

PARTICIPATION INTO ADMINISTRATIVE PROCEDURES: ACHIEVEMENTS AND PROBLEMS

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1. Foreword

In the early '90s Italy belatedly awoke to the need for efficiency in administrative law.¹ The answer came in the guise of L. 7 agosto 1990, n. 241, on administrative procedure and right of access to the documents. Participation was one of a number of novelties in the new law. It is quite at ease with right of access, another development brought about by the 1990 statute, so relevant to have made it to its title. However, it sits uncomfortably with simplification, another main trend in the reform of Italian administrative law.²

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¹ Already in 1979 Massimo Severo Giannini, a leading scholar in administrative law then serving as a Minister, drafted a report lamenting the overall inefficiency of the Italian bureaucracy (published as M.S. Giannini, *Rapporto sui principali problemi dell'amministrazione*, F.I. 289/V (1979)). He was pressed into resignation and nothing was done.

² Both aspects were not present in the draft originally submitted by the expert commission set up by the Government and were brought in at later stage: see M. Nigro, *Il procedimento amministrativo fra inerzia del legislatore e trasformazioni dell'amministrazione (a proposito di un recente disegno di legge)*, *Dir. proc. amm.* 8 (1989).

The main idea around participation (and right of access to the documents), was to move away from the traditional top-down Franco-Napoleonic pattern of public administration. The pattern highlighted the superiority of the administration over all other public powers and *a fortiori* over the citizens: «During the new era that began with the Revolution, the Executive became, in this administrative field, the only holder of public power and could freely exert all the prerogatives of this power, freely meaning without judicial control. It was at this point confirmed that France was, even under Revolutionary principles, and here opposed to the UK, neither a judicial nor a parliamentary State, but essentially an administrative State. Of course, Napoleon left an important legacy on the institutions that reinforce this fundamental feature».³

Unilaterally taken decisions were the tool of choice of the *puissance publique*: «like legislation and jurisdiction, administration, too, had its own decision-making functions and the *Verwaltungsakt* was vested with the task of declaring the law in concrete, individual case. In Germany, this concept became *jus receptum*, to the extent that it was codified by Article 35 of the general law on administrative procedures (*Verwaltungsverfahrensgesetz*). Running along the same line of reasoning, French and Italian legal doctrine identified those particular administrative decision-making functions through which *imperium* was exercised (*décisions administratives*, *provvedimenti amministrativi*), thereby limiting rights and liberties. This expressed the supremacy of the administration *vis-à-vis* private citizens, in the sense that the former declares what the law

³ E. Picard, *The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law*, in M. Ruffert (ed.) *The Public-Private Divide: Potential for Transformation?* 28 (2009); the Author also point out that «the autonomy enjoyed by the absolute monarchy prior to the Revolution regarding administrative matters outlived the Revolution and came to be enjoyed by the new executive-with the strong support of the agents appointed to a large extent under the Ancient Regime and that the Consulate and Napoleon later reinforced in number and functions. The Executive, accompanied and supported by its administrative apparatus, inherited the ancient prerogative claimed by the king in administrative matters».

is for the latter, instead of being placed under the same legal rules». ⁴

This model could do very well without participation, and procedural rules generally were little considered, so much so that French law does not really have a category for them and refers in the negative to administrative procedure as to the *procédure administrative non-contentieuse*: a way to point out that the only procedure that matters is the one leading up to the *Conseil d'Etat*. ⁵

Early adoption of the Franco-Napoleonic model had considerably boosted the efficiency of the then Kingdom of Sardinia allowing it, along with deft diplomacy, to unify Italy under the Crown of Savoy. ⁶ By the time L. 7 agosto 1990, n. 241, was adopted, the original pattern had lost some of its shine (even if retained redoubtable partisans, first among them the Council of State which, asked an advice on the draft law, considerably

⁴ G. della Cananea, *Beyond the State: The Europeanisation and Globalisation of Procedural Administrative Law*, Eur. Publ. L. 566 (2003); see also P. Gonod, «*La réforme du droit administratif*»: *bref aperçus du système juridique français*, in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe. La mutation du droit administratif en Europe* 72 (2007): «Le droit administratif reconnaît en effet des pouvoirs importants aux autorités administratives (la puissance publique), qui leur permettent de satisfaire leur mission de satisfaction de l'intérêt général (le service public). C'est pourquoi, pour reprendre la formule du juge, il semble « impossible, en bonne raison et en bonne justice, d'assimiler l'Etat à un simple particulier » [Conclusions E.M. David sur T.C., 8 février 1873, Blanco, R. 61]. Le droit administratif se présente aussi comme un *droit d'inégalité*, un droit de prérogatives (parmi lesquelles le pouvoir d'action unilatérale, les pouvoirs reconnus dans l'exécution des contrats administratifs, le pouvoir d'exécution forcée (...)).»

⁵ For this remark R. Caranta, *Procedimento amministrativo in diritto comparato*, in XI *Digesto disc. pubbl.* 608 (1996).

