ARTICLES

THE *INQUIRY MODEL* IN URBAN PLANNING: A STRATEGIC TOOL FOR EFFICIENCY OF ADMINISTRATIVE ACTION? *

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Abstract

In urban planning, *inquiries* may help in granting a fair management of the relationship with the private parties. The analysis of the British and the French models show the role of *inquiries* in avoiding the risks of scarce efficiency of the administrative action, due to a lack of participation by the stakeholders. The paper consists of an exam of the rules of law and of their evolution. It aims at demonstrating that there is not, even in the narrow field which has been considered, just one *inquiry model*. *De iure condendo*, it may be useful to re-think at the rules concerning participation by private parties, by distinguishing it into two different steps: the first should regard the strategic choices about the contents of the plan, the second should regard the technical issues. To this purpose, the British and the French *inquiry models* could represent an interesting source of inspiration.

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* This paper was accepted and discussed at the 2013 Joint Congress of IIAS-IASIA (Manama, Bahrain, June 1-6, 2013). I want to thank the participants – especially Prof. K.K. Pandey, Prof. A.A. Al-Mahmood and Dr. T.-S. Liao – for the interesting and useful discussion.

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1. Introduction: Why the Inquiry Model?

The growing complexity of administrative action has been producing new risks of failure. One of the most important issues regards the relationship between the public authorities and the private parties. This topic shows interesting sides in urban planning, which is a basic sector in the perspective of the economic and social development and of the achievement of good standards of quality of life. Urban planning is a technical and political process, concerned with the use of land and the design of the urban environment[1]. It has the function of indicating the best destination of each portion of land, for a comprehensive evaluation of the positive and negative effects on the whole territory; the competent authority is normally the local one, more seldom the regional one. Urban plans have of course various contents. Some are general rules; other contents are related to specific uses of certain portions of land. So, besides measures with individual addressees (such as the ones regarding the localization of public works) there are often rules whose addressee is the entire population involved[2].

The importance of urban planning has been growing in the last decades, as land has become a sort of "scarce resource"[3]; so, its

[1] See N. Taylor, *Urban Planning Theory since 1945* (2007).

[2] In the Italian doctrine, especially Prof. Paolo Stella Richter offered numerous and basic contributions; recently see, for instance, P. Stella Rchter, *Diritto Urbanistico. Manuale breve* (2010), especially 9 and ff. In the British doctrine, see, for instance, R. Baldwin, *Rules and Government* (1995), especially 16 and ff. and 125 and ff.; see also D.J. Galligan, *Due process and fair procedures: a study of administrative procedures* (1996). In the French doctrine, particularly interesting is S. Traorè (ed.), *Les documents d'urbanisme* (2012), where the author tries to describe the specific nature of land planning acts.

[3] The importance of land as a "scarce resource" is nowadays evident from many points of view. For instance, an interesting evidence of this is the growing phenomenon of land grabbing. About this topic see, for example: M. Coker, *United Nation food chief warns on buying farms,* Wall Street Journal, September 10 2008, available at http://tinyurl.com/5uahmp; L. Cotula, S. Vermulen, R. Leonard, J. Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Deals in Africa*, 2009, available at http://www.ifad.org/pub/land/land_grab.pdf; J. Franco, M.B. Saturnino Jr, *Land concentration, land grabbing and people's struggles in Europe*, TNI, 2013,

use must be carefully managed. From this point of view, there are several evident dangers, which are born from the co-existence of different aims about the development of urban spaces.

The first problem is connected with the complicated emersion and protection of all the (public and private) relevant interests, especially the ones owned by the weakest parts of the populations. The main purpose is to indicate a fair method of action; so, the competent authority may keep in mind and carefully evaluate all the legitimate expectations. Of course, this fundamental need is common to the whole area of administrative law. But in the field of urban planning the desired balance among different expectations may be particularly hardly obtained. In fact, the conflicts among the involved parties are often difficult to solve. The "strongest" stakeholders usually don't want to renounce their advantages, that have normally been achieved in the light of the previous use of the land. From the opposite side, the "weaker" part of the population aims at getting, through a well balanced planning action, a new and fairer distribution of resources.

Besides, in urban planning, public law plays a peculiar role. In fact, when the rules of law (and the plans) are emitted, usually the management and use of land in great part have concretely already happened. So, all the legitimate expectations, that have become ripe before, must be considered and they must be harmonized with the public interests. These are of different kinds: some are "traditional", such as housing, some are typical of the last decades, such as the protection of environment.

Only the completeness of the preliminary step of procedures may grant that a fair decision is taken. Moreover, the completeness of the preliminary step is fundamental in the perspective of the private stakeholders. The private parties, in fact, aim at presenting their views to the competent authority and hope not to be addressees of unfavourable decisions.

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available at http://www.tni.org/sites/www.tni.org/files/download/land_in_europe-jun2013.pdf; Grain (ed.), *Land grabbing for biofuels must stop*, February 2013, available at http://www.grain.org/article/entries/4653-land-grabbing-for-biofuels-must-stop; B. Nyari, *Biofuels Land Grabbing in Northern Ghana,* December 2008, available at http://biofuelwatch.org.uk/docs/biofuels_ghana.pdf.

The prior involvement of the stakeholders plays a basic role not only to grant the assumption of the "best" choice in the light of all the relevant interests. It is also a method to avoid, after the emission of the administrative measures, complaints and applications for judicial review[4]. This result, of course, is strictly connected with the need to assure the financial and practical efficiency of the administrative action. The legal tools to reach this goal are many and the specific solutions may be quite different in the different contexts.

For instance, a useful tool may be the constitution of "intermediate" bodies, entrusted with the task of communicating with the public authorities. The purpose is to find out good solutions to manage activities related with the protection of the public interest. In this perspective, a very interesting suggestion comes from the US legal system, where the Citizens Utility Boards[5] are ruled by the national legislators, especially for the management of commons and utilities. The CUBs have their own place between private and public law, in the field of associations based on participation by the citizens and on democracy as the main guide-principle. A federal model act has been dedicated to these bodies[6]. The Model Act introduces common rules, that may be implemented in the single States[7]. The aim is to contrast,

[4] The idea of participation in the administrative procedures as an instrument to prevent and overcome dissent is well known and is deeply rooted, for instance, in the contribution of N. Luhmann, *Procedimenti giuridici e legittimazione sociale* (1995); see also N. Luhmann, *A Sociological Theory of Law* (1985) and Id., *Law As a Social System* (2003).

