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Administrative Procedures and Democracy: The Italian Experience

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INTRODUCTION

The link between participation and democracy is evident: democracy means participation (at least), and participation is ensured by procedures whose goal is to ensure that a “good” decision is made. With regard to democracy, even if the Italian Constitution does not lay down a general rule that refers to administration,¹ there is no doubt that democratic principles also apply to administration, given how important it is.² Participation is the presence, within public bodies, of nonprofessional subjects. According to Italian scholars, we can either have institutional participation, which involves people within administrative organs, or functional participation, which relates to procedure.

Over the past few years, administrative procedures, and the role of private individuals within them, have been emphasized by Italian administrative science. There is a special reason for this: the approval of an administrative procedure law, which contains a set of minimum principles that apply to the relationship between authorities and citizens, is a basic measure of democracy. I am referring to Law n. 241 of August 7, 1990,³ which has tried to incorporate the results of a debate that has been going on for many years. Hence, this law is a kind of codification. This debate, which dealt with the crisis of the classic liberal model, was aimed at providing citizens with new channels for representing their interests.

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1. *But cf.* *IT. COST.* art. 52, cl. 3. This clause of the Constitution, which applies to military administration, says: “The rules concerning the armed forces must conform to the democratic spirit of the Republic.” (author’s translation).

2. “Administration,” as I use the term, refers to the combination of administrative law and regulation.

3. *Legge*, 7 Aug. 1990, n.24; *Gazz. Uff.*, 18 Aug. 1990, n.192 (“nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi,”) (new regulations/norms on the subject of administrative proceedings and the right of access to administrative documents) (author’s translation).

Before this law was enacted, a hearing for individuals who were concerned with administrative procedure was compulsory only in certain cases established by case law, such as in disciplinary proceedings and especially in *Consiglio di Stato*⁴ decisions.

Now, under current Italian law, the right of access to information and the right to be heard represent the two discrete aspects of participation: the right to enter the procedure by requesting the disclosure of administrative documents and the right to submit written opinions and comments. Once a decision is made, the pertinent results of public participation are taken into account. These powers are conferred on those members of the public who are affected, or likely to be affected, by the final act or those who have an interest in the decision, provided that they can be easily traced. This is not dissimilar to Article 41 of the Charter of Fundamental Rights of the European Union.

I. WEAKENING THE LINK BETWEEN DEMOCRACY AND PARTICIPATION

A. Participation and Democracy or Participation and Inequality

Could participation produce inequality between citizens? This is a fundamental question. Most of the time, people represent their own points of view. People concerned with a given procedure are usually trying to limit public power that seems to be dangerous for individual interests. More participation appears to be a positive move toward solving administrative problems because it takes into account public needs, and more opinions and comments will have the chance to be accepted by decisionmakers. But not everybody has the same capacity to elaborate his interests and to put forward proposals and opinions in the pursuit of the public interest. In this scenario, decisionmakers, who are obliged to pursue the public interest, or to find a balance between public and private interests, have fewer limits in rejecting the submitted opinions, which means authorities have more discretion. As I said above, the effort to elaborate an alternative requires, among other things, capacity, money, time, and expertise. Thus, participation could become a dangerous device used only by strong, private powers.

In order to avoid this risk, the role of local ombudsman should be strengthened. In Italy, the ombudsman is vested with the power to assist people and facilitate their interaction with public authorities. This helps ensure public bodies

4. *Consiglio di Stato* translates to Council of State.

are obliged to listen to individuals and take into account the individuals' interests. The following expression could be applied to these proceedings: freedom exists when the people can speak, democracy exists when the government listens. In this manner, participation can enhance good administration.

B. Participation and Legitimization: Is It Authentic Democracy?

According to Niklas Luhmann's reflection, the legitimization of public action is also given by participation.⁵ Luhmann's view stresses "legitimization through process." The link with democracy is evident, because by acting in a democratic way, the authorities can improve their legitimization. According to this opinion, proceedings and participation are also devices that build up confidence and trust in the decisions reached—not only for achieving consensus, but also for absorbing the disagreement of the community. In fact, many procedural rules seem to me to be either set up or able to be used for this purpose, as if they were a way of discharging tension between citizens and public power before a trial takes place.

