

## The Interaction between Private and Public Actors: Traditional Principles versus New Trends

### A Comparative Analysis

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#### 1. Foreword

This paper builds on a research project whose outcomes were published some years ago in a volume under the general coordination of the Department of Law of the University of Turin (Italy).<sup>1</sup> That research was based on the following crucial assumptions.

1. In the *traditional continental model* of public administration, firstly structured in France after the 1789 Revolution, political bodies – Parliament first and foremost – strike the balance among conflicting interests present in society or, rather, choose among the conflicting social interests those that deserve to gain the upper hand. The administrative organization implements the choices made by the law-maker in specific cases and is normally responsive to the law-maker. To this end, agencies work through adjudication processes and adopt decisions.
2. The main variable in this model depends on the limits which the law-maker is capable of providing to the administrative organization. This margin of appreciation may greatly vary in quality and extent. It may concern complex factual assessments and/or choices between conflicting interests.
3. To limit the risk of arbitrariness – potentially detrimental to both the general and individual interest – the law-maker usually lays down formal and procedural rules (i.e. the duty to have recourse to advisory opinions; the duty to give reasons) to be followed when the administration is exercising its discretionary powers.

As a contrast to the traditional model, a different model is possible, even if it is admittedly rarer and sector specific rather than general. This is a bottom-up model, in which different social actors negotiate and find mutually acceptable compromises among conflicting interests. Parliament would be content to lay down some basic engagement rules (for example, who may participate and how), and exclude or limit the negotiability of some interests (for instance, by selecting fundamental rights). The administrative organization acts as a facilitator or broker of decisions which are, to a large or lesser extent, taken by social actors. To this end, agencies may also set up a regulatory environment for social actors to come together.

Thus, this paper aims to discuss how and to what extent we are facing a dichotomy between the *traditional continental model* and one of *dialogue*. The research is aimed at classifying the legal system

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1 See R. Caranta & A. Gerbrandy (eds.), *Traditions and Change in European Administrative Law* (2011).

according to the models briefly outlined above, their possible combinations, and their variables. We will attempt this by offering a brief overview of the state of the Italian administration and its relationship to citizens and civil society, in order to explain them to a non-Italian reader. After discussing the parameters of the traditional and the dialogue models, attention will be focused on a different system inspired by common law principles, namely the American legal system. The comparison will be carried out by taking into account the general principles applied to the relations between agencies and citizens. More specifically, we will consider, on the one hand, the Italian Administrative Procedure Act of 1990 and, on the other hand, the American Administrative Procedure Act of 1946. If it is true that a remarkable example of the progressive democratization of the decision-making process can be found in environmental policy, we will evaluate the different environmental legislations both in Italy and in the USA. Thus, we will consider, as a potential tool for reaching ‘consensual decisions’, on the one hand, Italian environmental regulation, which still relies heavily on the ‘command-and-control approach’, but with important trends towards flexibility and co-regulation; and, on the other hand, US environmental mediation.

The paper is structured as follows: in Section 2.1, some terminological and conceptual clarifications are offered, regarding the traditional continental model as structured after the French Revolution. Sections 2.2 and 2.3 deal with the impact, both quantitative and qualitative, of the democratization of the decision-making process in Italy, especially regarding the so-called ‘administration by agreements’. Section 3 discusses the features of both the traditional model and the dialogue model in the US legal system, particularly in relation to the US Administrative Procedure Act and other sectoral regulations. Finally, Section 4 provides some concluding remarks.

By referring to legal sources, case law and textbooks, this paper will therefore consider the following aspects. Do different considerations apply to rule-making in comparison with adjudication? Is the social dialogue model accepted and/or practised either in general or with reference to specific fields; if so, in which fields? Are there combinations of the traditional and social dialogue models, such as giving power to the administrative organisation to make decisions if dialogue fails? The analysis of the Italian and American models will show the crucial role of *participation* by citizens and stakeholders, in avoiding the risks of inefficiency of administrative action. *De iure condendo*, it may be useful to re-think the rules concerning the participation of private parties. From this point of view, there are several evident dangers. A crucial problem is connected with the emersion and protection of all (public and private) relevant interests, especially those of the most vulnerable parts of the population. The main purpose is to indicate a fair method of action so that the competent authority may keep in mind and carefully evaluate all legitimate expectations. Conflicts among relevant parties are often difficult to resolve. To this end, the ‘dialogue model’ – which is in itself an evolution of the old ‘right to be heard’ – could represent an interesting source of inspiration. It could provide a good legal solution when dialogue among the competent authorities, citizens involved and private stakeholders is of primary importance.

## 2. The traditional continental model and its theoretical elaboration

### 2.1 The Italian legal system before the entry into force of Law No. 241/1990

The traditional top-down Franco-Napoleonic pattern of public administration 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.<sup>2</sup>

2 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?* (2009), p. 28.

Thus the traditional continental model, first structured after the 1789 Revolution, is mainly top-down.<sup>3</sup> Unilateral 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 cases (...). 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.<sup>4</sup>

This model could do very well without participation, and procedural rules were generally scarcely considered. In Italy, the early adoption of the Franco-Napoleonic model had considerably boosted the efficiency of the then Kingdom of Sardinia enabling it, along with deft diplomacy, to unify Italy under the Crown of Savoy.<sup>5</sup> By the time Law No. 241/1990 was adopted, the original pattern had lost some of its shine. Less state-centred and more bottom-up, market-friendly economies – like the Anglo-American one – 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, ‘the autonomous institutions of civil society are being given more rein. Public private partnerships, community-based partnerships and innovative forms of service delivery abound.’<sup>6</sup> It is possibly not a coincidence that those legal systems share 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*.<sup>7</sup>

This tradition was foreign to Italy. In 1940 Aldo M. Sandulli wrote the leading text on administrative procedure.<sup>8</sup> Participation was not even mentioned in the index. The input of the concerned parties was briefly discussed. That was to be the standard position in Italy. Even after Law No. 241/1990 was adopted, the Constitutional Court reiterated that the *due process* principle could not be read into the 1948 Constitution.<sup>9</sup> Only a small group of scholars who worked with Feliciano Benvenuti were ready to highlight the relevance of participation in the framework of a more bottom-up approach to administrative law.<sup>10</sup> The panorama has to some extent changed after the entry into force of Law No. 241/1990, which gives more space to civil society in the overall governance system, a system in which participation is one of the key instruments of democracy.<sup>11</sup>

## 2.2 A first change in the Italian legal system. Law No. 241/1990 and a new role for participation: A key instrument of democracy?

The Italian current phase of regulation is characterized by increased flexibility in the form of reduced regulatory burdens and simplified administrative procedures, allowing strong co-operation between agencies and citizens. This process has been rather slow and has been enhanced by the so-called ‘Bassanini’ reform (named after the Minister for Public Administration who proposed it), which included three different regulations: Act No. 59/1997, Act No. 127/1997 and the Legislative Decree No. 112/1998. The reform

3 See R. Caranta, *Introduction*, in Caranta & Gerbrandy, *supra* note 1. See also R. Caranta, ‘Participation into Administrative Procedures: Achievement and Problems’, (2010) 2 *Ijpl*, no. 2, pp. 311 et seq.

4 G. della Cananea, ‘Beyond the State: The Europeanisation and Globalisation of Procedural Administrative Law’, (2003) *Eur. Publ. L.*, p. 566; 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* (2007), p. 72.

5 See again Caranta (2010), *supra* note 3, p. 313.

6 M. Keating, ‘Europe’s Changing Political Landscape: Territorial Restructuring and New Forms of Government’, in P. Beaumont et al. (eds.), *Convergence and Divergence in European Public Law* (2002), p. 10.

7 See, among others, S. Rodriguez, ‘Representative Democracy vs. Participative Democracy in the EU and the US’, in R. Caranta (ed.), *Interest Representation in Administrative Proceedings* 2008), p. 112.

8 A.M. Sandulli, *Il procedimento amministrativo* (1940).

9 Italian Constitutional Court, 31 May 1995, No. 210, in *Giur. Cost.* 1586 (1995).

10 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), p. 28.

