Local Economic Development: Bargaining and Public Interest. A Comparative Study on Italy and France

Luca Sartorio

Abstract

This paper focuses on the concept of negotiation preceding agreements. This method, taken seriously, has many knock-on effects on urban planning and the efficiency of public administration by fast tracking. The method of planning with consent entered the Italian legislative procedure in the '90s and has been "alive and kicking" ever since, though not without criticism. Some recognized weak points are: the multi-level governance structure itself; a scarcity of public resources and the necessity for active participation and involvement of private entities; an unsuccessful process in simplifying public administration, and; better flexibility in the tools needed in comparison to the hierarchical model of decision making. Two questions have yet to be answered: the role of private entities within public planning, and the constraints resulting from agreements.

Introduction: The role of private entities within public planning and the constraints resulting from agreements in Italy

The need to associate private activities and resources (capital, projects and "know-how") in order to achieve economic development objectives lies at the heart of indirect government intervention through agreements – sometimes also referred to as contracts (development contracts, programme agreements, partnership agreements, productive recovery, etc.) – and inspires all these orientation measures to promote consultation, partnership and integration. Collaboration with the private sector appears crucial for public administrators seeking more effective and efficient

solutions (in comparison to those imposed unilaterally[1]). In particular, it is clear in the re-development of an abandoned industrial area whereabouts local policy requires the cooperation/consent of a plurality of public bodies and the direct involvement of 'qualified' private entities, essentially land owners or developers.

We think about the risks connected with the implementation, duration and price of complex interventions, usually in a 'progressive formation', not immediately and directly achievable since they are conditioned by a series of operational evaluations that cannot be "managed in advance" by administration. Facing these uncertainties, the resulting charges, the "cognitive weakness"[2] of the administrative and political apparatus and the state of crisis in public finance, it is assumed that public action, according to the contractual principles and 'economic calculation criteria'[3] used by private companies is a necessary and appropriate choice to achieve objectives of public interest with an economic component.

From this point of view, which we can define as "outcome-based", and from the perspective of a "tendency to quit the usual administrative system approaches in favour of *common law* approaches"[4], the specific nature of the relationships established between public and private bodies emerges, defined as "necessary collaboration"[5], and within which acts (such as certain agreements belonging to the category of so-called negotiated planning) can be applied, as well as more established legal forms such as concessions, planning agreements and subsidies[6]. It should be

[1] C. FRANCHINI (a cura di), *I contratti con la pubblica amministrazione*, Utet, 2007, p. 53; A. MARZANATI, *La programmazione della spesa pubblica*, Milano, Giuffrè Editore, 2001, p. 73; C. CHIAPPINELLI, L. CONDEMI, *Programmazione e controlli nelle pubbliche amministrazioni*, Milano, Giuffrè Editore, 2004, p. 22. A. CONTIERI, *La programmazione negoziata. La consensualità per lo sviluppo. I principi*, Editoriale Scientifica, Napoli, 2000.
[2] R. FERRARA, *Introduzione al diritto amministrativo*, Roma, 2005, p. 145.
[3] CANGELLI, *Riflessioni sul potere discrezionale della pubblica amministrazione negli accordi con i privati*, in Diritto amministrativo, 2/2000, p. 277.
[4] P. DE CARLI, *L'emersione giuridica della società civile*, Giuffrè Editore, Milano, 2006, p. 148.
[5] P.L. PORTALURI, *Le funzioni "necessarie" dei soggetti privati: aspetti di diritto interno e comunitario*, in Riv. It. Dir. pubbl. comunit. 1999, p. 119; A. CONTIERI "Amministrazione consensuale e amministrazione di risultato", in M. IMMORDINO – A. POLICE (a cura di), *Principio di legalità e amministrazioni di risultati*, Giappichelli Editore, Torino, 2004, p. 283.
[6] A. CONTIERI, *op. cit.,* p. 283.

added that the "active" participation[7] of private entities in economic development actions seems to introduce elements of "complication" in the decision-making procedure system[8], which is probably unavoidable. This is almost never limited to the initial phase of instances or proposals, and finds plenty space for expression through the entire process of progressive definition of the development action and clarification of the objectives, through a continuous dialogue or exchange[9] with public authorities: from the development of programmes, to the "assembling" of projects and their execution and implementation.