Consider the judicial review for challenging the legality of decisions that refuse the disclosure of documents: it may be regarded as a way to make judicial contact between individuals and public power. It has a plain role of giving an extra chance of setting a profitable dialogue, before taking action against the final act. By following this approach, we move away from the idea of procedure as the place of democracy.

C. Participation as an Application of Democracy or Participation and Good Administration Without Democracy?

Democracy, at least if considered from a formal point of view, means a specific way to make decisions while respecting the rights of minorities. By using this concept with regard to procedure, we move closer to the crucial point: the function of participation. For instance, some scholars have deemed that individuals are the coauthors of the final decision. This model has numerous important consequences. For example, it could be said that individuals and authorities are placed on the same level; hence, from a legal point of view, individuals have subjective rights when faced with an enforcement of public powers.

5. NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (1983).

However, with regard to our focus on democracy, the rule, according to which decisions must be made with consideration of private rights, should be applied in the previous stage. I mean the political stage, where the circuits of representative democracy should be ensured. If this were the case, by striking a balance between interests, the law would already establish the winner. In other words, participation in the legislative process has another goal with respect to participation during administrative proceedings.

If the winner is the public, the law confers the power on the authorities to pursue such a public interest in the best possible way. By unfolding the procedure, these authorities have to pursue the public interest in the best way and to achieve the best decisions. Thus, at this stage, private interests cannot be placed at the same level as public ones. If procedures are aimed at getting the best decision possible, participation has to be considered in such a way as to enhance the range of elements that authorities have to take into account when exercising their discretionary powers.

Regardless of the psychological reasons which urge individuals to participate (for example, for their own gain), from an objective point of view, comments and elements submitted by citizens must be valued only with an eye toward improving the decisionmaking process. They must be valued insofar as they offer a better outcome, that is to say, a better choice that is in the public interest.

Good administration also means making decisions on the basis of complete information. This is another link between participation and good administration, or rather, this demonstrates that participation is more connected with good administration than with democracy. Moreover, we have to recognize that not all interests may be put forward or considered (this is useful for defining the concept of good administration). This will only happen if these interests are relevant. We cannot really imagine a pluralistic scenario as such, and proceedings (outside the legislative frame) do not ensure the representation of all interests or give full protection to private interests. Hence, even impartiality cannot be considered as being the duty to take into account all private interests involved, although many scholars would not agree. The authorities' ultimate goal is to make decisions, not to remedy pluralistic deficits or a lack of democracy that has occurred in other stages of the system.

Of course, I am aware that "state failure" (which means a deficit of democracy) could pave the way to limiting pluralism (and governance); although, for the moment, and without specific rules, the legitimacy of the administrative body is not based on pluralism. Having said the last caveat, we should, in conclusion,

observe that democracy, within proceedings, means the duty to guarantee the respect, not of rights, but of individual interests within limits that do not harm the public interest.

In addition it can be said that during proceedings, another rule expressed by democracy should be applied: the reexamination of decisions must be carried out by the minority. In this case, minorities are individuals whose interests might be affected by public decisions, and a way to scrutinize these decisions is through individual participation, which is regarded as a way for individuals to “see” and “speak,” thereby limiting the freedom of the authorities. This enhances the transparency of the administrative procedures, which is related to democracy. Justice could be sought before administrative tribunals. Particularly, lawsuits concerning administrative decisions take place before the *Tribunale amministrativo regionale* and the *Consiglio di Stato* as an appellate court; such lawsuits also deal with misuse of discretionary power (so-called *eccesso di potere*), which might be based upon unfair consideration of comments and opinions.

II. CAN PARTICIPATION BE CONSIDERED AS A DEVICE WHICH MIGHT COMPENSATE FOR THE LACK OF DEMOCRACY?

A. Participation as a Compensation Device for the Lack of Democracy: The Case of the Legislative Process Meant to Allocate Administrative Functions

The Constitutional Court has recently singled out another link between participation and democracy. More specifically, in Decision 303, decided on October 1, 2003,⁶ the Court created a new link between administrative function and legislative function, based on political participation. The issue in the case was whether the state had the power to regulate government functions at the state level, even if the functions dealt with matters for which legislative powers are vested at a regional level.

