

PARTICIPATION IN ADMINISTRATIVE PROCEDURES: LESSONS
FROM THE SPANISH EXPERIENCE

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Abstract

This paper examines the legislative regulation of administrative procedures in Spain and Italy. It focuses on citizens' intervention in administrative procedures. Although the Italian and Spanish administrative systems have several common features, due to the influence of the French model of administration, they differ with regard to both the right to be heard in individual procedures and participation in rulemaking procedures. From the first point of view, the Spanish legislation is not only less recent, but it also makes different choices, to the extent to that it protects less the interests of those who are not formally involved by the procedure, but provides a specific instrument, the "*informacion publica*". The main difference, however, regards rulemaking procedures. Unlike in Italy, these procedures are characterized by participatory tools, as a consequence of a political choice made by the Constitution and confirmed by both legislation and institutional practice. This does not imply, however, that participation in administrative procedures is always connected with the democratic principle. Rather, it is often connected with the Rule of law, though a clear-cut distinction may not be drawn easily.

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I. Introduction

In discussing Prof. Caranta's excellent paper and presentation, I will try to stimulate dialogue on one of its central points: whether participation in administrative procedures is always connected with the democratic principle? A number of discussion questions come to mind. Does participation always reflect, using his words, a "less State-centered" and a "more bottom-up," market-friendly approach to administrative law, which gives "a bigger place to civil society in the overall governance" system? ¹ Is not participation typically just a requirement of the principle of the rule of law (*Rechtsstaat*)? When is participation related to democracy and when to the rule of law?

From my point of view, the Spanish experience suggests answers to these questions.

In my short presentation I will first make a brief comparison of the Spanish and the Italian regulation on participation in administrative procedures. After that, I will focus on the discussion questions and will make some general remarks on the main functions of procedural participation.

II. Main differences between the Spanish and the Italian regulation on participation in administrative procedures

Spanish and Italian Administrative law have many things in common, since both of them have been historically strongly influenced by the French system – by what Prof. Caranta called, "the traditional top-down Franco-Napoleonic pattern of public administration." ² However, these systems present significant differences with regard to the participation of citizens in administrative procedures. Particularly different are the *historical evolution* of the right to be heard in individual decision-making procedures and the *current* regulation of participation in rulemaking procedures. I will consider these aspects separately.

¹ R. Caranta, *Participation in administrative procedures: achievements and problems*, in this volume, at 1-3 of the draft version.

² R. Caranta, *Participation in administrative procedures: achievements and problems*, cit. at 1, 1.

1. The right to be heard in individual decision-making procedures

The right of interested parties to be heard in *individual* decision-making procedures that might affect them seems to have a longer tradition in Spanish administrative law. The old Administrative Procedure Act of 1958 (*LPA*)³, under General Franco's dictatorship, already recognised this right to holders of subjective rights and even to holders of individual interests that might be affected by the decision.⁴

Twenty years later, after Franco's death, Art. 105.c of the Spanish democratic Constitution of 1978 reinforced this right when it stipulated – at the highest normative level – that:

“The law shall regulate:

c) the procedures for the taking of administrative action, guaranteeing the hearing of interested parties when appropriate.”⁵

Enacted in 1992 and still in force today, the new Common Administrative Procedure Act (*LRJPAC*)⁶ adopted the regulation of the right to be heard contained in the old *LPA* and improved it in some aspects. Its major improvement was to extend explicitly the right to be heard to the holders of *collective* interests⁷. Although there are many technical and terminological differences between the regulation of participation contained in this Act and in the Italian Act on Administrative Procedure⁸, they both lead to similar practical results.

³ *Ley de procedimiento administrativo* of 17 July 1958.

⁴ Art. 23, 83 and 91 *LPA*.

⁵ According to the official translation of the Spanish Constitution available at <http://85.62.99.51/Lists/constPDF/ConstitucionINGLES.pdf> (last visited: 31 May 2010). Although the Spanish original version refers to “administrative acts” and not to “administrative action”: “La ley regulará: “c) El procedimiento a través del cual deben producirse los actos administrativos, garantizando, cuando proceda, la audiencia del interesado.”

⁶ *Ley 30/1992 de régimen jurídico de las Administraciones públicas y del procedimiento administrativo común* of 26 November 1992.

⁷ Art. 31 *LRJPAC*.

⁸ Act Nr. 241 of 7 August 1990 (*Legge 7 agosto 1990, n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*).

In my opinion, the main differences from a practical point of view are the following three.

While the Spanish Act only obliges the acting administration to communicate the existence of the procedure to the holders of subjective rights that might be affected by it and to the holders of affected interests who are *identified in the administrative record*,⁹ the Italian Act Nr. 241 extends this obligation of communication to all “*easily identifiable parties*.”¹⁰ Moreover, the Spanish Act allows that this personal communication takes place only as a substitute when the existence of the procedure has not been published.¹¹ The Italian solution better protects holders of affected interests without putting administrative efficiency at risk¹².