11 This evolution has parallels and derives 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’, (2010) *Riv. trim. dir. pubbl.*, pp. 125 et seq.

implied a general sweeping change in the Italian government structure, mainly based on decentralization (as proposed by Article 5 of the Italian Constitution), devolution, simplification and information/communication technology (ICT) leverage. It promoted the principle of shared responsibility among public administration, industry and citizens and, implicitly, a broader use of voluntary regulations. Prior to the Bassanini reform, in 1983, the Italian Government set up a Commission, chaired by a leading scholar, the late Prof. Mario Nigro, to work on a draft statute on administrative procedure.<sup>12</sup> The draft put together by the 'Commissione Nigro' finally made its way into the Administrative Procedure Act 1990 (*L. 7 agosto 1990, n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*) which was subsequently integrated and amended by supplementary provisions. On the one hand, Law No. 241/1990 deals with administrative procedure; on the other hand, it provides comprehensive regulation of access to administrative documents, whether or not they are connected to an administrative procedure.<sup>13</sup>

Before Law No. 241/1990 on administrative procedure was passed, it was held that the administration had an obligation to proceed, but not always to issue a provision. And even when it had to issue a provision, i.e. to conclude the procedure with a decision, there was no obligation to do so within a set time limit. If it failed to do so, the interested party could only give notice requiring the administration to come to a decision within a time limit of no less than thirty days, and if, at the end of this time, nothing had changed, the interested party would have to resort to an administrative judge to contest the so-called tacit rejection.<sup>14</sup> Even after notice had been given and the deadline had been assigned, silence equated to a dismissal of the private individual's application. That individual could bring an action against the dismissal and if the judge allowed the action (if for no other reason than that the rejection, being tacit, was without justification), he would rule that the administration should reach a decision. Often the administration would fulfil this obligation by dismissing the application which it had previously dismissed with its tacit rejection. Thus, after much expense and effort, the citizen would be left with nothing for his efforts.

Law No. 241/90 and subsequent laws that modified it have served to fill this substantial lacuna and provide safeguards in three ways. First, by stating that the proceedings must come to a conclusion within a prescribed time limit (established by law, regulation or organization norm). Second, that proceedings must conclude with the issue of an express measure (and not with silence), and third, that a delay by the administration gives the private individual the right to compensation for any unlawful harm. Law No. 241/90 radically changed the existing legal framework, devoting a whole chapter (III) to participation in administrative proceedings. According to the new rules:

- a. The interested party has the right to be notified of the initiation of proceedings (Article 7).
- b. Whether he has received such communication or not, the interested party has the right to intervene in the proceedings, presenting pleadings and documentation (Article 10 letter b).
- c. Having presented pleadings and documentation, the interested party has the right to have them assessed by the administration if they are pertinent to the case in hand (Article 10 cit.).
- d. In order to prepare the pleadings in his defence, or which in any case represent his point of view, the interested party has the right to see the files (Article 10 letter a) and, in general, to have access to the administration's documentation (Article 22). By exercising the right of access and presenting pleadings

12 See M. Nigro, 'Commissione per la revisione della disciplina dei procedimenti amministrativi. Appunto amministrativo (dic. 1983)', (1984) *Riv. trim. sc. amm.*

13 Prior to 1990, administrative procedure was regulated either by sectorial acts or case law and administrative custom, with the significant contribution of legal scholarship. As regards sectorial regulations, see, for example, Law No. 142/1990 on local autonomy, amended by Legislative Decree No. 267/2000; the Town Planning Act No. 1150/1942, amended by Act No. 765/1967, whose Art. 31 simply provides that planning projects must be publicized. Public interest groups, and the owners of land parcels affected by the project, were empowered to submit written observations, often quite cursorily examined by the public authorities.

14 See, for example, G. Corso, 'Administrative Procedures: Twenty Years on', (2010) 2 *Ijpl*, no. 2, pp. 274 et seq.

and documents, the citizen exercises his right to a defence which is constitutionally recognized in civil, criminal and administrative proceedings (Article 24 Const.).<sup>15</sup>

The administrative proceeding has ceased to be thought of as a place where an authoritative and unilateral decision (so-called '*provvedimento*') is taken, and has become the stage of participation, that is the place where conflicting interests are weighed one against the other to find a plausible – and possibly agreeable to everyone concerned – balance. Whilst all the attention was previously placed on the *provvedimento*, the decision which led the general interest in the actual facts of a case and overpowered all private interests to accommodate it, the emphasis is now on the interplay between public interests and private ones during the proceedings. *Openness, transparency and participation* are undoubtedly the main principles to which Law No. 241/1990 refers. A provision enabling widespread participation that extends well beyond those directly concerned is Article 9 of Law No. 241/1990: 'everyone representing an interest, be it public or private, and the associations and committees representing widespread interests that could suffer harm as a result of a final decision, may take part in the procedure'. Thus, the crucial innovation introduced by Article 9 was the admission of *widespread interests* to participate in administrative proceedings, if they are represented either by associations or committees. This choice may be justified in order to ensure a serious and stable intervention in the procedure.<sup>16</sup> In any case, despite the great importance of the reform introduced by Law No. 241/1990, the form of participation laid down by the Act can be viewed as a typical example of the traditional way in which agencies make their decisions. The reasons are many. Under Article 13, the provisions on participation do not apply to rule-making and planning procedures. This implies that participation rules only apply to adjudication – i.e. the process by which the legal rights or duties of a particular person in a specific situation are defined – not to rule-making – i.e. the process by which rules or regulations of general applicability are formulated and adopted.<sup>17</sup> Participation in rule-making is therefore not a general principle of Italian law.<sup>18</sup> It is, however, a general principle adopted by a number of Italian regions, which have their own general statutes on administrative procedures. Moreover, in national law, participation is the rule for some types of rule-making procedures and for specific sectors – forms of participation are established both in statutes issued before 1990 and in statutes issued later.

As for regional law, after the constitutional reform of 2001, it is still unclear to what extent Parliament may set out general rules on administrative procedures and to what extent regional parliaments (the so-called *Consigli regionali*) may set out different rules. It is not disputed, however, that regions may provide a general statute and that the latter can provide for the increased protection of interested parties, even in terms of increased participation; some regional statutes do, with provisions contained either in their general statutes on administrative procedure, or in other statutes. The main example is the Tuscan statute issued in 2007, which recognizes in broad terms the right to participation in regional policymaking, establishes a regional authority for the protection and promotion of these rights, requires a public debate for important projects, and sets general rules for regional rule-making and planning.

Other reasons can be found in the form of participation laid down by Law No. 241/1990. Articles 7-10 of the Act have introduced a wide form of participation by all interested parties, as well as the right of notice of the opening of the file by way of an individual communication (Article 8). Nevertheless, the content of the final decision to be taken is still left to the administrative organization. Neither forms of co-negotiation nor forms of mediation between the conflicting interests are laid down. Despite widespread participation

15 Recently, see D.-U. Galetta, 'The Italian Freedom of Information Act 2016. Why Transparency-On-Request is a Better Solution', (2016) 8 *IJpl*, no. 2, p. 268. The author refers to the 'Madia Reform' introduced with an important Law of August 2015 (Law No. 124/2015). The reform was widely glorified in the press as a revolutionary law and contains important provisions concerning the topic of access to administrative documents and to public sector information. A Legislative Decree on transparency dated 25 May 2016, No. 97, whose aim is to implement the provision of Madia Law, has recently been passed (the Italian FOIA).

16 Thus, according to Law No. 241/1990, in principle, all parties, whether ruled under private or public law, whose interests might be affected by the decision to be taken at the end of the proceedings, may take part in it. The same applies to public interest groups, provided they have attained minimal formal organization (Art. 9).

17 As we will see, this situation is quite different from that of the US Administrative Procedure Act of 1946, where participation rules for rule-making were developed, with the aim of significantly involving civil society in the most relevant decisions.

18 On this point, see B.G. Mattarella, 'Participation in Rulemaking in Italy', (2010) 2 *IJpl*, p. 342.

by all concerned parties, these procedures imply – as do all traditional forms of administrative procedures – a unilateral intervention by the agency in the pursuit of some interest represented as ‘public’ or even ‘general’. *Participation as defence*, as well as *participation as consultation* are the only forms of involvement that these traditional proceedings imply.