The logic and the reasons of the typical exchange in bargaining, thereby become part of the consultation prior to the planning of the work and then of the negotiation that shapes the proceedings, causing many "administrative deviations"[10]to be noted in practice. It often happens that "unlike what can be seen in the rules, the boundaries between preliminary briefs and decisions are interchangeable"[11]; private individuals and groups are also admitted to service conferences and inter-administrative agreements, which is normally something excluded in principle, etc.

These complications may be considered manifestations of a "*contractualism* that is a less cumbersome evolution of the procedure", to borrow the words of Berti[12], as well as signs of restraint of discretionary power since "discretion was consumed in the agreement"[13]. In administration-business relations, the private character of the negotiation phase objectively tends to reinforce the position of the participating private entity, tending to create parity between the 'parties' in the relationship. Even if real contracts are not concluded, no responsible entrepreneur

[7] M. DUGATO, *"Gli strumenti territoriali come strumenti di programmazione economica"* in Le Istituzioni del Federalismo, 2/09, p. 268.
[8] FERRARA, *op. cit*. 147.
[9] DIPACE, *Partenariato pubblico privato e contratti atipici*, Giuffrè Editore, Milano, 2006, p. 181 e 262; B. RAGANELLI, *Il dialogo competitivo dalla direttiva 2004/18/CE al Codice dei contratti: verso una maggiore flessibilità dei rapporti tra pubblico e privato*, in Riv. It. Dir. pubbl. comunit. 2009.
[10] ARGIOLAS-MATTARELLA, *"Attività amministrative moduli convenzionali"* in FRANCHINI (a cura di), *I contratti…,* p. 135.
[11] ARGIOLAS-MATTARELLA, *idem*; F. MERUSI, *Sentieri interrotti della legalità*, Il Mulino, Bologna, 2007, p. 30, come esempio di decostruttivismo.
[12] Citato in A. CONTIERI *"Amministrazione consensuale…",* p. 281.
[13] A. CONTIERI, op. cit., p.282.

would commit resources to such interventions without being sure of a "favourable disposition"[14] (memorandum of understanding, term sheets or other guiding measures), from those public entities that are able to influence the realisation of projects and development programmes.

On closer inspection, there is also another reason, in addition to the effectiveness and efficiency of administrative economic development action, which leads administrations to seek dialogue and agreements with the private sector: the identification, determination and evaluation of the specific public interest in the economic development action. This interest appears difficult (if not impossible)[15] to predetermine at the policy direction level (i.e. in abstract, by law[16]), in particular when the decision-making processes that accompany the identification of development objectives have a considerable degree of complexity; in such situations the predetermination of public interest "dissolves into theory"[17], "becoming limited to ensuring minimum objectives or indicating areas of protection"[18], or general aims[19].

It is also difficult for the competent administration (obviously no longer simply a legislative command executor[20]), which has to act in compliance with principles of legality, fairness and good performance, to translate projects into practical terms, and to then continuously implement, with also a lack of adequate resources, information and expertise. We could perhaps say that this particular public interest "is substantially and intrinsically incompatible to form the subject of a direct and immediate implementation by the administration"[21]. It can be achieved, however, "not so

