REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 14, NR. 2, 85-106, PARIS LEGAL PUBLISHERS © 2021

A Procedural Idea of Environmental Democracy: the 'Débat Public' Paradigm within the EU Framework

Alberto Nicòtina*

Ph.D. Candidate in Constitutional Law, University of Antwerp

Abstract

The aim of this paper is to analyse the 'débat public' procedure, which finds its roots in the Canadian legal system and its most defined formulation in France, and which more recently has been circulating to Italy – first at the regional level and, since 2016, at the national level. The first part of the paper will thus be devoted to a historical overview of the débat public and to how it is implemented in each of the two legal systems. The second part will subsequently distil the 'paradigm', i.e. those distinctive traits that make the débat public an autonomous research subject, within the multi-layered legislative framework of environmental governance in Europe. Three main features of the paradigm will be pointed out (Participation, Effectiveness, Authority), thus highlighting how it can respond to the needs in light of which it has been designed, namely dealing with proximity conflicts and providing a forum for the construction of shared rational decisions in environmental decision-making. The paper eventually leads to the conclusion that the débat public, with its codified rules and procedures, represents the first and probably the most noticeable attempt towards the institutionalisation and generalisation of deliberative practices in environmental decision-making, thus towards developing a procedural stance in environmental democracy.

1. Introduction

More and more frequently can a twofold phenomenon nowadays be observed in European democracies: on the one hand, the proliferation of new and diverse forms of citizen participation in public decision-making processes, especially at the local level; on the other, the raising of protests against the construction of major environmentally-impacting infrastructure works.

As for the first expression of the phenomenon, in most cases these are local, informal experiences grounded in the urgency felt by Public Authorities – especially the territorial ones – to provide a strengthened legitimacy to their decisions. In the second case – demonstrating why both phenomena, apparently distinct,

* DOI 10.7590/187479821X16254887670919 1874-7981 2021 Review of European Administrative Law

can be traced back to a single *genus* – the absence of institutional *fora* for participation turns into frantic reactions; these risk dispelling a 'social capital' which could instead be channelled towards virtuous paths in order to provide a more effective way to detect and pursue the public interest.

Already in the early 1990s, Elinor Ostrom reasoned in her book *Governing the Commons* on the need to make the management of environmental resources participated. If those who use common resources do not communicate with each other, a sort of Nash equilibrium is reached where everyone will opt for poor solutions based on the assumption that all others will do the same.[1] This shows, basically, that there is a way to reconcile individual and collective interests, and that the more open and participatory decision-making processes are, the more the outcome will be perceived as legitimate.[2]

In addressing this issue, Della Cananea recalls Hirschman's theorization of the possible responses to decline. When the members of a community express dissatisfaction about their role in society, there are two possible outcomes: leaving the field (*'exit'*) or bringing a personal contribution (*'voice'*), thus developing a sense of belonging in the community (*'loyalty'*). If the second option is not available, however, the only possible outcome can be to *'exit'*.[3]

Although the virtues of participatory processes have been the subject of vivid doctrinal debate, little has yet been written on the desirability of institutionalising these practices. The institutionalisation of participatory practices is indeed controversial: some scholars argue that it contributes to fostering its positive features, considering it as an implementation of the constitutional right to participate; there are also those who consider it a way to suffocate societal spontaneity, or even to manipulate people's consent in order to affect the outcome.[4]

1 E Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge University Press 1990) 3.

2 S Nespor, *La scoperta dell'ambiente. Una rivoluzione culturale* (Laterza 2020) 127.

3 AO Hirschman, *Exit, Voice and Loyalty. Responses to Decline in Firms, Organizations and States* (Harvard University Press 1970) referencing G Della Cananea, 'Exit or Voice? Débat public goes to Italy' (2019) 29 European Public Law 157, 161.

4 R Lewanski, 'Institutionalizing Deliberative Democracy: the Tuscany laboratory' (2013) 9(1) Journal of Public Deliberation 2 <https://delibdemjournal.org/article/id/427/> accessed 22 June 2021. For *pro* arguments see, for instance, ME Warren, 'Institutionalizing Deliberative Democracy' in SW Rosenberg (eds), *Deliberation, Participation and Democracy: Can People Govern?* (Palgrave 2007) 272-288; G Smith, 'The institutionalization of deliberative democracy: democratic innovations and the deliberative system' (2018) 4 Journal of Zhejiang University 5; C Offe, 'Referendum vs. Institutionalized Deliberation: What Democratic Theorists Can Learn from the 2016 Brexit Decision' (2017) 146 Daedalus 14 and V Molaschi, '*Le arene deliberative. Contributo allo studio delle nuove forme di partecipazione nei processi di decisione pubblica* (Editoriale Scientifica 2018). For *contra* arguments, see LM Sanders, 'Against Deliberation' (1997) 25 Political Theory 347 – according to whom deliberation seems to work for criminal trials (citizen juries), albeit it does not for public decision-making – and I Shapiro, 'Collusion in Restraint of Democracy: Against Political Deliberation' (2017) 146 Deadalus 77 who warns that 'institutions that are intended to encourage deliberation are all too easily hijacked by people with intense preferences and abundant resources, who can deploy their leverage in deliberative settings to bargain for the outcomes they prefer'.

In France and Italy, (national and sub-national) law-makers have identified the *débat public* as an appropriate tool to address the contemporary societal demand for participation, formalizing specific procedures to be activated in specific cases. While nowadays the *débat public* is profoundly rooted in the French legal culture, thus steadily integrating the toolkit of scholars and practitioners in administrative law and public administration, its recent transplant into another neighbouring European legal order – the Italian one – calls for some clarifications on its fundamental features. The overarching research question this paper intends to answer is whether it is possible to distil a *débat public* paradigm – in other words, an institutionalised participatory procedure that is characterized by specific features which make it distinguishable from other participatory tools and procedures despite different understandings within different legal orders.

The scope of this paper is thus limited to the analysis of the *débat public* procedure, which finds its roots in the Canadian legal system and its most defined formulation in the French one, and which more recently has circulated in Italy, first at the regional level and, since 2016, at the national level. The first part of this paper will outline the *débat public* in its historical development, highlighting its main characteristics and the way these are differently interpreted in each of the two considered legal systems (France and Italy). The second part will subsequently situate the 'paradigm' – the three distinctive traits that, in my opinion, make the *débat public* an autonomous research subject and a distinctive tool of environmental democracy in Europe.

The scope of this paper is limited in other ways as well. The analysis is confined to the French and Italian legal systems, the only ones in which the *nomen* '*débat public*' (or '*dibattito pubblico*' in Italian) can be observed, thus avoiding any other ambiguous definitions or wordings, such as 'inquiry model' or 'public debate', generally referring to a wide range of participatory practices and procedures.[5] Moreover, this being a legal analysis, it does not cover further important aspects within the considered legal systems, such as the quality of arguments and the social and philosophical implications, which represent the elective fields of other sciences and researchers. Instead, the (legal) comparison is focused on the normative texts, complemented with key judgments and legal doctrine written in English, French, and Italian.