However, in the Italian political and administrative landscape, the importance of Law No. 241/1990 must not be overlooked. It was one of the most important innovations ever introduced by national legislation in the field of public law. It is, beyond any shadow of doubt, the Act most frequently invoked by lawyers and judges in this field. Whether it contributed to imposing real changes on central and local administrators, however, remains to be seen. Evidence of its success may be seen in the opposition that administrators have constantly displayed towards it.<sup>19</sup> To the extent to which it introduces, or codifies, procedural constraints on the government, it strengthens the ‘limitation of government by law’ which is still, if not the most important part of Western constitutionalism, beyond doubt the oldest. However, when evaluating the Act, both its strengths and weaknesses ought to be considered, especially when the latter prevent the exercise of rights. In other words, the Act must not be idealized, but, rather, studied critically and, if possible, improved.<sup>20</sup> Hence, one may wonder if there are any examples – in the Italian legal order – of a different (‘dialogue’) model. Are there any hypotheses in which the agency is not enforcing overriding rules and does not impose its will, but rather acts as a facilitator or broker of decisions between disputing interests, represented by concerned parties and public interest groups, including non-governmental actors? Are there any examples of a model in which final decisions are more acceptable because they are the result of a compromise among the stakeholders rather than the imposition of an interest represented as ‘public’? Situations which might incorporate elements of the dialogue model or, rather, a mix of the traditional and the dialogue model will be discussed in the following sections. In these cases, co-operation between public and private actors has become the characteristic instrument of administrative action in defining objectives as well in implementing them.

In focusing on this growing co-operation-based practice in administrative action, this paper proposes analyzing examples of administrative agreements, as introduced by Article 11, Law No. 241/1990, which are the most suitable instrument through which voluntary agreements are implemented in the environmental field. They will be analyzed as a further example of a specific sector’s dialogue model, where an effective environmental policy can be formulated and put in place by a co-operation-network of actors that includes regional governments and other public authorities, individual enterprises and associations representing special interests at a local level.

### 2.3 The democratisation of the decision-making process in Italy. ‘Administration by agreement’: An example of a mixed model

The concept of administrative agreements, as introduced by Article 11 of Law No. 241/1990, undoubtedly corresponds to a new vision of the citizen-administration relationship, which is characterized less by ‘supremacy’ and ‘hierarchy’ and more by ‘collaboration’ and ‘negotiation’. Article 11 provides that, within an administrative proceeding and under given restrictive conditions, private parties are entitled to negotiate an agreement with an administrative body. This agreement may either specify the discretionary content of the final measure (supplementary agreement) or even replace the final measure itself (substitutive agreement).<sup>21</sup> It seems clear that this form of supplementary agreement represents an example of a mixed model of ‘traditional’ and ‘dialogue’ approaches. In fact, despite the possibility – for the interested parties – to determine the discretionary content of the final act, this procedure always implies the authoritative and unilateral intervention by the agency in the pursuit of the general interest. In any case, the prevalence of public interest over private interest will allow the public administration to unilaterally adopt the final measure (whose discretionary content is specified by the agreement), without the private party’s consensus.

19 See G. Della Cananea, ‘Administrative Procedures and Rights in Italy: A Comparative Approach’, (2010) 2 *Ijpl.*, no. 2, pp. 208 et seq.

20 See S. Cassese, ‘Per una nuova disciplina dei diritti dei privati nei confronti delle pubbliche amministrazioni’, (2007) *Giorn. dir. amm.*, pp. 5 et seq.

21 The nature of administrative agreements has long been debated in Italy. See further G. Greco, *Accordi amministrativi tra provvedimento e contratto* (2003), pp. 75 et seq.

The so-called ‘substitutive agreements’ are quite different. In this case, the final measure is fully replaced by the agreement, which is the result of real negotiation between public administration and private parties.<sup>22</sup> Law No. 15/2005 deleted the clause in Article 11 allowing public administration to have recourse to substitutive agreements ‘only in cases provided for by law’: the possibility to enter into substitutive agreements has thus been generalized, enabling a full application of this ‘negotiated’ tool. The abolition of the clause has been viewed by some as a clear implementation of the principle of ‘alternativeness’ between private law tools and unilateral and authoritative ones.<sup>23</sup>

### 2.3.1 Examples of voluntary agreements (VAs) in environmental policy

Co-operation and connecting procedures between actors whose interests are different or even contrasting is the basis of concerted and negotiated administration. This dialogue model is increasingly used as it meets the need to design new public functions and competencies because of the progressive democratization of decision-making processes, involving central and local public powers as well as private actors, and the pursuit of accrued efficiency.<sup>24</sup> A remarkable example of this can be found in environmental policy. Italian environmental policy still relies heavily on the ‘command-and-control approach’. However, over time an important trend towards decentralization and flexibility has emerged. This tendency has been clear in the evolution of Italian environmental regulation from the 1970s to today and is strictly connected with the EU framework.<sup>25</sup> In some complex areas like the environment, European political decision makers have primarily employed traditional regulatory strategies (so-called *command-and-control regulation*). However, in recent years, this form of regulation has increasingly been criticized on the grounds that it is considered to be an unsuitable instrument for implementing the goals of sustainable development – the modern paradigm of environmental policy.

Therefore, a certain tendency towards the use of alternative tools, such as deregulation, negotiation and moral suasion, has emerged. This is supported by the findings of various schools of political and legal science, all observing – in the environmental field – a loss of the hierarchical authority of public authorities and a trend towards establishing multipartite policy networks composed of public and private actors.<sup>26</sup> Since the 1990s, in fact, the EU has been developing a new regulatory policy, which increasingly puts emphasis on the use of alternative tools that are complementary to traditional governance. These alternative instruments are often labelled with the general term of ‘negotiation’, ‘soft law’, ‘self-regulation’ and/or ‘co-regulation’.<sup>27</sup>

Voluntary agreements (VAs) are a typical result of these alternative forms of governance and are frequently invoked as ‘better’, both because they are based on the superior expertise of the actors shaping the policy measures, and because they are immediately applicable and easier to change if the need arises. Other advantages have been mentioned. For instance, VAs could lead to a ‘refreshed attitude’ towards regulation, evidenced by industry and government acting more co-operatively; they can also be supplementary to existing ‘command-and-control’ approaches, filling gaps and providing additional flexibility.<sup>28</sup>

In the Italian environmental sector, the term ‘voluntary agreements’ as such appeared for the first time in Legislative Decree No. 22/1997 on waste disposal (known as the Ronchi Decree, after the Minister

22 A field in which substitutive agreements are often negotiated is the lease of public land granted by port authorities. Special rules allow the port authority to choose the most appropriate tools among unilateral ones (i.e. licences) and negotiated ones (i.e. substitutive agreements).

23 See generally G. De Marzo et al., ‘L’attività amministrativa alla ricerca del consenso’, in F. Caringella et al. (eds.), *Le nuove regole dell’azione amministrativa dopo le Leggi n. 15/2005 e n. 80/2005* (2005), I, pp. 95 et seq.

24 G. Rolla & E. Ceccherini, ‘Intergovernmental Relations in Italy’ (2000), <www.unisi.it>.

25 For more details on this evolution, see R. Lewanski, *Governare l’ambiente* (1997).

26 On this point, see E. Reh binder, ‘Environmental Agreements. A New Instrument of Environmental Policy’, European University Institute, Jean Monnet Chair Paper No. 97/45, who noticed that this does not mean that hierarchy disappears. The ‘State’ remains a ‘privileged’ actor that represents the public interest and has a moderating function. However, ‘the stereotype paradigm of the State as the instance of comprehensive control of society and the classical separation of State and society are modified in the sense that state action relating to complex and long-term problems of environmental policy to an ever increasing extent takes place in the framework of relatively stable dehierarchised exchange, bargaining and cooperation systems.’

27 R. Baggott, ‘Regulatory reform in Britain: the changing face of self-regulation’, (1989) *Public Administration*, <https://doi.org/10.1111/j.1467-9299.1989.tb00740.x>, p. 438.

