FROM THE "DEMOCRATIC CRISIS" TO THE "PARTICIPATORY DEMOCRACY". THE FRENCH *DÉBAT PUBLIC* AS AN INSPIRING MODEL

*Anna Giurickovic Dato**

Abstract

"Participatory democracy" could be the key word to contribute to the resolution of administrative conflicts - with a prominent effect with a view to implementing the "good governance" - in systems characterized by a strong crisis in the political-electoral circuit and, in general, by the lack of trust in democratic institutions which are no longer adequate to solve the challenges of modernity. The international and European guidelines seem to go in this direction and the comparative law offers a key turning point which may offer a functional example that could be adopted in the Italian system. Particularly, the French *débat public* appears to be a more advanced model compared to the Italian *dibatto pubblico*: through this lens the characteristics of both models will be specifically analyzed.

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* Ph.D Student of Administrative law, "La Sapienza" University of Rome.

1. **Introduction to the problem: the "democratic crisis" of the legal systems****

In this paper I identify, in the tools of "participatory democracy"[1], a suitable solution for the resolution of administrative conflicts, in systems characterized by a strong crisis in the political-electoral circuit and, in general, by the lack of trust in democratic institutions which are no longer adequate to solve the challenges of modernity.[2] In fact, phenomena such as the globalization of the market and of legal relationships[3], the increasing "liquidity"

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[1] See U. Allegretti, *Democrazia partecipativa: un contributo alla democratizzazione della democrazia*, in U. Allegretti (ed.), *Democrazia partecipativa. Esperienze e prospettive in Italia e in Europa* (2010). See also U. Allegretti, *Democrazia partecipativa*, Enc. dir., annali, 295 (2011). The term "participatory democracy" is accompanied by that of "deliberative democracy" (or of the deliberative democracy, according to the vast Anglo-Saxon literature on the subject), which provides that public decisions are preceded by a public discussion, to which interested parties can take part; according to some "participatory democracy" and "deliberative democracy" would be synonymous, according to other authors, however, it would be different models because the latter would indicate not only a quantitative increase in democratic participation, but also a qualitative increase, aimed at allowing public discussions informed, rational and aimed at the "impartial pursuit of truth"; see G. Manfredi, *Il regolamento sul dibattito pubblico: democrazia deliberativa e sindrome nimby*, in Urb. e app. 604 (2018); R. Bifulco, *Democrazia deliberativa*, Enc. dir., ann., IV, 271 (2011); D. Held, *Modelli di democrazia* 401 (2007); B. Faure, *Les deux conceptions de la démocratie administrative*, RFDA 709 (2013); J.B. Auby, *Droit administrative et démocratie*, Dr. adm. (2006); J. Rivero, *A propos de la métamorphose de l'administration aujourd'hui; démocratie et administration*, in Mélanges Savatier (1965); B. Plessix, *Décision administrative et démocratie administrative*, in Collected papers of the Law Faculty of the University of Split, 56, 1 (2019).

[2] See A. Giddens, *The consequences of modernity, Stanford,* SUP 1 (1990).

[3] Said Adam Smith, how is written in P. Rosanvallon, *Le libéralisme économique - Histoire de l'idée de marché* (1989); see also R. Bin, *Ordine giuridico e ordine politico nel diritto costituzionale globale*, Conference *Ordine giuridico e ordine politico: esperienze lessico e prospettive*, Trento, 24-25 November (2006).
Whether this is a pathological or necessary aspect of the legal system, is another thing: in fact, there are those who believe that the democratic deficit found, for example, in international and European authorities, far from being an accidental problematic of functioning, is instead a "project element" without which the project of a European or international system would not be in any way achievable: the non-democratic character of the institutions and the crisis of political

of the legal system (to use the words of Bauman)[4] and the society of risk[5], have led to an ever decreasing prescriptiveness of modern constitutionalism (which is qualified today, as "descriptive constitutionalism"), to an incapacity, on the part of the legislator, to provide criteria to be applied in highly technical decisions, and, consequently, to the necessary assignment of the burden of composing social conflicts to a different representative circuit, which operates at the administrative level on the specific case.

The crisis of representativeness is the necessary consequence of a complex, pluralist and multi-structured society, where there is a continuous emergence of new interests, according to the socio-economic changes. The constitutions are no longer able to offer a predetermined criterion on the basis of which to operate the balances between different values, nor the legislator is able to meet this function. The latter, in fact, can determine standards and indicators for the management of conflicts between interests, but remains unable to appreciate situations of high complexity and tends not to offer solutions and criteria to be applied in the balancing of heterogeneous interests, but to leave, instead, with open clauses, wide discretion to Public Administrations. And this, with obvious consequences in terms of legal certainty. In fact, especially in environmental matters, decisions need a highly technical appreciation that requires the intervention of experts, whose decision-making power is, inevitably, higher than the discretion of other parties involved in the decision-making process. In fact, the

representation, would be, for these authors, the necessary prerequisite for a coexistence of states in supranational institutions, in order to leave the market the possibility of producing rules independently of politics. To learn more about that point, see F. Zakaria, *Democrazia senza libertà in America e nel resto nel mondo*, 317 (2003); G. Majone, *Deficit democratico, istituzioni non-maggioritarie ed il paradosso dell'integrazione europea*, SM 3 (2003). On this same programmatic line there would be, for example, the independent administrative Authorities, which would have the aim of removing the politics from the regulation of the market, subtracting these authorities, by means of their "independence", from the political-representative circuit, and making them neutral. See on this F. Merusi, M. Passaro, *Le autorità indipendenti*, 20-98 (2003); A. Baldassarre, *Globalizzazione contro democrazia*, 20 (2002); U. Beck, *Risk Society: Towards a New Modernity* (1992); U. Beck., *What is globalization?* (2000); M. Luciani, *L'antisovrano e la crisi delle costituzioni*, Riv. Dir. Cost. 171 (1996).

[4] See Z. Bauman, *Liquid Modernity* (2000).

[5] See U. Beck, *Risk Society: Towards a New Modernity,* cit. at 3, 1 ss.

risks to health and environment often completely escape to the human capacity for direct perception;[6] these are decisions with a high degree of technocracy, because the which can be faced by the administrations that are in charge of evaluating the specific case and, thus, to carry out the real weighting between conflicting interests.[7]

As a consequence, the need for a concrete management of social conflicts led to the transfer of the real selection of interests from a regulatory level to an administrative level, following the phenomena of delegation and depoliticization[8] of the legal system. In this context, however, the high technicality of the assessments assigned to the Public Administration, far from being a neutral instrument, is an exclusionary tool, in a relationship of total information asymmetry between administrators and administrators, with the effect of increase exponentially the discretionality in the face of an ever diminishing responsibility.

Furthermore, the methods of determining environmental risks require a mixture of natural sciences and human sciences, between the rationality of everyday life and the rationality of the experts, between interests and facts. And this because, as Beck wrote in 1986, "the side effects have voice, eyes, faces and tears", and while the farmer's cows near to the new chemical plant turn yellow, the children suffer from pseudo-croup in areas where is present the sulfur dioxide in the air, people suffer from DDT or formaldehyde poisoning, risks that are not scientifically recognized still do not exist ("the imperative insensitivity of science"). While the "latency" of risks is being lost - public perception of risks is always increasing - the legitimacy of technical sciences to hold the monopoly of rationality in terms of risk perception also falls; this is called "the dynamic of the reflective politicization" that produces risk awareness and conflict. This leads to a crisis of the authority of science: the crisis, therefore, is not only economic, democratic and institutional, as these phenomena are accompa-

[6] U. Beck, *Risk Society...*, cit. at 3, 34.
[7] See C. Ham, M. Hill, *The Policy Process in the Modern Capitalist State*, 178 (1993); H. Wade, *Administrative Law*, Oxford 1 (1967); J. Jowell, *The legal control of administrative discretion*, Pub. L. 20 (1973).
[8] P. Pettit, *Depoliticizing democracy*, Ratio Juris, 17, 52-65 (2004).

nied by a loss of the sovereignty of science in the evaluation of the dangers to which one is exposed in such a direct way.

If, accordingly, we recognize that "scientific rationality" and "social rationality" can no longer be separated, the methods of determination (and management) of the risks presuppose a co-operation between expert technicians, groups of citizens, businesses, administration and politics, in order to avoid falling into a form of "scientific-bureaucratic authoritarianism" that manages - according to its own standards of rationality often linked to market opportunities - the most democratic thing of all: the environmental damage. Moreover, as has been said, "scientific rationality without social rationality remains empty, but social rationality without scientific rationality remains blind".[9]

2. **A suitable solution: the emergence (and the emergency) of the instruments of participatory democracy**

If, therefore, the administrative procedure becomes the forum for dialogue and selection of interests, which can't longer be carried out effectively at the political level, it is questionable whether the coordination tools available to the public administrations are adequate to a social system characterized by a high complexity, from the unavailability of stakeholders to resolve the ever-marked conflict of interests (the meeting between the bearers of different interests often seems to substantiate in an "all against all"), as well as the aversion of the social group (regardless of the effective opportunities) towards infrastructural interventions near the place of residence, which is well described by the American acronyms "Nimby" (not in my back yard) and "Niaby" (not in anybody's back yard). With the consequence that, in the end, the moment of composition is not resolved in the resolution of the conflict, but qualifies, substantially, as one of the phases of an unsolvable conflict.