5 As Della Cananea notes, 'débat public is commonly translated as 'public inquiry', though this term may be misleading': see G Della Cananea, 'Exit or Voice? Débat public goes to Italy' (2019) 25 European Public Law 157, 161.

2. The *débat public*: a twenty-five-year journey

2.1. Between Québec and France: from the prototype to the model

At the beginning of the 1970s, in Canada – particularly in the French-speaking region of Quebec – a strong opinion movement pushed for the recognition of its instances, namely the protection of the environment and the democratization of the relationship between citizens and Public Administration. The legislative response that followed led to the establishment of the *Bureau d'audiences publiques sur l'environnement du Québec* (BAPE). As Gauthier and Simard report: 'the starting point was clear: to establish a right to citizen participation closely linked to the environmental impact assessment of major infrastructure projects such as roads and motorways, power generation and transmission facilities and industrial projects'.[6]

Established in December 1978 by the *Loi sur la qualité de l'environnement*, the BAPE still operates within the Canadian Ministry of the Environment. Its institutional purpose is twofold: (a) it facilitates public access to environmental information held by the Government; and (b) it carries out investigations, public or confidential, on behalf of the Ministry of the Environment, after which it submits a detailed report.

Regardless of the actual differences between the *audiences publiques environnementales* and the *débat public*, what is interesting to notice is that, especially at that time, the BAPE's experience has provided a valuable precedent which has served as a source of inspiration for the French Legislator. While the BAPE still does not represent an ideal model, with its more than two hundred *audiences publiques* organised between 1978 and 2010,[7] it has represented and continues to represent the implementation of a fully effective legal obligation on the Government to keep citizens informed on environmental matters.

In France, although other forms of institutional involvement of citizens such as the *enquête publique environnementale* already existed,[8] that same time

---

6 M Gauthier and L Simard, 'Le Bureau d'audiences publiques sur l'environnement du Québec: genèse et développement d'un instrument voué à la participation publique' (2011) 17 Télescope 39, 42.

7 See the BAPE website at <www.bape.gouv.qc.ca/fr/> accessed 22 June 2021.

8 On the *enquête publique environnementale*, see M Prieur, *Les enquêtes publiques, quel avenir?* (La Documentation Française 1990); JC Helin, R Hostiou, *Traité de droit des enquêtes publiques* (Le Moniteur 2014); Y Goutal, P Peynet and A Peyronne, *Droit des enquêtes publiques* (Lamy Axe Droit 2012) and A Nicòtina, 'Partecipazione e tutela dell'ambiente : il modello dell' enquête publique environnementale francese' (*Rivista DGA – Diritto e giurisprudenza agraria, alimentare e dell'ambiente*, September/October 2018) <www.rivistadga.it/wp-content/uploads/sites/34/2018/10/Nic%C3%B2tina-Partecipazione-tutela-dellambiente.pdf> accessed 22 June 2021. For a comparative perspective see also A Simonati, 'The inquiry model in urban planning: a strategic tool for efficiency of administrative action?' (2014) 6 Italian Journal of Public Law 84.

period was characterised by popular dissatisfaction towards the construction of large-scale infrastructure works. Such dissatisfaction was grounded on two elements: on the one hand, even traditionally environmentally-oriented political representatives were deemed not to be sufficiently responsive;[9] on the other, participation only intervened in an overly mature phase of the decision-making process, thus proving to be marginal.[10]

A reaction to this popular dissatisfaction didn't take long to come, with the introduction of the *Circulaire Bianco* on 15 December 1992 concerning the realization of major infrastructure projects. For the first time, although in ministerial document only, Minister Jean-Louis Bianco affirmed that, in a modern democracy, environmentally-impacting decisions must be taken through a debate open to all citizens, thus emphasizing how the legislation in force until then presented insufficiencies which often led to questioning the legitimacy of projects and their implementation.[11]

In outlining the new procedure, the *Circulaire Bianco* filled the gap in the *enquête* by placing the exercise of the right to participate '*en amont des études*', i.e. before the design phase. The Prefect, designated by the Minister himself, was entrusted with the task of concretely organising the *débat,* to be carried out with an 'intermodal' approach. The *débat* was to take into consideration, as specified in the same circular: (a) the economic and social interest of the work; (b) the conditions of valorisation of the areas served; and (c) the impact on the human and natural environment in the portions concerned.[12]

In Bianco's understanding, the *débat* was based on a document prepared by the Ministry he presided over, and is conducted under the direction of a commission set up at the Prefecture '*afin d'assurer la transparence du débat*'; the commission is also entrusted with the task of ensuring that the questions raised

---

9 Graeme Hayes, for instance, in analysing the role played by *Les Verts* during the protests against the construction of the *TGV Méditerranée* railway infrastructure, which took thousands of people to the streets, recalls that 'the project was severely criticised by the Coordination associative régionale de défense de l'environnement (CARDE), which formed to oppose the scheme in the Bouches du Rhône department. It was only after 5000 demonstrators gathered in front of the Hotel Matignon, in September 1990, that Les Verts showed enthusiasm for the issue': G Hayes, *Environmental protests and the State in France* (Palgrave 2002) 18.

10 The insufficiency of the *enquête* has been acknowledged by the French institutions themselves on several occasions. According to Hélin and Hostiou, already at the time of its first applications in the first half of the 19th century, the Count of Corbière, Minister of the Internal Affairs, noted that 'ces enquêtes, trop négligées et presque toujours irrégulières dans les communes rurales, n'offrent aucune des garanties qu'on y cherche et se réduisent alors à une vaine formalité': JC Helin and R Hostiou, *Traité de droit des enquêtes publiques* (Le Moniteur 2014) 17. According to Blatrix, the subsequent introduction of the *débat public* was precisely 'une tentative de pallier les insuffisances de l'enquête publique, jugée trop tardive dans le processus de décision pour être crédible' : see C Blatrix, 'Utilité publique et démocratie participative: pour une approche pragmatique au débat public' (2001) 140 Aménagement et Nature 53, 55.

11 *Circulaire Bianco,Journal Officiel de la République Française*, 26 February 1993, 3039.

12 ibid.

are accurately and exhaustively answered. At the end of the procedure, the Prefect – the only authority with the relevant competence – draws up a balance sheet, which he presents to the Minister together with a detailed report. It will then be the task of the Government to establish the *cahiers de charges* and the procedures for implementing the project.