⁶ The relevance of institution building was not lost on the contemporaries. In 1836 Pier Alessandro Paravia – an expatriate from Venice, then under Austrian domination – was charged with delivering a speech at the University to celebrate the namesake day of King Carlo Alberto: *Orazione pel giorno onomastico di S.M. il Re Carlo Alberto* (Torino, Tip. Chirio e Mina, MDCCXXXVI). Worried to overdo what was anyway a flattening exercise, he decided to let facts do the talking («di lasciare che lodino CARLO ALBERTO gli stessi suoi fatti» at 9). The first fact listed to the King's merits is the establishment of a Council of State, the paramount institution of French administrative law («volle riunire al grand'uopo i più savii uomini de' suoi stati [...]. Ed eccovi istituito con ciò il Reale Consiglio di Stato; utilissima istituzione [...]» at 12 f).

watered down it).⁷ Less State-centred and more bottom-up, market-friendly economies were proving themselves to be far more efficient than those which, like Italy, had seen the role of the State grow and grow. Private sector techniques and assumptions have made major inroads into government via the « new public management ». In formerly state-dominated polities like Italy (but the same holds true for France and Spain), «the autonomous institutions of civil society are being given more rein. Public-private partnerships, community-based partnerships and innovative forms of service delivery abound».⁸ Possibly by no chance, those more performing legal systems shares a common law heritage. With it comes the idea of participation of those concerned by the decisions to be taken by public authorities, variously referred to as *due process*, *audi alteram partem*, or *fair hearing*.⁹

This tradition was foreign to Italy. In 1940 Aldo M. Sandulli wrote the leading text on administrative procedure.¹⁰ The concern underlying the book was dogmatic, it was about giving a proper place to the procedure in the *Begriffshimmel* alongside the final decisions and the various occurrences taking part during the procedure itself.¹¹ Participation was not even mention in the index. The input of the concerned parties was briefly discussed, with some passing reference to German scholars, to voice the

⁷ Contrast the more advanced proposition put forward by the Chairman of the commission charged with drafting the bill: M. Nigro, *Il procedimento amministrativo fra inerzia del legislatore e trasformazioni dell'amministrazione (a proposito di un recente disegno di legge)*, *supra* note 2, at 5.

⁸ M. Keating, *Europe's Changing Political Landscape: Territorial Restructuring and New Forms of Government*, in P. Beaumont, C. Lyons & N. Walker (eds.) *Convergence and Divergence in European Public Law* 10 (2002).

⁹ See G.F. Ferrari, *Il procedimento amministrativo nell'esperienza anglo-americana*, in *Dir. proc. amm.* 421 (1993); S. Rodriquez, *Representative Democracy vs. Participative Democracy in the EU and the US*, in R. Caranta (ed.), *Interest Representation in Administrative Proceedings* 112 (2008).

¹⁰ A.M. Sandulli, *Il procedimento amministrativo* (1940); the book was reprinted without any amendment in 1959 and 1964; the Author felt that his dogmatic work would lose its meaning when taken out of its proper historical context (at vii), which by itself is a remarkable acknowledgement as to the weakness of dogmatic.

¹¹ This was therefore a highly formalised construction: see, also for further references, D. Mastrangelo, *La cultura del procedimento e il suo declino*, in D. Mastrangelo (ed.), *L'alta velocità nell'amministrazione* 15 (2009).

opinion that parties involved in the proceedings are in the main making their wishes known to the decision-maker.¹²

That was to be the standard position in Italy. Even after L. 7 agosto 1990, n. 241, was adopted, the Constitutional Court reiterated that the *due process* principle could not be read into the 1948 Constitution.¹³ Today the constitutional standing of the 'due process' has not changed much. It was referred to in two important 2007 judgements concerning legislative provisions providing for the termination of existing contracts for executive officials with the public service. The Court found the provisions in conflict with the constitutional principle of efficiency and effectiveness which require a case by case examination of the results of the managing activities of each executive officer through procedures allowing the officer to represent his or her views. In this context, the participatory rules in L. 7 agosto 1990, n. 241, were recalled, the Court however stopping well before recognising constitutional role to the participation principle.¹⁴

Only a small group of scholars around Feliciano Benvenuti were ready to highlight the relevance of participation in the framework of a more bottom-up approach to administrative law.¹⁵

¹² A.M. Sandulli, *Il procedimento amministrativo*, supra note 10, at 166.

¹³ E.g. Corte cost., 31 maggio 1995, n. 210, *Giur. Cost.* 1586 (1995); Corte cost., 19 marzo 1993, n. 103, in *Regioni* 1671 (1993), with note by S. Staiano, *Lo scioglimento dei Consigli comunali e provinciali nella lotta alla criminalità organizzata tra Corte costituzionale e giudice amministrativo*; Corte cost., 20 luglio 1990, n. 344, *Giur. cost.* 2158 (1990); Corte cost., 19 ottobre 1988, n. 978, *Giust. civ.*, 2794/I (1988); critically U. Allegretti, *Il valore della Costituzione nella cultura amministrativistica*, *Dir. pubbl.* 790 (2006).