[5] See S. Flynn, K. Boudouris, *Democratising the Regulation and Governance of Water in the US*, in B. Balanyå, B. Brennan, O. Hoedeman, S. Kishimoto, P. Terhorst (eds), *Reclaimong Public Water. Achievements, Struggles and Visions from around the World* (2005), at 73 and ff.; B. Givens, R.C. Fellmeth, *Citizens' Unitility Boards: Because Utilities Bear Watching* (1991), at 90 and ff. Let me mention also A. Simonati, *La ripartizione dell'acqua negli Stati Uniti, fra diritti di proprietà e partecipazione dei privati. La democrazia come "metodo" per la gestione dell'acqua?*, Rivista giuridica dell'ambiente 837 (2012).

[6] About the model Act which rules the right of private parties to participate in the procedures regarding public utilities, see R.B. Leflar, M.H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A model Act*, 13 Harvard Journal on Legislation 235 (1973). For the text of the Model Act see, for example, B. Givens, R.C. Fellmeth, *Citizens' Unitility Boards: Because Utilities Bear Watching*, cited at 5, 90 and ff.

[7] See sec. 29 of the model Act.

through a democratic method, discriminations due to social and economic differences among the various groups of private parties. Their right to participation is satisfied thanks to the creation of permanent non-for-profit organizations, funded by voluntary contributions and acting under the democratic control of their membership[8]. To grant an affordable service and to promote the adequate representation of residential utility consumers[9], the CUBs assist citizens in writing complaints, collecting funds and cooperating with the public law structures and authorities (for instance, the competent agencies) in the rule-making and adjudicating procedures[10]. This instrument could be very useful, but it does not fit well in all situations. In fact, it may efficiently work only in the legal systems where the democratic involvement of populations is deeply rooted at every institutional level (both the central and the local ones). Moreover, in general terms, one could say that the CUBs model does not represent a real solution in fields – such as spatial planning – where the problem is not so much of rationally distributing *ex novo* a scarce resource, as to efficiently use areas which are already partially or massively urbanized.

Also, the "ordinary" instruments of procedural participation (i.e. the traditional "right to be heard") are not able in urban planning to offer a sufficiently strong protection to the private parties. First of all, "isolated" participatory contributions are normally inspired by selfish and self-defensive visions and do not give a real support for the implementation of the public interest. Secondly, the solicitations coming from the private parties may be better formulated when their ideas are discussed in a public debate.

That's why it is particularly interesting to examine the *inquiry model*[11] in the field of urban planning.

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[8] This is the definition of the CUBs set out in sec. 2 of the model Act.

[9] The purposes of creation of the CUBs are set out in sec. 2 of the model Act.

[10] See sec. 5 and ff. of the model Act.

[11] It may be useful to mention the existence of a third family of legal tools, which is, to so say, in an "intermediate" position between the protection of the "right to be heard" in the administrative procedures and the creation of *ad hoc* structures. It is the conclusion of agreements, whose parties are, from one side, the competent authority and, from the other side, the private stakeholders. This instrument is well known and in many legal systems it is often used in the fields of urban law and public works, where the need of harmonization among

Leading a fair *inquiry* procedure may allow the administration to get a large number of information, which are extremely useful to rationally manage land. The *inquiry model* – which is itself an evolution of the ancient "right to be heard"[12] – could represent a good legal solution when the dialogue among the competent authorities, the populations involved and the private stakeholders assumes a primary relevance. An *inquiry* procedure is more complex than the acquisition of single participatory acts. It offers a more complete view of the case; so, it is potentially more effective, both from the point of view of the competent authority and from the point of view of the private parties. At the same time, its structure may be quite simple, because it does not require the organization of new democratic mechanisms.

However, it would be wrong to assume that the *inquiry model* consists of a unitary paradigm. To analyze this issue – and to narrow the extent of the analysis, as well – I have chosen two European legal systems, where the *inquiry model* has been developing during the last decades and has now reached a good degree of ripeness: they are the British system and the French system. In both of them, participation of the private parties in the urban planning procedures normally consists of a double-step mechanism. First, people (normally, the whole local populations)

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different positions is particularly strong (about this subject see, for instance, R. Caranta, A. Gerbrandy (eds), *Traditions and Change in European Administrative Law* (2011). The main issue regards the indication of the legal rules that may be used to solve the problems of implementation. In particular, the question is if they are public law or private law rules and, in general, one could say that almost always the answer given by the legislators and the courts is a complex one. I have decided not to examine this topic because only partially these agreements may offer good solutions to avoid complaints and applications for judicial review. In fact, the agreements produce their effects in the legal sphere (not of communities, but) of single individuals, who are bound by them together with the authority; then, third private parties who feel damaged by the agreement maintain their right to produce complaints ad applications for judicial review. So, the agreements may be not so useful in the perspective of overcoming the risks connected with the administrative action, which is the aim of this paper.

[12] For the analysis of the modern develop into the "dialogue model" of the traditional "right to be heard" in the administrative procedures of several legal systems, see, for instance, R. Caranta, A. Gerbrandy (eds), *Traditions and Change in European Administrative Law*, cited at 11.

may express themselves, in a rather informal way, about a preliminary draft of the plan. Then, when the content of the draft has been specified, a sort of *inquiry* sub-procedure is carried out. Notwithstanding this common starting point, the study of the British experience and of the French experience shows that their divergences are probably more numerous and more relevant than their convergences. By indicating the weak and the strong elements of the two kinds of *inquiry model*, hopefully I shall be able to infer some suggestions for its further implementation *de jure condendo* in other contexts and legal systems.