In many countries the strategy aimed at overcoming this problem, traditionally was (or still is) the one known as DAD (De-

[9] U. Beck, *Risk Society*…, cit. at 3, 40.

cide, Announce, Defend)[10], where the approach is to limit the informational dynamics and participatory moments, in order to avoiding oppositions upstream: and this, on the conviction that the adversity of private individuals is insurmountable *a priori*.[11] However, that approach has been criticized because it would have the opposite effect: that of exasperating the problems related to the impact of large infrastructural works, rather than resolving them, as opposed to the procedures which provides a greater involvement of the administrated. That depends on the fact that - how it has frequently been pointed out - the motor of protest by citizens is often neither the environment nor health, but rather the fact itself of a lack of participation: due to the deficiency of trust in the State and in those who administer, the citizen wants today, as never before, to feel part of the decisions that directly involve themselves. This is, in fact, one of the consequences of the pluralism, where associations and committees, stakeholders of collective and widespread interests, become increasingly central, both legally - because the protection in favor of their interests has been progressively and generally increased - and mediatically - as has significantly increased the potentialities for the dissemination of informations and scientific knowledge. The "conflictual pluralization of the risks of civilization" has led to a situation where each party is trying to defend itself with its own definitions of risk, in a struggle of all against all to give the definition of risk most advantageous according to the interests.[12] In this way individuals, especially through the associations in which they organize themselves, have increasingly demanded an active role in the decision-making processes concerning environmental issues, and this request can't

[10] For an in-depth analysis of the critical aspects of the DAD method, see D. Ungaro, *Eco-Governance. I costi della non partecipazione*, in R. Segatori (ed.), *Governance, democrazia deliberativa e partecipazione politica*, 175-188 (2007); on how the DAD method aggravates NIMBY syndrome, see W. Sancassiani, *Gestire i processi deliberativi: problemi e soluzioni,* in L. Pellizzoni (ed.), *La deliberazione pubblica*, 205 (2005); Research center "Avanzi", *Introduzione ai conflitti ambientali*, in *La mediazione dei conflitti ambientali - Linee guida operative e testimonianze degli esperti*, 19.

[11] On the impossibility of resolving *a priori* conflicts in Italy see A. Macchiati, G. Napolitano (eds.), *È possibile realizzare infrastrutture in Italia?* (2009).

[12] U. Beck, *Risk Society…*, cit. at 3, 40-41.

be ignored where the public opinion exerts an ever-increasing pressure (also) with reference to environmental policies.

If, therefore, the will of the State no longer coincides with the will of the people - because of this great and widespread "crisis of democracy"[13] - every kind of choice, especially those concerning the installation of buildings and infrastructures having a great impact on the environment and on the territory, needs a greater direct involvement of the citizens, directly interested, not to be opposed *a priori*. In order to cope with these problems, the international and European tendency is to introduce increasingly open and democratic participatory tools to be used in the mechanisms for the selection of interests, in order to foster a dialogue between administrations and stakeholders and to achieve transparency and symmetry of informations: thereby, after having explored the various alternatives, will be possible an optimal composition of interests.

Some European countries, such as France and England, have provided themselves with such tools since many decades - in this they have been pioneers - by driving to the consolidation both in international and in Europe. Even some European countries, that traditionally have given little space to the instruments of participatory democracy, such as Italy, have - albeit with great delay - recently adapted to the new requirements. The Italian example[14],

[13] On the relationship between the crisis of representation and the development of new participatory modalities, see. F. Robbe, *Démocratie représentative et participation*, in *La démocratie partcipative*, 18 (2007); L. Cataldi, *Promesse e limiti della democrazia deliberativa: un'alternativa della democrazia del voto?*, Centro Einaudi, Laboratorio di politica comparata e filosofia pubblica, Working Papers - LPF, 3, 23-25 (2008).

[14] The Italian procedural administration model consists of two levels: the general state model identified by law 241/1990; and the decentralized, regional and local, which may derogate from the first, only without any prejudice to the minimum levels of protection. In fact, the derogation regime may provide enhanced protection, but in any way can empty the minimum guarantees, the standards and principles contained in Chapter III of the Proceedings Law. Therefore, between the two disciplines there is a relationship of integration, in a double sense: on the one hand, as stated above, the statutory discipline can only contain an increase in participation; on the other hand, in the event that a local authority remains inert from exercising its statutory authority, in any case the general rules on the procedure will apply. The adoption, by regional laws, of models that differ from law n. 241/1990 is not a widespread phenomenon be-

in particular, is interesting: in the stubbornness of the national legislator not to provide for this tools, some regions, autonomously, have equipped itself with advanced and suitable participatory modules, to be able to dialogue with citizens; from this, in the full implementation of the principle of subsidiarity, the local authority closest to the social stratum has, even before the national legislator, felt the strong need to identify procedural modules capable of inducing the dialogue among the stakeholders and thus allow the identification of more informed and better accepted administrative decisions, precisely because they are based on the necessary meeting between conflicting heterogeneous stakeholders. Only later, and very recently, the Italian legislator, has finally decided to fill the legislative gaps in terms of participation and adapt to what has now become a global need (in 2017 it reformed the institute of public inquiry and in 2018 introduced the public debate for major works that, however, still presents considerable criticality and has a narrow scope of application).

Especially in the last decades, more and more attention has been paid to ensure the adoption of instruments of "participatory democracy", first of all by supranational provisions - international and European - and then also in the legal systems of EU member states. Thus, the 1992 Rio De Janeiro Declaration, at the conclusion of the United Nations Conference on Environment and Develop-

cause, on the contrary, the regions tend to conform to the general discipline. However, the fact that the statutory or regulatory discipline can derogate from the general one only by way of reinforcement, leads to the existence of a series of participatory modules at local level of great interest and, sometimes, more evolved than those provided for by the general regulations. Therefore, not only the foreign examples - and in particular the French one - but also the regional legislation was, for the Italian national legislator, as inspiring as the foreign experiences, since the Regions and other local authorities first, in the shortcomings of the legal system, they have met the needs of modern society by accepting, independently, institutions of participatory democracy. However, a great novelty - which denotes a tendency towards the recognition of more democratic forms of participation, open and voted for orality - is represented by the introduction of the general public debate on major infrastructural works, in the wake of previous experiences, between first of all the French experience of the *débat public* and, in Italy, that of the Genoa gutter, then those provided for by the Tuscan and Apulian regional laws, which can't fail to recognize the fundamental contribution.

ment[15], provided for the states' duty to encourage the participation of interested citizens, at different levels, in decision-making procedures;[16] thus, the 1998 Aarhus Convention[17] established the criteria concerning the modalities and timing, in observance of which the participatory processes must be implemented.[18] Afterwards, the European Union emphasized its favor towards an expansion of participatory dynamics both with reference to general policies and, more specifically, with reference to environmental policies. In general, it is noted that although the EU establishes the importance of participation, it merely states the principle, but does not specify the implementation models for the principle itself: in July 2001 the Commission adopted the White Paper on the European governance that, among the strategic lines, defines the participation as a suitable instrument to bring the Union closer to the citizens; with the Treaty of Lisbon, participatory democracy becomes an integral part of the European model of society, and an open, transparent, democratic and regular dialogue between insti-

[15] Reference is made here to the United Nations Conference on Environment and Development held from 3 to 14 June 1992.

[16] L. Pineschi, *Tutela dell'ambiente e sviluppo: dalla conferenza di Stoccolma alla conferenza di Rio,* Riv. Giur. Amb., 3-4, 493-513 (1994). Consider, in particular, the principle n. 10 of the Rio Declaration, available on *www.unep.org.*

[17] The 1998 Convention was signed at the International Conference on Freedom of Information and Participation in Environmental Matters, promoted by the United Nations Economic Commission for Europe, and is composed of three pillars related respectively to the right of access to environmental information, the right of public participation in decision-making processes and the right of access to justice in environmental matters. It is available in *www.unep.org*. To learn more see J. Harrison, *Legislazione ambientale e libertà di informazione: la Convenzione di Aarhus*, Riv. Giur. Amb., 1, 27-36 (2000); R. Montanaro, *La partecipazione ai procedimenti in materia ambientale*, in P. M. Vipiana (ed.), *Il diritto all'ambiente salubre: gli strumenti di tutela. Lo status quo e le prospettive*, 192 (2005); A. Crosetti - F. Fracchia, *L'ambiente e i nuovi istituti della partecipazione* (2002); M. Feola, *Ambiente e democrazia. Il ruolo della governante ambientale* (2014); M. Prieur, *Le convention d'Aarhus, instrument universel de la démocratie environnementale*, RJ envir. (1999).

[18] In particular, in art. 6 provides that: a reasonable time must elapse between the procedural steps, which allows participants to be informed and prepared; participation must take place before the decision has been taken; the institution that will have to make the final decision must necessarily take into account the results of the participation and, if it intends to depart from it, must justify its choice.

tutions and citizens is encouraged, as well as extensive consultations and the possibility of publicly exchanging views in all sectors of EU action.[19]

With reference to environmental matters, instead, the European discipline on participation is not limited to the enunciation of principles, but is more developed and more meaningful, and this, first of all, because the EU, by adhering to the Aarhus Convention, has incorporated the second pillar with directive 2003/35/EC that, in particular to the art. 3, provides for the effective participation of the public in order to increase responsibility and transparency in decision-making and public awareness of environmental issues. In fact, it should be noted that the sectors in which participatory democracy has developed more are those of the environment and urban planning, both with reference to the supranational systems and in the national laws; think, in particular, of the examples of France and of England, where, as already mentioned, a special attention towards the participatory theme already emerged and that, following the implementation of the Aarhus Convention, they developed new and effective instruments aimed at to an ever greater involvement of private individuals in the decisions of the institutions. In particular, the "public inquiry" was born in England, and a later was established also in France, where it found a greater success (the so-called *enquête public*).[20]

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[19] In particular, the art. 11 on the Treaty on European Union, provides that "*1) The institutions give citizens and associations representative, through appropriate channels, the opportunity to make known and to publicly exchange their views in all areas of Union action. 2) Institutions maintain an open, transparent and regular dialogue with representative associations and civil society. 3) In order to ensure the consistency and transparency of the Union's actions, the European Commission is conducting wide-ranging consultations with stakeholders. 4) Citizens of the Union, at least one million in number, having the citizenship of a significant number of Member States, may take the initiative to invite the European Commission, as part of its powers, to present an appropriate proposal on subjects on which these citizens deem a legal act of the Union necessary for the implementation of the Treaties. The procedures and conditions necessary for the submission of a citizens' initiative shall be established in accordance with the first paragraph of Article 24 of the TFEU*", on *https://eur-lex.europa.eu.*