Article 118 of the Constitution provides that administrative functions belong to the municipalities, except when they are conferred to provinces, metropolitan cities, regions, or the state, in order to guarantee uniform practice (allocation is based on the “principle of subsidiarity,” differentiation, and adequacy). Municipalities, provinces, and metropolitan cities have their own administrative functions, in addition to those conferred by the law of the state or the region, according

6. Corte cost., 1 Oct. 2003, n.303, Foro It., I, 1004.

to their respective fields of competence. According to the Constitutional Court, state laws can transfer (shift up) certain administrative functions to the state, even if they are related to matters submitted to regional law (for example, infrastructure permits), but only if an agreement between the state and the regions has been reached or at least attempted (while waiting for a Chamber of the Regions to be created, as suggested by some Italian political parties).

The judgment is not very clear on the following point, but it seems that the element which has to exist to ensure the constitutionality of the law conferring the function (that is to say, the presence of an agreement) might take place not only during the legislative procedure, but also at the administrative stage. Either way, a lack of democracy exists because the state legislative power can act without consulting the regions. However, the regions must have space to participate during administrative function enforcement; in fact, the agreement is the result of participation or, better, of a specific kind of participation that involves public bodies. The participation of the regions becomes an important key for the constitutionality of the law aimed at conferring powers to the state level.

The state legislator can decide without consulting the regions, but the latter must be given the chance to participate in the enforcement of the administrative function. By shifting the agreement from the legislative procedure to the administrative stage, a further important result might be achieved: the control of the subsidiarity principle (according to which the administrative powers should be conferred to the public body which is the closest to the level of the involved interests), which could be exercised by administrative tribunals, thereby showing another link with democracy, given that the procedure appears as a “device” which paves the way to the controls.

B. Participation and Independent Agencies

Increasingly, a feature of all modern states is the growth of independent agencies. In Italy, such bodies exist at the local and national levels. Legislators delegate a lot of powers to these agencies and these agencies issue a lot of important acts. Because they are independent from the government, these agencies are outside the domestic circuits of representative democracy and out of political control. Some scholars suggest that procedural participation can compensate for this democratic deficit. I do not agree with this view. We cannot confuse two different problems and stages: democracy related to the structure and democracy related to the function. Because they are independent, these agencies should not exercise discretion-

ary power: only when their goal is enforcement of the law, at most by using a technical standard, are they compatible with the Constitution. Having said that, I agree with the opinions that emphasize the necessity of open participation with regard to technocratic proceedings. Comments and private opinions, in fact, might help agencies make the situation clearer, thus enhancing the standard of good administration, even if there are serious problems regarding equality and the influence of powerful groups who are involved in the procedure.

III. SOME PROBLEMS WITH PARTICIPATION

A. Who Should Regulate Administrative Procedures, Thus Establishing the Basic Measure of Democracy in Proceedings?

I have already said that Law 241 is a kind of framework law, which is devoted to establishing a minimum level of guarantees. But other laws have already strengthened this set of principles, by increasing, for instance, the number of people entitled to participate, even if they were not directly affected by the final act related to the procedure. Examples of this are procedures that are enforced by local authorities or environmental procedures where the law provides for community participation. Nevertheless, the Constitution does not provide for the participatory principle with regard to proceedings. A number of problems have arisen as a result of the recent amendment to our Constitution, which has modified the traditional allocation of competencies between the state and the regions, and has assigned to the state exclusive legislative power in a limited number of subject matters.

But administrative procedure is not one of these subject matters. If administrative procedure was to be considered a subject matter, then the scope of regional legislative power would be enlarged. On the other hand, the capacity of Law 241 to represent a general set of principles that can be applied all over Italy (hence limiting regional powers) could then be disputed, and it would no longer express the basic level of participatory democracy. It is possible to conceive an alternate view, based on the fact that procedure is not a specific subject matter allocated to the state or to the regions. In fact, administrative procedure could be considered one of the aspects of other subject matters. For example, by setting rules on the environment, the state has the power to deal with environmental administrative proceedings, and the same solutions may be reached with regard

to state organizations and other matters of state competence. If this hypothesis proves true, it would mean an expanded role for Law 241 in the future.

