distinguish the proceeding office and the decision-making one, and allow for hearings with the interested parties. Other independent authorities – mainly the older ones supervising financial markets – did not initially embrace the principle of participation and the other principles of good administration. Some of them even managed to be legally exempted by the general statute on administrative procedure: this is the case for the Bank of Italy and for the securities market Commission (*Consob*), to which that statute used to apply only “as far as compatible”. These provisions, however, have been repealed, and these authorities were forced to implement those principles by a 2005 statute, which set quite strong rules on participation: transparency, regulatory impact assessment, consultation of the representatives of regulated industries and consumers unions.

Overall, regulation in some of the most important sectors of the economy is now subject to rules of participation which often take the form of the notice and comment process: the rulemaking authority is asked to publish a project, any interested party may submit observations, and the authority is required to take them into account. Any interested party may challenge a regulation or general act in front of an administrative court. If this happens, the court will review compliance with procedural law and examine the statement of reasons, in order to check that all the relevant contributions have been considered.

Apart from these special provisions, however, rulemaking does not yet require participation. There are no participation requirements in Government rulemaking, including in those areas intensively affecting citizens such as health care; nor for central public bodies, such as those operating in the social security sector; nor for local government bodies, which have relevant regulatory powers. Very important regulations, such as the general regulation on public procurement and the one on local utilities are going to be issued in the coming months, without any chance for participation by private parties.

The picture, however, is not yet complete, as it shows only the law in theory. The law in practice is quite different and shows many different forms of participation, which is however often very informal and scarcely regulated. It is the consequence of the pervious nature of the Italian administration, which was very open to the influence of interested parties and organizations. Many important administrative decisions, often regulatory in nature, are made after informal but intensive negotiations with the regulated industry or professional workers trade unions. Relations between agencies operating in specific sectors and the corresponding regulated industry unions have always been intense. As an example, the Government would not make a decision concerning state aids to carmakers without a thorough consultation of the main national producers. Similarly, the Mayor of Rome would never make a decision concerning taxi licences or taxi fares without having previously secured consent from drivers. Of course, an informal and unregulated participation brings about a greater danger of corruption and the risk of disproportionate interest representation. Both risks are relatively strong in the Italian administration.

The reality of the Italian administrative system, furthermore, also manifests other forms of participation by interested parties, other than procedural participation. In the seventies, scholars used to distinguish between procedural and “organic” participation, the latter being the appointment of interest representatives as members of public bodies, charged with administrative tasks linked with corresponding interests: for example, professors and students in bodies operating in the Ministry of Education and in the universities, industry representatives in bodies operating in the public works sector, trade union officers in bodies operating in several areas of the economy. In some cases, the whole public body entrusted with administrative tasks in a certain area, is composed of interest representatives: this is common, for example, for many public bodies operating in the social security sector. In other cases, administrative tasks are assigned to ruling bodies composed of representatives elected by the professionals: this is the case of many professional associations (lawyers, doctors, engineers and many more), to whom the law grants important regulatory powers. In all these cases, procedural participation would be redundant.

These other forms of participation undoubtedly have flaws as well. Firstly, they are permitted only for selected categories, such as those practising the most esteemed professions: this explains the origin of the corresponding public professional associations, which are the most ancient and powerful. Secondly, when professional bodies are charged with the pursuit of public interests, it is always possible that they may be biased towards professional interest rather than public interest: many people are of the advice that this happens frequently with public professional associations. Nevertheless, this diversified participation has often largely compensated for the lack of procedural participation and has altogether secured good channels of communication between public authorities and civil society.

The environment arising from the absence of general rules, from the variety of specific ones, and from the availability of several informal and alternative instruments of participation, is a mixed one. This environment reflects the general attitude of Italian legislation towards participation, which is an ambiguous one. This attitude displays a tension between the principle of impartiality,

which requires administrative neutrality and opposes interest representation, and a concern for democracy, which requires a greater participation by concerned citizens in procedures affecting their interests. One could say that despite the absence of general rules, there is much participation in administrative rulemaking. However, this participation is usually directed at defensive purposes and at collaborative ones, but not at democratic purposes: interest representatives are allowed and encouraged to express their point of view, in order to both protect professional or class interests and provide useful information to the administration. But their role is not usually conceived as a way for citizens to take part in the performance of administrative tasks and to contribute to the pursuit of public interest.