This first timid step was followed shortly afterwards by the adoption of a new circular letter of the Minister for Energy André Billardon, specifying that the involvement of citizens must be '*très en amont de tout projet*'.[13]

Nevertheless, it was in the 1995 *Loi Barnier* that the *débat public* officially found a normative 'consecration', whereby it became a procedure of general application to be carried out in case of nation-wide infrastructure works; citizens enjoy the right to be called to give their contribution '*sur les objectifs et les caractéristiques principales des projets pendant la phase de leur elaboration*'.[14]

One of the main innovations of the *loi Barnier* is certainly the establishment, for the first time, of the *Commission Nationale du Débat Public* (CNDP). At this stage, it is still an internal body within the Public Administration which can be called upon jointly by the Ministers responsible for the construction of the planned infrastructure or by the Minister for the Environment, as well as – though in this case limited to works falling within the remit of local authorities and other public bodies – by the Minister '*chargé des collectivités locales*'. In fact, the *Loi Barnier* itself guaranteed, even at that time, the possibility that the CNDP would take a decision if requested by no fewer than twenty deputies or senators; a regional council in whose territory the infrastructure work is located; or a Nation-wide operating environmental association (an option that, in fact, was not very successful in the first years of the law's application). On closer inspection, in this first phase the CNDP seemed to play a role of an 'appendix' of the Executive: it pursued the (essentially political) objective of gathering the institutional stakeholders in the planning phase and thus enhanced the acceptability of the decision.

However, the composition of the CNDP even in that early phase tried to express a different appearance: it was composed, in equal parts, of political representatives (elected in the Parliament or in local councils), members of the *Conseil d'Etat* or of the administrative or ordinary judiciary, and of representatives of civil society (representing nation-wide operating environmental or consumers' association, or other highly qualified personalities).[15]

Although implicitly referring to the Canadian experience, the 1995 *loi Barnier* was immediately found to be partial and not resolutive of those negative aspects that already characterized its overseas counterpart. Approximately a

---

13 *Circulaire Billardon du 14 janvier 1993 relative aux procédures d'instruction des projets d'ouvrages électriques d'EDF*.

14 Law of 2 February 1995 No. 94-101, *Loi Barnier*, art 2, para 1.

15 See Loi No. 94-101 du 2 février 1995, *Loi Barnier*, art 2 para 6.

year after its entry into force, the French Government once again intervened with a *décret,* in application of Article 2 of the same law, to fill the gaps left by the minimal legislation already in place. The composition of the *Commission National du Dèbat Public* was thus further specified, establishing that its members, seventeen in number, had to remain in office for five years and could only serve two terms. The members had to be appointed by the Prime Minister by virtue of an *arrêté* among highly-profiled figures who could gave an appearance of impartiality.[16] In order to guarantee a more efficient action, the CNDP was also allowed to set up a *commission particulière* for each debate in charge of managing it directly.[17]

At that stage, the influence of the Canadian experience seemed to emerge once again, with the CNDP fully integrated within the executive and the Prime Minister being in charge of appointing its members. Moreover, the independency and impartiality were further jeopardised by the same *décret*, which foresaw that the CNDP's budget was to be established by the Government annually.[18] Thus structured, the *Commission Nationale du Débat Public* officially took office on 4 September 1997, chaired by Hubert Blanc, who remained in office until 2000. He was succeeded, from 2000 to 2002, by another State Councillor, Pierre Zemor. In this first five-year period there were still few *débats* organised, yet in this period the regulatory framework was tested and the internal rules of procedures defined.

In the first years of the new century, the French *Conseil d'État*, through its *Section du Rapport et des Études*, was entrusted with the mandate to investigate '*L'utilité publique aujourd'hui*'. The resulting report,[19] also known as *Rapport Questiaux*, stressed the importance of public participation not only '*en amont*' (i.e. in the initial phase), but for the whole duration of the procedure leading up to the final decision: the contribution of citizens, aimed at the pursuit of the public interest, should then emerge from the report and arise in the context of a procedure led by a third-party body independent from the executive.

A few years later, the Parliament, inspired by the content of the *Rapport Questiaux,* issued the normative act that, more than others, modified the

---

16 Décret No. 96-388 du 10 mai 1996. According to Article 2, the members had to be chosen among the following categories: one of the members of the *Conseil d'Etat*, one of the members of the *Cour de Cassation*, one of the members of the *Cour des Comptes*, one of the members of the *Cours Administratives*, one of the judiciary, one of the presidents of the regional councils, one of the presidents of the departmental councils, two of the mayors, two members among the representatives of environmental protection associations that have obtained recognition by the competent Ministry, two representatives of consumer protection associations and, finally, two highly qualified personalities, appointed on the proposal of the Minister of Industry and the Minister of Transport.

17 See Décret No. 96-388 du 10 mai 1996, Art 5.

18 ibid, art 9.

19 Conseil d'Etat, *L'utilité publique aujourd'hui. Etude adoptée par l'Assemblée générale du Conseil d'Etat le 25 novembre 1999* (La Documentation Française 1999).

physiognomy of the CNDP: Law No. 2002-276 of 27 February 2002, the so-called *Loi Démocratie de Proximité*. What happened in-between is not negligeable, that is the ratification of the Aarhus Convention in 1998 on access to information, public participation and access to justice in environmental matters. This determined significant consequences from a legal viewpoint: although some of the scholars involved in the drafting of the Convention firmly advocated its direct effect on the basis of the intentions allegedly expressed during the preparatory work, the French *Conseil d'État* acknowledged the direct effect of the Aarhus Convention only partially.[20] This solution was criticized by legal scholars who, over time, reaffirmed the need for an effective public participation.[21] Hence, the 2002 *Loi Démocratie de Proximité* profoundly modified the *Code de l'environnement* by inserting fifteen new articles; it further transformed the CNDP into an independent administrative authority and established the incrementation of the number of its members by four units, chosen from among the locally elected.[22] Such a transformation also implied, as a further important consequence, the financial independency of the CNDP, since it enabled it to recruit staff and obtain the means to carry out its functions independently and at a faster pace.[23] The results of these measures in quantitative terms reveal the accuracy of the forecasts: from November 2002 to November 2013, the Commission examined more than one hundred and fifty petitions, presiding over about seventy-five *débats*.[24]

Moreover, the same *Loi Démocratie de Proximité* opened the way to the organization of *débats publics* on general options in environmental governance.[25] To date, five *débats* of this kind have taken place, gaining wide public attention and making the CNDP a general institutional point of reference for participatory procedures.[26]

The last step in this *excursus* is finally represented by the Law of 27 December 2012 No. 1460 which modified for the last time the composition of the CNDP, setting the number of its members at twenty-five. It also slightly

---

20 J Bétaille, 'The direct effect of the Aarhus Convention as seen by the French Conseil d'Etat' [2009] Environmental Law Network International 63. In short, only the direct effect of Article 6, para 2 ('*the public concerned shall be informed early in an environmental decision-making procedure, and in an adequate, timely and effective manner*') is recognised, whereas it is denied with reference to para 4 concerning the moment in which public participation should take place ('*when all options are open*') (emphasis added).