[20] On the topic see R. N. Abers, *Reflections on what makes empowered participatory governance happen*, in A. Fung - E. O. Wright (eds.), *Deepening Democracy* (2003); C. Fraenkel, P. Haeberle, S. Kropp, F. Palermo, K. P. Sommermann, *Citizen Participation in Multi-level Democracies* (2015); M. Zinzi, *La democrazia partecipativa in*

Consider that, the public inquiry was established in England already in the XI century, but this was a mere means of knowledge for the Public Administration, until, with the Inhibition Act of 1801, it became a real participatory tool, aimed at the hearing of the owners landfills before a special commission, before they were expropriated. Subsequently, the scope of application of this investigation tool was expanded, and this entailed a significant application in the area of territory management. However, the Committee on Tribunals and Inquiries Report (also known as the "Franks Committee")[21], in 1957, took over the problems and inefficiencies of public inquiries - as slow and formal procedural tools - and subsequently introduced new tools and corrective measures, such as for example, the "examination in public"[22]: this, in particular, although it was more effective, did not have the typical characteristics of participatory democracy, since there was no right of those involved to take part in the procedure (participation took place at the invitation of the inspector or minister) and that, moreover, triggered an already advanced procedural phase.[23]

Francia alla luce delle recenti riforme legislative, Dir. Pub. Comp., 2, 822-843 (2004); T. Zittel, D. Fuchst, *Participatory Democracy and Political Participation: Can Participatory Engineering Bring Citizens Back In?* (2006); C. Harlow, R. Rawlings, *Law and Administration*, 273 (2003); H. W. R. Wade, C. F. Forsyth, *Administrative Law*, 938 (2000); B. Benoist, *La mise en place de la Commission National de Débat Public,* Dr. env. 18 (1998); J. L. Boussard, *L'enquête public en Angleterre,* PUF 1 (1969); J. B. Auby, H. Perinet-Marquet, *Droit de l'urbanisme et de la construction*, L.G.D.J 59 (2001).

[21] About the *Franks Committee* see H. W. R. Wade, *Administrative Law*, 2ª ed., (1967).

[22] Procedural instrument established in 1971. To deepen on the point, see: L. Casini, *L'inchiesta pubblica. Analisi comparata*, Riv. trim. dir. pub., 1, 43-92 (2007); G. Pizzanelli, *La partecipazione dei privati alle decisioni pubbliche. Politiche ambientali e realizzazioni delle grandi opere* (2010); Camera dei Deputati, *La realizzazione delle opere infrastrutturali in Francia, Germania e Regno Unito. Aspetti normativi e partecipazione dei cittadini al processo decisionale*, dossier available on *http://www.camera.it.*

[23] M. Loughlin, *Lo sviluppo del sistema della pianificazione urbanistica in Gran Bretagna*, in E. Ferrari, N. Saitta, A. Tigano (eds.), *Livelli e contenuti della pianificazione ambientale,* 20 (2001); P. Birkinshaw, N. Parry, *La flessibilità nella pianificazione urbanistica, nello sviluppo edilizio e nel controllo sugli edifici*, in E. Ferrari (ed.), in *La disciplina pubblica dell'attività edilizia e la sua codificazione*, Conference proceedings AIDU 2001, Milan, 29 (2003); I. Galli, *Recenti sviluppi della normativa urbanistico – edilizia in Gran Bretagna*, Riv. Giur. Urb. 3, 331-368 (1998).

Since 1990[24], particularly in the procedures relating to the adoption of urban plans, the English legal system provides for the examination in public, for the adoption of the structure plans, and the local inquiries, for the adoption of the Unitary Development Plus related to the areas metros, as well as local plans.[25]

In the French excursus, the *enquête public*[26], previously provided exclusively with reference to the expropriation procedures as a mere cognitive tool, with the *loi Bouchardeau* (*loi 83-630 du 12 juillet 1983*)[27], became a real participatory tool which was manda-

[24] Reference is to the 1990 Town and Country Planning Act - TCPA, partly modified by the Planning and Compensation Act of 1991, to be read in conjunction with the Planning and Compulsory Purchase Act of 2004, the Planning Act of 2008 and the Localism Act of 2011, all available in *www.legislation.gov.uk.*

[25] L. Casini, *L'equilibrio degli interessi nel governo del territorio*, 102 (2005).

[26] L'*enquête public,* first introduced in the French legal system by the law 8th march 1810 "*sur l'expropriation*" (modified later by the *loi paysages* n. 93-24 of 8 January 1993 and the financial law n. 93-1352 of the 30th dicembre 1993, article 109; *loi n. 2002-276 du 27 février 2002* about "*democratie de proximité*"; *loi n. 2004-1343 del 9 dicembre 2004, art. 60 "de simplification du droit*"), finds today discipline in the article L123-1 del *Code de l'environnement*, and it was last modified by the *Ordonnance* n. 2016-1060 of 3 August 2016, art. 3, and states that "*L'enquête publique a pour objet d'assurer l'information et la participation du public ainsi que la prise en compte des intérêts des tiers lors de l'élaboration des décisions susceptibles d'affecter l'environnement mentionnées à l'article L. 123-2. Les observations et propositions parvenues pendant le délai de l'enquête sont prises en considération par le maître d'ouvrage et par l'autorité compétente pour prendre la décision.*" In *www.legifrance.gouv.fr.*

About *enquêtes publiques* see: M. Ceruti, *L'esperienza francese delle inchieste pubbliche per la tutela dell'ambiente,* in Riv. Giur. Amb., 2, 215 (1996); J. L. Autin, *Inchieste pubbliche e dubat public nell'ordinamento francese,* in Dir. gest. ambiente, 1, 67 (2001); Camera dei Deputati, *La realizzazione delle opere infrastrutturali in Francia, Germania e Regno Unito. Aspetti normativi e partecipazione dei cittadini al processo decisionale*, dossier available in *http://www.camera.it*; D. Anselmi, *Il dibattito pubblico: profili giuridici*, in Astrid Rassegna, 21, 1-38 (2016); L. Casini, *L'inchiesta pubblica. Analisi comparata*, in Riv. Trim. dir. pub., 1, 43-92 (2007); G. Pizzanelli, *La partecipazione dei privati alle decisioni pubbliche. Politiche ambientali e realizzazioni delle grandi opere* (2010); Y. Jégouzo, *La réforme des enquêtes publiques et la mise en oeuvre du principe de participation*, AJDA, 1812 (2010); Y. Jégouzo, *L'enquête publique en débat, in Etudes offertes au professeur René Hostiou* (2008).

[27] *Loi n. 83-630 du July 1983*, cd. *loi Bouchardeau "relative à la démocratisation des enquêtes publiques et à la protection de l'environnement*", than repealed by *Ordonnance* n. 2000-914 of the 18th September 2000 "*relative à la partie Législative du code de l'environnement",* established of the *Code de l'environnement* that encom-

tory in proceedings aimed at the realization of works or having an environmental impact. The institute has been modified with more interventions, up to the *loi Grenelle I* (*loi 2009-967 du 3 août 2009*), *loi Grenelle II* (*loi 2010-788 du 12 julliet 2010*)[28] - which harmonized the discipline on public investigations, and extended the scope of application to environmental matters, since up to that moment they were only foreseen in urban planning, accepting the principles established by the Aarhus Convention – the *Code de l'expropriation* of 2015 (*ordonnance n. 2014-1345 du 6 novembre 2014* and *décret n. 2014-1635 du 26 décembre 2014*) and, finally, the *Code des relations entre le public et l'administration* of 2015 (or CRPA: *ordonnance n. 2015-1341 du 23 octobre 2015* and *décret n. 2015-1342 du 23 octobre 2015*).

Therefore, the *enquête publique* finds today a fragmented discipline: the special provisions contained within the meaning of the *Code de l'environnement* which, in art. 123-2 specifies that *plans*, *schémas* and *programmes* and other planning documents, subject to environmental assessment, must be submitted to a *enquête public* for approval; the special provisions contained in the articles 121-10 to 121-15 of the *Code de l'Urbanisme*[29]; all the others special provi-

passes and rules relating to environmental law (last edit occurred the 2th November 2018), all available on *www.legifrance.gouv.fr.*

[28] *Loi n. 2009-967 du 3 août 2009, loi Grenelle I* "*de programmation relative à la mise en œuvre du Grenelle de l'environnement*" (last edit 1th January 2017), and *loi n. 2010-788 du 12 julliet 2010, loi Grenelle II* "*portant engagement national pour l'environnement*" (last edit 1th March 2017), both available on *www.legifrance.gouv.fr.*