One last remark – what has been reported so far shows a frequent gap between theory and practice in participation. In some cases, the law has provided certain forms of participation in rulemaking and has introduced new mechanisms, such as the public inquiry, but these provisions were not implemented because of political and bureaucratic opposition and because of the fear of impartial procedures and independent officers. In other cases, the law did not provide for participation, but local authorities and national agencies however laid down solid rules of participation (as in the land planning sector). This difference between statute provisions and administrative reality is quite typical of the “Italian style”: in theory Parliament can do anything, but in practice the administrations’ autonomy is great.

3. Arguments for and against.

A certain hostility towards participation can be traced back not only to the principle of impartiality, but – more generally – to the traditional way of conceiving democracy, administration, and relations between citizens and public authorities.

Participation in rulemaking procedures is an instrument of “direct democracy”, a channel for communication between public administration and society. This kind of democracy has never been paramount in the Italian law, not even when the Fascist regime established the corporative system, intended as a tool for confrontation and synthesis of the interests of diverse professional categories. It was the outcome of an intense cultural debate on the

inadequacy of the political system and on the need for more representation of interest. The present Constitution carries a reminder of that system in the provision of the National Council on Economy and Labour, a body that has always suffered substantial irrelevance within the institutional landscape. In fact, the Constitution and the political and scholarly mainstreams have given much more importance to indirect democracy and to political representation: politicians were conceived as the necessary intermediaries between the administration and citizens, because they can legislate on administration and because ministers can address the action of the agencies.

One of the consequences of the emphasis on political representation is the intrusiveness of the law: parliamentary bills and governmental law decrees, constituting primary law and being mandatory on administrations, have often been used to establish very detailed regulations, even in technical matters. This reduces the scope of administrative rulemaking and therefore scales down the problem of participation. In fact, participation is still ensured, but at lawmaking level and in a very informal fashion: ministerial cabinets and parliamentary commissions are excellent venues for negotiations. This system, of course, does not ensure transparency in participation and also fuels legislative inflation, which is very high in Italy.

Another consequence of the emphasis on political representation is the concentration of rulemaking powers in the hands of the national Government and regional governments. Even when the rules are set at administrative level, this is often the highest administrative level, as regulatory powers are conferred to Government as a whole or to one or more Ministers: these are too high-ranked, too far from citizens, and too closely incorporated in the political circuit to be open to participation by interested parties different from powerful industries.

Consistent with this concept of democracy is the concept of administration that has long prevailed in research and in institutional thinking. Public administration was conceived as a mechanical instrument for the execution of the law and of political decisions. In accordance with this view, the duty of secrecy was considered a general principle and there was little room for transparency, which is a prerequisite for participation. There was an unrealistic faith in the ability of administrative agencies to

obtain all relevant information without consulting the regulated parties. The authoritarian attitude of administrative law, which held sway for a large part of the twentieth century, offered a bilateral, adversarial view of relations between agencies and citizens. Finally, in harmony with the said concepts of democracy and administration, and as a consequence of the strict separation between judicial authorities and administrative ones, the protection of individuals was always conceived mainly as judicial protection.

The history of the national statute on administrative procedure provides further evidence of these tendencies. The statute, issued in 1990, was later amended several times, but Parliament never considered introducing instruments of participation for rulemaking. It has strived to adjust and improve other parts of the statute, but not the ones concerning participation. Among the provisions that were more frequently amended there are those relating to the "*conferenza di servizi*" ("services conference"), an instrument aimed at forcing the different authorities involved in the same procedure to come to a decision. This shows that the main concern of Parliament is coordination of public parties rather than participation by private parties.

Participation in rulemaking has also been hindered by some factors of a less theoretical nature. One is the question of time and money. The urban development plan of Rome is a good example: it was preliminarily published in 2003, interested parties brought 10,000 observations, it took three years to assess these observations, the plan was finally issued in 2008, and this was only the beginning of the judicial review process.

Another practical reason against participation is peculiar to the Italian administration, and it is its resemblance to a weak giant. It is often weak in its relations with political bodies and also with private organizations. But it is large, it performs many functions, and it is accustomed to performing even more of them as public bodies and public companies were the main or exclusive providers of many services of general economic interest, such as energy, telecommunications and air transport. In these areas, there was no need for participation by regulated industry in rulemaking, simply because there was no regulated industry separate from the State: the regulators and the regulated were the same subjects. In this situation, consumer participation was not promoted either, as

relations between consumers and providers were one and only with relations between citizens and the State: political bodies were the ones expected to protect consumers from public utilities, and were entrusted with regulatory powers. Furthermore, consumer participation was also frustrated by the lack of adequate consumer associations, which developed late and slow. Only business associations and trade unions had an early development and were frequently involved in rulemaking procedures.