21 See G Lefloch, 'La convention d'Aarhus devant le juge administratif' (2008) 157 Petit Affiches 4 and Y Aguila, *Conclusions, Conseil d'Etat, 03 octobre 2008, Commune d'Annecy* (2009) 34 Revue Juridique de l'Environnement 96.

22 See C. Env., art L 121-3 para 9.

23 See C. Env., art L 121-6.

24 See annual reports on <www.debatpublic.fr/> accessed 26 June 2021.

25 See C. Env., art L 121-10.

26 Among these see, in particular, the *débat public* on nanotechnologies and the one on radioactive waste.

modified the rules of procedure, granting citizens the possibility to access at all times – especially during the procedure – the information, opinions, and observations provided by the participants.

It is interesting to note that this happened despite the ‘loose’ interpretation of both the *Conseil d'État* and the Aarhus Convention Compliance Committee: the first denied the direct effect of Article 6, para. 4 of the Aarhus Convention; the second, called to analyse the implementation of the provisions of Article 6 Aarhus Convention by France, concluded that the *débat public* is not a necessary requirement under the Convention, the *enquète publique* being sufficient in this regard.[27]

Since 2002, more than 130 projects have been the subject of a consultation or debate organised by the CNDP. Many of the projects have been modified, and nearly ten have even been abandoned. This was the case, for example, in 2007, for the Toulouse motorway bypass project and the methane terminal project in Verdon-sur-Mer. Some projects have also been significantly modified. Specifically, in 2010, the Arc Express and Grand Paris public transport network projects were merged into a single project: the Grand Paris Express.[28]

2.2. The Tuscany laboratory

Even in the absence of a national normative framework of reference, in 2007 the Legislator of the Region of Tuscany set up a very particular type of experimentation, or – as it has been defined – ‘an attempt to give institutional and procedural form to the normative principles that have been produced, in recent years, by the theoretical elaboration on deliberative democracy, taking into account the numerous and various experiences of participatory democracy that have been developed in the panorama of contemporary democracies’.[29]

According to Ravazzi, what led the Tuscan Legislator to adopt a law on public participation introducing the *débat public* was a twofold phenomenon: the decrease of electoral participation at the regional level and the rapid increase of citizen committees aimed at opposing specific planning decisions.[30]

Taking inspiration from the French model, Tuscany Regional Laws 69/2007 and 46/2013 have codified a ‘*dibattito pubblico regionale*’ (regional *débat public*),

---

27 See J Bétaille, ‘Le droit français de la participation du public face à la Convention d'Aarhus’ (2010) 37 L' Actualité Juridique Droit Administratif 2083 and the Aarhus Convention Compliance Committee No. ACCC/C/2007/22 of 3 July 2009.

28 Data retrieved on the website of the Commission Nationale du Débat Public <www.debatpublic.fr/> accessed 22 June 2021.

29 A Floridia, ‘La democrazia deliberativa, dalla teoria alle procedure: il caso della legge regionale toscana sulla partecipazione’ (2007) 5 Le Istituzioni del Federalismo 1, 3 (my translation).

30 S Ravazzi, ‘When a government attempts to institutionalize and regulate deliberative democracy: the how and why from a process-tracing perspective’ (2017) 11 Critical Policy Studies 79, 85.

together with further participatory practices which fall beyond the scope of this paper. In doing so, the Regional Legislator chose a more elastic approach, taking as a model the 1995 *Loi Barnier* instead of the contemporary French legislation, considered too rigid in fixing objective parameters for the activation of the procedure.[31]

Following the French model, the regional law adopts a criterion of maximum inclusiveness, the right to participate in the *débat* not being linked to a legally qualified position: all persons wishing to take part in the procedure can do so without any restriction.[32] This choice is consistent with the 2005 *Charte Constitutionnelle de l'Environnement* which, unlike the Aarhus Convention addressing the '*public concerned*', refers to '*any person*'.[33]

The characteristic which more than any other qualifies the Tuscan experience as innovative – while emphasizing its derivation from the French-Canadian model – is the creation of a Regional Authority for Participation: its existence is, indeed, certainly inspired by the BAPE and the CNDP. The discipline of the Authority for the guarantee and promotion of participation is one of the profiles that has been the subject of major changes and improvements over time. Initially conceived as a monocratic body, the current text of Regional Law 46/2013 is primarily concerned with the experiences of the Authority, drawing on the experiences from which it is inspired and strongly affirming its independent nature.[34] According to the same provision, the independence from the regional government is also ensured by the appointment procedure, reserved to the Regional Council rather than to the Regional Government. Moreover, as a guarantee of further independency, it is foreseen that the duration of the mandate of the members of the Authority does not correspond to that of the Regional Council. The members of the Authority stay in office for a duration of five years and are chosen among people of proven personal experience in participatory methodologies and practices, regardless of their nationality.[35]

---

31 M Ciancaglini, 'La democrazia partecipativa in Toscana. Note a margine della legge regionale n. 69/2007' (2009) 1 Osservatorio sulle Fonti 1, 8-9.

32 V De Santis, 'La nuova legge della Regione Toscana in materia di dibattito pubblico regionale e promozione della partecipazione' (2013) 0 Osservatorio AIC 205.

33 See *Charte Constitutionnelle de l'Environnement*, art 7, as opposed to Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 [Aarhus Convention], art 6 (emphasis added).

34 The reasons that led to the preference for a collegiate rather than monocratic composition are various, certainly in part linked to the need to increase its authoritativeness, but above all of a practical nature. Ciancaglini also notes that the main problem shown by the Authority in the previous five years was, more simply, the shortage of personnel: M Ciancaglini, 'Un'ulteriore tappa nel processo di consolidamento della democrazia partecipativa. La legge regionale toscana n. 46/2013' (2014) 1 Osservatorio sulle Fonti 1, 11.

35 See Regional Law L. R. 46/2013, art 3.

Article 7 of Regional Law 46/2013 defines both the *débat public* and the moment in which it has to be held in order to be effective. According to the Tuscan Legislator, the *débat public* is '*a process of information, public confrontation and participation on works, projects or interventions that are particularly important for the regional community in environmental, social, cultural and economic matters*'.[36] As for the timing, according to the same provision, it 'takes place in the preliminary stages of the elaboration of a project, or of a work or intervention, when all the different options are still possible; it can also take place in subsequent stages but in any case not beyond the start of the final draft'. According to the subsequent Article 8, its activation is compulsory for public or private infrastructures projects exceeding fifty million euros, but can still be held in other cases under specific conditions.[37]

Since its establishment, the Tuscan Authority for Participation has presided over the organization of three *débats*,[38] and has rejected an application to hold a fourth one relating to the construction of the Florence airport.[39] Considering both the limited territorial extension and number of large-scale infrastructure projects in Tuscany over the past ten years, although the number of *débats* actually carried out is very limited, the overall balance cannot be defined as negative.