[29] *Code de l'urbanisme*, adopted by the *décret n. 54-766 du 26 julliet 1954*, than divided, in 1973, between the C*ode de l'urbanisme* (*décrets nn. 73-1022 e 73-1023 du 8 novembre 1973*) and the *Code de la construction et de l'habitation* of 1978, finally completely modified by the *loi Grenelle II*. In particular, the articles referred to have been modified with the *ordonnance n. 2015-1174 du 23 septembre 2015* (articles from L121-10 to L121-12 and L121-14) and with the *loi n. 2016-1888 du 28 decembre 2016,* art. 71 (L121-13 e L121-15). See in *www.legifrance.gouv.fr.* See L. Casini, *L'equilibrio degli interessi nel governo del territorio*, 102 (2005). For more information on the concertation see J-C. Hélin, *Participation du public aux décisions d'urbanisme,* in AJCT, 5, 1 (1994); J-C. Hélin, *L'évolution récente du droit des enquêtes publiques*, RDI 179 (1994); J-C. Hélin, *La loi "paysages" et le droit des enquêtes publiques*, AJDA 776 (1993); more recently see A. De Laubadère and Y. Gaudemet, *Traité de droit administratif, II. Droit administratif des biens*, XV° éd., 311 (2014); J. C. Hélin, R. Hostiou, *Traité de droit des enquêtes publiques* (2014); see also M. Boutelet, *La démocratie environnementale: participation du public aux décisions et*

sions contained in the *Code de l'expropriation*, in the *Code général des collectivitès territoriales,* in the *Code de la voirie routière* and in the *Code rural et de la pêche maritime*. The already mentioned CRPA today provides the new regime of *enquêtes publiques*[30] and aims to harmonize the multitude of existing special provisions.[31] However, as is clarified in the art. 5 of the *ordonnance n. 2015-1341 du 23 octobre 2015* cit., the provisions of the CRPA relating to the *enquête publique* have not replaced those provided in the *Code de l'environnement* and in the *Code de l'expropriation*: rather, the art. L 134-1 expressly excludes those special regimes form the scope of application of the CRPA, which, on the contrary, generally refers to all the other cases disciplined by special sector regulations (as the ones envisaged by the *Code des collectivitès territoriales*, the *Code de l'Urbanisme*, the *Code de la voirie routière* and the *Code rural et de la pêche maritime*) and also establishes common rules which are applicable in case of atypical public inquiries.[32]

Moreover, with the *loi Barnier* (*loi 95-101 du 2 février 1995*)[33], the *débat public*[34] was introduced, following the affirmation of the

politiques environnementales (2009); M. Prieur, J. Bétaille, M. A. Cohendet and others, *Droit de l'environnement* 165 (2016).

[30] The general discipline about the *enquête publiques* is thus contained in Book III, Chapter IV, Art. L-134-1 et seq. where five legislative provisions and twenty-nine regulatory provisions are dedicated to the institute; in particular, for what especially concerns the activation of the inquiry and the competent authority, the nomination and compensations of the *Commissair enquêteur* and the members of the *Commission d'enquête,* the preparation of the *dossier* which has to be presented to citizens, and the conclusion of the inquiry, including the drafting of the final report by the *Commission* and its publication. On this theme see M. De Donno, *The French Code "Des relations entre le public et l'administration*", in IJPL, 9, 2, 237 (2017).

[31] As it has been said, a first important rationalization of the legislation about the institute of the *enquête publiques* has been achieved by the *Loi 2010-788 du 12 julliet 2010* cit. (*Loi Granelle II*). After this, another attempt at rationalizing that rules has been made by the *Code de l'expropriation of 2015* (*ordonnance n. 2014-1345 du 6 novembre 2014* and *décret n. 2014-1635 du 26 décembre 2014*), especially for what concerns the *enquêtes publiques préalables à une déclaration d'utilité publique* and the *enquêtes de droit commun*.

[32] For a broader discussion, see M. De Donno, *The French Code "Des relations entre le public et l'administration*, cit. at 30, 237.

[33] *Loi n. 95-101 du 2 février* 1995 regarding the « *renforcement de la protection de l'environnement* » (last edit the 21th of September 2000), on *www.legifrance.gouv.fr.*

principle of participatory democracy in international and European legal systems (and unlike the *enquête public*, whose institution it was, however, very prior to the development of a supranational attention to participation). Therefore France, where there was already a special sensitivity towards the issue of participation, represented in this respect an *avant-garde* example in Europe, having always been attentive to the evolution of participatory instruments, also through the adoption of increasingly effective adaptations and modifications.

The *débat public*, today finds discipline, in France, in *Section* III, *Titre* II, *Chapitre* I of the *Code de l'environnement*[35] and must necessarily be called in the case of major infrastructure projects of national interest, not only in environmental matters, but in general in the matter of territorial governance[36], thus representing a moment of dialogue between the parties concerned and under the guid-

[34] Following this, it has been amended several times (see, for example, Law 2010-788, *Ordonnances Nn.: 2013-714 du 5 août 2013*, art. 1; *2014-1345 du 6 novembre* 2014 art. 5; *2015-948 du 31 julliet 2015* art. 14; *2015-1174 du 23 septembre 2015* art. 9) until today it is disciplined, following the *Ordonnance n. 2000-914 du 18 semptembre 2000*, in the *Code de l'environnement*. With reference to *débat public* see *Codificazione e norme tecniche nel diritto ambientale. Riflessioni sull'esperienza francese*, Dir. gest. ambiente, 9 (2002); P. Marsocci, *Consultazioni pubbliche e partecipazione popolare*, Rass. Parl., 1, 29-68 (2016).

[35] *Code de l'environnement*, introduced by *Ordonnance n. 2000-914* cit. "*relative à la partie Législative du code de l'environnement*", which includes the rules relating to environmental law (last modification occurred on 2 November 2018), available in *www.legifrance.gouv.fr*. In particular, art. L121-8, about the *débat public*, has been last edited by the *loi n. 2018-148 du 2 mars 2018*, art. 2, which states that "*La Commission nationale du débat public est saisie de tous les projets d'aménagement ou d'équipement qui, par leur nature, leurs caractéristiques techniques ou leur coût prévisionnel, tel qu'il peut être évalué lors de la phase d'élaboration, répondent à des critères ou excèdent des seuils fixés par décret en Conseil d'Etat; Pour ces projets, le ou les maîtres d'ouvrage adressent à la commission un dossier qui décrit les objectifs et les principales caractéristiques du projet entendu au sens de l'article L. 122-1, ainsi que des équipements qui sont créés ou aménagés en vue de sa desserte. Il présente également ses enjeux socio-économiques, son coût estimatif, l'identification des impacts significatifs sur l'environnement ou l'aménagement du territoire, une description des différentes solutions alternatives, y compris l'absence de mise en œuvre du projet. Lorsqu'un projet relève de plusieurs maîtres d'ouvrage, la commission est saisie conjointement par ceux-ci*".

[36] The scope of application of the *débat public* has been extended by the *loi n. 2002-276 du 27 février 2002*, following the entry into force of the Aarhus Convention.

ance of the *Commission nationale du débat public* (CNDP).[37] With complete affirmation of the centrality of the participatory theme, the constitutional reform of 2005 (*loi constitutionnelle n. 2005-205 du 1 mars 2005*) has equated the Charter of the Environment - *Charte de l'environnement*[38] - to the Constitution and, in this way, the extended right to participate in the elaboration of public decisions relevant to the environment has taken on constitutional dimension[39]; moreover, the *loi 2012-1460 du 27 décembre 2012*[40] in the art. 1 provided that everyone should be informed of the procedures relevant to the environment and subject to public decision, so that they can make their own observations.

With reference to the French evolutionary process regarding the ever more intense assertion of the principle of participation and the strengthening of the guarantees of citizens[41], it cannot fail

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[37] The *Commission National du Débat Public* is governed by Section I-II of the *Code de l'environnement*, in particular by art. L.121-1: "*La Commission nationale du débat public, autorité administrative indépendante, est chargée de veiller au respect de la participation du public au processus d'élaboration des projets d'aménagement ou d'équipement d'intérêt national de l'Etat, des collectivités territoriales, des établissements publics et des personnes privées, relevant de catégories d'opérations dont la liste est fixée par décret en Conseil d'Etat, dès lors qu'ils présentent de forts enjeux socioéconomiques ou ont des impacts significatifs sur l'environnement ou l'aménagement du territoire*". For further informations see: J. F. Beraud, *Il caso della Francia: la Commission National du débat public*, in A. Valastro (ed.), *Le regole della democrazia partecipativa* 387 (2010); B. Benoist, *La mise en place de la Commission Nationale de Débat Public*, Dr. Env., 55, 18 (1998).

[38] Reference is made to the *Charte de l'environnement* adopted on June 24, 2004 during the *Raffarin III Government*, integrated into the so-called "*bloc de constitutionnalité du droit français*" today, therefore, constitutional value, through the *loi constitutionnelle n. 2005-205 du 1 mars 2005*. Available in *www.legifrance.gouv.fr.*

[39] In particular, reference is made to article 7 of *Charte de l'environnement.* See in *www.legifrance.gouv.fr.*

[40] *Loi 2012-1460 du 27 decembre 2012* "*relative à la mise en oeuvre du principe de participation du public défini à l'article 7 de la Charte de l'environnement*", in *www.legifrance.gouv.fr.*

[41] On the theme, see: J. Rivero, *A propos de la métamorphose de l'administration aujourd'hui: démocratie et administration*, cit. at 1, 6 ss.; M. Prieur, *Le droit à l'environnement et les citoyens: la participation*, RJ envir., 397 (1988); J.B. Auby, *Droit administratif et démocratie*, cit. at 1, etude 3; M. Moliner-Bubost, *Démocratie environnementale et participation des citoyens,* AJDA 259 (2011); B. Faure, *Les deux conceptions de la démocratie administrative*, cit. at 1, 709; S. Saunier, *L'association du public aux décisions prises par l'administration*, AJDA 2426 (2015); Y. Jégouzo, *La*

to mention the *Loi du 27 février 2002, relative à la démocratie de proximité*[42] whose main purpose was to deepen local democracy, on the one hand through the development of the participatory democracy, in order to allow citizens to be better associated with local life[43], in the other hand by strengthening representative democracy, in order to provide elected local representatives with the best conditions for the exercise of their mandates.

Consacrated as much by the international law as by national law, the principle of participation in the environmental sector, as has already said, has been finally constitutionalized through the adoption of the *Charte de l'environnement* on march 1th, 2005, which, in its article 7, disposes that everyone has the right to access information relating to the environment held by public authorities and to participate in the preparation of public decisions having an impact on the environment. Moreover, in its *rapport public* of 2011, *Consulter autrement, parteciper effectivement*, le *Conseil*

réforme des enquêtes publiques et la mise en oeuvre du principe de participation, cit. at 26, 1812.

