

TOWARDS A «DUE» PROCESS OF EMINENT DOMAIN¹

Prof. Fabio SAITTA²

INDEX

1. THE PRINCIPLE OF THE DUE PROCESS: A BRIEF ADDRESS ON THE DOCTRINAL AND JURISDICTIONAL DEBATE AND A NECESSARY METHODOLOGICAL INTRODUCTION FOR THE PERPETUATION OF THE RESEARCH

2. THE PROCESS OF EMINENT DOMAIN IN THE LIGHT OF THE LAW N. 241 OF 1990: OPEN UP NEW PERSPECTIVES

3. THE «DUE» PROCESS OF EMINENT DOMAIN IN THE PLENARY SESSION OF THE COUNCIL OF STATE

4. THE «DUE» PROCESS OF EMINENT DOMAIN IN THE UNIQUE TEXT OF 2001 AND IN THE LAST DECADE OF CASE LAW:

- a) the creation of the predestined restriction of the eminent domain process;*
- b) editing and approval of the project of public work or of public utility;*
- c) extension of terms and renewal of the declaration of public utility;*
- d) reiteration of eminent domain restriction;*
- e) emergency occupancy;*
- f) determination of allowance for eminent domain;*

¹ Report of the Conference of the Cultural association Articolo 111 on: «Espropriazione per pubblica utilità. A dieci anni dall'entrata in vigore del Testo Unico nuove questioni e vecchi problemi non risolti» - Reggio Calabria (Italy), on the 11th-12th October 2013.

² Professor of Administrative Law, University of Catanzaro (Italy), School of Law.

g) execution of the eminent domain decree.

5. CONCLUSIVE REFLECTIONS: CAN THE PROCESS OF EMINENT DOMAIN BE CONSIDERED «DUE» TODAY?

1. THE PRINCIPLE OF THE DUE PROCESS: A BRIEF ADDRESS ON THE DOCTRINAL AND JURISDICTIONAL DEBATE AND A NECESSARY METHODOLOGICAL INTRODUCTION FOR THE PERPETUATION OF THE RESEARCH

Notoriously, the term “giusto procedimento” is the Italian form to say “due process of law”³, a principle contained in the V and in the XVI amendments of the United States Constitution, which provide respectively, “No person shall be deprived of life, liberty, or property without due process of law” and “any State should be deprive any person of life, liberty or property without due process of law”.

It is well-known, moreover, that the Constitutional Court used that notion for the first time more than 50 years ago, when it stated that the legislator normally must “enunciate abstract hypothesis preparing an administrative procedure” through which the authorities in charge can concretely impose the restrictions to the citizens’ rights considered for the law. In addition, as the Constitutional Court stated, this principle has not a constitutional foundation, but it is valid as general principle of the legal order. Therefore only the regional legislator must respect it, not the state legislator⁴.

³ E.D.RE, *Due process of law*, in *Enc. giur.*, XIII, Rome, 1989.

⁴ Judgment n.13 pronounced on the 2 March 1962, in *Giur. cost.*, 1962, 130, with note of V. CRISAFULLI, *Principio di legalità e giusto procedimento*.

Indeed, to revisit the path of the Court in the field of due process and, to identify the potential constitutional foundation, we should consider a previous period, but it would be too long a path that we cannot start herein.⁵

For our research is sufficient to highlight that the above mentioned principle has at least two meanings: the first one refers to the case in which the legislator makes his considerations and the administration takes action; the second one refers to the total guarantee of the effective participation of the private citizen to the administrative procedure. We want to deal with this second meaning of the “due” process of eminent domain, which “seems to represent the connotative trait of the same principle”⁶, so we have to remember how, for a long time, this meaning did not find reception in our legal system in spite of the efforts of the doctrine to valorize -art. 3 of the abolishing law of the legal argument⁷. Only in the law n. 241 of 1990 rules in the field of participation to the administrative procedure have been finally established⁸.

⁵ See also: G. SCIULLO, *Il principio del “giusto procedimento” fra giudice costituzionale e giudice amministrativo*, in *Jus*, 1986, 291 et seq.; M.C. CAVALLARO, *Il giusto procedimento come principio costituzionale*, in *Foro amm.*, 2001, 1829 et seq.; G. MANFREDI, *Giusto procedimento e interpretazioni della Costituzione* (Report of the conference : “Procedura, partecipazione e processo” - Urbino, on the 14th-15th June 2007), in *Foro amm.- TAR*, 2007, 2707 et seq.; F. CASTELLO, *Il principio del giusto procedimento dalla sentenza n. 13 del 1962 alla sentenza n. 104 del 2007 della Corte Costituzionale*, in *Foro amm.- Cds*, 2008, 269 et seq.; F.G. SCOCA, *Amministrazione pubblica e diritto amministrativo nella giurisprudenza della Corte Costituzionale*, in *Dir. amm.*, 2012, 58-63.