2. The British Model

In the UK, *public inquiries* were introduced for the first time in urban law with the 1947 *Town and Country Planning Act*[13]. These rules described the *inquiry* as a sort of tool of "second degree". It was used, at the local level of urban planning, after a period of time during which the interested people could express themselves about the general contents of the published preliminary drafted plan. The primary *inquiry model* consisted of a hearing based on

[13] See, for instance, Bar Council, Law Society, Royal Institution of Chartered Surveyors (editor), *Overarching and Underpinning: Planning in the 21st Century*, in *Journal of Planning and Environment Law, Occasional Paper 31*, 2003; the paper by S. Cirell (*The modernisation of local government and its impact on planning*) is particularly interesting, as it shows how the evolution of local power in spatial planning may change the administrative action. About the evolution of planning law in the UK legal system see, for example: Y. Rydin, *Urban and Environmental Planning in the UK*, New York, Basingstoke, 2003; B. Cullingworth, V. Nadin, *Town and country planning in the UK*, London, Routledge, 2006; R.M.C. Duxbury, *Telling and Duxbury's Planning Law and Procedure*, Oxford, New York, Oxford University Press, 2009. About the role of inquiries anche the right to be heard in the procedures, see, for instance: R.E. Wraith, G.B. Lamb, *Public Inquiries as an Instrument of Government*, London: Allen and Unwin, 1971; Senate of the Inns of Court and the Bar, Law Society, Royal Institution of Chartered Surveyors (editor), *Inquiries: The Right to be Heard?*, in *Journal of Planning & Environment Law, Occasional Paper 25*, 1997; T. Th. Ziamou, *Rulemaking, participation and the limits of public law in the US and Europe*, Burlington, Ashgate, 2001. In a general perspective, to comprehend the evolution of British administrative law, see, for example: C. Harlow, R. Rawlings, *Law and Administration*, London, Butterworths, 1997; H.W.R. Wade, C.F. Forsyth, *Administrative Law*, Oxford, Oxford university Press, 2000; P.P. Craig, *Administrative Law*, London, Sweet and Maxwell, 2012.

the cross-examination of private individuals by an inspector[14], who was indicated by the Ministry. The inspector could manage round table sessions to examine the strategic elements of the main issues; he (or she) could also fix less formal hearings to discuss about simpler aspects. At the end of the *inquiry*, he (or she) produced a final report. This had no binding effect, but the competent authority had to give reasons when it decided not to follow the report.

This mechanism was substantially confirmed ten years later by the Franks Committee[15], but it soon showed its weak points, in terms of excessive formalism and length of the procedure. So, the statute was later amended.

For the regional level structure plans, which contain the guidelines that must be implemented in the local plans, the 1971 *Town and Country Planning Act*[16] substituted the "old" *inquiry* with an *examination in public*. The *examination in public* looked like a sort of seminar, carried out in an advanced step of the procedure (when the main decisions about the content of the plan had already been taken). Just some private parties (normally, the technical experts and the stakeholders) were invited. Therefore, the "strong" participatory model, represented by the *inquiry* tool (that survived only for the local plans), was changed into a "weaker" one, which worked, to so say, like a round table about some strategic issues. The relevant issues were in advance indicated by the competent commissioner, who was delegated by the Ministry. The final report was non-binding.

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[14] F. Layfield, *The Planning Inquiry: An Inspector's Perspective*, Journal of Planning & Environment Law 370 (1996).

[15] In 1957, the Committee on Tribunals and Inquiries (Franks Committee) made only little changes: it decided that the inspector's final report must be published and it underlined that the inquiry used in the field of urban planning «*cannot be classified as purely administrative or purely judicial*»: H.W.R. Wade, C.F. Forsyth, *Administrative Law*, cited at 13, 938. See *Report of the Committee on Tribunals and Inquiries* (1957), section 262. About the ambiguity of the meaning of the term *inquiry* in the field of urban planning, see for instance M.J. Grant, *Urban Planning Law*, London, Sweet & Maxwell (1982), at 553. For a specific analysis of the British inquiry in the late Sixties of the 19th Century, from the point of view of a French scholar, see, for instance, J.L. Boussard, *L'enquête publique en Angleterre* (1969).

[16] See Town and Country Planning Act 1971, in particular sec 9 and sec. 13.

The *examination in public* was less flexible than the *inquiry* and the authorities (directly the regional ones, indirectly the central ones) kept a strong control on the whole procedure. In fact, the commissioner decided what issues deserved to be discussed. Besides, he (or she) had the power to invite (just) some private parties to join the meeting: the stakeholders were chosen because they had a deep interest in specific subjects. So, the *examination in public model* made the procedure simpler and quicker at the regional level, where admitting a strong and deep participation by (all) the public could lead to concretely inefficient solutions. Only one important convergence with the traditional *inquiry model* was maintained: the production by the commissioner of a final non-binding report. Notwithstanding the purpose of simplification connected with the introduction of the *examination in public model*, the result was in great part disappointing: the authority maintained a very (and maybe too) strong role and participation by the private parties was very (and maybe too) advanced in the procedure[17].

The 1990 reform led to the emission of a new *Town and Country Planning Act*, which produced deep changes in the British system of urban planning. In fact, according to this statute, three kinds of development plans worked at the different levels: the unitary development plans[18] in the metropolitan areas, the structure plans[19] and the local plans[20] in the other areas. But, from the point of view of participation in the procedure, nothing really changed. To form a development plan a *local inquiry* was normally

[17] That's why various proposals have been in the last years formulated to grant the private parties the possibility to participate earlier and more strongly in the procedure. For instance, the *Planning for a Sustainable Future: White Paper* was produced by different British Secretaries of State (the Secretary of State for Communities and Local Government, the Secretary of State for Environment, Food and Rural Affairs, the Secretary of State for Trade and Industry and the Secretary of State for Transport) and was explained to the Parliament in May 2007. See http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/documents/planningandbuilding/pdf/planningsustainablefuture.pdf, especially 97 and ff. and 121 and ff.

[18] See TCPA 1990, sec. 10-28A.

[19] See TCPA 1990, sec. 31-35C.

[20] See TCPA 1990, sec. 36-45.

requested[21]; the rules in force were contained in different acts (statutes and statutory instruments), but the model did not loose its previous characteristics. To form a structure plan, instead, an *examination in public* was normally still requested[22].