[42] *Loi n. 2002-276 du 27 février 2002, relative à la démocratie de proximité*, on *legifrance.gouv.fr*.

[43] More specifically, the *Loi 276/2002* cit. has introduced an essential principle of "local democracy" and that is the right of the inhabitants of the municipality to be informed about its activities, as well as to be associated with the decisions the concern them. Although numerous legislative provisions already allowed the exercise of these rights, the law provided for an important step forwards as it guaranteed their effectiveness throughout the territory. In implementation of this principle, therefore, the law provided for the creation of neighborhood councils (the "*conseil municipal*") in the municipalities of at least 80,000 inhabitants, to also create specific positions for persons responsible for dealing mainly with one or more districts; the same possibility has been provided for the municipalities of at least 20,000 inhabitants who form neighborhood councils. The law also required municipalities with more than 100,000 inhabitants to create aggregated bodies to offer local services to one or more neighborhoods and meet user expectations more efficiently. In addition: the *Loi Paris, Marseille, Lyon* of 1982 has been modified, in order to increase the powers of the districts and their means of actions and functioning; the advisory commissions of local public services (*commissions consultatives des services publics locaux*) for municipalities of over 10,000 inhabitants, as well as the public institutions of inter-municipal cooperation (EPCI – *établissements publics de coopération intercommunal*) of over 50,000 inhabitants, departments and regions have been renewed and relaunched; the rights of officials elected in local assemblies were strengthened in order to strengthen pluralism of opinions and enrich the democratic debate; etc.

d'Etat considered that the value of this constitutionalization of the principle of participation is twofold: on the one hand the will to assert a human right to the environment justifies this constitutional protection, on the other hand it is important to guarantee the protection of the living environment by the appropriate implementation of procedures actually available to citizens.[44]

Furthermore, in 2015 has been adopted the already mentioned CRPA with the aim of facilitate the dialogue between administrations and citizens through simplified relations, transparency and greater responsiveness of the administration.[45] Among the various provisions, those that are most interesting for the purposes of this discussion are the rules designed to enhance public participation in the rulemaking of the public administration, that is consecrated, in art. L131-1, as a general principle[46]: with this provision the Code has allowed any atypical form of public participation in the preparation of any "reforms", "acts" and "projects" of the public administration. Especially, these provisions are con-

[44] See *Conseil d'Etat, Rapport public du 28 juin 2011*: "*Consulter autrement, participer effectivement*", available on *conseil-etat.fr*.

[45] See article 3 of *loi n. 2013-1005 du 12 novembre 2013* that charged the French Government with the duty of adopting, within two years, the Code containing the general rules of administrative procedures. See also *Exposé des motifs* of the *Projet de loi n. 664 du 13 juin 2013*. On the preparatory works of the law see *La simplification des relations entre l'administration et les citoyens* and, more particularly, see P. Gonod, *Codification de la procédure administrative. La "fin de l'exception française?"*, AJDA 395 (2014); M. Guyomar, *Les perspectives de la codification contemporaine*, AJDA 400 (2014); *La lex generalis des relations entre le public et l'administration*, especially M. Vialettes, AJDA (2015); C. Barrois de Sarigny, *Questions autour d'une codification*, AJDA 2421 (2015); S. Saunier, *L'association du public aux décisions prises par l'administration*, cit. at 41, 2426; Dossier 1 RFDA (2016) *Le Code des relations entre le public et l'administration*, and especially D. Labetoulle, *Avant propos*, 1; P. Bon, *L'association du public aux décision prises par l'administration*, RFDA 27 (2016); P. Delvolvé, *La définition des actes administratifs*, RFDA 35 (2016); P. Delvolvé, *L'entrée en vigueur des actes administratifs*, RFDA 50 (2016).

[46] Especially, art. L131-1 provides that when the administration decides, apart from cases governed by legislative or regulatory provisions, to involve the public in the conception of a reform or in the preparation of a project or act, it makes public the terms of this procedure, makes the relevant information available to the persons concerned, ensures them a reasonable period of time to participate in it and ensures that the planned results or follow-up are made public at the appropriate time.

tained in Book I, Title III of the Code, headed "*L'Association du public aux decisions prises par l'administration*" (or "CRPA")[47] and consist of: consultation via online procedures or *consultation ouverte sur internet*[48] (already provided in *loi n. 2011-525 du 17 mai 2011)*; the *commissions administratives à caractère consultatif*[49] (already provided in *décret n. 2006-672 du 8 juin 2006*, as amended by *décrets n. 2009-613 du 4 juin 2009* and *n. 2013-420 du 23 mai 2013*); the already mentioned new regime of *enquêtes publiques*[50]; the *référendum local* and the *consultation locale.*[51]

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[47] For a more detailed analysis, see S. Saunier, *L'association du public aux decisions prises par l'administration*, cit. at 41, 2426 ss.; P. Bon, *L'association du public aux decisions prises par l'administration*, cit. at 45, 35 ss.

[48] Especially, the chapter II, of Title III, Book I, is dedicated to the consultations via online, where section 1 (articles from L132-1to R*132-7) is dedicated to the *consultation ouverte se substituant à la consultation d'une commission* and section 2 (articles from R*132-8 to R*132-10) is dedicated to *autres consultations ouvertes sur internet*. The discipline provides that When the administration is required to consult a consultative committee prior to the enactment of a regulatory act, it may decide to organize an open consultation allowing the comments of the persons concerned to be collected on a website. This open consultation replaces the compulsory consultation in application of a legislative or regulatory provision. The advisory committees whose opinion must be obtained in application of a legislative or regulatory provision may make their observations known within the framework of the consultation provided for in this article. Mandatory consultations with independent administrative authorities provided for by laws and regulations, assent procedures, those concerning the exercise of public freedom, constitute the guarantee of a constitutional requirement, reflect a power of proposal or implement the principle of participation.

[49] The *commissions administratives à caractère consultatif* constitute all committees whose vocation is to render opinions on draft texts or decisions even if they have other powers. Except when its existence is provided for by law, a commission is created by decree for a maximum duration of five years. This creation is preceded by the realization of a study allowing in particular to verify that the mission assigned to the commission meets a need and is not likely to be assured by an existing commission. The discipline is contained in Chapter III, Title III, Book I, where section 1 (article R*133-1) is dedicated to the application field of the institute, section 2 (article R*133-2) to the maximum duration of existence and section 3 (articles from R133-3 to R*133-15) to the actual functioning of the institute.

[50] The general discipline about the *enquête publiques* is thus contained in Book III, Chapter IV, Art. L-134-1 et seq. where five legislative provisions and twenty-nine regulatory provisions are dedicated to the institute; in particular, for what especially concerns the activation of the inquiry and the competent authority, the nomination and compensations of the *Commissair enquêteur* and the

3. **The French *débat public***

Among all, the French *débat public* appears, in the opinion of the writer, the most advanced and effective model of "deliberative arenas", and this is shown by the fact that it was taken up by other European states - among which, for example, Italy - as an inspirational model. This institute was introduced in France after the great city protests regarding the construction of the high-speed line between Lyon and Marseilles in the early nineties, with the aforementioned *Loi Barnier*. Following the implementation of the Aarhus Convention, by *loi n. 2002-285 du 28 février 2002*, some important changes were made to the previous regulation, including the possibility of calling the public debate on issues of national interest in the field of the environment, sustainable development and spatial planning, as well as the transformation of the CNDP in an independent administrative authority.[52] Subsequently, further legislative interventions reformed the institute.[53] Finally, the bitter protests that occurred in the recent years in relation to some important works, including the airport in Nantes (that led to the referendum on June 26, 2016, in which then, the majority of voters, expressed in favor of the project), the transfer of radioactive materials along the territory, as well as the construction of the Sivens Dam[54], have led to the emergence of some issues of the *débat public*. All these challenges were followed by the government's awareness of a need to reform the subject, with the assignment of an *ad hoc* commission (the *Commission spécialisée du Conseil national*

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members of the *Commission d'enquête*, the preparation of the *dossier* which has to be presented to citizens, and the conclusion of the inquiry, including the drafting of the final report by the *Commission* and its publication. On this theme see M. De Donno, *The French Code "Des relations entre le public et l'administration"*, cit. at 30, 237 ss.

[51] The discipline of the *référendum local* and the *consultation locale* are contained in the Chapter V, Title III, Book I, about "*Participation du public aux décisions locales*", respectively in section 1 (article L135-1) and section 2 (article L135-2).

[52] See V. Molaschi, *Le arene deliberative*, 244 (2018).

[53] Particularly, the *Loi Grenelle II, n. 2010-788 du 12 julliet 2010*, which modified the CNDP, and the *loi n. 2012-1460 du 27 décembre 2012*.

[54] The *Barrage de Sivens* or Sivens Dam was a dam which was planned for construction in the Southern France, across the Tescou (near Toulouse); the works started in 2014 and then halted after the killing of young protester Rémi Fraisse by the police; after the protests arose, the project was closed in 2015 by the Minister of Ecology Ségolène Royal.

de la transition écologique sur la démocratisation du dialogue environnemental) and the appointment of a *consultation du public* pursuant to the art. L 120-1 of the *Code de l'environnement*, which resulted in *Ordonnance no. 2016-1060 du 3 août 2016*, then implemented by *décret n. 2017-626 du 25 avril 2017*: it identified the national plans and programs, subject to environmental assessment, which must necessarily be submitted to the CNDP.