28 On this point, see B.O. Gram Mortensen, ‘The legal efficiency of Voluntary Environmental Agreements illustrated by the EU electricity sector’, (2001) *Journal of Cleaner Production*, pp. 155-166.

who promoted it). The Decree encouraged co-operation between public and economic private parties for waste recycling, defining a voluntary agreement as ‘an official agreement signed between agencies and the interested economic sectors, open to all stakeholders and aimed at pursuing the objectives of waste recycling and re-use’. In April 2006, the new Environmental Code (Legislative Decree 3 April 2006, No. 152) came into force, in order to simplify, rationalize and coordinate previous environmental legislation on the following matters: environmental impact assessment; soil and water protection, waste management; air protection and environmental damage. Articles 178 and 206 of the Environmental Code – modified by Legislative Decree 16 January 2008, No. 4, Law 27 December 2017, No. 205 and Law 20 November 2017, No. 167 – confirm the possibility (already laid down by the Ronchi Decree) of using agreements and contracts between public and private parties (i.e. firms, associations and trade unions) in order to increase the re-use and recycling of waste. Article 206(5) contains an important reference to EU legal sources, i.e. to the Communication on an EU-level framework for environmental agreements, in which – as already mentioned above – VAs are seen as a flexible form of co-regulation that can complement traditional measures. The considerable attention paid to EU rules also emerges from Article 206(3), which expressly states that agreements and contracts may introduce simplified administrative burdens, but cannot fail to conform to EU provisions. In Italy, some parts of the public administration are inclined to use these VAs with a certain frequency. However, if the process at regional and local level seems quite dynamic, the national level process still appears to necessitate more time to be adequately designed and implemented. Undoubtedly, to obtain a widespread and more successful recourse to VAs, the role of different groups of social actors is of crucial importance. In Italy, public administration attitudes and ways of acting have still to evolve in order to guarantee a correct and effective use of such tools. The public sector needs to develop the capabilities to understand and take into real consideration the signals from civil society. This will imply a full shift from the command-and-control mechanism and the imposition of rules, to shared action based on voluntariness and negotiation.

These examples clearly show that a pure dialogue model does not yet seem to exist in Italy. Nevertheless, VAs are good examples of a compromise between the traditional and dialogue models. They can be viewed as actual proof of the evolution of the traditional model towards a different and complex dialogue approach, in which decisions are more the result of a balance among the stakeholders than the imposition of an interest represented as public.<sup>29</sup> For instance, this is quite clear in all instances in which local public administrations are inclined to use VAs. Among these, the Region of Emilia Romagna strongly encourages their use.<sup>30</sup> Other interesting examples can be found in the Regions of Lombardy<sup>31</sup> and Tuscany.<sup>32</sup>

Some encouraging signals have emerged in the environmental sector which have been praised as potentially more flexible and less costly than command-and-control instruments: public authorities and private sector (a firm, a group of firms or a whole industrial sector) negotiate their commitments to some environmental quality and/or performance goals (i.e. waste recycling, air emissions, waste water, soil contamination). However, even in this sector, the evolution towards an extensive and advantageous (in terms of environmental goals) use of VAs cannot be viewed as complete. There still seems to be a limited

29 See on this point, S. Mirate & S. Rodriguez, ‘The Dialogue Model in the Italian legal system’, in Caranta & Gerbrandy, *supra* note 1.

30 See the study by P. Milizia & M. Tamborra, ‘Juridical framework of voluntary agreements in Italy and policy relevance at the local level’, FEEM Working Paper No. 19/2000, available at SSRN: <<https://ssrn.com/abstract=229478>>, which refers to some interesting examples of VAs stipulated in Italy; for instance, the VA of the Province of Bologna on waste management, which explicitly contained a reference to Art. 5 of the Ronchi Decree; the VA of the Municipality of Faenza with some local companies on air emissions.

31 The reference is to the agreement negotiated on 25 January 1996 between Regione Lombardia and ‘Comieco’ (*Consorzio Nazionale Recupero e Riciclo degli Imballaggi* – National Consortium for the recovery and recycling of packing), aimed at pursuing the implementation and development of selected collection and recycling circuits for paper and cardboard.

32 See, for example, the agreement signed on 12 September 1994 between the Region of Tuscany and Assocarta (Italian Association Paper Industry), aimed at providing a real implementation for national and regional provisions for the promotion of waste reduction and the improvement of the local public administration institutions’ actions towards selected waste collection.

awareness of the potential of the tool itself among public and private actors and there is a clear need for a new policy approach, as well as new ways of interacting and negotiating.<sup>33</sup>

### 3. The traditional model in the US legal system

#### 3.1 The general picture from the American Constitution to the Administrative Procedure Act

A 'traditional model' – for the purposes of this research – can be identified in the US legal system. A political body (i.e. the Congress) strikes the balance among conflicting interests present in society; administrative organizations (i.e. agencies) implement the choices made by the legislature. These assumptions also clearly result from the American Constitution (hereinafter, the Constitution), the supreme law of the US and one of the oldest constitutions still in use.<sup>34</sup> The most striking feature is how extensively it implements the prevailing principle of separation of powers, which is reflected in Articles I, II and III.<sup>35</sup> Clear lines divide legislative, executive and judicial branches. Pursuant to Article I 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'. No one branch contains absolute power; rather, each branch is balanced by the others creating a system of checks and balances to protect the principles of democracy.<sup>36</sup> Agencies have the primary task of implementing the choices made by Congress through adjudication and they derive their legal authority from statutes they implement. It is worth noting that American administrative law is basically procedural law, that is, the law governing the processes by which agencies make decisions or take other action, and the processes by which the wisdom and legality of the latter are reviewed by other bodies (including courts). Considerable attention is given to procedural formalities followed to make administrative decisions. The crucial point is the idea that agency action is to be founded on fair procedures quite similar to trial-type procedures. The procedural content of administrative law stems from a number of statutory sources. The foremost general source is the federal Administrative Procedure Act of 1946 (hereinafter, APA).<sup>37</sup>

In general the APA aimed to guard against overreaching or unfair regulation by providing affected parties increased hearing and participation rights.<sup>38</sup> It also aimed to prevent tyranny by fortifying judicial review of administrative decisions.<sup>39</sup> The APA contemplates two particular forms of agency decision-making: *rule-making* and *adjudication*. In the American legal order, as well as in most legal systems, these forms of agency decision-making represent the traditional way through which administrative decisions are made. While, on the one hand, adjudication is the process by which the legal rights or duties of a particular person in a specific situation are defined, on the other hand, rule-making is the process by which rules or regulations of general applicability are formulated and adopted.<sup>40</sup> These forms of public decision-making imply participation by

33 Recently, see W. D'Avanzo, *Accordi volontari, partecipazione e governance ambientale* (2015). This issue is also thoroughly studied – with regard to Italian environmental policy – in G. Pesaro, 'Environmental Voluntary Agreements: A New Model of Co-operation between Public and Economic Actors', FEEM Working Paper No. 9.2001, available at <<https://ssrn.com/abstract=272132>>, in particular p. 34: 'We could consider all these experiences as a "work in progress" towards a new model of negotiation and co-operation proposed by public to economic actors, the goal of all these policy actions being the increasing of the diffusion of voluntary agreements. And this can be regarded as a signal to clear up the concrete and stable importance the public actors attach to the new policy approach. The environmental policy action at national and local level seems in fact oriented to provide for a framework for the diffusion and adequate implementation of these instruments. Negotiation and voluntary activities are more and more present in regulation acts and laws and embedded within a system characterised by a major recognisability, legitimisation and social acceptability, where a major amount of resources can be mobilised but within a precise constraint system. Economic actors, by their side, will have to demonstrate their real capability and willingness to use the new instruments in an adequate way and the real voluntariness to undertake their commitments.'

34 S.M. Griffini, *American constitutionalism. From theory to politics* (1996), pp. 11 et seq.

35 See L.H. Tribe, *American Constitutional Law*, (2000), p. 7.

36 On this issue, see, for instance, P.L. Strauss, *Administrative Justice in the United States* (2002); E. Magill, 'The real separation in separation of powers law', (2000) 86 *Virginia Law Review*, pp. 1127 et seq.

37 W. Gellhorn, 'The Administrative Procedure Act: the Beginnings', (1986) 72 *Virginia Law Review*, p. 231, stresses that the Act had the aim of ensuring 'a reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government'. Once the federal APA was adopted, most states became convinced of the desirability and feasibility of such acts, and followed its example.

38 L. Schultz Bressman, 'Beyond Accountability: arbitrariness and legitimacy in the administrative state', (2003) 78 *N.W.U.L. Rev.*, p. 461.

39 See again Schultz Bressman, supra note 38, p. 461. On the point, see also R.L. Rabin, 'Federal Regulation in Historical Perspective', (1986) 38 *Stanford Law Review*, p. 1189.