Unlike the Italian Act, the Spanish Common Administrative Procedure Act specifically envisions a second mode of citizens’ participation which is open not only to interested parties, but to *everybody*: the so-called “public information” (*información pública*). In contrast to the hearing (*audiencia*)¹³ of interested parties, its activation is usually left to the discretion of an administrative agency except in some sector-specific procedures, where it is compulsory. *Información pública* does not invite individuals to participate in making a decision, but does require that the public have: a public notice; rights to access the complete record (or just a

⁹ Art. 34 LRJPAC.

¹⁰ Art. 7 of Act Nr. 241 (in the English translation by Catharine de Rienzo distributed among the participants in the workshop).

¹¹ Art. 8.3 of Act Nr. 241 only allows that the personal communication is substituted by general publication when the first is impossible or particularly onerous on account of the number of addressees. This aspect of Art. 34 LRJPAC is widely criticized (see e.g. C. Cierco Seira, *La participación de los interesados en el procedimiento administrativo* (2002) at 179 ff.; J. González Pérez; F. González Navarro, *Comentarios a la Ley de régimen jurídico de las Administraciones públicas y procedimiento administrativo común*, I, (2007) at 975).

¹² C. Cierco Seira, *La participación de los interesados en el procedimiento administrativo*, cit. at 11, 179.

¹³ Which is not really a “hearing,” since it takes place in writing and doesn’t entail oral mechanisms of participation. The right to be “heard” is then devaluated into a right to comment or a right to be “read..” Public meetings are only envisioned in some isolated provisions and are very rare. Something similar happens in Italy (G. della Cananea, *Administrative procedures and rights in Italy: a comparative approach*, in this volume, p. 4 of the draft version; R. Caranta, *Participation in administrative procedures: achievements and problems*, cit. at 1, 4).

part of it), rights to make comments¹⁴ in a period not shorter than twenty days and the right to receive a reasoned answer.¹⁵ According to its nature, *información pública* cannot substitute the hearing of the affected parties, but just complement it. This traditional notice and comment participation instrument becomes of interest particularly when it is carried out by electronic means.

A third major difference between the Spanish and the Italian regulation on participation concerns *procedural agreements*.¹⁶ One of the most relevant novelties of the 1992 LRJPAC was that it admitted the possibility that Spanish administrative agencies make agreements with the interested parties about the issues discussed in the procedure. The agreement may even replace the unilateral decision of the procedure by the administration. However, the Spanish legislature has been less brave than the Italian¹⁷ or the German¹⁸ and Art. 88 LRJPAC allows such agreements only when sector-specific legislation admits them.¹⁹

2. Participation in rulemaking procedures

But where the gap between the Italian and the Spanish regulation is bigger is in the field of *rulemaking* procedures.

¹⁴ This legal expression is therefore also misleading: the public “information” is not just an information instrument, but also allows the public to make comments on the proposed regulation.

¹⁵ Art. 86 LRJPAC.

¹⁶ Due to the influence of the Italian scholarship and of Act Nr. 241, in Spain procedural agreements are also usually seen as a participation instrument (F. Delgado Piqueras, *La terminación convencional del procedimiento administrativo* (1995) at 160; A. Huergo Lora, *Los contratos sobre los actos y las potestades administrativas* (1998) at 90 ff.).

¹⁷ Art. 11 of Act Nr. 241.

¹⁸ § 54 ff. of the German Administrative Procedure Act of 25 May 1976 (*Verwaltungsverfahrensgesetz*).

¹⁹ Á. Menéndez Rexach, *Procedimientos administrativos: finalización y ejecución*, in J. Leguina Villa, M. Sánchez Morón (eds.), *La nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, (1993) at 261 ff.; A. Gallego Anabitarte (*et al.*), *Acto y procedimiento administrativo* (2001) at 165-166; E. García de Enterría, T.R. Fernández Rodríguez, *Curso de Derecho Administrativo*, II, 11th ed., (2008) at 523; J.A. Santamaría Pastor, *Principios de Derecho Administrativo General*, II, 2nd ed., (2009) at 85; M. Sánchez Morón, *Derecho Administrativo. Parte General*, 5th ed., (2009) at 507-508. A different opinion is held by F. Delgado Piqueras, *La terminación convencional*, cit. at 16, 186 ff.; L. Parejo Alfonso, *Derecho Administrativo* (2003) at 948-949.

According to Prof. Caranta,²⁰ one major shortcoming of Act Nr. 241 is that its participation provisions do not apply to rulemaking procedures.²¹

This is not unusual in a comparative law perspective. Other relevant democracies such as Germany, France or even the “less State-centred” and “more bottom-up”²² United Kingdom does not generally recognise the right of affected parties to be heard in rulemaking procedures. Innovative consultation mechanisms recently adopted by the European Commission are also contained only in non-binding, soft law instruments²³.