Entering into the merits of the French procedure, first the CNDP - which, as we said, is now an independent authority and has a composition aimed at ensuring neutrality and impartiality[55]

[55]Art. L 121-3 *Code de l'Environnement*: The *Commission Nationale du débat public* is composed of 25 members appointed for five years or for the duration of their term. In addition to its president and two vice-presidents, it includes: 1) A deputy and a senator appointed respectively by the President of the National Assembly and the President of the Senate; 2) Six local elected representatives appointed by decree on the proposal of the representative associations of the elected officials involved; 3) member of the Council of State, elected by the General Assembly of the Council of State; 4) member of the Court of Cassation, elected by the general meeting of the Court of Cassation; 5) member of the Court of Auditors, elected by the General Assembly of the Court of Auditors; 6) Member of the organ of the members of the administrative tribunals and of the administrative tribunals of appeal, appointed with decree on the proposal of the Superior Council of the administrative courts and of the administrative tribunals of appeal; 7) Two representatives of environmental protection associations, approved pursuant to article L. 141-1, who carry out their activities throughout the national territory, appointed on the order of the Prime Minister on the proposal of the Minister responsible for the environment; 8) Two representatives of consumers and users, appointed respectively by order of the Prime Minister on the proposal of the Minister of Economy and the Minister of Transport; 9) Two qualified persons, one of whom acted as investigative commissioner, appointed on the order of the Prime Minister respectively on the proposal of the Minister of Industry and the Minister responsible for the Equipment; 10) Two representative trade union representatives of employees and two representatives of companies or consular chambers, including a representative of agricultural enterprises, appointed by order of the Prime Minister on the proposal of the respective most representative professional organizations. The two vice presidents are a woman and a man. The members appointed on proposal of the same authority in application of the 2nd, on the one hand, and of all the members nominated under the 7th, 8th and 9th, on the other, include an equal number of women and men. Each of the authorities appointed to nominate, propose or elect a member of the commission in application of the 1st, 3rd to the 6th and 10th guarantees that, after this nomination, proposal or election, the difference between the number of women and the number of men among all committee members must not be greater than one, or be reduced when it is

- has the task of ensuring respect for public participation in the process of drawing up projects and works of national interest that have significant impact on the environment. This authority guarantees information and public participation throughout the development phase of a project, plan or program.[56] The CNDP may decide to hold a public debate or a preliminary consultation in order to discuss opportunities, objectives and characteristics of a project that falls within certain economic value thresholds - fixed by decree by the *Conseil d'État* - even in the eventuality of identifying alternative solutions or to deny its implementation.[57] It follows that recourse to the CNDP is mandatory for some projects[58] and optional for others;[59] it is always mandatory for plans and programs for which an environmental assessment is required.[60]

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greater than two. The president and vice-presidents are appointed by decree. Subject to the rules established in the twelfth paragraph, the term of office of the members is renewable once. The president and vice-presidents are full-time and paid. When occupied by public officials, the jobs of president and vice president of the National Commission of Public Debate are jobs leading to retirement according to the Civil Pensions and Military Retirement Code. The duties of the other members give rise to compensation.

[56] Art. L 121-1, *Code de l'Environnement.*

[57] More Particularly, the article L.121-8-1 of the *Code du l'environnement* says that the CNDP is seized of all projects of fittings or equipment which, by their nature, their characteristics, techniques or their estimated cost, as it can be assessed during the development phase, respond to criteria or exceed thresholds set by decree in Council of State. Article R.121-1 also specifies that operations concerned are the creation of highways, railway lines, tracks navigable, nuclear facilities, airport infrastructure or aerodrome runways, dams hydroelectric or reservoir dams, oil and gas pipelines, river basin water transfer, industrial, cultural equipment, sports, scientific or tourist.

[58] For a project that its characteristics are located above the upper threshold, the referral is compulsory by the contracting authority or the responsible public person of the project. These must then send to the National Commission a file setting out the objectives and the main features of the project, as well as the socio-economic issues, the estimated cost and identifying significant impacts of the environmental project or land use planning.

[59] Based on the table provided pursuant to art. R 121-2 of the *Code de l'Environnement*. In particular, recourse to the CNDP is mandatory for projects whose economic value exceeds 300 million euros, even if the economic value is not the only index, as it is supplemented by other indices such as size, length of roads, highways, railway lines, the power of some plants, etc. For example, the creation or extension of airports are among the projects to be compulsorily subjected to CNDP over a much lower threshold of 300 million, that is if over 100

More specifically, pursuant to article L121-8 of the *Code de l'environnement*, for all infrastructure or management projects which, by nature, technical characteristics or estimated cost, meet criteria or exceed certain thresholds established by Prime Minister's decree, subject to the opinion of the *Conseil d'Etat*, the *maître d'ouvrage* (the public or private client of the work) must send a *dossier* to the CNDP (the so-called *dossier de saisine*) in which the objectives and main characteristics of the project, its socio-economic implications, the estimated cost, the identification of significant impacts on the environment or on the management of the territory and a description of the alternative solutions, including the failure to carry out the work, are indicated. This submission must necessarily also be made in the case of national plans or programs which are subject to an environmental assessment. The Prime Minister's decree also establishes a second threshold, lower than the one whose exceeding makes the sending of the dossier mandatory. For works falling between the two thresholds, sending the *dossier* to the CNDP is optional. The *maître d'ouvrage* must however make the project public, publish its objectives and essential characteristics, express his will to appeal, or not, to the CNDP, specify the methods of consultation that he undertakes to carry out in the event that he does not deems to send the *dossier* to CNDP, informing the latter. Within two months from the date on which the *maître d'ouvrage* makes this information public, a request for activation of the public debate procedure can be sent to the CNDP by the following subjects: 10,000 EU citizens of the European Union residing in France; ten MPs; a regional, departmental or municipal council or a public body of inter-municipal cooperation with territorial management responsibilities, whose territories are affected by the project; an environmental association operating at national level. In this case, the *maître d'ouvrage* will have to prepare the *dossier* and send it to the CNDP.

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million euros; for port infrastructures whose "mandatory" threshold is 150 million euro. Thus, always in principle, the optional projects include those worth between 300 million and 150 million euros, with the necessary exceptions, also here, for airport and port infrastructures. See V. Molaschi, *Le arene deliberative*, cit. at 52, 247.

[60] Artt. L 121-8, c IV, e L 122.4, listed at the art. R 121-1-1, *Code de l'Environnement.*

In its judgments, the *Conseil d'Etat* specified that the CNDP has no capacity for "*auto-saisine*" (self-referral), nor for expanding the subject of the *saisine*.[61]

Within two months of receiving a *dossier de saisine*, the CNDP pronounces on the need or not of the public debate, with a concrete "filter effect" for the discretional power involved in the decision about which are the territorial impact of the project, its socio-economic implications and its impacts on the environment or on the management of the territory (article L121-9 of the *Code de l'evironnement*). Two articles of the law define the criteria according to which the CNDP assess whether or not the project should be the subject of a public debate: the art. L. 121-1 defines the projects which fall within its competence as "development or equipment projects of national interest […], falling within the categories of operations whose list is fixed by decree in Council of 'State, as soon as they present strong socio-economic challenges or have significant impacts on the environment and regional planning"[62]; the art. L.121-9 indicates that "the National Commission assesses for each project whether the public debate should be organized according to the national interest of the project, its territorial impact, the socio-economic issues attached to it and its impacts on the environment or territory planning".[63]

The law lists the criteria cumulatively and not alternative: a project is the subject of a public debate if it is of national interest and if it involves strong socio-economic issues or has a strong impact on the environment or the territory. Despite this clarity, its

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[61] See *Conseil d'Etat*: 13th December 2002 n. 229348 (*Association pour la sauvegarde de l'environnement et la promotion de Saint-Léger-en-Bray*); 2th June 2003 n. 249321 (*Association Bouconne-Val de Save*); 28th December 2005 n. 277128 (*Syndacat d'agglomération nouvelle Ouest-Provence*); 24th may 2006 n. 280372 (*Jean-Louis M. et Marie-Jo Z.*).

[62] The art. L.121-1 of the *Code de l'environnement*: "*…projets d'aménagement ou d'équipement d'intérêt national […], relevant de catégories d'opérations dont la liste est fixée par décret en Conseil d'État, dès lors qu'ils présentent de forts enjeux socio-économiques ou ont des impacts significatifs sur l'environnement et l'aménagement du territoire*".

[63] Art. L.121-9 of the *Code de l'environnement*: "*…la Commission nationale apprécie pour chaque projet si le débat public doit être organisé en fonction de l'intérêt national du projet, de son incidence territoriale, des enjeux socio-économiques qui s'y attachent et de ses impacts sur l'environnement ou l'aménagement du territoire*".

application can be difficult, in particular with regard to the first criterion of national interest. Indeed, as regards to the concept of national interest of a project, the law contains no definition. It is therefore necessary to make an assessment on a case by case basis.[64]

The CNDP's decision to organize or not a public debate is subject to appeal: this has been stated by the decision *Association France Nature Environnement* of the *Conseil d'Etat* in 2002, that annulled a decision by which the Commission rejected a request for the organization of a public debate, and stated that "the contested decision of the CNDP for public debate does not have the character of a preparatory measure for the decisions taken by the competent administrative authorities for the implementation of the projects and constitutes a decision adversely affecting, susceptible of being referred to the judge of the excess of power".[65]

If the Commission deems it necessary to hold a public debate (it has two months from the investiture, within which to decide how to participate in the public), it can organize it in itself or entrust it to a *commission particulière*, indicating, in this case, the modalities for a proper conduct of the debate. Once the debate for

[64] See *CNDP 2002-2012 "La pratique du débat public: évolution et moyens de la Commission nationale"*, on *debatpublic.fr* 20 (2012).