40 On the rule-making process see, for example, C. Coglianesi, 'Citizen participation in Rule-making: Past, Present, and Future', (2006) 55 *Duke L. J.*, p. 943. For a comprehensive analysis of agency rules that covers the period from 1983 to 2010, see A.J. O'Connell, 'Agency rulemaking and political transitions', (2011) 105 *N.W.U.L. Rev.*, p. 471.

all interested groups,<sup>41</sup> as well as the right of notice and the right of hearing.<sup>42</sup> Due process implying a right to a fair hearing is the overarching principle applicable to both kinds of procedures.<sup>43</sup> The threat of uncontrolled agency discretion lies at the heart of American administrative law, as well as the necessity to confine, structure and check discretionary power.<sup>44</sup> What is obviously needed is a balanced discretionary power that is neither excessive nor harmful.<sup>45</sup> To limit the risk of abuse of discretion and balance excessive discretionary power, formal and/or procedural rules are provided. The obligation to give reasons, for instance, is an example of such a procedural rule. This rule has a different content according to the different forms of agency decision-making. For example, when it comes to formal adjudication, APA § 557 requires the agency to provide a statement of ‘findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record’. The provision thus lays down quite a strong obligation to give reasons.

As to rule-making, an agency’s public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the public decision as democratic and thus essentially self-legitimizing.<sup>46</sup> Moreover, ‘rulemaking is comprehensible, relatively quick, and democratically accountable, especially in the sense that decision-making is kept above board and equal access is provided to all’.<sup>47</sup> Rule-making has been described as ‘refreshingly democratic’<sup>48</sup> and ‘the most transparent and participatory decision-making process in the government’.<sup>49</sup> Technological changes and the advent of e-rule-making may have the potential to enhance public understanding of and involvement in rule-making. Scholars have noticed that ‘participation in rulemaking is one of the most fundamental, important and far-reaching of democratic rights’<sup>50</sup> and that e-rule-making represents ‘online deliberative democracy’,<sup>51</sup> with the potential to significantly broaden a genuine public sphere in which individual citizens participate directly in governmental decision-making.<sup>52</sup> Nevertheless, in both traditional rule-making and e-rule-making, the content of the final decision to be taken is left to the administrative organization. *Participation as defence*, as well as *participation as consultation*, are the only forms of involvement that these traditional proceedings imply. Neither forms of co-negotiation nor forms of mediation between the conflicting interests present in society are assumed. Despite widespread participation by all concerned parties, these procedures imply – like all traditional forms of administrative procedures – unilateral intervention by the agency in the pursuit of some interest represented as ‘public’ or even ‘general’.

### 3.2 The ‘bottom-up model’ in the US legal system: Introductory remarks on the democratic methods of policy-making

A bottom-up model can be found in the American legal order, even though it must be admitted that this model only rarely surfaces. The first assumption of such a dialogue model is that agencies do not enforce overriding rules and do not impose their will, but rather act as facilitators or brokers of decisions between disputing interests, represented by concerned parties and public interest groups as well as non-governmental actors. Mediation between conflicting parties may lead to decisions which are more acceptable because they are more the result of a compromise among stakeholders than the imposition of an interest represented

41 On the influence of lobbies on legislative policymaking, see D. Nelson & S. Webb Yackee, ‘Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking’, (2012) 74 *The Journal of Politics*, no. 2, p. 339.

42 See for example N.D. Woods, ‘Promoting Participation? An Examination of Rulemaking Notification and Access Procedures’, (2009) 69 *Public Administration Review*, no. 3, p. 518.

43 The nature and scope of the rights protected by the Due Process Clauses of the Fifth and Fourteenth Amendments are among the most debated topics in constitutional law. See recently, R.C. Williams, ‘The One and the Only Substantive Due Process Clause’, (2010) 120 *The Yale Law Journal*, no. 3, p. 408.

44 J. Freeman, ‘Private parties, public function and the new administrative law’, (2000) 52 *Administrative Law Review*, p. 815.

45 American scholars have traditionally considered administrative discretion to be the greatest problem in this field. See the fundamental analysis of K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969), pp. 3 et seq.

46 See N.A. Mendelson, ‘Rulemaking, Democracy, and Torrents of E-Mail’, (2010-2011) 79 *Geo. Wash. L. Rev.*, p. 1343.

47 K.F. Warren, *Administrative Law in the Political System* (2004), p. 269.

48 M. Asimow, ‘On Pressing McNollgast to the Limits: The Problem of Regulatory Costs’, (1994) 57 *Law & Contemp. Probs*, p. 127.

49 See C.R. Farina et al., ‘Rulemaking 2.0’, (2011) 65 *U. Miami L. Rev.*, p. 395.

50 See S. Noveck, ‘The Electronic Revolution in Rulemaking’, (2004) 53 *Emory L. J.*, p. 433.

51 P.L. Strauss, ‘Legislation that Isn’t – Attending to Rulemaking’s “Democracy Deficit”’, (2010) 98 *Cal. L. Rev.*, p. 1351.

52 See B.C.E. Dooling, ‘Legal Issues in E-Rulemaking’, (2011) 63 *Adm. L. Rev.*, pp. 893 et seq.

as 'public' or 'general'. Mediation thus involves multiple interests; the agency itself represents just one interest. Following this hypothesis, the decisions which the agency takes after wide participation may, under given conditions, be considered as taken by the stakeholders themselves. Which are, then, the examples, in the American legal order, of such a model? Is it accepted and/or practised either in general or with reference to specific fields (if so, in which main fields)? Are there any hypotheses of a mix of the traditional and the dialogue model, such as giving power to the administrative organization to decide if dialogue fails?

First, it has to be acknowledged that the prior involvement of the stakeholders plays a basic role in establishing the assumption of the 'best' choice in light of all the relevant interests. It is also a method to avoid, after the issue of administrative measures, complaints and applications for judicial review.<sup>53</sup> This result, of course, is strictly connected with the need to ensure the financial and practical efficiency of the administrative action. The legal tools 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 discover good solutions to manage activities related to the protection of the public interest. From this perspective, a very interesting idea comes from the US legal system, where the Citizens Utility Boards (CUBs)<sup>54</sup> are controlled by states, 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 guiding principle.<sup>55</sup> The aim is through a democratic method, to counter discrimination on the grounds of social and economic differences among the various groups of private parties. Their right to participation is satisfied thanks to the creation of permanent not-for-profit organizations, funded by voluntary contributions and acting under the democratic control of their membership. To grant an affordable service and to promote the adequate representation of residential utility consumers, the CUBs assist citizens in writing complaints, collecting funds and co-operating with the public law structures and authorities (for instance, the competent agencies) in the rule-making and adjudicating procedures. This instrument could be very useful, but it does not fit well in all situations. Also, the 'ordinary' instruments of procedural participation (i.e. the traditional 'right to be heard') cannot offer a sufficiently strong protection to private parties in urban planning. First of all, 'isolated' participatory contributions are normally inspired by selfish and self-defensive visions and do not give real support for the implementation of the public interest. Secondly, solicitations from private parties may be better formulated when their ideas are discussed in a public debate. Thus, two situations that might incorporate elements of the dialogue model will be discussed: negotiated rule-making and environmental mediation.

### 3.3 The case of negotiated rule-making: A mix between the traditional model and the dialogue model

Some examples of the dialogue model (rather, of a combination of the traditional and dialogue models) can be found when US agencies use structured bargaining among competing interest groups as a means for developing certain rules. This is the case in a specific type of rule-making procedure called *negotiated rule-making* (sometimes colloquially abbreviated as 'neg-reg'), which arose from dissatisfaction with notice-and-comment rule-making under the APA (which is described above). It refers to a process in American administrative law in which an advisory committee, made up of disparate interest groups, negotiates the terms of an administrative rule and proposes it to an agency. Thus, as the name implies, policy disputes raised by a rule-making proposal are resolved through a negotiating process. The agreement that results from these sessions is then forwarded to the agency, which normally publishes it as a proposed rule and

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

54 See S. Flynn & K. Boudouris, 'Democratizing the Regulation and Governance of Water in the US', in B. Balanyà et al. (eds.), *Reclaiming Public Water. Achievements, Struggles and Visions from around the World* (2005), pp. 73 et seq.; B. Givens & R.C. Fellmeth, *Citizens' Utility Boards: Because Utilities Bear Watching* (1991), pp. 90 et seq. See 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?', (2012) *Rivista giuridica dell'ambiente*, p. 837.