[14] F. LEDDA, *Appunti per uno studio sugli accordi preparatori di provvedimenti amministrativi*, in Dir. Amm. 1996
[15] A. CONTIERI, *op. cit*., parla di "impossibilità della selezione in sede legislativa", p. 17; mentre ZAGREBELSKY, *op. cit.,* p. 41 afferma che la "legge il più delle volte si limita ad individuare l'autorità pubblica competente e ad autorizzarla ad agire in vista di un fine di interesse pubblico", rimettendo all'amministrazione competente l'individuazione delle scelte di merito.
[16] G. CLEMENTE DI SAN LUCA, *I nuovi confini dell'interesse pubblico*, Cedam, Padova, 1999.
[17] A. POLICE, *La predeterminazione delle decisioni amministrative*, Edizioni Scientifiche Italiane, Napoli, 1997, p. 106
[18] R. SPASIANO, *L'interesse pubblico e l'attività della P.A: nelle sue diverse forme*, in Foro amm. TAR 2005, 05, 1820
[19] G. ZAGREBELSKY, *Il diritto mite*, Einaudi, Torino, 1992, p. 41.
[20] G. BERTI, *Sussidiarietà e organizzazione dinamica* in *Problemi attuali della "sussidiarietà"* (a cura di E. DE MARCO), Giuffrè Editore, 2005, p. 37. Anche secondo AMOROSINO, la decisione legislativa può contenere (solo) indirizzi, criteri e parametri, "ma certo, ontologicamente, non può esprimere quel *continuum* di attività che caratterizza la programmazione amministrativa", in S. AMOROSINO, *Leggi e programmazioni amministrative: diversità funzionale, riserva di amministrazione e reciproche "invasioni di campo"*, in Dir. amm. 2006, 01, 229.
[21] A. FEDERICO, *Autonomia negoziale e discrezionalità amministrativa*, Edizioni Scientifiche Italiane, Napoli, 1999, p. 39

much through the isolated and abstract provisions of the administration, in itself, but by making provisions in a context that can only be ensured by the voluntary cooperation of the parties"[22].

It is here that both the importance and the quality of private interests are highlighted, proposed and represented by actors with specific knowledge and skills in relation to the technical and economic problem to be addressed. In some cases, it seems that the private entity actually has a "power to influence the final arrangement of interests related to particular matters"[23]: frequently in territorial transformation processes, or in the management-owners relationship concerning abandoned industrial areas. This is because the interests we are examining are able to mobilise articulated and complex procedures, "branding their direction and conclusions in fire"[24]. They are capable of influencing[25] the formation of the public decision, guiding it towards a solution, therefore towards a "reconstruction of the public interest that recomposes the various interests involved"[26].

If this is the case, however, and if the economic development interest is determined and represented concretely by the private entrepreneurs/owners that become active, then we should question both the nature of this particular interest (which is therefore not public in a traditional or subjective sense), and its evolution (no longer only definable as "compound, mixed, the result of dialogue or compromise", or built by the administration itself through "comparative"[27], or "integrated"[28] assessment operations).

Public interest and private interests "seem to converge around the social value of economic development", and find in it a "common denominator" but that "does not and should not imply the

[22] PORTALURI, op. cit., p. 142 con nota rif. F.P. PUGLIESE.
[23] PORTALURI,, *Le funzioni "necessarie" dei soggetti privati: aspetti di diritto interno e comunitario*, in Riv. It. Dir. pubbl. comunit. 1999. Potere che "gli permette di influenzare le scelte sugli assetti del territorio in nome dell'interesse allo sviluppo economico", in A. BARONE, *Urbanistica consensuale, programmazione negoziata e integrazione comunitaria*, in Rivista italiana di diritto pubblico comunitario, 2001.
[24] R. FERRARA, op. cit., p. 122
[25] V. MENGOLI, *Gli accordi amministrativi fra privati e pubbliche amministrazioni*, Giuffrè Editore, Milano, 2003, nella prefazione parla di *governance* fatta di "coinvolgimento e mutuo condizionamento".
[26] A. CONTIERI, *La programmazione negoziata. La consensualità per lo sviluppo. I principi*, Editoriale Scientifica, Napoli, 2000, p. 17
[27] F.G. SCOCA, *La discrezionalità nel pensiero di Giannini e nella dottrina successiva*, in Riv. Trim. dir. pubb. 2000
[28] G. DI GASPARE Giuseppe, *Il potere nel diritto pubblico*, Padova, 1992 . Ved. nota 66 a pag. 382 su interesse "composto", espressione attribuita a L. ARCIDIACONO, *La vigilanza nel diritto pubblico*, Padova, Cedam, 1984.

coincidence between public interests and private interests"[29]. A different concept builds public interest "not as a synthesis to be achieved in a mediated way, but as the sum of particular interests"[30]. In this perspective of a 'composition' of public and private interests "measurement of the economic effects"[31] of the development action becomes important, because it is this objectification (or quantifying) of assets that basically identifies and shapes the economic development interest.