⁶ A. ZITO, *Il principio del giusto procedimento*, in *Studi sui principi del diritto amministrativo*, edited by M. Renna and F. Saitta, Milano, 2012, 510.

⁷ See F. SAITTA, *Cittadino e pubblici poteri dopo le leggi amministrative di unificazione*, in *Unificazione politica ed unificazione giuridica* (Acts for the celebration of the 150 anniversary of the Italian Unification - Catanzaro, on the 15th March 2011), edited by P. Mori, Naples, 2012, 99 et seq., spec. 100-102.

⁸ S. MANGIAMELI, “Giusto procedimento” e “giusto processo”. *Considerazioni sulla giurisprudenza amministrativa tra il modello dello Stato di polizia e quello dello Stato di diritto*, in

From that moment, the issue of the due process is not anchored anymore to thin couplings of positive right, as it was before. Vezio Crisafulli, hoping for an in-depth examination, revealed the difficulty to find a system of positive right with “applicable guarantees of the same administrative act”⁹. Today, on the contrary, we can affirm without any doubts that both terms “due” and “process” appear soaked of a high constitutional value, and in addition, we can state that the assignment of constitutional rank- not just materially, but also formally- to this principle consents to detract the availability to the ordinary legislator and it allows, besides, to identify the institutions and the procedures of the “due process”. This one has been characterized for a long time by a strong evocative power but also by an extreme elusiveness of contents¹⁰. We have to consider, furthermore, the frequent emergence of the principle of the due process in the common law of the

www.associazionedeicostituzionalisti.it (2010), § 3, through the law n. 241/1990 it states that the principle of the due process represents itself through the right of participation in the administrative process.

⁹ On this point, N. LONGOBARDI, *Il principio del “giusto procedimento” come limite al legislatore* (Intervention in the annual conference of the Gruppo di S. Giustino - Naples, on the 4th-5th of June 2004), in www.amministrazioneincammino.luiss.it, § 2; G. COLAVITTI, *Il “giusto procedimento” come principio di rango costituzionale*, in www.associazionedeicostituzionalisti.it (2005), § 4, states that Crisafulli saw the refined programmatic indications of the Court as desirable lines of development, seeing that in 1962 the normative basis for a positive anchoring of the authority of “state your case” in an administrative procedure was the art. 3 of the abolishing law of 1865.

¹⁰ L. BUFFONI, *Il rango costituzionale del “giusto procedimento” e l’archetipo del “processo”*, in *Quad. cost.*, 2009, 277 et seq. See also M. BELLAVISTA, *Giusto processo come garanzia del giusto procedimento*, in *Dir. proc. amm.*, 2011, 640, it states that Constitution does not have a disposition that explicate the principle of “due process”, but, in spite of this, we can not affirm anymore that the above-mentioned principle is constitutionalized. F.G. SCOCA, *op. cit.*, 62, states that is important that the constitutional Court recognizes that the disposition of the process law are applied in a generalized way. This is valid also for the procedures that have been regulated before by the law in question, and that do not consider adequate forms of participation (*infra*, § 2). It’s important to say, besides, that the “due process”, even if it is not expressly constitutionalized, constitutes – according to the constitutional Court – a criterion of orientation for the legislator and for the interpreter (sent. 31st of May 1995, n. 210 and 24th of February 1995, n. 57, in www.giurcost.org).

European Courts¹¹, so at a global level¹², and its path towards the category of the essential levels of the performances. This means the conferment of the relative discipline to the exclusive State competence, with the law n. 69 of 2009¹³. It would be necessary to focus the attention on the way in which the Court of Strasbourg protects the property right (and, in general, the economic freedom)¹⁴ which is guaranteed by the art.1 of the Additional Protocol of the European Convention on human right¹⁵, and it is recognized by more

¹¹ See M. COCCONI, *Il giusto procedimento come banco di prova di un'integrazione delle garanzie procedurali a livello europeo*, in *Riv. it. dir. pubbl. com.*, 2010, 1127 et seq.; even before M.P. CHITI, *Il mediatore europeo e la buona amministrazione comunitaria*, iv, 2000, 303 et seq.. We can find indications about how the European judge decoded the principles of "due process of law" in G. PEPE, *Principi generali dell'ordinamento comunitario e attività amministrativa*, Rome, 2012, 186 et seq.. The importance of the European jurisprudence, especially the property conservation, can be consulted in F. SALVIA, *Garanzie delle norme e garanzie del sistema: il caso delle proprietà*, in *Dir. amm.*, 2007, 47 et seq.. The author states that "the greater guarantees that a determined system can emanate in the face of some rights are not always ascribable to the specific constitutional rules which form the same rights, but they constitute the indirect effect (sometimes not expected) of a legal environment which is strongly geared toward the defence of civil liberties". The author underlines, besides, "how the reinforcement of the principle of legality made by the European Convention on human rights contributed to increase the defense of the owner everytime in which the related right has been exposed to the administrative procedures that deprive the citizen of a determined right".