55 See R.B. Leflar & M.H. Rogol, 'Consumer Participation in the Regulation of Public Utilities: A model Act', (1973) 13 *Harvard Journal on Legislation*, p. 235.

follows up with the standard APA rule-making process of soliciting and evaluating public comments in order to decide whether to modify or adopt the proposed rule.<sup>56</sup>

Some scholars have considered negotiated rule-making to be a realistic alternative to adversarial administrative procedures, as it facilitates the resolution of ‘interest disputes’.<sup>57</sup> In a negotiated rule-making process, conflicts do not involve application of pre-existing legal standards. It is characterised, by contrast, by the absence of pre-existing rules for decision. Resolution of such disputes thus requires that all disputing parties work out the rules according to an accommodation of their interests.<sup>58</sup> Already in the 1970s and increasingly since the 1980s, the Occupational Safety and Health Administration (OSHA), the Department of Transportation (DOT), the Environmental Protection Agency (EPA) and some other federal agencies used the negotiation process both as an aid to the development of certain regulations, and as a more efficient, sensible alternative to the traditional ‘notice and comment’ procedure typically followed by federal agencies in the development of regulations. However, only in 1990 did Congress enact a statute that explicitly legitimized neg-reg by the adoption of the Negotiated Rulemaking Act<sup>59</sup> and the Clinton Administration became a strong supporter of its use.<sup>60</sup> The statute was then codified as §§ 561-583 of the APA. The Act specifies a set of procedures that have to be followed if an agency wishes to use negotiated rule-making. Under these provisions, in fact, an agency may – but is not required to – use negotiated rule-making to develop a proposed rule whenever it determines that it would be ‘in the public interest’ to do so.<sup>61</sup> If the agency desires to use negotiated rule-making, it must publish a notice of that intention in the Federal Register. The notice must announce that the agency intends to establish a negotiated committee to negotiate and develop a proposed rule.<sup>62</sup> The notice must also list the various interests that would be ‘significantly affected by a proposed rule’, and determine whether those interests could be represented adequately by a group of persons brought together to serve as a negotiated rule-making committee.<sup>63</sup> If so, the agency may then establish a committee, made up of persons representing the various affected interests (the regulated public, community and public interest groups, NGOs, state and local governments), *plus* at least one member of the agency. The committee’s goal is to determine whether committee members can reach a ‘consensus’ on the wording of a draft rule. If the committee members do reach consensus, the rule drafted by the committee must then be put out for public notice and comment, in the same way as any other proposed rule. The agency retains authority over the wording of any proposed or final rule, and is empowered to modify the rule drafted by the committee if it is inconsistent with the applicable congressional mandate. In any case, the agency itself remains sovereign because it alone makes the final decision and may accept all, part or none of a consensus rule. Some scholars counter-argue that this point is moot because the agency must make a good faith effort, to the maximum extent possible and consistent with its legal obligations, to use the consensus rule as the basis for its published rule.<sup>64</sup> If consensus is not reached, the agency has the power to decide, by proceeding with its normal rule-making activities. Thus, it is clear that neg-reg cannot be viewed as a pure example of the dialogue model. Rather, giving power to the agency to make a decision if dialogue fails, seems to represent a hypothesis of a mixed/hybrid traditional-dialogue model.

56 See, among others, O. Spivey & J.G. Micklos, ‘Developing provider-sponsored organization solvency standards through negotiated rulemaking’, (1999) 51 *Administrative Law Review*, pp. 261 et seq. See recently, J. Kobick, ‘Negotiated Rulemaking: The Next Step in Regulatory Innovation at the Food and Drug Administration?’, (2010) 65 *Food & Drug L. J.*, pp. 425 et seq., who analysed why the Food and Drug Administration (FDA) never voluntarily convened a rule-making negotiation.

57 In this sense, see H.H. Perritt, Jr., ‘Negotiated rulemaking and administrative law’, (1986) *Administrative Law Review*, pp. 471 et seq.

58 *Ibid.*

59 5 U.S.C. Sec. 561-570. Congress reauthorized the 1990 Act in the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, 110 Stat. 3870 (1996).

60 President Clinton followed up with an executive order and memorandum to agencies urging them to make use of neg-reg. See Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 Fed. Reg. 52, 391 (1993); Executive Order 12866, Sec. 6(a), 30 September 1993.

61 On this point, D. Wendel, ‘Negotiated Rulemaking: An Analysis of the Administrative Issues and Concerns Associated with Congressional Attempts to Codify a Negotiated Rulemaking Statute’, (1990) 4 *Administrative Law Journal*, pp. 238 et seq., in particular p. 241.

62 See H.H. Perritt, Jr., ‘Negotiated rulemaking before Federal Agencies: Evaluation of the Recommendations by the Administrative Conference of the United States’, (1986) 74 *Geo. Law Journal*, pp. 1625 et seq., in particular p. 1635.

63 These provisions thus give the agency a degree of discretion in determining what interests are included in a rule-making committee. ‘Significantly affected’ relieves the agency of the burden of including remotely affected interests.

64 Wendel, *supra* note 61, p. 252.

More in general, the neg-reg process has been quite controversial. Proponents argue that it can increase the efficiency of rule-making through compromise and consensus. However, some American scholars argue that it is unrealistic to expect agencies to employ it as the process for issuing most major rules.<sup>65</sup> Critics assert that the neg-reg procedure leads the agency to abandon its role as the guardian of public interest or that it subverts ‘the basic, underlying concepts of American administrative law and reasoned decision-making’.<sup>66</sup> Others find that it does not save time, money, or resources, and that it does not reduce conflict or litigation.<sup>67</sup> Ellen Sieglar criticized neg-reg for imposing ‘considerable time and resource demands on participants’.<sup>68</sup> However, it is undisputed that, if used in the right context, negotiated rule-making can represent a useful tool in the establishment and implementation of a policy, thereby facilitating a better understanding of issues among different parties and among different interests. If all affected, interested parties, including the agency, participate in hammering out a consensual solution, the result is likely to be more acceptable to the participants than any policy which the agency might seek to impose. Moreover, the regulatory negotiation process allows the interested, affected parties a more direct input into the drafting of the regulation, thus ensuring that the rule is more sensitive to the needs and limitations of both the parties and the agencies.<sup>69</sup>

### 3.4 The case of environmental mediation

Mediation – as an alternative or an adjunct to the adversarial process – is increasingly considered as the future in US environmental policy matters. It can be described as the process by which a neutral, third party mediator engages in the examination of ecological ideas and alternatives with the parties whose interests are at issue. Thus, during mediation, a *non-partisan* third party – the mediator – assists two or more disputing parties in reaching a settlement.<sup>70</sup> In an environmental dispute (involving, for instance, the allocation of fixed resources, the specification of public policy priorities, or the setting of environmental quality standards), parties may be one or more private corporations, a state environmental agency, city or county officials, the EPA, the Army Corps of Engineers, the Department of Justice, or any other federal or state agency with statutory authority. In the United States, modern forms of mediation have evolved rapidly in the second half of the 20th century.<sup>71</sup> In 1973 the Governor of Washington State agreed to let two mediators try out their ideas to resolve a long running dispute between the Army Corps of Engineers and local conservationists concerning the building of a dam on the Snoqualmie River 30 miles east of Seattle. This was the first formal mediation of an environmental dispute in the country and the result was judged a success.<sup>72</sup> It generated enormous interest and was credited with launching the ‘environmental mediation movement’.<sup>73</sup> Initially only site specific cases were mediated, but from 1978 onwards broader policy disputes were also mediated.<sup>74</sup> Today mediation is used to resolve disputes about both site specific issues and about

65 R.J. Pierce, *Administrative Law Treatise* (2002), pp. 522 et seq.

66 W. Funk, ‘Bargaining toward the new millennium: regulatory negotiation and the subversion of the public interest’, (1997) 46 *Duke Law Journal*, p. 1351.

67 C. Coglianese, ‘Assessing Consensus: The Promise and Performance of Negotiated Rule-making’, (1997) 66 *Duke Law Journal*, p. 1255. See also P.J. Harter, ‘Fear of Commitment: an affliction of adolescents’, (1997) 46 *Duke Law Journal*, p. 1389.

68 E. Sieglar, ‘Regulatory Negotiations and Other Rulemaking Processes: Strengths and Weaknesses from an Industry Viewpoint’, (1997) 46 *Duke Law Journal*, p. 1429.

69 See A.P. Morris et al., ‘Choosing How to Regulate’, (2005) 29 *Harvard Environmental Law Review*, p. 179, in particular p. 183.

70 See the definition given by E. Smith, ‘Danger-Inequality of Resources Present: Can the Environmental Mediation Process provide an effective answer?’, (1996) *Journal Disp. Resol.*, p. 379, in particular p. 381: ‘a consensual, voluntary process where the parties meet face-to-face to reach mutually acceptable decisions with the aid of a third-party neutral’.