2.3. From local to national: the *débat public* in the Italian Public Procurement Code

In light of the success of the Tuscan experience and the growing antagonism surrounding the construction of major infrastructures projects of national relevance, on the occasion of the recent reform of the Procurement Code, the national legislator has decided to insert, in Article 22, the provision of the *débat public*, postponing the setting of criteria, size thresholds, and concrete implementation methods to a subsequent decree of the Prime Minister (DPCM), to be adopted within one year after the entry into force of the same provision.[40] Contrary to the Tuscan one, the Italian introduction of the *débat public* is not generally applicable; it is instead confined to the field of public procurement.

---

36 Emphasis added.

37 See L. R. 46/2013, art 8.

38 See the Tuscan Authority for Participation's Annual Reports from 2014 to 2019: <www.consiglio.regione.toscana.it/oi/default?idc=47&nome=partecipazione> accessed 5 November 2020.

39 See Tuscan Authority for Participation, Decision of 16 March 2015 No. 12, where it specifies that 'however, the members of the Authority consider it desirable and unavoidable to carry out another participatory process on the project'. As explained by the Authority in its decision, the rejection was grounded on the circumstance that 'in the case of the Tuscan airport the decision-making context is too advanced to allow the opportunity of the project to be called into question'.

40 Legislative Decree of 18 April 2016 No. 50, *New Public Procurement Code*, art 22.

Such a provision is in line with previous 'spontaneous' experiences of *débat public* that – even if not legally provided for – took place over the past few years, as well as with several (unsuccessful) attempts to give legal sanction to the *débat*. As for the first profile, the most important experiment took place in Genoa in 2009 and was led by an influential Italian political scientist, Luigi Bobbio. On that occasion, the *débat* was related to construction of the so-called *Gronda di Genova*, a large infrastructure designed for the doubling of the A20 highway, and consisted of the organization of six physical meetings (beyond the paper-work) and many mediation meetings on specific sub-topics, taking as a model the French legislation.[41]

As for the second profile, several bills were proposed and discussed in Parliament but were never approved.[42] Moreover, the Working Group on Institutional Reforms, established in March 2013 by the President of the Republic, dedicated the first chapter of its final report to the issue of '*strengthening citizens' rights and democratic participation*', indicated as '*a fundamental pillar for renewing democracy and public life*'.[43]

The Working Group also pointed out the need for the *débat* to be compulsory in certain cases and to be regulated. Hence, Article 22 of the Italian Public Procurement Code, without going into further detail, precisely prescribes its obligatoriness and the creation of a specific Authority with the mandate to monitor the implementation of these provisions.

In 2018, the announced decree (DPCM 76/2018) was adopted.[44] In implementing Article 22 of the Public Procurement Code, the Prime Minister established three sets of rules: (a) those establishing the cases in which must or can be held; (b) the rules of procedure; and (c) those governing the *Commissione Nazionale per il Dibattito Pubblico* (the Italian counterpart of the CNDP).[45]

Contrary to the French and Tuscan *débat public*, the Italian one, being limited to the discussion of large-scale infrastructure projects, cannot be called for the discussion of general options in environmental governance.

As for the 'Italian CNDP', the circulation of the French model cannot be considered complete. The Italian CNDP is not an independent authority and does not have any power to decide whether to hold a *débat* or not. In this sense, it is significantly different from its French and Tuscan counterparts, calling

---

41 For further see L Bobblio, 'Il dibattito pubblico sulle grandi opere. Il caso dell'autostrada di Genova' (2010) 1 Rivista italiana di politiche pubbliche 119.

42 For a comprehensive analysis of such bills, see P Vipiana, 'La disciplina del dibattito pubblico nel regolamento attuativo del Codice degli appalti, tra anticipazioni regionali e suggestioni francesi' (2019) 2 Federalismi 1, 3.

43 My translation (emphasis added). See the final report of the Working Group on <www.giurcost.org/cronache/relazioneriforme.pdf> accessed 28 June 2021.

44 Decree of the Prime Minister (DPCM) of 10 May 2018, No. 76.

45 L Torchia, 'Il nuovo Codice dei contratti pubblici : regole, procedimento, processo' (2016) 5 Giornale di diritto amministrativo 609.

many scholars to doubt its actual significance.[46] As a further negative element, Della Cananea highlights that, beyond its lack of independence, it has a very limited budget in line with its negligible duties.[47]

The role of the Italian CNDP is limited to monitoring activity, and primarily consists of ensuring that all documents are made public; organising activities at the local level by involving the bodies concerned; and proposing general or methodological recommendations for the appropriate conduct of the *débat*.[48]

This cautious approach seems to reflect the concern that its collocation in the public procurement code could represent a factor enhancing slowness and inefficiency: carrying out a *débat public* within a public procurement procedure might reduce the options for the public to intervene on the project, on the one hand, and it might significantly slow down the development of the project, on the other hand, as it implies further procedural steps. This concern is not groundless: the French experience shows that carrying out a *débat public* '*trés en amont de tout projet*', as Billardon put it in 1993,[49] is not always easy. As a partial countermeasure, DPCM 76/2018 establishes that the *débat* must be carried out at the so-called '*feasibilitydocument'* phase, i.e. when the project is not definitive and may still be subject to change, ideally as a consequence of the inputs arisen within the *débat* itself. As noted by Vipiana, however, such provision is less precise compared to the one referred to in the Tuscan legislation, according to which the procedure must take place '*no later than at the start of the final project*'.[50]

In any case, this means that the call for tenders takes place after the *débat public*, and on the basis of the results thereof. At the moment of writing, only one Italian *débat public* has been held. Interestingly Genoa, the closest to France among the Italian big cities, has once again been the protagonist of the *débat public*. The infrastructure project involved was the construction of the outer breakwater. The *débat* started on 9 January 2021 and consisted of 12 meeting held remotely (due to the Covid-19 pandemic), involving more than 900 active participants and 60.000 spectators, and leading to a definitive project that will

46 CE Gallo, 'Il dibattito pubblico nel codice degli appalti: realtà e prospettive' in R Balduzzi and R Lombardi (eds), *Autonomie locali, democrazia deliberativa e partecipativa, sussidiarietà. Percorsi di ricerca ed esperienze italiane ed europee* (Pisa 2018) 129.

47 G Della Cananea, 'Exit or Voice? Débat public goes to Italy' (2019) 25 European Public Law 157, 168.

48 See DPCM 10 May 2018, No. 76, art 4 para 6.

49 See *Circulaire Billardon du 14 janvier 1993 relative aux procédures d'instruction des projets d'ouvrages électriques d'EDF* (emohasis added).