This is certainly the direction taken by all those refined evaluation mechanisms in intervention proposals from private entities that are included in the activation procedures of certain collaborated urban programming or negotiated programming instruments, in which the public convenience or economic benefit is also required to be highlighted in detail, according to pre-established schemas. Can the need to promote private initiative in view of the protection of public development interests by "relying on corporate convenience and entrepreneurial energy"[32] and, conversely, the need to limit the influence of private interests on public interest[33] find an effective response in the use of contract-type instruments? It would seem so, not only because of their capacity to "govern the behaviour of the administration and private entities as well as reciprocal rights and duties with greater stability"[34], but above all because the public-private contractual dialogue appears to offer a greater guarantee of satisfying the public economic development interest, compared to the difficult (if not impossible) endeavour to achieve this though predetermined legislation.

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[29] In BARONE *op.cit.*

[30] F. DENOZZA*, Poteri della pubblica amministrazione e benessere degli amministrati*, in Annuario 2006 dell'AIPDA, Giuffrè editore, 2007, p. 13; A. LOLLI, *L'amministrazione attraverso strumenti economici*, Bologna, 2008, p. 32.

[31] P. DE CARLI, *L'emersione giuridica della società civile*, Giuffrè Editore, Milano, 2006, p. 122, si fa rilevare che "alla diversa natura dell'interesse si collega anche un incremento della negozialità che comprende la stessa fase di programmazione". E prima ancora che è "la misurazione economica degli effetti derivanti da una serie di azioni contrattate, pubbliche ma soprattutto private, che identifica e plasma l'interesse di sviluppo economico". "Interesse complesso, pubblico in senso tradizionale e allo stesso tempo proprio e personale dei partners della negoziazione"

[32] G. AMATO, *Gli strumenti della programmazione e i privati*, in "Aspetti privatistici della programmazione economica", I, Milano, Giuffrè Editore, 1970, p. 141.

[33] PORTALURI, *op. cit*., p. 119 sulla nota teoria generale dei rapporti di condizionamento di RANELLETTI

[34] G. SCIULLO, *Profili degli accordi fra amministrazioni pubbliche e privati*, in Dir. Amm., 4/2007.
Ricorda queste come le ragioni attinenti all'efficienza e all'efficacia dell'azione amministrativa nello schema provvisorio redatto dalla Commissione Nigro e da cui si farebbe derivare la nozione di "principio di contrattualità".

The French system: State of the art

The idea that state and local communities can and must contribute to economic development is clearly present in French legislation; here we find not only the specific techniques of public economic development law concerning help for businesses, planning and the public-private partnership, but also several organising rules that refer to 'economic development' as a 'block of competencies'[35]. Here, the role of public authorities in economic development actions proves, however, to be well-defined and effective, even in terms of dedicated resources, both financial and organizational (DATAR, etc.)[36]. In some cases, their intervention is considered by law as a "public service mission", in which public administration takes care of public development interests in a concrete way, preparing a series of specific services and techniques, sometimes experimental, aimed at businesses.

An example would be local aid to private companies, which was subject to amendments introduced by the law of August 13, 2004 (Loi no. 2004/809) concerning local freedom and liability, and in particular the widespread case of the creation of 'atelier-relais' by municipalities or inter-municipal cooperation[37], emblematic of a sensitive division of private initiative and public intervention. Another would be partnership contracts as a new mode of public intervention: the initiative comes from a public body (a public, governmental or local community entity), the preliminary assessment of the applicability of the partnership agreement is made with the cooperation of a public body of experts, and finally the Minister of the Economy and Finance has the final word on the compatibility of the consequences of the contract conditions on public finances.