71 On the historical evolution of US environmental mediation, see D. Shmueli & S. Kaufman, ‘Environmental mediation’, *The Center for Environmental Policy Studies Series*, no. 24, 2006, available at <www.jiis.org.il>.

72 W.F. Smith, ‘Alternative means of dispute resolution: practices and possibilities in the Federal Government’, (1984) 17 *Mo. Journal Disp. Resol.*, p. 9, in particular p. 17, who argued that as of that year, more than 40 major environmental disputes have been settled through mediation. Moreover, some states have passed laws specifying how negotiations and mediations can be used to resolve environmental disputes.

73 See H. Harrison, ‘Environmental mediation: the ethical and constitutional dimension’, (1997) *Journal of Environmental Law*, p. 79, who refers to some case studies in which mediation was successful.

74 Environmental mediation is being practised in many parts of the United States. Organizations involved include, for instance, the Center for Environmental Conflict Resolution (Minneapolis); the Conservation Foundation (Washington); Environmental Mediation International (Washington); the Office of Environmental Mediation (Seattle). On this point, see L. Susskind, ‘Environmental mediation and the accountability problem’, (1981) 6 *Vermont Law Review*, p. 1.

general rules of future application. These have included the location of highly controversial facilities such as incinerators, highways, dams and airports, the enforcement of fiercely contested clean-up plans of toxic waste Superfund sites, the making of broad environmental policy such as a national energy policy and the drafting of detailed and highly technical environmental regulations.<sup>75</sup>

Some scholars have argued that environmental mediation can represent a more efficient use of societal resources, because it is more likely to produce a result on which all sides can agree.<sup>76</sup> And indeed, the use of mediation in environmental disputes has grown rapidly. Despite this evolution, however, environmental mediation remains a hotly contested concept, with many commentators debating whether it represents an adequate tool to resolve environmental disputes. Due to the influence it can have on a variety of interested parties, there are many intricacies involved in reaching and enforcing agreements through mediation, i.e. irreparable impacts on natural resources and public health.<sup>77</sup> One of the questions raised in this regard is to whom and how environmental mediators will be held accountable. As Susskind has argued, ‘how can those affected by the actions of mediators effectively chastise, sue, or fire them?’<sup>78</sup> Critics are also concerned that parties coming into a mediation process should be given an equal chance to be heard and to determine the agenda. Mediation can be really successful only if there is a *balance of power* among all participants, giving both sides the opportunity to make gains. The mediator thus plays a crucial role in ensuring that all participants conduct a fair process and is responsible for ensuring that all parties have a sense that their participation is required for a successfully mediated settlement.<sup>79</sup> Under these circumstances, if the crucial goal is to consider environmental mediation as a *dialogue-process* where all parties meet face-to-face to reach mutually acceptable decisions with the aid of a neutral and accountable mediator, guidelines – both at federal and state level – are still needed to ensure that mediation efforts are structured properly and enforcement of such guidelines still needs to be institutionalized.

#### 4. Final remarks: Civil society and demand for broader bottom-up democratic spaces.

The increased development of regulatory strategies involving a plurality of actors has radically changed the traditional way in which public regulators make their public choices.<sup>80</sup> These crucial changes require more attention to the interaction between public and private actors.<sup>81</sup> Important developments have occurred in relation to public regulation. While in the recent past, private regulation was useful to define regulatory areas not covered by the public sphere, today there is a trend towards a different form of co-regulation between public and private regulators.<sup>82</sup> Within this framework, at a fairly general level of abstraction, the traditional (continental) model is facing new requests mainly from civil society: a demand for broader bottom-up democratic spaces. This trend occurs not only in administrative decision-making processes, but in legislative procedures too. For instance, several forces worked together to promote the spread of the popular initiative in the United States.<sup>83</sup> The earliest efforts were launched in New Jersey by antimonopoly

75 On this point see, Susskind, *supra* note 74, in particular pp. 29 et seq.

76 See C.C. Caldart & N.A. Ashford, ‘Negotiation as a means of developing and implementing environmental and occupational health and safety policy’, (1999) 23 *Harvard Environmental Law Review*, p. 141.

77 This point is highlighted by G. Soto, ‘Environmental Regulatory Mediation’, (2007) 8 *Texas Tech Journal of Texas Administrative Law*, p. 253, in particular p. 254.

78 See further Susskind, *supra* note 74, p. 4 and p. 41.

79 See L. Maute, ‘Public Values and Private Justice: A case for Mediator Accountability’, (1991) 4 *Geo. Journal Legal Ethics*, p. 503, in particular p. 521.

80 The list of actors can include, for example, private individuals, private firms, financial institutions, public interest organizations, professional associations, labour unions, self-regulating organizations and non-profit groups.

81 On this point, see F. Cafaggi, ‘Rethinking private regulation in the European regulatory space’, European University Institute Working Paper Law No. 2006/13. On the evolution of the regulatory state, see R.C. Scott, ‘Regulation in the age of governance: the rise of the post regulatory state’ in J. Jordana & D. Levi Faur (eds.), *The politics of regulation* (2004), pp. 145 et seq.

82 M.A. Frison Roche (sous la direction de), *Les régulations économiques: légitimité et efficacité* (2004), pp. 7 et seq.

83 Initiative mechanisms can be either constitutional (permitting the submission by voters of proposed constitutional amendments) or statutory (permitting the submission by voters of proposed statutory laws). They can also be direct (in which the legislature is bypassed entirely, and the proposal is submitted directly to the voters) or indirect (in which the legislature must first be allowed to consider any proposals submitted to the voters). In many states both the constitutional and statutory initiative processes are available in either the direct or indirect form. Source: Initiative and Referendum Institute, on-line at [www.iandrinstute.org](http://www.iandrinstute.org). See also M.D. Waters, ‘The Initiative Process in America: An Overview of How it Works Across the Country’. Paper read at Speaker’s Commission on the Initiative Process, 18 December 2000, at Sacramento, California, available at [www.cainitiative.org](http://www.cainitiative.org).

reformer Benjamin Urner, and later, by J.W. Sullivan and the Direct Legislation League of New Jersey.<sup>84</sup> Sullivan and others looked to direct democracy as a means to promote causes that failed to gain traction in state legislatures: the single tax, prohibition, regulation of monopolies, labour rights and anti-party electoral reforms. Groups promoting each of these issues may not have shared policy goals, but many were able to embrace one overarching institutional goal: adoption of the popular initiative and referendums as a means by which to pursue further reforms. However, today direct democracy itself cannot be considered as sufficient to correct the inefficiency of representative government for many reasons: for instance, initiatives and referendums may often 'place minority rights and individual liberties in serious jeopardy'.<sup>85</sup>

Confronted with this discouraging situation, what are the other means by which citizens (as well as the associations in which they are organized) could effectively participate in the governance of public life? There is a set of arguments that explain why the public, societal bodies and individuals should be involved in reaching a decision based on an agreement. These arguments deal with the growing of citizenship power. The modern western citizen wishes to be seen as a full participant, to be taken seriously. The individual wishes to be seen *as* an individual, to be acknowledged and to be heard, which leads to a conundrum for modern democracy which is still founded on 'the corporate and representative organization of the mediation of interests'. If taken seriously by the government, however, this might imply that the citizen is not only awarded rights, for example a right to be heard, but also given duties, for example, a duty to be involved in issues concerning the individual citizen. This duty might be expressed as a duty to participate, or forgo your turn to influence the substantive outcome.

Another, related, argument for having final decisions based on a negotiation between equal parties – with the administrative agency as either 'just' a procedural guardian, but not as primary decision maker, or as party between equal parties – would be that it is pressure groups and interest groups that know what is happening best. These societal pressure groups do care about the substantive outcome, and should therefore be allowed to influence the substantive decision-making procedure. Moreover, efficiency may be an economic argument for leaving substantive issues to be decided between parties, instead of having substantive issues examined again in court. The idea is that not going to court will be less costly than going to court, not only in purely monetary terms, but also in terms of societal loss. Too much litigation – it could be held – is not healthy for a society. This argument, however, may be very much culturally influenced, in that it seems that in some societies the costs of litigation are not only factually much higher than in others, but also the idea of whether litigation is something out of the ordinary may be very dependent on cultural issues. Nonetheless, if interested parties are substantively involved in reaching a final decision, this may lower the costs of litigation in general.<sup>86</sup>

This research shows that the 'traditional model' is very much the dominant one in both the Italian legal system and the American one. However, it shows that there are indeed instances of the dialogue model, though these seem to differ in context, content and form. The outcome of these changes is that a mixed model situation arises: the traditional model is infused with dialogue-type elements.