Both theoretical and practical reasons against participation are however losing ground. The concepts of democracy and administration have evolved. Representative democracy is still paramount, but various forms of direct democracy have been introduced and are considered a necessary completion and correction of the political circuit. Mainstream political and legal thinking recognize that democracy has to do not only with counting preferences, but also with debating and transforming preferences.

As for the concept of administration, the authoritarian attitude of administrative law has given way to its liberal attitude, which emphasizes the instruments for the protection of individuals. Non-judicial instruments of protection, and dispute resolution, have developed. Recognition of the plurality of the administrative system and appreciation for public-private cooperation brought about a less adversarial concept of administrative law. Law scholars recognize that the administration represents not only the execution of law, but also decision-making and interest assessment. Transparency is more and more a general principle of administrative law. Awareness that agencies are open to the influence of interested parties advocates for general rules on open participation.

Rulemaking, in particular, has changed in several ways. First, it is less and less centralized and assigned to the national Government. A constitutional provision, as mentioned before, establishes regional governments and administrations as ordinary rulemaking bodies. As explained before, in many sectors such as services of general economic interest and financial markets, rulemaking powers are assigned to independent regulatory commissions. These regulatory commissions, which are not politically accountable and have an open-ended mission, often foster the participation of interested parties in order to consolidate

their legitimacy and to strengthen their position within the institutional system. In many fields, regulatory powers grow in scope and nature, sometimes taking the place of adjudication (for example, for general authorisations in the field of telecommunications), as well as in complexity, making it all the more important to obtain information and preferences from interested parties. Rulemaking procedures evolve too: regulatory impact assessment is more and more required by the law, calling for more accurate preliminary examinations.

Finally, the practical reasons that used to hinder participation in rulemaking are also vanishing. Simpler participation rules may now be introduced for the most complicated procedures. Sectors previously subject to public monopolies are now open to free competition, public utilities were privatised and now require regulation by public authorities, while consumers need to be protected and to have a voice in regulation. Consumers associations have spread and grown.

4. The evolving scope of rulemaking.

All these developments encourage procedural participation in rulemaking, which is actually spreading in various fields. Still, further developments may restrict or jeopardize its spread. These developments are connected both with the attitude of legislation and with the evolution of administration. At both levels, a tendency to escape the ordinary legal framework may be detected.

As for legislation, the balance between statutory law, which binds administrations, and administrative regulations issued by the administrations, is always insecure. Many decisions are made through statutes, exactly to avoid complex administrative procedures that would grant participation and effective controls. A fair example is the recent approval of the agreements between motorway management companies and the public body in charge of their supervision. These contracts, which regulate very important issues such as tolls and improvement works required from the companies, should be approved by specific government bodies. When the proposed agreements were rejected, they were then approved by Parliament through a statute: the law was used in breach of the law. Drivers had no chance of expressing their views.

Another way to escape the ordinary legal framework that was very common in the past months is the use of emergency powers. Since ordinary procedures are regarded as slow and intricate, extraordinary powers are used in many situations that are not at all alarming, nor unpredictable. The number of "*ordinanze di urgenza*" (emergency orders) issued by the Government has dramatically risen. The national Agency for civil protection, in charge of emergencies, is entrusted weekly with new powers: therefore, many more decisions are made, and much more money is spent, through quick and simplified procedures that do not allow for participation.

The emergency model is spreading also across the administrative organization. A very recent statute has established a civil protection company, owned by the government, set to support the Civil Protection Agency. Of course, it will act as a private company and will not be bound by the administrative procedure statute. Publicly-owned companies were sometimes established in order to organize important events, such as Olympic or football games.

More generally, among the main trends in present administrative law, the use of private law models for public administrations and the assignment of public functions to private subjects should be mentioned. These trends certainly have positive aspects, but they make it more difficult to ensure participation, although the law and the courts often require these private subjects to apply the general principles of administrative procedure, including the principle of participation.

Overall, participation in rulemaking is expanding in the Italian public administration, but the public administration affected is somehow shrinking.