The last relevant statute is the 2004 *Planning and Compulsory Purchase Act*[23], still in force[24] even if amended by the 2011 *Localism Act*[25]. The 2004 PCPA should have been a turning point towards a further simplification. Urban planning was expressed at the regional level by the regional spatial strategy (RSS[26], now abolished by the *Localism Act*)[27]. At the local level the development plans were substituted by the local development framework, which is made of three parts: a local development scheme, the local development documents (LDD) and a statement of community involvement (SCI) which indicates the standards of participation that have to be assured by the local authorities in the procedure[28].

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[21] See TCPA 1990, sec. 16.

[22] See TCPA 1990, sec. 35B.

[23] A. Chaplin, *Planning for Local Development Framework: a new development plan regimes*, Journal of Planning and Environmental Law 260 (2004); L. Rozee, *The new development plan system*, Journal of Planning and Environmental Law 147 (2006); P. Thomas, *The Planning and Compulsory Purchase Act 2004. The Final Cut*, Journal of Planning and Environmental Law 1348 (2004); S. Tromans, M. Edwards, R. Harwood, *Planning and Compulsory Purchase Act 2004: A Guide to the New Law* (2005).

[24] The relevant legal framework is also constituted by the *Town and Country Planning (Regional Planning) (England) Regulations* 2004, the *Town and Country Planning (Local Development) (England) Regulations* 2004, the *Planning Policy Statement 11: Regional Spatial Strategies-PPS 11* and by the *Planning Policy Statement 12: Local Development Frameworks- PPS 12*.

[25] See in particular sec. 109-116. About the *Localism Act* see, among the scholars, J. Raine, C. Staite (eds), *The World will be your Oyster? Reflections on the Localism Act of 2011*, (2012) and P. Leyland, *The Localism Act 2011: Local Government Encounters the "Big Society"*, 4 *Le Istituzioni del federalismo* 767 (2013).

[26] See PCPA, sec. 1.

[27] See *Localism Act*, in particular sec. 109.

[28] The importance given in the British legal system to participation by the private parties in the urban planning procedures is shown by the existence in the official website http://www.communities.gov.uk of many papers regarding this issue. Among these, particularly interesting seems to be the *New streamlined planning guide launched online*, published on August 28, 2013 (https://www.gov.uk/government/news/new-streamlined-planning-guide-launched-online. Besides, see, for example, *Community Involvement in Planning: the Government's Objectives* (February 2004), in

In the PCPA, the traditional *inquiry model* is permanently deleted from the British urban planning system.

The *examination in public* is maintained for the regional-level plans; it aims at checking the soundness of the draft and its consistence with the national policies. The strong public discretionary power regarding its concrete carrying out represents, in a sense, a risk factor. In fact, it could make the participatory step more flexible and efficient, if it is used in an independent way to value all the contributions offered by a free and open discussion. Otherwise, it may determine the stiffness of the sub-procedure and the flattening of its results on the choices made upstream by the public authority (which, *de facto*, are not submitted to a real debate among all the stakeholders)[29].

At the local level, the interested populations first may informally participate in the procedure at a very preliminary step[30]. Then, they are involved, when the drafted plan has been emitted by the competent authority, in a compulsory *independent examination*, which is leaded by a commissioner nominated by the competent Ministry. The commissioner, who holds strong discretionary powers, must assure the respect of the basic administrative principles (impartiality, transparency, fairness) and the sub-procedure normally ends with a binding report[31].

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http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/documents/planningandbuilding/pdf/147588.pdf and *Participatory Planning for Sustainable Communities: International Experience in Mediation, Negotiation and Engagement in Making Plans* (2003), in http://www.chs.ubc.ca/archives/files/Participatory%20planning%20for%20sustainable%20development.pdf. Then, at the institutional level, a new awareness is growing up about the importance of the *inquiry model* as a participatory tool in urban planning: see, for instance, K. Barker, *Barker Review of Land Use Planning. Final Report - Recommendations (2009)*, available at http://www.ukcip.org.uk/wordpress/wp-content/PDFs/Barker_review_landuse.pdf. All these contributions show a new turmoil, which is progressively leading to best practices for participation in urban planning.

[29] See: PCPA 2004, sec. 6 and sec. 8; TCP Regional Planning Regulations, sec. 11, 13, 14 and 15; PPS 11, Annex 3, para. 5 and para. 19.

[30] See: PPS 12, para. 3.5. and paras 4.1 ss; TCP Local Development Regulations, sec. 25 and sec. 26.

[31] See: PCPA 2004, sec. 20; TCP Local Development Regulations, sec. 34 and ff.; PPS 12, Annex D, para. 41 and sec. 15. See also Planning Inspectorate,

So, the *independent examination* shows important convergences with the *examination in public* procedure, rather than with the ancient *inquiry*. The differences between the *independent examination* and the *examination in public* regard the compulsory nature of the former tool and the binding force of the report which is its final result[32].

In the British system, participation works in two different stages: at the beginning of the procedure, when the whole population may express itself on a draft which has only been sketched; almost at the end, when the competent authority chooses specific private stakeholders as interlocutors. The shape of the *inquiry model* in force is quite different than it used to be; the ancient cross-examination burdensome mechanism has been abandoned to search more flexible and effective solutions.

The main problem of course regards the mixed nature of urban planning procedures. Urban plans, in fact, are based on, to so say, partially normative and partially strictly administrative procedures; besides, the final act is able to affect the legal positions of a potentially unlimited number of addressees. In the perspective of the protection of the interest of the private parties to effectively participate in the procedure, the solution given by the British legislator perhaps is not fully suitable. In fact, the administrative authority holds a very strong power and may strictly control private participation, that is allowed when the plan has reached a good degree of substantial ripeness only to a few private stakeholders. So, formal simplification has (paradoxically) produced a procedural stiffness.

A sign of innovation could come in the near future from the 2011 *Localism Act*, which gives stronger rights to the local communities. This statute, in fact, introduces the new concept of *neighbourhood planning*, that enables people to put together their ideas about spatial policies affecting the local area. Participation normally is held via a series of forums and it is open to persons living, working or being an elected councillor in the area. The emission of a *neighbourhood development plan* is not compulsory,

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Development Plans Examination - a Guide to the Process of Assessing the Soundness of Development Plan Documents, 2005, 28 and ff.