¹⁴ Corte cost., 23 marzo 2007, n. 103, G.D.A. 1307 (2007), with note by A. Massera, *Il difficile rapporto tra politica e amministrazione: la Corte costituzionale alla ricerca di un punto di equilibrio*; see also F. Merloni, *Organizzazione amministrativa e garanzia dell'imparzialità. Funzioni amministrative e funzionari alla luce del principio di distinzione tra politica e amministrazione*, *Dir. pubbl.* 86 (2009).

¹⁵ First and foremost F. Benvenuti, *Per un diritto amministrativo paritario*, in *Studi in memoria di E. Guicciardi* (1975); the approach was fully developed in F. Benvenuti, *Il nuovo cittadino* (1994) at 28, and shared by few other scholars, such as G. Pastori, *La procedura amministrativa* (1964), and more recently *Interesse pubblico e interessi privati fra procedimento, accordo e autoamministrazione*, in *Scritti in onore di P. Virga*, vol. II, 1303 (1994) ff, and U. Allegretti, *Il valore della Costituzione nella cultura amministrativistica*, in *D. Pubbl.* 790 (2006). See also the (diverging) analysis by A. Romano Tassone, *Il «Nuovo cittadino» di Feliciano Benvenuti tra diritto ed utopia*, in *Dir. amm.* 319 (2008); R. Caranta, *La tutela dell'interessato nel diritto amministrativo paritario di Feliciano Benvenuti*, in *Ritorno*

The panorama has to some extent changed after the entry into force of L. 7 agosto 1990, n. 241. The top-down model still has its partisans, pretending that participation mainly serves the needs of the public authority by providing it with information as to the interests that will be affected by the administrative action.¹⁶ Some weakness in the way participation was written into the law, and some more recent efficiency-oriented reforms may be called to substantiate this position. Other reforms – both specific and of general constitutional relevance – which have been passed in the past twenty years, however, point to another direction, towards giving a bigger place to civil society in the overall governance system, a system where participation is one of the key instruments of democracy.¹⁷

This paper will first analyse the provisions on participation originally brought about by L. 7 agosto 1990, n. 241, also focusing on their main shortcomings. The changes introduced into the 1990 statute in the past twenty years will then be introduced, with some new trends concerning participation being covered as well. Conclusions will be drawn with reference to some more general development taking place in Italy.

2. The Rules on Participation Laid down at Art. 7 ff. L. 7 agosto 1990, n. 241.

L. 7 agosto 1990, n. 241, marks the start of a shift from a procedure which is centred on the public authority supposed to be vested with the knowledge as to where the general interest lays, to

al diritto 49 (2008); F. Merusi, *Diritti fondamentali e amministrazione (o della «demarchia» secondo Feliciano Benvenuti)*, in *Dir. Amm.* 541 (2006); A. Andreani, *Funzione amministrativa, procedimento e partecipazione nella l. 241/90 (quarant'anni dopo la prolusione di F. Benvenuti)*, in *Dir. proc. amm.* 655 (1992).

¹⁶ E.g. A. Crosetti and F. Fracchia (ed.), *Procedimento amministrativo e partecipazione - problemi, prospettive ed esperienze* (2002).

¹⁷ This evolution has parallels and derive strength from synergic developments taking place at European level: see S. Rodriguez, *Law Making and Policy Formulation: il ruolo della società civile nell'Unione europea*, R. T. D. Pubbl. 125 (2010); see also L. Azoulay, *Le principe de bonne administration*, in J.M. Auby & J. Dutheil de la Rochère (eds.), *Droit Administratif Européen* 502 (2007), and from a more general perspective G. della Cananea, *Beyond the State: The Europeanisation and Globalisation of Procedural Administrative Law*, in *Eur. Publ. L.*, 571 (2003).

a public administration which finds out those solutions which are more acceptable to the civil society involving concerned parties and interest groups into the procedure. Participation is ruled under Art. 7 to 13 of the 1990 Act.¹⁸ In principle, all parties, from both the private and public sectors, whose interests might be affected by a decision to be taken at the end of a proceeding may take part into it. Under Art. 9, the same applies to public interest groups, provided that they have reached a minimal formal organisation.¹⁹ Moreover, under Art. 7 of the Act, save in case of special urgency, the parties directly affected by the final decision, the parties whose participation is mandated by law, and, provided they are known or easily knowable to the decision maker, those parties which might be detrimentally affected by the final decision, all are to be served a notice as to the beginning of the proceedings.²⁰ The notice, to be served individually when practicable, is to be drafted in compliance with the rules laid down in Art. 8. It must list the subject-matter of the proceedings, the term for its completion, the office and officer responsible, and where to ask to have access to the documents in the file. No doubt this provision is instrumental in allowing a real participation of the parties concerned: everyone concerned may participate, but those more directly involved are invited to take part into the proceedings²¹.

Under Art. 10 participants enjoy two major rights, namely the right to have access to all the pieces in the file and the right to submit briefs and documents to the competent authority to be considered in taking the final decision. In keeping with the civil law high bureaucratic tradition – itself the heir of Roman and Canon law – the written word is the instrument for the

¹⁸ For more details R. Caranta, L. Ferraris and S. Rodriguez, *La partecipazione al procedimento amministrativo* (2005, 2nd); reference to older case law and scholarly works in R. Caranta & M. Protto, 'Italy' in *Comparative Analysis of Administrative Law, European Public Law Series – Bibliothèque de droit public européen*, vol. XXIV 203 (2002).