[35] BERTOLINI Cecilia, *La sussidiarietà amministrativa, ovvero la progressiva affermazione di un principio*, in Dir. amm. 2007. Per RICHER, quando è impossibile applicare il blocco delle competenze, il contratto diviene fattore d'ordine, op. cit., p. 135)

[36] Impressiona la considerevole attività di valutazione degli strumenti, anche mediante rapporti "à mi-parcours": si ved. per es. il rapporto finale aprile 2011 dei contratti di progetto Stato-Regioni a cura DATAR.

[37] J. ATTALI, *Liberare la crescita. 300 decisioni per cambiare la Francia*. EGEA Università Bocconi Editore – Rizzoli, Milano, 2008, p. 197. Ricordiamo che la Francia conta più di 36 mila comuni, 110 dipartimenti, 26 regioni e più di 2.500 enti pubblici di cooperazione intercomunale (EPCI). L'intercomunalità riguarda più del 90% dei comuni (EPC). Per approfondimenti sulla cooperazione contrattuale ved. CE, Rapport public 2008, p. 75.

If, in Italy, the existence of undeniable elements and moments of bargaining in development actions can be interpreted as a response to the "need for collaboration"[38] or integration between private and public power, as part of "a process to create a common law arising from the convergence of private and public institutes in administrative action"[39], in France the extension of recourse to contracts as administration tools "equal to provisions"[40] is the most emblematic aspect of a generalised phenomenon[41] of contracting of public action that, on the contrary, does not leave much space to the "complex play of the subjective and private positions involved in the procedure"[42]. In France, public intervention, while showing increasing use of techniques and tools of a relatively clear contractual nature, continues to be widely exercised, as seen from the importance of legal action in administrative law, and prevalently in the forms of publishing control[43]. Firstly, this is achieved through the category of the administrative contract (well known to Italian scholars[44]), under which French legislation or the law includes most instruments for the purpose of economic development: from concessions[45], to plan contracts and partnership agreements.

[38] L. FRANZESE, *Il contratto oltre privato e pubblico*, Cedam, Padova, 2001, p. 98

[39] C. MEOLI, *Spunti di convergenza tra pubblico e privato negli accordi procedimentali*, in C. AMIRANTE (a cura di) *La contrattualizzazione dell'azione amministrativa*, Giappichelli Editore, Torino, 1993, p. 97

[40] V. CERULLI IRELLI, *Note critiche in tema di attività amministrative secondo moduli negoziali*, in Dir, Amm. 2003, p. 221.

[41] J. CHEVALLIER, *Loi et contrat dans l'action publique*, Cahiers du Conseil constitutionnel n° 17 (Dossier: Loi et contrat) – mars 2005

[42] MEOLI, *op. cit*., p. 97

[43] Viceversa, in Italia, è un dato saldamente ancorato alla normazione positiva (ved. comma 1° bis che integra l'art. 1 della l. 241/90) che "la negoziazione contrattuale nell'attività non autoritativa delle pubbliche amministrazioni si compia 'secondo le norme del diritto privato'", così B. CAVALLO, *Tipicità e atipicità nei contratti pubblici fra diritto interno e normativa comunitaria: rilievi procedimentali e sostanziali*, in Contratto e impresa, 2006. Come segnale di un certo avvicinamento tra diritto civile e diritto amministrativo dei contratti è stata letta, per es. da TRUCHET e MARCOU, la decisione *Commune de Bézier* (CE, 28 déc. 2009) in quanto vi si afferma la "esigenza di lealtà delle relazioni contrattuali" nei contratti amministrativi come richiamo del principio di buona fede contrattuale previsto dal codice civile francese, art. 1134.