[32] R.M-C. Duxbury, *Telling and Duxbury's Planning Law and Procedure*, , cit. at 13; V. Moore, *Planning in Britain: The Changing Scene*, in *Urban Law Annual: Journal of Urban and Contemporary Law* (1972), at 89 and ff.

but if it is adopted it is part of the overall local plan. An independent commissioner has the duty to check its compatibility with the other plans in force and with the guidance issued by the competent Secretary of State, but he or she has not the duty to test the soundness of the plan[33].

3. The French Model

The *enquête publique* tool is deeply rooted in the history of the French legal system. It was born at the beginning of the XIX Century as an instrument of protection of private parties (and particularly, at least at the origin of the evolution, of their ownership rights) in front of the growing administrative powers[34].

Notwithstanding this, the diachronic analysis of its evolution is not particularly interesting, because in urban law the *inquiry model* has maintained in time its own characteristics, with no significant changes[35].

Nowadays, several statutes[36] regulate various kinds of *enquête publique*, both in a general perspective[37] and regarding

[33] For interesting information, see, for instance, http://www.pas.gov.uk/neighbourhood-planning;jsessionid=25027C626049F1CE8E07C3D9DF3C791A.

[34] In a general perspective, about the evolution of the *inquiry model* in the French legal system, see, for example: A. de Laubadère, *Réforme de l'enquête publique*, in Actualité Juridique - Droit Administratif 363 (1976); A. Givaudan, *Prolifération des enquêtes publiques et régression de l'état de droit*, Revue Française de Droit Administratif 247 (1986); J.P. Colson, *La réforme des enquêtes publiques en France*, in *Revue Juridique de l'Environnement*, (1993), at 223 and ff.; R. Hostiou, J.C. Hélin, *Droit des enquêtes publiques* (1993); J.P. Colson, *La démocratisation des enquêtes et ses limites structurelles*, in août/septembre Géomètre 30 (1998); P. Zavoli, *La démocratie administrative esiste-t-elle? Plaidoyer pour une refonte de l'enquête publique et du référendum local*, in Revue de Droit Public 1495 (2000); Y. Goutal, P. Peynet, A. Peyronne, *Droit des enquêtes publiques* (2012).

[35] Of course, this does not mean that in recent history the *enquête* has not changed at all. For example, a particularly important reform is contained in the so-called *loi Grenelle I* (*loi* n. 2009-967, August 3 2009) and *loi Grenelle II* (*loi* n. 2010-788, July 12 2010), but it regards the field of environment law. Besides, also in this subject, the basic structure of the *inquiry model* has been substantially maintained. See, for instance, J. Caillosse, *Enquête publique et protection de l'environnement*, in Revue Juridique de l'Environnement 151 (1986).

[36] In particular, see artt. L122-11, L123-10 e L124-2, *Code de l'urbanisme*.

[37] In a general perspective, see, for instance, *loi* n. 83-630 (July 12th 1983, the so-called *loi Bouchardeau*) about «*la démocratisation des enquêtes publiques et à la*

specific sectors[38]. In the field of urban law, the instrument is now precisely described in the Urban Law Code (*Code de l'Urbanisme*)[39].

The French Urban Law Code normally requires, in the procedure for the approval of an urban plan, two compulsory steps of public participation. This is true for plans at all levels: *schemas de cohérence territoriale*, *plans locaux d'urbanisme* and *cartes communales*[40].

The first participatory step, at a very preliminary moment, consists of a *concertation* about the main elements of the plan among the competent authority, the other interested public bodies and the citizens. At the end of this step a *dossier* is produced and published[41]. The second participatory step consists of an *enquête publique*, which is carried out to gather opinions and proposals by the local populations and the stakeholders[42].

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protection de l'environnement». About the evolution of the *inquiry model* in the field of the protection of environment, see, for example, R. Hostiou, *Enquêtes publiques, Loi n. 83-630 du 12 juillet 1983: Démocratisation des enquêtes publiques et protection de l'environnement*, in Actualité Juridique - Droit Administratif 606 (1983) and J.C. Hélin, *La loi "paysages" et le droit des enquêtes publiques*, *Actualité* Juridique - Droit Administratif 776 (1993). Moreover, see art. 109, *loi* n. 93-1352 (December 30th 1993). See J.C. Hélin, R. Hostiou, Y. Jegouzo (sous la direction de), *Les nouvelles procédures d'enquête publique* (1986).

[38] For example, see *loi* n. 93-24 (January 8th 1993, the so-called *loi paysages*) and *loi* n. 2002-276 (February 27th 2002, about the «*démocratie de proximité*»). About the importance of the *inquiry model* for the so called "*démocratie de proximité*", see, for example, J.M. Pontier, *La démocratie de proximité: les citoyens, les élus locaux et les décisions locales*, Revue Administrative 160-168 (2002).

[39] The rules contained in the Urban Law Code – together with the ones contained in the Environment Code (*Code de l'environnement*) – represent almost completely the legal system of French public *inquiries* in administrative law. The two codes, in fact, have substituted numerous legal sources which were previously in force. It is evident that the existence of a Code which is entirely dedicated to urban law shows the great importance that the French legislator gives to this subject and to the need for a unitary body of rules. About the use of the *inquiry model* in the field of urban law, see, for instance: J.C. Hélin, *L'évolution récente du contrat d'aménagement*, Revue de Droit Immobilier 179 (1994); H. Jacquot, F. Priet, *Droit de l'urbanisme* (2004); B. Jadot (ed.), *La participation du public au processus de décision en matière d'environnement et d'urbanisme, Actes du colloque organisé le 27 mai 2004 par le Centre d'étude du droit de l'environment (CEDRE) des Facultés Universitaires Saint-Louis* (2005).

[40] See artt. L121-1 and ff., *Code de l'urbanisme*.

[41] See art. L300-2, I, *Code de l'urbanisme*.