¹⁹ R. Caranta, L. Ferraris & S. Rodriguez, *La partecipazione al procedimento amministrativo*, *supra* note 18, at 172.

²⁰ *Id.* at 51 ff.

²¹ C.E. Gallo, *La partecipazione al procedimento*, in P. Alberti et al. (eds.), *Lezioni sul procedimento amministrativo* 70 (1992).

conversation between the public administration and the interested parties.²²

Under Art. 11, proposals submitted according to Art. 10 may be negotiated with and accepted by the decision maker, giving rise to an agreement (*accordo*) defining the content and, originally only if the law so provides, taking the place of the unilateral decision.²³

One major shortcoming affects participation as ruled by L. 7 agosto 1990, n. 241. Under Art. 13, the provisions just sketched do not apply to rule-making and planning procedures. Older rules still apply instead. This means in essence that participation rules only apply to adjudication – individual decision making procedures – not to regulation in its different forms. The Government's bill diverged here from the draft proposed by the experts, who had envisaged a public enquiry procedure for those project having a wide impact.²⁴ Italy failed to follow a widespread pattern calling for the involvement of civil society in the most relevant decisions.²⁵ To these days, recourse to public enquiries is only had in environmental matters, where it is mandated by EU law in the framework of environmental impact assessment – EIA procedures.²⁶ Again with reference to the environmental matter, the general rule laid down in Art. 13 of the 1990 Act sits uncomfortably with the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, implemented, as far as participation is involved, by Directive 2003/35/EC.²⁷

²² R. Caranta, L. Ferraris & S. Rodriquez, *La partecipazione al procedimento amministrativo*, *supra* note 18, at 200.

²³ G. Greco, *Accordi amministrativi tra provvedimento e contratto*, in F.G. Scoca, F.A. Roversi Monaco, G. Morbidelli (eds.), *Sistema del diritto amministrativo italiano* (2004).

²⁴ See M. Nigro, *Il procedimento amministrativo*, *supra* note 2, at 10.

²⁵ The 1976 *Verwaltungsverfahrensgesetz* has specific provisions on planning procedures; this statute had been translated into Italian by A. Meloncelli and published in R. T. D. Pubbl. 293 (1978); it was also the object of scholarly work, such as A. Masucci, *La codificazione del procedimento amministrativo nella Repubblica federale di Germania* (1979).

²⁶ For remarks as to the strategic relevance of EIA procedures see S. Rodriquez, *Representative Democracy*, *supra* note 9, at 86.

²⁷ The Aarhus Convention itself was ratified in Italy with L. 16 marzo 2001, n. 108; Cons. St., Sez. IV, 22 luglio 2005, n. 3917, F.A. – CdS 2142 (2005), ruled out breach of the Convention since on the facts of the case the environmental NGOs

The limitation we are talking about is a major obstacle to participative democracy. It does not make much sense to allow NGOs and other public interest groups to take part into individual decision making procedure while excluding them when regulatory measures – including planning – are taken. It is plain that much more is at stake for the general interest in regulation.²⁸ Evidently, the Government in power at the time was much keen to maintain the monopoly of representative democracy institutions – shortly said, of the political parties – on interests representation when serious issues are at stake (and no other Government in the 20 years so far elapsed thought better).²⁹

Even if the provisions recalled could be thought to be somewhat modest, the early life of the participation rules was not easy. Public administrations routinely forgot to serve the notice provided for under Art.7 L. 7 agosto 1990, n. 241. Administrative courts, faced with a rising tide of straight cases but worried to undo everything that had been done by decision makers around the country, started to introduce *hors texte* exceptions to the applicability of Art. 7, the major being that participation was useless in cases of bound competencies when no margin of discretion was left to the decision maker.³⁰ Therefore the failure to serve the notice of the opening of the procedure was condoned more often than not as it was in cases where, notwithstanding the failure, the interested parties had gained knowledge as to the existence or the procedure, or had anyway been provided with the opportunity to voice their concerns.³¹

had indeed participated in the proceeding voicing their opinion on the relevant documents in the file.

²⁸ For a more nuanced take see S. Cassese, *La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato*, R. T. D. Pubbl. 15 (2007): «Non minori problemi suscita la partecipazione della società civile nelle decisioni pubbliche quando diventa un surrogato della democrazia. Può, infatti, un gruppo di privati (o, meglio, una somma di individui), per quanto ampio, prevalere rispetto ai funzionari pubblici, che rispondono, in ultima istanza, a chi rappresenta l'intera collettività? Perché alcune decisioni collettive dovrebbero essere sottoposte a osservazioni, commenti, inchieste, se chi le prende è responsabile rispetto al Parlamento?»

²⁹ R. Caranta, *I procedimenti avanti alle autorità amministrative indipendenti*, in V. Cerulli Irelli (ed.), *Il procedimento amministrativo* 173 (2007).

³⁰ E.g. Cons. St., Sez. V, 11 ottobre 1996, n. 1223, F.A. 2882 (1996).