50 P Vipiana, 'La disciplina del dibattito pubblico nel regolamento attuativo del Codice degli appalti, tra anticipazioni regionali e suggestioni francesi' (2019) 2 Federalismi 1, 20 (emphasis added).

be outlined in its definitive version by the end of 2021, and realized by the end of 2022.[51]

3. A three-pillar structure within a multi-layered framework: Participation, Effectiveness, Authority

After having examined the rules governing the *débat public* in the considered legal systems, it is time to draw up some of the features that make these experiences of institutionalisation of a specific participatory process belong to a same 'paradigm'. This will allow for a further and more theoretical (and synthetic) analysis, leading to situate the *débat public* within the wider picture of environmental democracy in Europe.

The *débat public* seems to be grounded on three pillars, which are more precisely a prerequisite, and two main features: *Public Participation, Effectiveness* and *Authority*.

3.1. Public participation

Public participation in environmental decision-making is a major trend in the academic literature of recent years,[52] and participatory procedures all over the world obtain an almost uncontested endorsement for enhancing the competence of environmental policy-makers.[53] However, a precise and universally accepted definition of 'public participation' is still missing.

As Professor Prechal noticed with reference to another topic, '*when a concept becomes too broad, imprecise and diluted, an effort can be made to redefine it. Basically, there are two options: narrow it down or broaden it. Whatever direction this may take, I have serious doubts about the usefulness of such an exercise*'.[54] I think that this is the case of public participation. On the one hand, the temptation is

---

51 F Canalia, *Concluso il dibattito pubblico sulla diga foranea di Genova*, in (Osservatorio AIR, — —) <www.osservatorioair.it/concluso-il-dibattito-pubblico-sulla-diga-foranea-di-genova/> accessed 14 June 2021.

52 See *ex pluribus* BJ Richardson and J Razzaque, 'Public participation in environmental decision-making' in BJ Richardson, S Wood (eds), *Environmental Law for Sustainability* (Hart Publishing 2006); J Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach' (2001) 21 Oxford Journal of Legal Studies 415 and J Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 Yearbook of International Environmental Law 51, 51.

53 K Getliffe, 'Proceduralisation and the Aarhus Convention. Does increased participation in the decision-making process lead to more effective EU environmental law?' (2002) 4 Environmental Law Review 101.

54 S Prechal, 'Direct Effect Reconsidered, Redefined and Rejected' in JM Prinssen, A Schrauwen, *Direct Effect. Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing 2002) 23-24 (emphasis added).

to narrow-down the notion so as to confine it to those cases in which the involvement of citizens in decision-making processes of any nature can be considered useful and effective, thus excluding all formalistic approach, leading to the so called 'scenic' participation. On the other hand, however, this operation would determine the exclusion of a long list of experiences in which the 'voices' have still played a role of some kind within the decisions, raising awareness on environmental issues or even representing a deterrent to even worse potential unilateral solutions.

For the purpose of this paper, it is crucial to understand which participation is the prerequisite for the *débat public*. However, what is relevant is a definition of public participation not as a generic concept, but as a legal principle.

The first legal text that enshrines public participation as a legal principle is the 1992 UN Rio Declaration,[55] though this instrument is not legally binding. Only in 1998 was a more comprehensive and precise legally binding definition of public participation provided as the second pillar 1998 UNECE Aarhus Convention: (a) 'in decision on specific activities'; (b) 'concerning plans, programmes and policies relating to the environment'; and (c) 'during the preparation of generally applicable legally binding normative instruments'.[56] Under the Aarhus Convention, the 'public concerned' shall be informed early in an environmental decision-making procedure, when all options are still open, and in an adequate, timely, and effective manner. According to Article 2, para. 5, of the Convention, '*public concerned means the public affected or likely to be affected by, or having an interest in, the environmental decision-making*'.[57] It is interesting to notice that, to avoid any potential abuse, the same provision also specifies that '*non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*'.[58] Moreover, the procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public to prepare and participate effectively in the decision-making phase.[59]

---

55 Principle 10 states that '*environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*': United Nations General Assembly, Rio Declaration on Environment and Development (12 August 1992) UN Doc A/CONF.151/26/Vol.I (emphasis added).

56 See the Aarhus Convention.

57 Emphasis added.

58 Emphasis added.

59 Aarhus Convention, arts 6–8.

The Aarhus Convention is considered '*the most far-reaching and detailed environmental treaty on public participation*',[60] introducing democracy in environmental decision-making for the first time,[61] and representing also a source of inspiration for similar legal texts around the world.[62]

The Convention is also known as one of the most noticeable examples of the so called 'Europeanisation' of international law, since it has been ratified by both the EU and its Member States. This implies, for instance, that non-compliance by EU Member States is not an option.[63] The provisions of the Aarhus Convention enjoy supremacy over both conflicting national law and EU secondary law.[64] As affirmed by the EU Court of Justice, this is the case also with regard to those Convention provisions which have not yet been incorporated into EU law.[65] As pointed out by Squintani and Perlaviciute, this has the further consequence that '*the European Union can be considered to be in breach of the Convention if its Member States breach the Convention and the EU has not established a regulatory framework ensuring compliance on the side of the Member States*'.[66]

The European Union has thus adopted a series of *ad-hoc* pieces of legislation to implement its own obligations,[67] making the Aarhus Convention actually

60 E Tsiounami, 'Public participation in environmental decision-making' in L Krämer and E Orlando (eds), *Principles of environmental law* (vol VI, Elgar Encyclopaedia of Environmental Law 2018) (emphasis added).

61 M Prieur, 'La Convention d'Aarhus, instrument universel de la démocratie environnementale' (1999) n° spécial Revue Juridique de l'Environnement 9.

62 See, for instance, The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021), better known as the Escazú Agreement, in force since 21 April 2021. I thank the anonymous reviewers for bringing this to my attention.

63 R Wahl, 'Europeanisation Beyond Supremacy' in J Wouters, PA Nollkaemper and E de Wet (eds), *The Europeanisation of International Law* (TMC Asser Press 2008) 19.

64 L Squintani and G Perlaviciute, 'Access to public participation: Unveiling the Mismatch between what Law Prescribes and what the Public Wants' in M Peeters and M Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 137.

65 Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Zoskupenie)*, EU:C:2011:125.

66 L Squintani and G Perlaviciute, 'Access to public participation: Unveiling the Mismatch between what Law Prescribes and what the Public Wants' in M Peeters and M Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 138 (emphasis added).

67 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - Statement by the Commission[return][2003]OJ L156/17 and Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

enforceable by individuals before national courts also in case national legislators fail to comply with their international obligations.