[42] Initially, the relevant rules of law were contained in decree n. 85-453 (April 23th 1985), which was the implementing regulation of *loi* n. 83-630 (July 12th

The *inquiry* procedure is ruled basically in the same way with reference to the different kinds of plans[43].

It starts with the indication of a commissioner (or, in the more complex cases, of a commission) by the local administrative court[44], on request by the competent mayor or president of other local entity. The appointment is made within the following fifteen days. The mayor or president of the local entity which is emitting the plan indicates the object of the *enquête*, its lasting-time (usually between one and two months) and the place where it is carried out.

The action must be managed so to allow the widest participation by the population, with no subjective restrictions[45]. That's why all the relevant information must be published (also in newspapers and posters) at least fifteen days before the beginning of the *inquiry* procedure and throughout its entire duration. The private parties may produce written memories and in fact their participation in the procedure normally takes place in that way[46].

1983). In the *Code de l'urbanisme*, at present in force, see, about the *schemas de cohérence territorial*, art. L 122-10 and art. R 122-10; about the *plans locaux d'urbanisme*, see art. L123-10 and art. R 123-19; about the *cartes communales*, see art. R 124-6.

[43] Interesting data regarding the implementation of the *enquête publique* may be inferred looking at the case law. It shows that participation in the French urban planning procedures is almost normal by the private stakeholders, who own specific interests. On the contrary very seldom the *quisquis de populo* presents his or her views. One could say that this "quantitative" element brings, a little paradoxically, to qualitative consequences. In fact, the French inquiry model could be very "expensive" if strongly implemented, but it has effectively survived till now because it is almost exclusively used by the stakeholders and not by the other private parties who are not entitled with particular interests in the procedure. For an analysis of the case law regarding the *enquête publique* legal tool, let me mention A. Simonati, *Administrative law and the dialogue model in France: the administrative courts' contribution*, in R. Caranta, A. Gerbrandy (eds.), *Traditions and change in European Administrative Law*, cited at 11, 63 and ff.

[44] In some exceptional cases the commissioners are designated by the *préfet*: see, for example, art. R 123-23 and art. R 322-3, *Code de l'urbanisme*.

[45] It is interesting to notice that, according to art. 14, *décret* n. 85-453, the timetable regarding the public participation through access to the inquiry dossier by the interested population must be prepared as to «*permettre la participation de la plus grande partie de la population, compte tenu notamment de ses horaires normaux de travail*».

[46] On this topic, see the result of the research held by the Commission appointed by the French Government, which, in 2005, produced an interesting report

But there is also the possibility to be personally heard by the commissioners, who may dedicate some days to oral hearings.

A *réunion publique* may be fixed, which surely is the best solution in the perspective of the completeness of the preliminary step. To this purpose, the commissioners address a demand to the mayor or president of the local entity, if they find it necessary in the light of the particular characteristics of the single situation. In this case, of course, orality determines flexibility. Furthermore, it is quite clear that the potential presence in the meeting of the stakeholders all together allows a useful simultaneous expression of their views. As a consequence, the opinions expressed may be jointly considered by the commissioners and by the authority competent for the emission of the plan. The result of the *réunion publique* is part of the final report, that is written at the end of the whole *inquiry* procedure. It is important to notice, at this regard, that the oral debates among the interested citizens are increasingly used by administration: so, the *enquête* is transforming into a more and more flexible instrument[47].

Before the conclusion of the *inquiry* procedure, the commissioners may hear the private parties again.

A report is prepared and sent to the public authority author of the plan, together with the complete *dossier*, within one month from the date of termination of the *inquiry* step. The same documents must be put at the disposal of the public one year long. The *dossier* contains a summary of the procedure and the final remarks, with their reasons. The report is not binding, but it is often followed by the planning authorities, which, in case of disagreement, must give reasons[48]. Besides, if the results of the *inquiry* procedure have deeply changed the original draft, a new *enquête* must start[49].

(*Rapport sur la simplification des enquêtes publiques*, in http://www.ladocumentationfrancaise.fr/rapports-publics/064000115/index.shtml. See also, for instance, E. Le Cornec, *La participation du public*, Revue française de droit administratif 770 (2006).

[47] Information about the French rules and praxis regarding the *débat public* may be found in http://www.debatpublic.fr/debat-public/textes-fondateurs.html.

[48] B. Pacteau, *Le régime de motivation des conclusion qui clôturent l'enquête publique*, note to Conseil d'Etat, March 20 1985, Commune de Morigny-Champigny, Revue Française de Droit Administratif 703 (1985).

[49] However, it may be interesting to notice, in a general perspective, that the last relevant (even if still incomplete) step in the evolution of the inquiry model in

The French *enquête publique* shows positive and negative sides from the point of view of the protection of the participatory rights of the private parties.

First of all, it is important to notice that their right to participate in the procedure is very wide. But, at the same time, the procedure is normally carried out in written form and holding *réunions publiques* is merely optional. Moreover, the *enquiry model* is used in an advanced step of the planning procedure, when the strategic choices have already been taken. The delayed placement of the *enquête* only marginally is compensated by the rules regarding the preliminary *concertation*, which allows the interested population to openly discuss about the draft plan almost at the starting point.

4. *The British and the French Models Compared: Convergences and Divergences*

As is evident, the British and the French *inquiry models* are quite different.

There are some common elements.

Mainly, both the *inquiries* are an important step of the urban planning procedure. The private parties may discuss and express their views, in order to obtain the production by the competent authority of the best plan in the light of the harmonization between the public interest and the interests of the stakeholders.

Besides, both the *inquiries* may be described as a sort of "second stage participatory tool". In fact, they are used when the drafted plan has already reached an advanced level of ripeness and the interested populations have already been able to participate in the procedure at a very preliminary stage. From the point of view of the private parties, this of course may be a weak point, because it is not easy to obtain a change in an almost complete draft.

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the French legal system dates back to the *loi* n. 2004-1343 (December 9th 2004) about legal simplification, which instructed the Government to enact an *ordonnance* to «*regrouper les différentes procédures d'enquête publique et en simplifier et harmoniser les règles*», to «*autoriser le recours à une procédure d'enquête unique ou conjointe en cas de pluralité de maîtres de l'ouvrage ou de réglementations distinctes*» and to «*coordonner les procédures d'enquête publique et de débat public*»: see art. 60.