³¹ E.g. Cons. St., Sez. VI, 9 agosto 1996, n. 1000, 1 Giur. It. 224/III (1997), with note by S. Verzaro, *In tema di comunicazione dell'avvio del procedimento*

Taken in isolation, such trend could well be understood in the name of efficiency: focus on the substance rather than on procedural niceties. The full story told is that Italian administrative courts had never before developed anything akin to the French doctrine of *violation de formes substantielles*, each and any breach leading to the annulment of the challenged decision. And they had not because they – up to this day – very much resist reviewing the substance of the decision.³²

In due time, however, the administrative courts reached more balanced solutions, holding that the failure to serve the notice due under Art. 7 might be condoned only in cases when the factual conditions and legal framework of a bound power decision were not disputed by the claimant and anyway no other decision was legally possible in the circumstances of the case.³³ Earlier judgements had indeed stressed that participation can be of some use even in cases of bound competence, since underlying every administrative proceedings are some material facts which are better ascertained and evaluated with the wider participation possible.³⁴

Finally, administrative courts have applied the exclusion for cases of special urgency in a restrictive way, thus avoiding another possible inroad to the principle³⁵; as a consequence derogation from Art. 7 has been mainly allowed either in case for security reasons,³⁶ when human health is at stake,³⁷ or following natural disasters such as earthquakes³⁸.

amministrativo: l'art. 7 e la normativa previgente; the whole story is retold by R. Caranta, L. Ferraris and S. Rodriquez, *La partecipazione al procedimento amministrativo*, *supra* note 18, at 78.

³² R. Caranta and B. Marchetti, *Judicial Review of Regulatory Decisions in Italy; Changing the Formula and Keeping the Substance?*, in O. Essens, A. Gerbrandy & S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* 145 (2009).

³³ The leading case is Cons. St., Sez. V, 22 maggio 2001, n. 2823, F.A. 1204 (2001).

³⁴ See Cons. St., Sez. V, 13 novembre 1995, n. 1562, F.A. 2604 (1995).

³⁵ See Cons. St., Sez. IV, 25 marzo 1996, n. 368, 1 Giur. it. 542/III (1996); see also Cons. St., Sez. V, 14 aprile 1997, n. 354, F.A. 1090 (1997); Cons. St., Sez. V, 29 gennaio 1996, n. 111, F.A. 141 (1996); T.R.G.A. Trentino Alto Adige, Sez. Bolzano, 30 dicembre 1996, n. 378, T.A.R. 535/I (1997); but see T.A.R. Basilicata, 9 maggio 1995, n. 220, *Rass. giur. Enel* 511 (1996).

³⁶ Cons. St., Sez. VI, 21 aprile 2010, n. 2223, *Giur. it.* (2010).

3. Reforming the Reform: Conflicting Signals for Participation.

Until 2005, only one – apparently minimal – reform affected the provisions just discussed. Already in 1995, indent 1 *bis* was added to Art. 11 to the effect that, in order to make it easier to reach an agreement, the officer responsible for the proceeding has the power convene meeting with the interested parties (one by one or all together as he or she thinks fit). The departure from the tradition of a faceless bureaucracy which speaks only through the decisions it takes is impressive, but the power – which still is not a duty – we are talking about could have been easily construed from provisions already existing. The officer responsible for each procedures is under a duty by Art. 6 of the 1990 Act to take any measure instrumental to a rapid and satisfactory conclusion of the procedure.³⁹

Other concerns have been preeminent in the minds of both the Parliament and the Government now under the full blow from two main shocks coming in the form of a (then) EC Commission starting to get serious about State aids – an indispensable lifeline for the inefficiently run public conglomerates which were the backbone of the Italian economy – and a desire to enter the (then) future monetary union, which brought about the need to finally curb the ballooning public budget deficit. At a more generally encompassing level, the belated completion of the single – and later internal – market inevitably exposed a weak economic system to ever growing challenges, making changes a life or death necessity. Speed and quality – or, to use just one word, efficiency – were values Italy could ignore no more.⁴⁰

³⁷ E.g. Cons. St., Sez. V, 14 novembre 1996, n. 1364, Cons. Stato 1729/I (1996), concerning an animal disease which can be transmitted to human beings.

³⁸ T.A.R. Campania, Sez. V, 21 novembre 1995, n. 368, T.A.R. 297/I (1996); it is fair to say however that the effects of earthquake on the application of administrative law lasts for decades after the seismic event has occurred.

³⁹ See generally M. Renna, *Il responsabile del procedimento a (quasi) dieci anni dall'entrata in vigore della legge n. 241*, Dir. proc. amm. 505 (2000), and Id., *Il responsabile del procedimento nell'organizzazione amministrativa*, Dir. Amm. 13 (1994).

⁴⁰ See the contributions collected in C. Franchini and L. Paganetto (ed.), *Stato ed economia all'inizio del XXI secolo* (2002), and G. Della Cananea and G. Napolitano (eds.), *Per una nuova costituzione economica* (1998); see also M. D'Alberti, *Il diritto amministrativo fra imperativi economici e interessi pubblici*, Dir. amm. 63 (2008).