[44] Interessati soprattutto ai criteri materiali di qualificazione dei contratti amministrativi ad opera del giudice amministrativo, come la presenza delle cd. "clausole esorbitanti": "disposizioni contrattuali che non sono normalmente adottate nell'ambito di contratti ad analogo contenuto, se stipulati da soggetti privati", F. SATTA - F. CARDARELLI, *Il contratto amministrativo*, in Dir. Amm., 2/2007, p. 212. GRECO, *op. cit*., p. 49

[45] R. CARANTA, *I contratti pubblici*, Giappichelli Editore, Torino, 2004, p. 13 "il diritto francese non ha sentito la necessità di riconoscere valore provvedimentale alla concessione, ma ne ha fatto la figura più rappresentativa dei contratti amministrativi".

As is known, the main issues relating to the admissibility of contracts under public law in Italy are focused on the subjective difference between the parties to the presumed contract, the limits of public negotiating autonomy characterised by discretionary power, and the compatibility of the contractual obligations with the obligation to pursue public interest that underlies public action and justifies the public administration's powers of supremacy[46]. French law, on the other hand, "has never doubted the legality of contracts under public law", in the wake of the doctrine of *services publics*[47]. In the administration contract, the public entity "has a certain number of prerogatives connected with the primacy of general interest, of which it is the bearer, and which place it in a position of superiority in relation to the other contracting party": there is therefore the constitutive element of the agreement (a concurrence of intention) but not on a basis of legal equality.

Other particular characteristics of the form, which are relevant for the purposes of comparison with the Italian legal system, are part of the formation and conclusion phases of the contract. These regard both the public body's choice of contractor[48], as well as the content, where it is clearly seen that the margins for proposal and negotiation of contractual terms are very limited, unlike what we have seen happen in the Italian situation with the intermingling of public interest and the relevance of the private proposal, often solicited and promoted by national positive law.
In the "contractual practice"[49] of territorial layout grants (*concession d'aménagement*) for example, frequent use is made of *cahiers des charges* unilaterally prepared by the administration (i.e. of rules

[46] F. FRACCHIA, *L'accordo sostitutivo*, Cedam, Padova, 1998, p. 30 ss.
[47] G. GRECO, *Accordi amministrativi. Tra provvedimento e contratto.* Giappichelli Editore, Torino, 2003, p. 47. Come rileva anche G. NAPOLITANO "in Francia, soprattutto nella c.d. *Ecole du service public*, l'intera attività pubblica è stata a lungo considerata un insieme di prestazioni rese alla collettività", alla voce "Servizi pubblici" in S. CASSESE, *Dizionario di diritto pubblico*, Giuffrè Editore, Milano, 2006, p. 5523
[48] D. TRUCHET, *Droit administratif*, Paris 2010, p. 269-270, ricorda che la questione è al centro di un contenzioso comunitario e nazionale abbondante. La tradizione francese che consentiva all'Amministrazione una grande libertà di scelta del suo contraente nelle delegazioni di servizio pubblico fino alle leggi del 1992 e 1993 (ved. anche GRECO sul punto, *op. cit*., p. 50), in parte oggi ancora libera a condizione che sia fatta secondo criteri giuridici leciti, previa adeguata pubblicità e messa in concorrenza. Cfr. procedura prevista dalla legge n° 2009-179 del 17 febbraio 2009 per l'accelerazione dei programmi di costruzione e di investimento pubblici e privati.
[49] Come suggerisce L. RICHER, *Droit des contrats administratif*, L.G.D.J., 2008[6] p. 4

that are not subject to negotiation)[50] which make this type of concession something comparable to adhesion contracts, confirming not only the unequal position of the contracting parties but also a contracting that is 'guided' by the public authorities, by means of circular letters, instructions, standard contracts and other contractual documents that progressively specify the drafting of the final contracts, subject however to public control (of legality, financial compatibility, etc.).

The Council of State[51] has clarified that the legality of the decision to launch the activation procedure for partnership contracts is subject not only to the completion of a mandatory preliminary assessment in prescribed forms[52] but also the control of the judiciary, which can be called upon by the interested parties in the pre-contractual phase to determine whether there are statutory conditions for the use of this type of instrument. This proportionality check should eliminate evident assessment error, but it certainly represents a barrier to inconsistent, superficial or merely ideological analysis[53] of the superiority of this type compared to others.