But, as already noticed, the divergences are more numerous and more important.

The first basic difference can be discerned by examining the diachronic evolution of the *inquiry model* in the two systems. The French *enquête* has substantially maintained in time its original characteristics, while the British tool has deeply changed.

The "original" *inquiry* has been eliminated by the British system of urban planning because of its excessive formalism, that made it non-effective. But in the modern participatory models (the *examination* ones) the main role belongs to the public authority. In fact, it chooses the private parties whose intervention in the procedure is considered useful, either because they own interests in opposition, or because they own a technical expertise and may offer suggestions concerning the implementation of the public works. So, while anyone could participate in the "original" *inquiry* (even just to cooperate with the authority in the general interest), nowadays the *examination model* primarily leads individualistic interests to be expressed in a self-protection perspective.

Here comes a sort of paradox in the rules in force. The attenuation of the impact of the public interest in the debate regarding the drafted plan is clearly due to the limitation of participation only to the stakeholders. It should maybe have had as a logical consequence the production of just advisory effects of the *inquiry* procedure. But this has happened only at the regional level. On the contrary, the results of the *examination* procedure bind the local planning authorities. The reason may perhaps be found out, from a side, in the legal and political relationship between the central authority and the one which is competent for the planning action. From the other side, a basic element is related to the different nature and content of the different plans. At the regional level, the plan aims at indicating some general principles and objectives, in a "large area planning" perspective; besides, the dialogue with the central power is easier and more direct. Anyway, the binding or advisory strength of the *inquiry* report is not so a relevant element as it seems to be, because, at all the planning levels, the key-factor consists of the action carried out by the commissioners named by the Secretary of State. In fact, they always own a very strong role and in practice they are often able to influence the content of the final report.

In France, the *enquête publique* has always been a participatory instrument which may be used by the interested populations, without any subjective limitations. In the recent history one may see a sign of transformation that could lead to a turning point to improve the efficiency of the *inquiry model*. It has been underlined, in fact, that the tool is gradually turning from a purely written procedure – as it used to be – into a participatory mechanism increasingly focused on orality and public debates. Perhaps, this could in the future produce a transformation in the sense of a deeper flexibility in the rules of law.

Another important difference between the British model and the French one precisely regards the role of the commissioners, which are presumed to be independent. But the principle of impartiality works in the two cases in very different ways. In the British model, the commissioners are designated by the Ministry; therefore, they are independent just from the specific interests of the local populations, not from the executive power. In the French model, instead, the commissioners are appointed by a judge: this means that they are independent not only from the interest of the local population involved, but also (and maybe primarily) from the Government and from the political power[50].

5. *Final Remarks*

From the point of view of the desired overcoming of the risks associated with the interaction between public authorities and private parties, the examined examples show some common problems.

One problem is connected with the moment chosen by the legislators for the *inquiry* to be used, which is when the strategic decisions have already been taken by the competent administration: too late to effectively allow a useful debate in the interested population. To this purpose, *inquiries* should be perhaps situated earlier in the procedure.

Another important issue regards the difficulty of "exporting" the *inquiry model* into very complex legal systems. The co-existence of different centers of public power at the different

[50] J.P. Papin, *L'impartialité du commissaire enquêteur*, Cah. jur. élec. Gaz. 165 (1983).

institutional levels (and the possible high degree of conflictuality among them) may represent an obstacle for the introduction of procedural mechanisms which are able to produce binding or strongly influent effects on the final plans.

Last but not least, it is not simple to set out good rules for the indication of the impartial commissioners encharged with the duty to carry out the inquiry step and to assess its results in the final report. The French solution is good, even if it could be perhaps useful – at least in the more complicated cases – to impose a sort of "mixed membership" for the commission designated by the administrative court: one of the members should be chosen among a group of experts indicated by the local authority, another among the experts indicated by the central authority and the third among a group of experts indicated by the private stakeholders. This method could maybe assure pluralism besides impartiality.

Notwithstanding these critical sides, the *inquiry models* applied in the British and in the French urban law may teach us much. They offer important suggestions, *de iure condendo*, to overcome the risks connected with an excessive "authoritative approach" in urban planning.

There is no doubt about the need to enhance the efficiency of participation by the private parties in the urban planning procedures. This need is much stronger today than in the past, because all the legal systems are now aware of the importance of the protection of rights of private participation in the administrative procedures and the citizens fully comprehend the deep relevance of their role (also) in the perspective of taking efficient planning choices.

The modern technologies may help in granting new paths (such as online participation) for the interested populations to get information and to express themselves[51]. This is not of course a

[51] In the French legal system something starts moving from this point of view. For instance, the *décret* n. 2011-2021 (December 29th 2011) is particularly interesting. It contains a list of projects, plans and programmes – which are included in the legal framework of art. 123-10, *Code de l'environnement* – that are compulsorily the object of an e-communication to the public before the inquiry starts. Notwithstanding these rules regard environment law and not urban law, they show that the French legislator aims at testing new instruments for making the participation of private parties in the administrative procedure easier, especially when primary public interests are involved. For the text of the *décret*, see

strictly legal phenomenon. But, in order to facilitate the emersion of all the contributions and to lead them into a public interest-oriented vision, the legislators should provide for mechanisms to convey them to the competent authorities. To this purpose, it may be useful setting out a specific step in the urban procedures where, when the draft still has a preliminary shape, the interested private parties may freely discuss and exchange their points of view, with the involvement of the planning authorities.

In the "background", to so say, there is however another important problem, which is strictly connected with the issue of effective communication. In fact, it is well known that the basic technical decisions about the future physiognomy of land are normally taken not by the boards of the local authorities, whose mission is to make the political choices in the perspective of the best social and economic develop of urban welfare. The technical decisions, instead, are taken – primarily in the very specialized field of urban planning – by groups of experts, holders of the necessary knowledge. As a consequence, the preliminary documents and drafts are written in a specific language, difficult to be fully understood by "common" people. This problem regards the members of the political boards, too: they formally have the power to emit the plan, but must normally trust the suggestions expressed by the groups of experts. However, the same problem regards, of course, participation by the interested populations. In other terms, formal and substantial transparency may not correspond to each other, because the technicality of the terminology used in the urban plans makes them hardly accessible to people without specific expertise.