Simplification has been the rallying cry for reform after reform affecting L. 7 agosto 1990, n. 241, starting already in 1993 and taking place almost on a yearly basis, with a succession of changes designed at strengthening those mechanisms which prods public authorities into fast action or – simply put – curb their power to stop private – and especially economic – activities from happening.

Concerning the first kind of measures, the provisions on *conferenze di servizi* (shortly put, an institutional arrangement requiring the different authorities involved in the same proceeding to take their decisions together) were changed so many times that the original Art. 14 has now been expanded all the way to Art. 14 *quinquies*.⁴¹ This is a metastatic process extreme even by Italian standards. Something similar has happened to Art. 2, providing for the pre-fixation of the duration of each and any administrative proceeding, changed a number of times also to fight the tendency displayed by many public administrations to allow themselves fairly generous times for decision;⁴² as recently as last year, Art. 2 *bis* has been grafted unto L. 7 agosto 1990, n. 241, by L. 18 giugno 2009, n. 69, providing those having applied for a decision with the right to sue the decisions maker for damages in case the deadline for taking a decision is not met.⁴³

The same fate of never stopping recasting has befallen those provisions aimed at avoiding the possibility that the dynamic forces in the society are stalled by simple inaction on the part of the public administration. Art. 16 l. 7 agosto 1990, n. 241, on advices, and Art. 17, on technical expertise have been changed (the last time in 2009), to make it easier for the competent authority to decide notwithstanding the delays of other authorities. Art. 19 of l. 7 agosto 1990, n. 241 provides for *denuncia* – now *dichiarazione* – di

⁴¹ A reinforced form of cooperation between the different authorities involved is the *società pubblica di progetto*, a public-public institutional partnership now ruled by Art. 156 of D.lgs. 12 aprile 2006, n. 163, the new Code on public contracts, and charged with adopting any necessary measure, including expropriation and the award of contracts, on behalf of the authorities involved.

⁴² E.g. Cons. St., Ad. gen., 9 febbraio 1995, n. 3, Cons. Stato 1728/I (1995).

⁴³ Damages actions for delay has been stricken out by the case law: see Cons. Sr., Ad. plen., 15 settembre 2005, n. 7, Resp. civ. prev. 1397 (2006), with note by R. Caranta and G. Vecci, *Inerzia, silenzio, ritardo: quale responsabilità per la pubblica amministrazione?*, reprinted in V. Parisio (ed.), *Silenzio e procedimento amministrativo in Europa: una comparazione tra diverse esperienze* (2006) 15.

inizio attività (DIA). It is a system under which those who under rules formerly in force had to ask for an authorisation or permission to start an economic activity now only need to give notice to the competent administration of their intention. Over the time this has been transformed in a fairly general tool applicable every time no discretion is vested in the public administration.⁴⁴ The same may be said of *silenzio assenso* – implicit positive decision – which has become today a default rule of administrative licensing activity even when it is vested with margins of discretion.⁴⁵

It should be plain from what has just been said that speed has been the paramount worry of the Italian legislation in the past twenty years.⁴⁶ Simplification measures have become stronger and stronger as the years passed, with DIA being introduced and *silenzio assenso* becoming a default option.⁴⁷ Few general interests only – the environment, urban planning, health, and of lately national security – have been granted a special status, and have not been much affected by the new trends to reduce the binding force of administrative law.⁴⁸

Only in 2005 participation was again back at the centre of the stage, this time an awkward dancing partner with simplification.⁴⁹ On the one hand, a couple of measures indeed strengthened participation. New Art. 10 *bis* provides that before

⁴⁴ The 1993 reform was analysed by A. Pajno, *Gli artt. 19 e 20 della l. n. 241 prima e dopo la l. 24 dicembre 1993, n. 537*, *Dir. proc. amm.* 40 (1994); on the most recent version see C. Di Gaetano, *La dichiarazione di inizio attività*, in D. Mastrangelo (ed.), *L'alta velocità nell'amministrazione*, *supra* note 11, at 57.

⁴⁵ See L. Giovagnoli, *I silenzi della pubblica amministrazione dopo la legge 80/2005* (2005); M. Marinaro, *Il silenzio assenso* and F. Caricato, *L'accelerazione della tutela avverso i silenzi dell'amministrazione*, both in D. Mastrangelo (ed.), *L'alta velocità nell'amministrazione*, *supra* note 11, at 103 and 115; A. Cioffi, *Dovere di provvedere e silenzio assenso della pubblica amministrazione dopo la legge 14 maggio 2005, n. 80*, in *Dir. amm.* 99 (2006).

⁴⁶ E.g. D. Mastrangelo, *La cultura del procedimento e il suo declino*, in D. Mastrangelo (ed.), *L'alta velocità nell'amministrazione*, *supra* note 11, at 19.

⁴⁷ See G. Forlenza, *Un'enfatizzazione del principio di efficacia a scapito delle garanzie di tutela dei cittadini*, in 10 *Guida dir.* 42 (2005).

⁴⁸ See M.A. Sandulli, *Semplificazione e garanzia*, in *Scritti in onore di E. Casetta*, 585/II (2001).