[65] See *Conseil d'Etat*, 10/9 SSR, 17th May 2002, n. 236202 (*Association France Nature Environnement*) stated that "*la décision attaquée de la Commission nationale du débat public n'a pas le caractère de mesure préparatoire des décisions prises par les autorités administratives compétentes pour la réalisation des projets et constitue une décision faisant grief, susceptible d'être déférée au juge de l'excès de pouvoir.*" This principle has been confirmed by the administrative judge with the decision of the *Conseil d'Etat*, *Section du contentieux*, 14th June 2002, n. 241036 (*Projet A32*). In another decision, the *Conseil d'Etat* reaffirmed the principle mentioned above, in relation to a request to interrupt and postpone the debate: "*Les différentes décisions que la Commission peut être appelée à prendre après qu'elle a décidé d'ouvrir un débat public et qui peuvent notamment porter sur ses modalités, le calendrier et les conditions de son déroulement ne constituent pas des décisions faisant grief ; qu'il en va en particulier ainsi du refus de la Commission d'interrompre le débat ou de le reporter à une date ultérieure*" (*Conseil d'Etat, 6ème et 1ère sous-sections réunies*, 5th Avril 2004, n. 254775 (*Inter-municipal citizen association of the populations concerned by the Notre-Dame airport project -Landes - ACIPA*). For a reconstruction on the theme, see the already mentioned *CNDP 2002-2012 "La pratique du débat public: évolution et moyens de la Commission nationale"*, cit. at 64, 20 ss.

a project is called, the *maître d'ouvrage*[66] will have six months to prepare the dossier - containing all the information, characteristics, reasons, opportunities, variations, environmental impact and socio-economic implications of the project - which will be evaluated by the CNDP which may request additions and, only when it considers it appropriate, will authorize its dissemination[67] and the observations subsequently received by the public will be collected in the *cahiers d'aucteurs*, also then disseminated. The debate lasts for four months - extendable for two additional months on motivated decisions by the CNDP - during which public meetings and thematic round tables are held for the exchange of information and the confrontation between the *maître d'ouvrage* and citizens. Within two months of the conclusion of the public debate, the CNDP will draw up a report of the positions that emerged[68] and, within three months of its publication, the *maître d'ouvrage* will have to communicate its intentions regarding the realization, variation or withdrawal of the project.[69]

For the plans and programs the public debate follows the same procedure, with a variation in the times, whose meshes widen, as in this case it can last six months, extendable for another two months by the CNDP's decision.[70] Furthermore, the Government can also appeal to the CNDP, asking it to hold a *dèbat public* on general options of national interest relating to policies, plans and programs that may have significant impacts on the environment, sustainable development and territory.[71] Finally, the CNDP will be able to contact even sixty parliamentarians or 500,000 EU citizens residing in France.

Among the strengths of the *débat public*, which make it one of the best models of "deliberative arenas" among those tested, there is certainly the fact that it is designed to offer participatory guarantees to citizens for each work that meets predetermined objective criteria, whereas, in other countries, the scope of applica-

[66] It is the subject that proposes the project and can be both public and private, unlike the provisions of Italian law.
[67] Artt. L 121-11, c. II e III, *Code de l'Environnement.*
[68] Artt. L 121- 11, c. III, *Code de l'Environnement.*
[69] Artt. L 121-13, c. I, *Code de l'Environnement.*
[70] Artt. l 121-11, c. I, *Code de l'Environnement.*
[71] Artt. L 121-10, *Code de l'Environnement.*

tion of the participative tools is delimited on the basis of subjective criteria (for example, in Italy, the public debate applies only to cases in which the proponents are "the contracting authorities and entities contractors", so as to leave out the cases in which the project is proposed by private individuals). It is therefore important to provide an instrument of participatory democracy that does not apply any unjustified discrimination between works proposed by public administrations and, instead, works proposed by private individuals.

Again, and not less important, is the presence of a third party (the CNDP), independent and impartial, which leads the work and has in assignment important functions: such institution, in fact, not only it is capable of guaranteeing a substantial protection, but also of allowing the overcoming of that aversion *a priori* which often characterizes the citizens (the aforementioned "Nimby" and "Niaby" effects) thanks to the trust more easily placed towards a neutral subject, rather than towards a subject who is coordinating the procedure in an evident impartiality due to a conflict of interests.

However, it is considered that an efficient tool should not be limited to projects characterized by excessively high size thresholds, so as not to end up minimizing the recourse to that institute, which, if well used, is also a valid deflation tool for litigation. On this point, however, the French legislation not only provides for mandatory recourse to the *débat public* in certain cases, but also for its optional use when, the subjects to whom the initiative is delegated, request it (even the private, if it will proceed at its own expense).

4. **The Italian *dibattito pubblico*: a "participatory oligarchy"**

The Italian model of public debate has been recently introduced by the national legislation (with the *d.lgs. 50/2016*, art. 22, implemented by the decree of the President of the Council of Ministers 76/2018) to make up for a gap in the law that has long required an intervention in this regard. In fact, the need to adopt the public debate for major works at national level in Italy, was felt for a long time, as this juridical institution appeared (and appears) as

a suitable solution to the administrative conflicts from which the Italian infrastructural policy is certainly characterized.[72]

There is no doubt, in fact, that the discipline of the Italian *dibattito pubblico* is adequate to guarantee the participatory needs where it is applied. The Constitutional Court (which ruled on the question of legitimacy of the art. 7 of the regional law of Puglia on participation, as it would produce interference with the prerogatives of the State) it considered that "a reasonable point of balance between the requirements of participation and those of efficiency" has been reached since it configures "a fundamental step in the journey of the culture of participation, represented by a model of administrative procedure that has, among its unavoidable steps, the comparison between the proposing public administration at the work and the subjects, public and private, interested and involved by its effects, thus fueling a dialogue that, on the one hand, allows any more satisfactory solution to emerge and, on the other hand, defuses the potential conflict that is implicit in any intervention that has a significant impact on the territory".[73]

The criticalities of the institute, however, have to be individualized, precisely, in its field of application, since the implementing regulation has identified excessively high dimensional thresholds, as a condition of application of the public debate.[74] In this sense, in fact, the *Consiglio di Stato* (with the opinion n. 359/2018 having as object the draft decree of the president of the Council of Ministers) on the one hand gave a positive judgment, where it considered that the decree has reached a "reconciliation between the need not to lengthen too long the times of realization of the great infrastructural and architectural works of social importance, thanks to the involvement of citizens, stakeholders and adminis-

[72] *Ex multis*, see A. Averardi, *Amministrare il conflitto: costruzione di grandi opere e partecipazione democratica*, Riv. trim. dir. pubbl., IV, 1174 (2015).

[73] *Corte costituzionale*, decision n. 235 of 9th October 2018, in the judgment of constitutional legitimacy on the article 7, comma 2, 5 e 12, of the regional law of Puglia 13th July 2017, n. 28 (Law on the participation), promoted by the President of the Council of Ministers on the violation of articles 97, 1° comma, and 117, 2° comma, lett. *m)*, and 3° comma, and 118 Cost., accepted only in part, where it provides that the regional public debate also takes place on national works.

[74] See U. Allegretti, *Un caso di attuazione del principio costituzionale di partecipazione: il regolamento del dibattito pubblico sulle grandi opere*, Riv. Aic, 3 (2018).

trations interested in the realization of the work";[75] on the other hand, however, it stressed that the size thresholds identified by the decree "are such of a high amount as to end up making the use of this institute minimal, which instead represents one of the most important innovations of the new already mentioned *Codice dei contratti* and that, if well used, could also constitute a valid deflationary instrument of the dispute". As well as a precious instrument upstream, for the resolution of eternally unresolved social conflict, often because of a perpetual and not always justified lack of confidence on the part of private individuals with regard to any type of infrastructural intervention in the area of residence (the aforementioned "nimby" syndrome).[76] The *Consiglio di Stat*o, therefore, suggested an intervention that modifies the level of the indicated dimensional thresholds, which, if not resolved, "could frustrate the operation of the institution of the public debate" in Italy.

It would seem that the *Corte costituzionale* also appears inclined to favor a greater extension of the public debate, since, with the decision n. 235/2018 (about the legitimacy of the regional law of Puglia which provides for an alternative public debate with respect to the regional regulation that would affect state prerogatives) has sanctioned the constitutional illegitimacy of the provision censured only in the part in which it provides that the regional public debate will also take place on the national work, offering an interpretation aimed at saving the regional legislation on

[75] See *Consiglio di Stato*, Special Commission of 7th February 2018, Opinion n. 359 of 2018 on the Decree of the President of the Council of Ministers with methods of carrying out, types and thresholds of the works subject to public debate, pursuant to article 22, 2, of the legislative decree 18 April 2016, 50, 2, in *www.giustizia-amministrativa.it.*

[76] F. Benvenuti, *Il nuovo cittadino. Tra libertà garantita e libertà attiva (1994)*, today in *Scritti giuridici*, I, 896 (2006); G. Manfredi, *Il regolamento sul dibattito pubblico: democrazia deliberativa e sindrome nimby*, cit. at 1, 605; see also A. Averardi, *La decisione amministrativa tra dissenso e partecipazione. Le ragioni del dibattito pubblico*, Munus 129 (2018); T. Nichols, *La conoscenza e i suoi nemici. L'era dell'incompetenza e i rischi per la democrazia*, it. Transl., (2018). See also K.E. Portney Siting, *Hazardous Waste Treatment Facilities: The NIMBY Syndrome*, AH (1991); W. A. Fischel, *Why Aere There NIMBY's?*, Law and economics, 77, 1, 144 (2001); H. Hermansson, *The Ethics of NIMBY Conflicts*, *Ethical Theory and Moral Practice*, 10, 1, 23 (2007).

the subject of public debate, as it considered that the contested norms should be linked to the hypotheses in which it is a regional public work, and not to the cases concerning a national work, of which the Region does not hold.[77]

Moreover, it is important to highlight another difference - which leads to important consequences - of the "Italian-style" public debate, compared to the French inspiring model. In fact, the former refers, on the basis of a subjective criterion, only to the cases in which the proponents are the "contracting authorities and contracting entities", excluding projects that are proposed by private parties from the application of the participation tool. Thus, while the *débat public* offers participatory guarantees to citizens for every work that meets the predetermined objective criteria, in Italy an unjustified distinction is applied between works proposed by public administrations and work proposed, instead, by private individuals. Still, and of not less importance, in the Italian model of public debate there is not a third, independent and impartial party that conducts the work as is provided in the French model. In fact, in the *Codice dei contratti* is provided the *Commissione Nazionale per il Dibattito Pubblico* at the Ministry of Infrastructure and Transport, but it is not in the same way independent, nor does have the important functions assigned to the French CNDP.[78]

On the basis of what has been said so far, the Italian model resembles, rather than an instrument of participatory democracy, an instrument of participatory oligarchy. This shows how the European states have a heterogeneous situation in the implementation of these instruments, and not very satisfactory, where perhaps - as one would hope - the French model should be adopted, homogenizing the administrative tools of the different European states, to face a common crisis of "incommunicability" between administrators and administrated.