The experience of indicative planning in France can be traced back to a kind of "internal" contracting[54] in the public sphere (i.e. between the state and regional authorities, or between the state and public companies). The state uses the plan contract[55] to direct public action towards predefined development objectives and at the same time to "influence the extension of companies' autonomy"[56], especially national public companies, in terms of return on capital, price evolution and investments. This "external conditioning of the company"[57] usually takes place through subsidies and other accompanying measures traditionally linked to planning.

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[50] GRECO, op. cit., p. 50-51; RICHER, op. cit., p. 637; M.R. SPASIANO, *L'interesse pubblico e l'attività della P.A: nelle sue diverse forme*, in Foro amm. TAR 2005

[51] CE, 29 octobre 2004, *Sueur et autres*

[52] Arreté du 2 mars 2009

[53] N. SYMCHOWICZ, *Partenariats public-privé et montages contractuels complexes*, Paris, 2009, p. 376 e 392.

[54] La distinzione è di CHEVALLIER, op. cit.

[55] Ai sensi dell'art. 11 della legge del 29 luglio 1982 "lo Stato può concludere con le collettività territoriali, le regioni e le imprese pubbliche o private (…) dei contratti di piano comportanti impegni reciproci per le parti in vista dell'esecuzione del piano e di suoi programmi prioritari".

[56] Doppia funzione messa in evidenza da C.-A. GARBAR, 'Performance et contractualisation de l'action publique', in N. ALBERT (a cura di), *Performance et droit administratif*, Paris, 2010,

[57] S. GAMBINO, *Amministrazione e contratto: l'esperienza francese fra tecnocrazia e consenso*, in (a cura di C. Amirante) La contrattualizzazione dell'azione amministrativa, Giappichelli editore, Torino, 1993, p.

The widespread and growing use of procedures, techniques, and even a "vocabulary"[58], which have little to do with the contract in the strict sense, substantially indicates a different approach to administration, which for convenience we can refer to as contractual (or with a dozen other expressions[59]). Modern administrations, which are "in permanent negotiation with social and economic actors"[60], are often found to express their will, as we have repeatedly said, through forward-looking documents, guidelines, agreements, memorandums of agreement, and other "guidance measures"[61] whose legally binding nature is dubious (an example would be the subtle distinction between certain non-contractual administrative commitments which nevertheless serve to encourage certain behaviour on the part of economic operators, the promise that while not creating a synallagmatic relationship, this is nevertheless contained in the contract conclusions, as often happens with regard to public aid or administrative simplification, and the promise, which is sufficiently clear to not be considered a mere encouragement, that is found in a conditioned administrative measure that may contain elements of reward[62]).

The quantitative expansion and qualitative improvement of these measures is the signal of the possibility of achieving economic development goals through actions (or interventions) in which, in a certain sense, the contract is diluted. The reflection should therefore focus on the process that produced the agreement and the evaluations that determined it. The process consists of dialogue and contractual relations, which appears in its entirety as a "complex contractual assembly" operation[63] or in any case a legal operation containing several elements of a contractual

[58] TRUCHET, *op. cit*., p. 258

[59] GARBAR, *op. cit*., p. 134: riporta come nozioni più o meno sinonimi: amministrazione contrattuale, attività pubbliche convenzionate, governare per contratto, partenariato pubblico-privato, etc. E definisce la contrattualizzazione dell'azione pubblica come il ricorso accresciuto di persone pubbliche alla negoziazione, sia tra esse sia con persone private, che non conduce sistematicamente alla conclusione di contratti veri e propri. E ricorda che non bisogna confondere la contrattualizzazione con la consultazione (o concertazione) che precede l'adozione di una decisione unilaterale, p. 134

[60] RICHER, op. cit., p. 17. Sul rapporto fra Stato e società civile, e più in generale fra pubblico e privato ved. DE CARLI.