⁴⁹ It is however worth noticing that the father of the 1990 reform saw *accordi* as a form of simplification M. Nigro, *Il procedimento amministrativo*, *supra* note 3, at 10.

rejecting any application, the decision maker must serve the applicant with a statement of the reasons against granting the benefit sought. The applicant has then time to submit (further) documents and briefs. The provision aims at making it easier to come to a mutually satisfactory agreement.⁵⁰ This new participation phase entails extended decision times, and as such it has been denounced by the traditionalists.⁵¹ The introduction of new Art. 10 *bis*, however, is coupled with, and makes sense together, the amended Art. 11 widening to the scope for *accordi*. Since specific legal authorisation is no longer needed, it is today generally possible to have an agreement taking the place of a unilateral measure.⁵² *Accordi* have a mixed public-private law regime. They are submitted to the same controls as administrative unilateral decisions and they can be unilaterally terminated by the public administration, the private party being entitled to a compensation. Apart for this, the rules governing *accordi* has to be found in the principles of the Civil code on the law of obligations provided that these are consistent with their peculiar nature.⁵³

On the other hand, efficiency – and time saving – needs can still lead the dance with participation. Under new Art. 21 *octies* of L. 7 agosto 1990, n. 241, added in 2005, procedural breaches does not need to cause the annulment of the decision taken. Annulment is ruled out in cases of bound competence if the decision taken appears to be the right one on its substance; the same with the failure to give the notice provided under Art. 7, and even in case of discretionary powers, provided that the defendant authority can show that no other decision could have been taken on the

⁵⁰ See R. Caranta, L. Ferraris and S. Rodriguez, *La partecipazione al procedimento amministrativo*, *supra* note 18, at 376, and A. Bonomo, *L'accelerazione dell'attività amministrativa e gli oneri di comunicazione agli interessati*, in D. Mastrangelo (ed.), *L'alta velocità nell'amministrazione*, *supra* note 11, at 93.

⁵¹ E.g. C. Videtta, *Note a margine del nuovo art. 10 bis della l. n. 241 del 1990*, F.A. - TAR 837 (2006).

⁵² See, with an eye to the reform process then in progress, F. Merusi, *Il diritto privato della pubblica amministrazione alla luce degli studi di Salvatore Romano*, *Dir. amm.* 649 (2004), e F. Trimarchi Banfi, *Il diritto privato dell'amministrazione pubblica*, *Dir. amm.* 661 (2004); V. Cerulli Irelli, *Note critiche in tema di attività amministrativa secondo modelli negoziali*, *Dir. amm.* 244 (2003).

⁵³ G. Greco, *Accordi amministrativi tra provvedimento e contratto*, in F.G. Scoca, F.A. Roversi Monaco, G. Morbidelli (eds.), *Sistema del diritto amministrativo italiano* (2004).

given circumstances and that therefore the breach had no effect on the outcome of procedure.⁵⁴

The provision in Art. 21 *octies* went farther than the case law already discussed and was casted along the lines of § 46 of the German *Verwaltungsverfahren Gesetz*. That provision makes indeed sense in Germany, where courts are more than ready to step into the shoes of the decision maker. In Italy, as it was already remarked, administrative courts stop well before going into the merits, and this – rather than an improbable sudden love for participation – goes a long way towards explaining the prudence they have so far displayed in the application of the new rule found in Art. 21 *octies*.⁵⁵ The 2005 reform can be said to have had a very limited effect on the case law. Courts are ready to condone breaches of participation rules in cases of bound competence if they are satisfied the competent official has reached the correct decision, while they invariably strike down discretionary decisions when participation rules have been violated.⁵⁶

4. Conclusions: The Wider Picture and the Way Forward.

Participation can be seen as an instrument of legitimacy under many respects. Participation of the potential addressee of a decisions infringing his/her property is different from participation as consultation of stakeholders⁵⁷, which in turns is deeply different from taking part into the decision process and being able to negotiate its outcome.⁵⁸ Defense, consultation, and

⁵⁴ See R. Caranta, L. Ferraris and S. Rodriguez, *La partecipazione al procedimento amministrativo*, *supra* note 18, at 163.

⁵⁵ See for references A Bonomo, *L'accelerazione dell'attività amministrativa e gli oneri di comunicazione agli interessati*, *supra* note 50, at 91.

⁵⁶ For a recent case see Cons. St., Sez. IV, 21 maggio 2010, n. 3224, Giur. it. (2010), quashing the decision by a military panel to dismiss a military police recruit having stolen a SIM card from a colleague because the recruit was not really given the opportunity to mount a defence.

⁵⁷ L. Azoulay, *Le principe de bonne administration*, *supra* note 14, at 502.