5. **Conclusions**

We have seen, therefore, how, in the democratic and institutional crisis, the citizens' aversion grows, above all towards in-

[77] See *Corte costituzionale*, decision n. 235 of 9th October 2018, cit. at 73, §9.
[78] See V. Molaschi, *Le arene deliberative*, cit. at 52, 262.

frastructural works that have a great impact on the environment and on the territory; in this way the conflicts appear insurmountable with the recourse to ordinary procedural tools, because the lack of trust of represented in representatives and of the administrated in administrators, causes a continuous obstacle, both in a procedural-decisional phase and in a contentious phase. The only possibility to curb this perpetual stall mechanism is to allow the collaboration of those who are most affected by the interventions on the territory (the citizens!); in fact, these conflicts emerge at the local level, as the "resident" perceives costs (risks) much more easily than the benefits. In fact, using the opposite approach, minimizing the participatory moments with the DAD method, does nothing but exacerbate the conflict, aggravating the situation of citizens' lack of confidence in the State.

Furthermore, the participation constitutes an achievement not only for the citizens, but also for the administration itself; in fact, it not only has a guaranteed purpose, as it protects the interests and claims of the private, but also, and even more, has a collaborative purpose, where it allows public administrations, at a stage of the initial process, to be able to come aware of information that would otherwise not have been known, to evaluate interests that otherwise would not have been introduced into the proceeding, and so as to make a more targeted and appropriate weighting. Therefore, participation does not only mean a defense of the private sector, but also a good performance of the public administration, according to the principles of efficiency, effectiveness and even economics (where, for example, a work that is the result of a participatory choice, it is less subject to contentious appeals).[79]

[79] On the dual function - guaranteeing and collaborative - of participation, see *ex multis*: G. Berti, *Procedimento, procedura, partecipazione*, *Studi in memoria di Enrico Guicciardi* 780 (1975), in the new edition G. Berti, *Scritti scelti*, 571 (2018). On this point, it should be noted that at the terminological level the Nigro's Commission used the term "contradictory" meaning with it the participatory intervention, meaning "para-jurisdictional", hence the interpretations that highlight the guarantee and "anticipated protection" function of the procedural participation. On point see the *d.d.l.* containing "*Disposizioni dirette a migliorare i rapporti fra cittadino e pubblica amministrazione nello svolgimento dell'attività amministrativa*", in F. Trimarchi (ed.), *Il procedimento amministrativo fra riforme legislative e trasformazione a cura dell'amministrazione*, 182 (1990); see also M. C. Romano, *La partecipazione al procedimento amministrativo*, in A. Romano (ed.) *L'azione amministrativa*,

While the administration becomes an instrument aimed at satisfying a public interest that no longer coincides with the "common good", but which is enriched with any other interest, of a public or private nature, which can be detected in order to achieve a more satisfactory possible weighting. An administration, therefore, that uses the procedural forms not in order to form an authoritarian and unilateral will, but with the intention of achieving the maximum agreement between the various stakeholders, in the implementation of the principle of collaboration. On the other hand, "participatory democracy" means interaction, within public procedures - above all administrative, but also normative - between society and institutions, which aims, through both collaboration and conflicts, to produce a unitary result each time, attributable to both of these subjects and to which the extension of the democratic method is foreseen also to the administrative functions, as well as to the representative institutions, through the direct participation of private individuals.

However, speaking of participatory democracy as a magic formula doesn't make sense, since any principle needs to be translated into rules that make it effective and efficient. Therefore, we cannot blame the principle itself for the failure of some models of participatory democracy; but, *vice versa*, it is necessary to identify

310 (2016); and, on the ambivalence of the functions attributable to participation, see A. Massera, *Il diritto del procedimento amministrativo tra vocazione alla protezione delle libertà e pressioni verso la democraticità delle decisioni*, in G. Falcon (ed.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario*, 78 (2008); S. Battini, B. Mattarella, A. Sandulli, *Il procedimento*, in G. Napolitano (ed.), *Diritto Amministrativo Comparato*, 107-121 (2007). On the role of adversarial in participation see F. Figorilli, *Il contraddittorio nel procedimento amministrativo (dal processo al procedimento con pluralità di parti)* 184 (1996); F. Trimarchi, *Considerazioni in tema di partecipazione al procedimento amministrativo*, Dir. proc. amm. 634 (2000); G. Ghetti, *Il contraddittorio amministrativo,* 73 (1971); G. Berti, *Procedimento, procedura, partecipazione*, cit. at 79, 799; A. Carbone, *Il contraddittorio procedimentale: Ordinamento nazionale e diritto europeo-convenzionale*, 230 (2016). Even in the interpretation of administrative jurisprudence, the ambivalence of participation, between protection and collaborative functions, is known. About this see: *TAR Lazio*, Section III, 15th March, 2011, 2352, *giustizia-amministrativa.it*; *Consiglio di Stato*, Section V, 10th January, 2007, 36; *Consiglio di Stato*, Section II, 23th Maggio 2007, 413. On the triple function guaranteed, democratic and collaborative, see A. Ferrari Zumbini, *La regolazione amministrativa del contratto*, 324 (2016).

the most efficient mechanism to decline the principle so as to make it as effective as possible, aware of the difficulty of the social and structural challenges which it is supposed to cope with, and without forgetting that there is an inseparable connection between democracy and social conflict.

In fact, there are various procedures that provide for moments of information and participation which, however, appear to be late and insufficient in order to prevent and resolve the conflict. Participation, therefore, must be conducted according to certain criteria, under a responsible and coordinated governance, in order not to translate itself into a means of mere absorption of the conflict. According to Luhmann's[80] conception, in fact, a margin of uncertainty of the outcomes is necessary to induce the holders of the various interests at stake to pursue the satisfaction of these within the institutionalized procedures, in order to allow a better social control of the tensions and the final achievement of a consensus (i.e. a legitimization) of the choice; therefore, procedures that, despite being participated, are characterized by a substantial certainty of the outcomes, prove to be absolutely problematic in terms of the legitimacy of the decision. If in an authoritarian system the principle of certainty can be synonymous with efficiency, effectiveness, coercivity and unavoidability, the same can't be applied to a model inspired by canons of democracy and pluralism, where certainty does not present itself as a factor of efficiency and stabilization.[81]

The dialogue among stakeholders cannot be just a formal issue. The non-negotiability of the interventions promoted by the proposers is one of the main reasons for conflict, the lengthening of time, and the waste of resources. To promote negotiability, interventions and projects must take on a territorial value, intervening on the mitigation of environmental impacts and on ecological compensations, but not only. Integration stems not only from indepht studies, but also and above all from the interaction with local actors, often holders of knowledge that otherwise would not be

[80] Refer to N. Luhmann, *Procedimenti giuridici e legittimazione sociale*, it. Transl. 112 (1995); N. Luhmann, *Organizzazione e decisione* (*Organisation und Entscheidung* - 2000), it. Transl. (2005).

[81] L. Mengoni, F. Modugno, F. Rimoli, *Sistema e problema. Saggi di teoria dei sistemi giuridici* 172 (2017).

taken into consideration. Furthermore, to strengthen trust, it is necessary to limit conflicts of interest, make decision-making processes transparent, starting from the definition of plans, programs, up to the projects, making credible assessments.

On this point, it appears that the institute of the French *débat public*, where it respects the aforementioned guarantees (such as an area of application not restricted by too high thresholds, or from discriminatory provisions that resort to the use of subjective criteria, and the assignment of the functions of coordination and guarantee to a third *super partes* subject) constitutes a reasonable balance between the requirements of participation and those of efficiency, in a model of administrative procedure that has, among its unavoidable passages, the confrontation between the proposing public administration and the subjects (both public and private) that are interested and involved in its effects.

The same efficiency cannot be attributed, instead, to the Italian *dibattito pubblico*, given that it does not possess any of the three characteristics that have been identified as fundamental for the effectiveness of a deliberative arena.

The hope of the writer, therefore, is not only a broad and global diffusion of the institute of the *débat public*, but furthermore that the same approach could be also used to arrive at a sort of co-decision between the parties, not having to be relegated to an exclusively pre-decisional phase. The moment seems favorable for identifying new and additional forms of composition that are flexible and not very proceduralized, which allow the participation of all the parties involved, be they public or private, not only in an initial participatory phase, but also in the decision-making phase, and this in order to cool the conflicts, to direct the choices constructively in confrontation tables with informal discussions before an authoritative, impartial and high-profile technical legal person, who is able to reduce the information asymmetry by making stakeholders aware, to mediate and give more confidence, in the light of transparent decision-making procedures that are based on an "organized and assisted search for compromise".[82]

[82] C. Dupont, *La négociation: conduite, théorie, applications*, 3rd ed. (1990); L. De Lucia, *La conferenza di servizi nel decreto legislativo 30 giugno 2016, n. 127*, Riv. Giur. Urb. 39 (2016); M. G. Imbesi, *Il valore sociale della mediazione ambientale*, Giureta, X, 1 (2012); see also Camera arbitrale di Milano, *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* 3 (2016).