[61] Come le definisce TRUCHET, *op. cit*., p. 282 ss. Sulla questione ved. anche COLSON, p. 395 ss.

[62] P. URBANI, *Territorio e poteri emergenti*, Giappichelli Editore, Torino, 2007, p. 22. Vedi esempi Parte Seconda, capitolo 3.

[63] Dal titolo del saggio di P. TERNEYRE pubblicato sulla rivista AJDA, numero speciale luglio-agosto 1994.

nature, in which "the general interest can be sought in several ways and can take various forms"[64]. Hence, the concept of administrative operation[65] defined by Hariou as a series of acts aimed at a "common administrative result" which include both an "initial" administrative act, other successive acts, and all the necessary implementation measures to achieve the purposes of the administration, as well as all legal consequences of carrying this out[66] can be useful, also in terms of substantive law, to better understand the issues related to the determination and evaluation of the economic development interest, with respect to which – as we have seen –French law appears better equipped.

Final remarks

After analyzing different legal forms with substantial differences, even from a structural point of view, but which are all characterized by the active cooperation necessary to effectively achieve the various economic development goals, and having suggested an approach to the study of development actions (also adopting the broader concept of "operation" that is sometimes used in positive law and, in our opinion not by chance, indiscriminately with that of "contracts"[67]), we demonstrated with legislative data and concrete experiences the existence of a high degree of contractual character, expressed in various 'places' and times as characteristic of economic development actions. One possible explanation for this phenomenon is that public-private cooperation for the sake of economic development needs a contractual character, which basically means minor differences in the relationship between the 'parties' involved.

We have also attributed certain "contact" effecting public interest and private interests to the diffusion of bargaining. Perhaps the most important and least studied of these is that of helping to convey elements of economic analysis to administrative activity that until recently were unknown

[64] RICHER, *op. cit*., p. 68
[65] Per tutti sul tema D. D'ORSOGNA, *Contributo allo studio dell'operazione amministrativa*, Editoriale Scientifica, Napoli, 2005
[66] Riportata da D'ORSOGNA, *op. cit*., p. 28
[67] Come giustamente ha osservato anche S. AMOROSINO, *Profili sistematici del partenariato pubblico-privato per le infrastrutture e le trasformazioni urbanistiche*, in Rivista trimestrale degli appalti, 2/2011

(or practically so), which go beyond the ordinary (so to speak) "administration by agreements". An example would be the evaluations that PA is called upon to make concerning the 'transactional' contents of intervention proposals from private entities. Beyond the technical aspect, these evaluations almost always occur during the preparatory phase of planning or that of the decision relating to the development action, appearing in problematic terms for the public interest that is not "given": the "legal recognition of the goal setting"[68] then overlaps with the moment of emergence of the public interest, which first needs to be specified and then achieved. This indicates a possible one-to-one correspondence in development operations between increased bargaining and better definition of the public development interest. In France, the issue of contracting out is the subject of a much older debate. The phenomenon appears generalised, and is mainly situated in the internal perspective of administration performance improvement. The space provided for substantial interaction between private and public interests is therefore limited to some exceptional hypotheses, and is in any case a prerogative of large-scale enterprises The frequent recourse to so-called *cahiers des charges* or "type contracts", the presence in the system of numerous rules of economic conduct related to public bodies, the "technocratic traditions" that coexist with the contract culture[69], and the importance of the role of the court for the achievement of goals of general interest, represent other differences in the system compared to that of Italy.

[68] M. D'ORSOGNA, ricorda a tale proposito le felici intuizioni di G. MARONGIU e di V. CRISAFULLI, in M. D'ORSOGNA, *Individuazione e gestione degli obiettivi nell'attività di indirizzo politico*, in A. CONTIERI, F. FRANCARIO, M. IMMORDINO, A. ZITO (a cura di), *L'interesse pubblico tra politica e amministrazione*, Editoriale scientifica, Napoli, 2010, p. 400.

[69] L. BOBBIO, political production by means of contracts in the Italian public administration, "State and market", no. 58, April 2000, p. 112

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