Although the right to participate is certainly a fundamental right *per se*, it being so inherently intertwined with access to information and access to justice makes it less apparent than the other two pillars of the Aarhus Convention. The qualification of 'public concerned' is, in other words, a pre-condition, or better a *medium*, allowing individuals and environmental NGOs to claim their right to access to information and access to justice. That is why it is no surprise that a case-law research on 'public participation' shows less results compared to one targeting 'access to information' or 'access to justice'.[68]

These interventions at the international and supranational level proceeded in parallel, and stimulated a similar evolution at the national constitutional level as well. In Italy, a constitutional right to participation in decision-making is derived by some generally-phrased constitutional provisions, such as Article 3, para. 2, on the equality principle referring to '*the participation of workers in the economic, social and political life*', or Article 118 on the so-called 'horizontal subsidiarity'.[69] Only in 2021, at the time of writing, is a constitutional reform, amending for the very first time the bill of rights, being discussed in the Italian parliament with a view to insert environmental protections in fundamental rights (Article 9), also for the benefit of future generations. By contrast, the French Constituent in 2005 adopted the *Charte Constitutionnelle de l'Environnement*, a constitutional text enshrining and giving constitutional 'dignity' to the 21st century environmental rights, among which the right to public participation in decision-making (Article 7). What is even more interesting is that, for its drafting, a deliberative constitutional law-making procedure has been followed, with the organization of meetings, debates, and consultation rounds.[70]

68 L Squintani and G Perlaviciute, 'Access to public participation: Unveiling the Mismatch between what Law Prescribes and what the Public Wants' in M Peeters and M Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 144, who notice that 'despite the elapsing of 20 years from the signature of the Convention, and about three lustra from its implementation in the EU, case-law of the Court of Justice on public participation is scarce, in striking contrast with what noticeable about access to information and, even more, access to justice'.

69 Emphasis added. See S Cassese, 'La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato' (2007) 1 Rivista Trimestrale di Diritto Pubblico 3; M Picchi, *Il diritto di partecipazione* (Giuffré 2012) and G Pizzanelli, *La partecipazione dei privati alle decisioni pubbliche* (Giuffré 2010). On 'horizontal subsidiarity' see G Arena, 'La cittadinanza amministrativa. Una nuova prospettiva per la partecipazione' (2010) 11 Espaço Juridico 522 and G Arena, *Cittadini attivi* (Laterza 2006).

70 The drafting of the *Charte Constitutionnelle de l'Environnement* is explained in greater detail in Y Jegouzo 'La genèse de la Charte Constitutionnelle de l'Environnement' (2003) n° spécial Revue Juridique de l'Environnement 23 (« La Charte Constitutionnelle en débat »).

3.2. Effectiveness

Effectiveness is more a goal that the *débat public* paradigm pursues rather than an actual requirement. It pertains to both the 'when' and the 'how'. As required by the legal definition of public participation, in order to be effective, a participatory procedure must be timely, '*when all options are open*'; it also needs to be effective regarding the impact of individual contributions on the outcome. As Jegouzo correctly notices, '*the outcome of participatory procedures must be able to influence the final decision; otherwise, the principle of participation itself shall be called into question*'.[71] However, from a strictly legal standpoint, both in France and in Italy, a strong obligation to take into account the results of public participation is currently missing.[72]

Nevertheless, an enforceable legal obligation is not the only way in which participation can be effective. In this second regard, the Maastricht Recommendations on Promoting Effective Public Participation prepared under the Aarhus Convention might play a significant role.[73]

The term of comparison to assess the effectiveness of participatory procedures, including the *débat public*, shall thus be the legal definition of participation and the best practices in its implementation. In this regard, for instance, the Italian *débat public* procedure can be considered ineffective insofar as it excludes the general options on environmental governance from the scope of application of the procedure.

Outlining a *débat public* paradigm is indeed useful to compare the implementation of the model with the model itself, showing *de jure condendo* whether there exists room for improvement.

The effectiveness of the procedure applies also to the discussion within the *débat*. The opponents of institutionalised forms of participation generally argue

---

71 Y Jegouzo, 'Principe et idéologie de la participation' in D Amirante et al (eds), *Pour un droit commun de l'environnement. Mélanges en l'honneur de Michel Prieur* (Dalloz 2007) 584 (emphasis added).

72 For France, see J Bétaille, 'La motivation au service de la participation: l'émergence d'une obligation de répondre aux commentaires du public comme clé d'articulation entre la représentation et la participation' (2020) 17 *Cahiers de la Recherche sur les Droits Fondamentaux* 31, according to whom '*if the deliberative nature of administrative procedures is to be improved and the results of participation are to be taken into account, the legislator must explicitly formulate an obligation on the part of the administration to respond to the public's comments in all the texts on participation*' (emphasis added). For Italy, see G Della Cananea, speaking of the Italian *débat public*, who notes that DPCM 76/2018 '*draws a clear distinction between the outcome of the public debate and the proposals emerged therein, and their assessment by that public administration or body. But it imposes a specific giving of reasons requirement. Whether this will give rise to a stronger duty of justification remains to be seen*': G Della Cananea, 'Exit or Voice? Débat public goes to Italy' (2019) 29 European Public Law 157, 167.

73 United Nations Economic Committee for Europe, *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention* (UN Publications, — —).

that these participatory procedures are dominated by power groups; or that, in the best case scenario, they replicate societal differences, so that for instance highly-educated white men have higher chances of impacting the decision compared to lower-educated participants belonging to minority groups.[74] If one can initially agree with these findings, several criticisms can be raised: the first and foremost is that these procedures take place within reality, not out of it; thus, bias affecting the reality will necessarily affect the procedures too. Secondly, this statement should be verified on the field: recent studies have actually shown that these assumptions are not necessarily grounded on scientific evidence.[75] Finally, lobbies and power groups are more likely to have an impact on decisions assumed behind closed doors, so a participatory procedure, within which strategic choices can at least be publicly contested, certainly represents a deterrent for corruption and economic-only driven choices.

Several scholars from social and political sciences have thoroughly studied the French experience in practice. Their analyses show that, although the CNDP and its sub-committees in theory play a 'facilitation' role, in practice their role is more similar to a 'mediation' procedure between the different interests at stake.[76] As a further, no less important finding, such studies show that the *débat public* is able to deliver long-term results: gathering together actors not used to conversing with one another and getting them to have a discussion under specific rules and procedures shows how dialogue can always be possible, thus delivering in such a way a good service to democracy.[77]

3.3. Authority

One of the substantial limitations of the Canadian BAPE – which, although it could not be ascribed to the *débat public* paradigm, has still been briefly mentioned – was its perfectly organic nature in the face of the Public Administration. This is a characteristic that has also been negatively noted with reference to the Italian CNDP, since the lack of a third-party guidance represents a *vulnus* affecting the outcome.