Law 241 could also be considered as a kind of codification of general principles of good administration and impartiality. Because these principles are laid down in the Constitution, they must be applied by all public bodies, and Law 241 could be seen as the law defining them. Again, one might say that procedural rules concern the following matters: "determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory."⁷ This is a subject matter of state competence. Hence, participative rights should be considered basic standards of welfare.

B. Participation, Democracy, and General Regulation

Returning to Law 241, according to Article 13, provisions relating to participation cannot be applied in the case of rulemaking procedures, procedures aimed at issuing general regulations, or program-related proceedings. Hence, the Italian provisions are very similar to Article 41 of the Charter of Fundamental Rights. The *ratio* was singled out by the *Consiglio di Stato* in order to avoid general participation with regard to acts with a wide application and that involve a great many interests, whose participation could interfere with good administration.

Apart from normative acts, where the derogation from the discipline is based on the fact that they are submitted to a specific procedure, these exceptions appear unacceptable. Given that these proceedings concern acts affecting a large range of interests, participation should be ensured even more from the perspective of democracy. But specific legislation (concerning, for instance, the environment and town planning) provides such participation, and judicial statements seem to prefer an extensive interpretation. In this way, the risk of undermining democracy, by excluding the participation with regard to many important proceedings, seems to be averted.

C. Democracy and Simplification

Another principle that has been laid down by Law 241 is simplification. Its application leads to both the elimination of certain stages of procedures and the introduction of a number of special procedural devices. In particular, the procedural

7. IT. COST. art. 117, c. 2, lett. m.

devices enable authorities to reach the end of the proceeding by overcoming disagreements between other authorities or procedural obstacles. An example of this is silence: in some cases, the final act (for instance, a license) is deemed to be granted if the application has not been rejected within a specific deadline. Hence, the proceeding is not necessarily the determining factor.

Numerous articles of Law 241 deal with these problems. The link with our topic is that by applying the rules on simplification, participation could be precluded. Scholars and judges have carried the burden of finding tools of interpretation that allow a contextual application of both the principles of participation and simplification; if this were not the case, then the principle of democracy would be infringed.

D. Democracy and Illegality

Another trend which could undermine and weaken the principle of participation has emerged from case law. Numerous decisions, backed by some administrative lawyers (and now contained in some legislative proposals), have established that the violations of certain rules do not render the administrative act illegal or, at least, do not bring about the annulment of the final decision. The problem arises with regard to rules that, if respected, would not ensure a substantially different decision of the administrative authority (for instance, infringement of the duty to give reasons). Often, participation rules are also included, so that the related procedural defects (consider the situation in which the administrative authority does not take into account the opinion expressed by a citizen during the proceeding) do not always render the decision null and void.

Of course, there is a reason for this: the need to avoid a formal defect could determine whether the final act is quashed. In other words, in many cases, the measure that would eliminate the act would appear to be too severe and radical, especially considering the likelihood of the provisions' being infringed because of the increasing number of procedural rules. First, there is the critical problem of the great power that this approach gives to judges in finding formal procedural defects. Apart from that, I think that if we decide that the violation of certain rules is not relevant with regard to the legality of the final act, then the rules should be eliminated. However, in so doing, participation might once more be impaired.

This problem can be solved by maintaining the participation rules and by providing specific protection for them. Not the usual judicial review, leading to

the possibility of quashing the act when the proceeding has already finished, but a specific form of review, elucidated within the procedure itself so as to ensure and guarantee participation when it is crucial—before the proceeding ends. In Italy, for instance, individuals have access to a review procedure before an administrative tribunal to challenge the legality of decisions upholding the nondisclosure of documents. The decisions may be challenged during the proceeding, namely before the issue of the final act. Something similar is provided in EU law by directive 35/2003, with regard to environmental information.