In the light of all the indicated elements, it may be rational to think (or re-think) at the participation of the private parties, by distinguishing it into two steps.

The first step could regard the strategic choices about the contents of the plan. They regard political, social and economic issues and their comprehension does not require technical knowledge. The involvement of the private parties (not only the stakeholders, but also the interested population in wide sense) could happen almost at the beginning of the procedure, by an

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http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025054387&dateTexte=&categorieLien=id.

"open" inquiry which could be similar to the French *enquête publique*. It should grant a real dialectical confrontation among the various views, to search the best develop of urban welfare.

The second step could strictly regard the technical issues related to the material implementation of the plan. This kind of participation could consist of a series of meetings, open to the public but involving as speakers (only) the competent authorities and the private technicians and stakeholders, similarly to what happens in the British *examination in public* model.

This solution could perhaps be a good compromise between (real) transparency and efficiency of administrative action.

At these conditions, a renewed *inquiry model* (which is maybe – not a son, but – a grandson of the traditional right to be heard) could play a basic role as a strategic tool for private participation in the urban planning procedures. In fact, it could assure a large – democratic in wide sense – debate on the general planning choices. These choices are very important if the planning action is the first step of develop of land. But they may be as much (or even more) important when the plans aim at adapting *ex post* to the public interest an urban space which has already been settled down. Precisely in the latter case a preliminary strong discussion among the interested population may help in identifying priorities and critical aspects. Later – when the purpose is to choose how the plan has to be implemented – a restricted debate among the competent authorities, the private stakeholders, the technicians and the representatives of the possible contractors (where the populations could be involved just as listeners) could grant at the same time efficiency and transparency of administrative action.

So, the *inquiry model* may be of primary relevance to get all the potentially useful contributions, in the perspective of a rational management of land.

At the first level, it represents a strong legal weapon to grant the completeness of the preliminary step of the planning procedure. This matters from the point of view both of the private stakeholders, who during the inquiry may express their views before the plan is adopted, and of the whole population (together with the public authorities themselves), because the *inquiry model* permits a deep exam of all the facets of the single issues.

At the second level, when the plan has been emitted and produces its legal effects, the *inquiry model* may be able to significantly reduce litigations about its implementation, because the main problems have been discussed and solved in advance, through a wide debate.

That is why, in my opinion, the *inquiry model* may be quite useful to overcome the risks of inefficiency of administrative action. Albeit with the necessary adaptations, it is a flexible instrument which could be successfully introduced in various legal systems, even if they are different in traditions and rules in force. This possibility is shown by the analysis of the British and the French experiences, where the *inquiry model* assumes different shapes, notwithstanding the existence of some common elements.

Of course, the choice of permanently introducing the *inquiry* tool in the urban law procedures could be very expensive, especially from the point of view of the implementation of the rules. However, also the costs of a frequent judicial review action and, in a more general perspective, of a lack of confidence in administration are particularly high. So, the adoption of the *inquiry model* may be really convenient, especially if – at least in the first testing period – its use is not the effect of binding rules, but of the carrying out by the legislators of a promotion campaign of good practices.

Participation by the private parties is in general a basic issue of administrative action. But in urban planning there are some specific factors, due to the aim of changing the physiognomy of the urban environment and of the allowed use of land. The complexity of the matter, the big number of different interests involved and the need for avoiding complaints and judicial review when the decisions have been taken make *ex ante* participation extremely useful. So, the *inquiry model* is in this field particularly suitable. However, it is quite clear that this model may more and more be considered as a fundamental legal tool also in other kinds of administrative procedures. In particular, a "large" inquiry could allow participation in the decision-making process by people who are not stakeholders in a technical meaning, but, as members of the community touched by the effects of the decision, aim at expressing their views before the act is emitted. The possible expansion of the inquiry tool (not only in urban law) may be nowadays easier because of the "new" rules – in force since the

last months in several European legal systems – about "e-transparency" of administrative action[52]. This could allow the wide circulation of information, which may make participation less complicated for the interested populations[53].

[52] For instance, in Italy d. lgs. March 14th 2013, n. 33 has ruled some new duties of publication of data in the websites of public authorities (see on this subject, for example, G. Mancosu, *La transparence administrative en Italie face au défi de l'*open data, Conférence-débat du CDPC sur la transparence administrative et ses déclinaisons technologiques récentes, Cycle *Les valeurs du droit public*, 15 avril 2013, available at http://www.u-paris2.fr). In France, it may be useful to mention Law October 11th 2013, n. 2013-907 (*Loi relative à la transparence de la vie publique*) and *Loi organique* October 11th 2013, n. 2013-906 (with the same name). The Spanish reform is very recent too: see *Ley de transparencia, acceso a la información pública y buen gobiern*, approved on November 28th, 2013.

[53] Moreover, the introduction of the *inquiry model* – especially in subjects where technical notions deeply influence the administrative choices, such as urban planning – may be particularly important in the European States which have signed the European Convention of Human Rights. In the light of the Convention, in fact, a procedural due process of law has become a basic legal value, especially when different interests have to be balanced. On this subject see, for instance, G. Della Cananea, *The Italian Administrative Procedure Act: Progresses and Problems*, 11 Jus Publicum Network Review (2011), available at http://www.ius-publicum.com/repository/uploads/12_01_2012_9_44_DellaCananea_EN.pdf, at 16. See also Idem, *Administrative Law in Europe: a Historical and Comparative Perspective*, 2 *IJPL* (2009), where a lot of interesting references are quoted. However, regarding the case law, it may be interesting to notice that the British House of Lords has expressed its view about the possibility to conduct inquiries under the conceptual umbrella of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The answer given by the House of Lords is negative. See House of Lords, Alconbury, May 9th, 2001, [2001] UKHL 23, available at http://www.publications.parliament.uk/pa/ld200001/ldjudgmt/jd010509/alcon-1.htm (March 31st, 2014).