The Italian legal system should learn from the American experience. Reading Italian Law No. 241/1990, it is clear that participation rules only apply to adjudication, not to rule-making. There is not even an informal notice or comment. In sum, although rule-making involves the exercise of discretion concerning not only the technical means of implementing a policy, but also the priorities to be accorded to relevant, competing interests, nothing is specified by the law except the fact that everything is left to specific statutes

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84 The Direct Legislation League was formed in New Jersey in 1893; local organizations affiliated with the parent organization sprouted throughout the states as support for the initiative movement grew. See further M.C. Anderson, 'Exploring the Conditions Under Which Legislatures Cede Authority: Legislative Consideration of Initiative Mechanisms, 1893-1916', paper presented at the 2005 State Politics and Policy Conference, Michigan State University, available at <www.polisci.msu.edu>. See also D.B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States*, (1984); J. F. Zimmerman, *The Initiative: Citizen Law-Making*, (1999).

85 T. Donovan, 'Direct Democracy and Campaigns against Minorities', (2013) 97 *Minnesota Law Review*, p. 1730. Direct democracy not only promoted the expression of the majority will on general political legislation, but also permitted oppression of minorities and the imposition of a particular set of social or moral values. The history of direct democracy is permeated with this tension between effecting the will of the majority and protecting the rights of the minority. On direct democracy in a comparative view, see further S. Rodriquez, *Rappresentanza democratica e strumenti di partecipazione. Esperienze di diritto comparato* (2017).

86 On these issues, see R. Caranta & A. Gerbrandy, 'Introduction', in Caranta & Gerbrandy, *supra* note 1.

(Article 13, Law No. 241/1990). Allowing NGOs and other public interest groups to take part in individual decision-making procedures (i.e. adjudication), while excluding them when regulatory measures – including planning – are taken, undoubtedly represents an unreasonable choice by the Italian legislature, as well as a strong limitation to a bottom-up approach.

This situation is quite different from that of the US Administrative Procedure Act of 1946, where participation rules for rule-making were developed, with the aim of the significant involvement of civil society in the most relevant decisions. As we have seen, both negotiated rule-making and environmental mediation are examples of a compromise among the traditional and the dialogue models. They can be viewed as concrete proof of the slow but inexorable evolution of the traditional model towards a dialogue one. Even if these remain hotly contested proceedings, with several American commentators debating whether they are adequate alternatives to traditional methods, they can undeniably be viewed as examples in which decisions are more the result of a balance among the stakeholders than the imposition of an interest represented as ‘public’ or ‘general’. Indeed, these regulatory negotiations involve multiple interests whereas the agency itself represents just one interest.<sup>87</sup> Some defenders of this evolution have recently highlighted the benefits of a negotiated model over traditional methods:

When the regulator makes the decisions [through the traditional tools], everyone loses something, and parties have no control over what they lose. [On the other hand], in the negotiation process, each party chooses which among the many points it is willing to lose in order to gain something else (...). The trade-offs arrived at voluntarily are much more stable and effective.<sup>88</sup>

Negotiation thus allows the parties themselves to make the trade-offs, instead of leaving it to the public regulator to split the difference. It is clear that dissatisfaction with the traditional channels should lead scholars and practitioners to note that new alternative methodologies are developing to supplement conventional systems. Public law must undoubtedly re-orient itself to study the complex public-private arrangements that characterize contemporary regulation. A new conception of governance as a set of negotiated relationships between public and private actors should be acknowledged and encouraged.<sup>89</sup> For the above mentioned reasons, a pluralist ‘interest representation’ model of administrative law must be welcomed.<sup>90</sup> This is a model in which public procedures ensure that interest groups enjoy a forum in which to press and negotiate their views and that agencies adequately and concretely consider those views when making final and negotiated policy choices.

The above is not to say that the traditional model can be declared outdated. This study shows that participation can assume different forms and be expressed in different ways. The idea of democracy itself has changed over the course of time too. It not only describes a political system, it also represents social relationships, values and guarantees, as well as equal opportunities for all citizens and their associations. Today, different participatory instruments may increase the level of participation as well as people’s confidence in institutions. Think about public assemblies, public consultations and referendums. The local level (municipalities, local communities) is undoubtedly the natural ground for developing participatory democracy. Nevertheless, other new channels promising to increase participation have also to be taken into account. Within this framework, a new form of relationship between private and public regulators is today acquiring new importance and requiring wider spaces.

This research has shown that lack of trust in traditional democratic institutions is, both in the European (Italian) and American framework, widespread. The ‘dialogue model’ can really be viewed as a way to approach civil society and politics and allow people to be an effective part of their democratic institutions.

<sup>87</sup> However, Spivey and Micklos harshly criticized these new trends. As to negotiated rule-making, they considered it as the ultimate extension of the interest group theory of politics. ‘Rules are nothing more than the product of negotiation of the parties affected by the rule with the public interest lost in the process.’ While defenders of neg-reg counter that the agency is not to abandon its role as protector of the public interest as a participant in neg-reg, the criticism is nonetheless troubling: see Spivey & Micklos, *supra* note 56, p. 264.

<sup>88</sup> G. Palast et al., *Democracy and Regulation: How the Public can govern essential services* (2003).

<sup>89</sup> See further J. Freeman, ‘The Private Role in Public Governance’, (2000) 75 *New York University Law Review*, p. 543.

<sup>90</sup> See R. Stewart, ‘The Reformation of American Administrative Law’, (1975) 88 *Harvard Law Review*, p. 1667. More recently see, R. Stewart, ‘Administrative law in the twenty-first century’ (2003) 78 *New York University Law Review*, p. 437.

However, several problematic aspects of a complete paradigm shift can be seen. For instance, there is a danger that some groups have more (monetary) clout than others, and will be able to influence the outcome to the extent that the substantive decision is not necessarily in the interest of all concerned parties. Equally there is a danger that some groups will not be heard. There will always be groups or interests that have no strong or organized voice: children, the disabled, the elderly, the weak, the 'not logged in', the opted-out. The actual lack of systematic regulation of participatory procedures inevitably risks increasing the influence potential of well-organized interest groups to the detriment of more loosely organized pressure groups, citizen initiatives, and, worst of all, the individual citizen. This situation can make it possible for those groups that possess considerable bargaining power to reach, unofficially, decisions together with the administration on policy or regulatory matters.<sup>91</sup> Thus, safeguards are needed to ensure that it is not only the most powerful groups which get their voices heard. This could imply an obligation on the part of the institutions to provide some sort of financial assistance for all those parties with an interest and a will to participate. Participant compensation meaning agency payment of expenses that members of the public incur when they are involved in administrative proceedings is established practice in the American system.<sup>92</sup> In Europe, selected interest groups again have preferential treatment.

In any case, the construction of a coherent system of participatory procedures cannot be considered sufficient on its own. Effective public participation depends mostly on conditions of a political nature, like the level of the political education of the citizens, the political maturity of those citizens that enables them to make informed choices, and the desire on their part to abandon individualism and participate in the exercise of public power.<sup>93</sup> Madison's emblematic declaration can be called to mind to end this study. It specifically refers to the American legal framework, but it is useful to more general aims:

[T]here were other qualities in human nature which justify a certain portion of esteem and confidence and those have been barely recognized let alone honored and institutionalized in the American party system. Consequently, it may indeed be true that Americans are today small women and men incapable of any great thing. Still, great things are required of our nation in the coming years – not least among them, survival as a democracy – and it seems clear enough that if those things are to be achieved, voters (...) will have to become, if not great women and men, at least active, participating citizens in the governance of our public life.<sup>94</sup>

91 On this risk, see M. Olson, *The logic of collective action* (1965).

92 Since the 1970s agencies like the Federal Trade Commission, the EPA, the National Highway Traffic Safety Administration, and the Department of Energy have begun to use 'intervenor funding' to help needy citizen groups to cover the costs of participation. See C. Tobias, 'Participant Compensation in the Clinton Administration', (1995) 27 *Conn. Law Rev.*, p. 563.

93 See T.T.H. Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (2002), pp. 165 et seq. and p. 247.

94 See on this declaration B.R. Barber, *A passion for democracy*, (1998), p. 119.