⁵⁸ F. Merusi, *Diritti fondamentali e amministrazione*, *supra* note 15, at 543; participation is at times equated with consultation (e.g. C. Möllers, *European Governance: Meaning and Value of a Concept*, *C.M.L.Rev.* (2006) 321), but it is not necessarily so; the latter kind of participation could be considered 'strong' participation, quite close to self- or direct government.

negotiation leading to co-regulation or co-decision⁵⁹ are three very different kinds of participation indeed.⁶⁰

Seen through this framework participation in Italy seems very much to hang in balance. Its future will very much depend on more general trend in the national, regional, and global legal orders.⁶¹

Italian legislation to a large extent vindicates participation as a defence right which is now part of global administrative law.⁶² It seems safe to assume that Italy will not resist forever the push to abandon the traditional top-down approach to public administration in favour of a different bottom-up take geared at stimulating – rather than stopping – entrepreneurial and other forces present in the civil society.⁶³

The reasons are many. It is difficult to escape the conclusion that the traditional administrative law model was appropriate for fairly authoritarian government systems quite unlike present day ones.⁶⁴ European principles like proportionality and legitimate expectations run counter the idea of an omnipotent public

⁵⁹ According to P. Verbruggen, *Does Co-Regulation Strengthen EU Legitimacy?*, *Eur. L. Journ.* 425 (2009), 'In general terms, co-regulation can be described as a regulation method that includes the participation of both private and public actors in the regulation of specific interests and objectives. As such, co-regulation brings together private and public actors in the different stages of the regulation process'.

⁶⁰ As to the difference between consultation and negotiation see L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, *Eur. L. Rev.* 29 (1998).

⁶¹ I have tried to provide some elements for an answer in *Introduction. The Future of Participation*, in R. Caranta (ed.), *Interest Representation in Administrative Proceedings*, *supra* note 9, at 19.

⁶² Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat Int. Foundation*, ECR (2008), attracted wide attention in Italy: see the commentaries in *G.D.A.*, 1088 (2008) by A. Sandulli, *Caso Kadi: tre percorsi a confronto*; S. Cassese, *Ordine comunitario e ordine globale*; E. Chiti, *I diritti di difesa e di proprietà nell'ordinamento europeo*; M. Savino, *Il principio del contraddittorio e le fasi comunitarie di procedimenti globali* and G. della Cananea, *Un nuovo nomos per l'ordine globale*; see also G. della Cananea, *Global Security and procedural Due Process of Law between the United Nations and the European Union*, 15 *Columbia Journ. Eur. Law* 516 (2009).

⁶³ R. Caranta, *The Fall from Fundamentalism in Italian Administrative Law*, in M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?* 114 (2009).

⁶⁴ B.G. Mattarella, *Il rapporto autorità-libertà e il diritto amministrativo europeo*, *R. T. D. Pubbl.* (2006) 910.

administration crushing citizens' interests in the blind pursuance of the common good.⁶⁵

Moreover, «Europeanisation stimulates the search for more consensual forms of accommodation between legal systems and their principal actors, [and] facilitates the mobilisation of a third-level of territorial claims at the sub-state level, [and] encourages the articulation and regulatory involvement of new voices within the spheres of civil society and the economy».⁶⁶ Indeed the distance of the 'general' interest from the 'individual' is much shorter when competences are transferred from the national to the regional or local level; not by chance «territorial decentralisation is accompanied by functional decentralisation and a shifting of the boundaries between the government, the market and civil society».⁶⁷

Finally, recourse to independent administrative authorities undermines at the foundations the top-down approach which was strengthened by its marriage with representative democracy institutions distilling the general interest which necessarily prevails over individual interests. Italian independent administrative authorities are now increasingly turning to notice-and-comment regulation patterns.⁶⁸ Indeed, the role of participation is much strengthened with reference to these authorities which operates at the margins when not outside the circle of democratic legitimacy.⁶⁹

Participation in Italy could be seen tentatively evolving beyond the right of concerned parties to be heard before and individual decision is taken and towards a power given to

⁶⁵ Generally A. Massera, *I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario*, Dir. Amm. 707 (2005).

⁶⁶ 'Preface' to P. Beaumont, C. Lyons & N. Walker (eds.), *Convergence and Divergence in European Public Law* (2002).

⁶⁷ M. Keating, *Europe's Changing Political Landscape*, supra note 5, at 10.

⁶⁸ Eg., with reference to the insurance market regulator, R. Caranta, *Assicurazioni (vigilanza sulle)*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, vol. I, 458 (2006).

⁶⁹ E.g. Cons. St., Sez. VI, 1° ottobre 2002, n. 5105, in Giur. it. 1266 (2003), con nota di S. Rodriguez, *Il rapporto tra la L. 7 agosto 1990, n. 241 come legge di principi generali e le forme di partecipazione previste da disposizioni speciali*; Cons. St., Sez. VI, 27 dicembre 2006, n. 7972, Resp. civ. prev. 1139 (2007), with note by M. Poto, *Autorità amministrative indipendenti e partecipazione al procedimento amministrativo*; see also S.A. Frego Luppi, *Il principio di con sensualità dell'agire amministrativo alla luce della legislazione e della giurisprudenza più recenti*, Dir. Amm. 695 (2008).

individuals and public interest organisations to act as a co-decider.
An outcome which would have pleased Feliciano Benvenuti.⁷⁰

⁷⁰ F. Merusi, *Diritti fondamentali e amministrazione*, *supra* note 9, at 543.