---

74 I Shapiro, 'Collusion in Restraint of Democracy: Against Political Deliberation' (2017) 146 Deadalus 77, 78.

75 A Siu, 'Deliberation and the challenge of inequalities' (2017) 146 Daedalus 119, 5. According to Siu, within the analysed participatory procedure '*participants with higher participation scores did not influence outcomes any more than participants with lower participation scores*' (emphasis added).

76 See S Allain, 'La conduite d'un débat public sur un projet d'infrastructure : une activité de médiation spécifique. Réflexions à partir du débat public Francilienne' in C Revel et al (eds), *Le débat public : une expérience française de démocratie participative* (La Decouverte 2007) 112-122.

77 Pierre Sadran defines this '*participer au débat pour apprendre à débattre*': see P Sadran, 'Participer au débat pour débattre? Les difficultés de l'acculturation au débat public' in C Revel et al (eds), *Le débat public : une expérience française de démocratie participative* (La Decouverte 2007) 142-147 (emphasis added).

By 'authority', I thus mean both the administrative authority or body – such as the CNDP and the Tuscan Authority for Participation – and the need for the outcome decision to be authoritative (i.e. to be perceived as legitimate).

The idea of a managing independent Authority for the management of participatory procedures is not novel, and it has not been developed exclusively within environmental decision-making. Further examples can be found in other fields where societal demand has made them equally invested in public participation since the late 1970s. Among these, one that seems worth recalling is the field of technology assessment. Many experiences took place over time, leading in some cases to an institutionalisation of participatory procedures. In Denmark, for instance, a Danish Board of Technology (DBT) took office in 1986 as an independent organization linked to the Danish Parliament, with the mandates of facilitating the dialogue between experts and the public, and of conducting technology assessments.[78] Despite its tight link with the Parliament and the political parties, the Board was a self-governing institution free to define its rules and procedures. According to Klüver, in practice it has acted for a long time as an independent administrative authority: since the Danish Parliament did not have a bureaucracy, it granted governmental funds to its connected independent authorities, such as the Ethical Council, the Centre for Human Rights and the Danish Board of Technology.[79] In 2011, following a broader budget settlement, the DBT has been transformed into a fully independent private foundation (the DBT Foundation).[80] With its current 7 board members and 25 employees, the DBT is considered '*one of the leading figures in the development and practice of participatory methods for technology assessment and policy development*'.[81]

Although the work of the DBT falls beyond the scope of this paper, and a comparison between the Danish experience of the DBT and the French/Italian CNDP would not be possible anyway – given the different fields they refer to, i.e. technology assessment, on the one side, and environmental decision-making, on the other – these experiences show that the 'authority' feature allows for a more flexible and independent solution, as the presence of a third and impartial authority in charge of facilitating public participation is certainly useful – at the very least – to avoid the dispersion of the relevant know-how gathered in participation management, thus making the procedures constantly improved and up-to-date. This is possible since, as the CNDP writes in its website, '*participatory*

78 L Klüver, 'The Danish Board of Technology' in NJ Vig and H Paschen, *Parliaments and Technology. The Development of Technology Assessment in Europe* (State University of New York Press 2000) 173.

79 ibid, 181.

80 R Øjvind Nielsen, 'Institutional Interpretation of Parliamentary Technology Assessment. A Framework for Studying the Danish Board of Technology' in T Michalek et al (eds), *Technology Assessment and Policy Areas of Great Transitions* (Technology Centre ASCR 2014) 76.

81 ibid, 75 (emphasis added).

democracy is not subject to a very strict legal framework; its exercise is based on a simple yet complex basis: the participation of an unpredictable ensemble of citizens, gathered to debate in a common freedom of speech'.[82]

4. Concluding remarks

The fundamental question at the basis of this paper was whether it is possible to identify a *débat public* 'paradigm', i.e. whether the *débat public* represents a distinguishable participatory procedure characterized by specific features. The analysis has shown that such a paradigm exists, and has been developed through a two-step process: a 'prototype' – represented by the Canadian experience, source of inspiration for the French legislator of the 1990s – and a 'model' – outlined in France since 1995 and which subsequently circulated in Italy. The analysis has also pointed out the legal and societal contextual factors that led to the development of the *débat public*, from the societal demand for participation of the 1970s and 1980s to the comprehensive legal framework provided by the 1998 Aarhus Convention. After twenty-five years, the *débat public* has continuously improved, and has further been adopted by other legal systems following a successful sub-national 'trial'. This means that, at least theoretically, the *débat public* is useful to fill a gap. Stimulating citizens' participation in environmental decision-making not only has an educational purpose (which, by the way, does not yield short-term results): even if only partially, it somehow contributes to implementing a fundamental right, the right to participate, based on more or less detailed yet still enforceable constitutional provisions. The value of public participation as a legal principle is, in short, that it puts the spotlight on individuals, more particularly: on their ability to reach rationally-grounded decisions when put in conditions of time and access to the relevant information; where these elements being granted by law, rather than by concession; within a procedure ideally presided over by an independent authority; and governed by rules which are actually enforceable. That these features embody the three pillars of the Aarhus Convention is no coincidence. In this sense, (environmental) democracy and judicial trial have, interestingly, something in common: environmental democracy can be defined as a creative (of administrative solutions) and heuristic method only if it is governed by a sufficient (but not strict) number of rules; and it will be fair if there is a third, impartial, and independent authority that facilitates the decision-making process.

For these reasons, the 'authority' feature – and in particular the role of the CNDP in France and of the 'Italian CNDP' in Italy (but also of the DBT

82 See the website of the Commission Nationale du Débat Public <www.debatpublic.fr/> accessed 22 June 2021 (emphasis added).

Foundation in Denmark) – appear worthy of further joint study, analysis, and research.

Further studies shall also investigate whether the *débat public* paradigm is suitable for export to the EU level. Given the increasingly transnational character of public decisions in environmental matters, what is worth investigating is whether that same principle of subsidiarity which appears to be pivotal in assigning competences to peripheral bodies could potentially be used 'upside down', thus enabling the Union to intervene in areas in which it does not have exclusive competence when '*the objectives of the proposed action cannot be sufficiently achieved by the Member States either at central level or at regional and local level*' and '*by reason of their scale or their effects can be better achieved at Union level*'.[83]

At least in those cases in which the construction of transnational large-scale infrastructure projects is at stake, such a supranational procedural approach may definitely contribute to enhancing the authoritativeness of both the decisions and the authorities implementing them, thereby reaching the two-fold goal of filling the widely alleged democratic deficit of supranational institutions and achieving the perceived procedural fairness of decision-making processes.

83 Consolidated Version of the Treaty on the European Union [2016] OJ C202/15, art 5 para 3. See also N De Sadeleer, 'Principle of subsidiarity and the EU Environmental Policy' (2012) 9 Journal of European Environment and Planning Law 63.