But Spain does so and such participation is even guaranteed by the Spanish Constitution in Art. 105.a. This article stipulates that:

“The law shall regulate:

a) the hearing of citizens directly, or through the organisations and associations recognized by law, in the process of drawing up the administrative provisions which affect them”²⁴.

The central Government Act²⁵, the Local Authorities Act²⁶ and several regional Acts have developed this constitutional provision granting the right to affected parties to be heard in administrative rulemaking procedures.

At the local level and in some sector-specific procedures even the consultation of the general public via *información pública* is compulsory.

²⁰ R. Caranta, *Participation in administrative procedures: achievements and problems*, cit. at 1, at 4-5; see also G. della Cananea, *Administrative procedures and rights in Italy: a comparative approach*, cit. at 13, 4-5.

²¹ Art. 13.

²² In Prof. Caranta’s words (cit. at 1).

²³ Communication from the Commission, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM(2002) 704 final, 11 December 2002. Art. 41.2.a of the Charter of Fundamental Rights only grants the right to be heard with regard to individual measures.

²⁴ “La Ley regulará: a) La audiencia de los ciudadanos, directamente o a través de las organizaciones y asociaciones reconocidas por la ley, en el procedimiento de elaboración de las disposiciones administrativas que les afecten.”

²⁵ *Ley 50/1997 del Gobierno* of 27 November 1997, Art. 24.

²⁶ *Ley 7/1985 reguladora de las bases del régimen local* of 2 April 1985, Art. 49.

This duty to hear affected parties is usually fulfilled in practice by Spanish administrative agencies before passing new regulations. For practical reasons, affected citizens are rarely heard directly, but through organisations and associations that represent them.

But even if the Spanish regulation of administrative rulemaking procedures encourages participation more than others in Europe, it is far from being a model to be exported. Ideal regulation should require both the publicity of rulemaking procedures and the transparency of the consultations held. Spanish courts should also be less restrictive when interpreting the existing legal requirements and less permissive with those administrative agencies that – too often – don't take public participation and the aroused comments as seriously as they should. Spanish legislators, courts and administrative agencies still have a lot to learn from more open systems – such as the United States Administrative Procedure Act's notice and comment procedures.²⁷

III. Participation, democracy and the rule of law

This comparison shows, in my opinion, that participation in administrative procedures is not always connected with the democratic principle. Rather, the Spanish experience demonstrates that participation is often only related to the principle of the *rule of law*. In 1958, when the Spanish LPA recognised the right of affected individuals to be heard in administrative procedures, Spain was far from being a democracy. Under that authoritarian regime, individual's participation only served to extend the rule of law²⁸ to cover the administrative agency's action, without any democratic connotation.

²⁷ On participation in Spanish administrative rulemaking procedures see in recent years G. Doménech Pascual, *La invalidez de los reglamentos* (2002); M. Fernández Salmerón, *El control jurisdiccional de los reglamentos* 263 (2002); J. Ponce Solé, *Deber de buena administración y derecho al procedimiento administrativo debido* 310 (2001); M.I. Jiménez Plaza, *El tratamiento jurisprudencial del trámite de audiencia* 23 (2004); M. Sánchez Morón, *Derecho Administrativo*, cit. at 19, 209 ff.; S. Muñoz Machado, *Tratado de Derecho administrativo y Derecho público general*, II, 968 (2006) ff., with further references.

²⁸ Just a peculiar and very limited version of the rule of law (pseudo rule of law), of course, since a real rule of law requires nowadays democracy and

Not by chance, under General Franco's regime the right to be heard was only recognised to individuals, and not to organised groups. The right to be heard was also applied only in adjudication procedures, and not in rulemaking ones. Groups, rather than individuals, can be an effective counter-power, and administrative regulations implicate a much stronger political dimension than individual decisions. The right to be heard was extended to groups and to rulemaking procedures only after Spain became a democracy.

So, when is participation only an instrument of the rule of law and when does it also reinforce the democratic principle? Where is the dividing line between both functions of participation?

From my point of view, two key elements are the *range* of the decision (the number of persons affected) and the recognition of administrative *discretion*.

When an administrative agency withdraws a dangerous product from the market or sanctions a driver who has exceeded the speed limit or who has drunk too much, it seems clear that the right to be heard of the affected company or individual has nothing to do with democracy. Participation here is only related to the rule of law: participation gives affected parties the opportunity to defend themselves and to make sure that their rights, the rights conferred by the legal system, are respected. In these examples, participation has just a *defensive nature*, resembling defence rights in judicial procedures.

Participation is instead directly connected to democracy when it takes place in administrative procedures that requiring administrative agencies to exercise discretion on decision that might affect many people, as happens, for example, in rulemaking

fundamental rights protection. However, under Franco's dictatorship, the right of individuals to be heard was effectively granted by Spanish administrative agencies and courts. Even if authoritarian and non democratic the rule of law governed administrative agencies' actions, at least with regard to administrative decisions without political connotation. Otherwise hadn't Franco's regime lasted almost forty years. Many scholars still believe today that Spanish Administrative law had its golden age in the second half - 1954-1975 - of that dictatorship (S. Martín-Retortillo Baquer, *Instituciones de Derecho Administrativo* 67 (2007); J.A. Santamaría Pastor, *Wissenschaft des Verwaltungsrechts*. § 68 Spanien, in A. von Bogdandy; P.M. Huber; S. Cassese, *Ius Publicum Europaeum*, IV, par. 66 ff, in press).

and planning procedures or in certain authorisation procedures, such as those regarding the authorisation of nuclear plants.

In this second group of cases, the final decision is not predetermined by the legislator (by the institutions of the representative democracy), and it is left to the discretion of the administrative agency. Democracy demands then that all interested parties and citizens, not only the more influential ones participate in the decision-making procedure; hence, representative democracy is complemented and enriched by participatory democracy. Participation in these types of decision is not just a defensive nature; but it also contributes to grant *quality and soundness* to the drafted regulation or decision where participants contribute to define and to represent the public interest.

Participation has obviously this democratic dimension when it is carried out through *información pública* and other consultation modalities addressed to the general public – to the citizens as such, *uti cives* – and not only to the affected parties. But even the hearing of affected parties has a democratic connotation in such a wide range of discretionary procedures. This is shown by the fact that in rulemaking procedures not all affected parties – and not even all existing associations and organisations that represent them – shall be heard: it is enough that *some* representative associations and organisations of *all* affected interests are consulted. Such participants are selected by an administrative agency not in consideration of the concrete individuals they represent, but based upon the interests they embody. What really matters is that all diverging interests are considered by the administration.

Affected parties try obviously to defend their interests, but when doing so they reflect, at least to some extent, the pluralism existing in the society and introduce a democratic input into the rulemaking procedure. On the other hand, interested parties may make comments on the whole drafted regulation and not only on the concrete aspects that may affect them more directly. However, the best way to avoid the risk of neo-corporatism and to strengthen procedural democracy and the equality principle is to

encourage the participation of the general public and not only of the more influential and well organised interested parties.²⁹

Both types of participation in administrative procedures should be distinguished clearly. To do so, some authors consider that the term “participation,” in a narrow sense, should be reserved to refer only to that connected to democracy.³⁰

Of course, citizen’s participation doesn’t only serve to extend the rule of law and to reinforce democratic legitimacy of administrative action. Participation also satisfies other important functions linked to administration’s *effectiveness* and *efficiency*,³¹ such as the gathering of relevant information, the increase of the acceptance of administrative decisions and the reduction of litigation.

²⁹ F.J. Rodríguez Pontón, *Participación ciudadana en los reglamentos y reserva de ley: algunas consideraciones*, 21 *Autonomías* 283 (1996).

³⁰ M. Sánchez Morón, *Derecho Administrativo*, cit. at 19, 466. Very skeptical about the concept of participation, due to its ambiguity, J.A. Santamaría Pastor, *Fundamentos de Derecho Administrativo*, 247-248 (1988) (now in *Principios de Derecho Administrativo General*, I, 2nd ed., 88 (2009). On the general debate on participation that took place in Spanish Administrative law after the Constitution of 1978 was passed see S. Muñoz Machado, *Las concepciones del Derecho Administrativo y la idea de participación en la Administración*, *Revista de Administración Pública* 84 (1977); M. Sánchez Morón, *La participación del ciudadano en la Administración pública* (1980); Id., *Participación, neocorporativismo y administración económica*, in S. Martín-Retortillo Baquer (ed.), *Estudios sobre la Constitución española. Homenaje al Profesor Eduardo García de Enterría*, vol. 5, (1991); T. Font Y Llovet, *Algunas funciones de la idea de participación*, *Revista Española de Derecho Administrativo* 45 (1985); A. Pérez Moreno, *Crisis de la participación administrativa*, *Revista de Administración Pública* 119 (1989), with further references.

³¹ Spanish Administrative Law scholarship usually bases the principles of administration’s effectiveness and efficiency on the social state clause (*Sozialstaat*), the third structural principle of the Spanish state along with the democratic principle and the principle of the rule of law (Art. 1.1 of the Spanish Constitution). See L. Parejo Alfonso, *Derecho Administrativo*, cit. at 19), 141 ff.; J.A. Santamaría Pastor, *Principios de Derecho Administrativo General*, I, cit. at 30, 67 ff.