¹² On a global level, the participation right, cfr. S. CASSESE, *Il diritto alla buona amministrazione*, in *Studi in onore di A. Romano*, Naples, 2011, I, 105 et seq., spec. 107-108.

¹³ See M. COCCONI, *Il giusto procedimento fra i livelli essenziali delle prestazioni*, in *Reg.*, 2010, 1021 et seq., and L.R. PERFETTI, *Pretese procedurali come diritti fondamentali. Oltre la contrapposizione tra diritto soggettivo ed interesse legittimo*, in *Dir. proc. amm.*, 2012, 850 et seq., spec. 855-862.

¹⁴ For further details see G. RAIMONDI, *Diritti fondamentali e libertà economiche: l'esperienza della Corte europea dei diritti dell'uomo*, in *Eur. e dir. priv.*, 2011, 417 et seq.

¹⁵ This means that such disposal, recognizing to everybody the right to the respect of their assets, guarantees the property right, C.E.D.U., 13th of June of 1979, n. 31, *Marcks c/Belgio*, in *Riv. dir. intern.*, 1980, 233; cfr., also, 23rd of September of 1982, *Sporrong et Lönnroth c/Svezia*, iv, 1984, 592, according to which the above mentioned art. 1 states three different rules: the first one, contained in the first sentence of the clause 1, enunciates the principle of the respect of property; the second one, contained in the second sentence of the same clause, refers to

International instruments (such as the Universal Declaration of human rights, but not by the International Pact on civil and political rights, nor by the International Pact on economic, social and cultural rights, both of the 1966). It is known, in fact, that the Court has developed an interpretative line which considers the property right on the same line of an inviolable human right equatable with the Fundamental Freedoms, starting from a not solid normative and basing its ideas in the market culture typical of the European system¹⁶. Referring to the guarantees of procedural due process, we can deduce from the jurisprudence of the Court many reasons to consider that art. 6 of the European Convention on human rights can strongly influence the procedural defense¹⁷. This disposal has been considered applicable when in presence of eminent domain processes (or processes with direct consequences on use or benefit of property right)¹⁸. In turn, the Court has stated that,

the eminent domain and states some conditions for this last one; the third one, contained in the clause 2, recognizes to the States the power to regulate the use of the assets according to the general interest establishing the laws that they consider necessary.

¹⁶ *Ex plurimis*, C.E.D.U., Sez. III, 16th of November of 2006, *Ippoliti c/Italia*, in *Giur. it.*, 2007, 1517. For further details on the debate about the equalization of the patrimonial rights (property and economical freedom) to the human rights and freedom rights, if seen by a comparative prospective, cfr. G. RAMACCIONI, *The private property, the constitutional identity and the competition among models*, in *Eur. e dir. priv.*, 2010, 861 et seq.

¹⁷ Interesting analysis have been recently made by S. FOÀ (*Giustizia amministrativa e pregiudizialità costituzionale comunitaria e internazionale. I confini dell'interpretazione conforme*, Napoli, 2011, 375 e s.), F. GOISIS (*Garanzie procedurali e Convenzione europea per la tutela dei diritti dell'uomo*, in *Dir. proc. amm.*, 2009, 1338 ss.; *Un'analisi critica delle tutele procedurali e giurisdizionali avverso la potestà sanzionatoria della pubblica amministrazione, alla luce dei principi dell'art. 6 della Convenzione europea dei diritti dell'uomo. Il caso delle sanzioni per pratiche commerciali scorrette*, *ivi*, 2013, 669 ss.) and M. ALLENA (*La rilevanza dell'art. 6, par. 1, CEDU per il procedimento e il processo amministrativo*, *ivi*, 2012, 569 ss.; *L'art. 6 CEDU come parametro di effettività della tutela procedimentale e giudiziale all'interno degli Stati membri dell'Unione europea*, in *Riv. it. dir. pubbl. com.*, 2012, 267 ss.), refer to these last for the indication of jurisprudence.

¹⁸ For related references, see v. S. FOÀ, *Giustizia amministrativa e pregiudizialità costituzionale comunitaria e internazionale*, cit., 348 e s., 371 e s.; M. ALLENA, *La rilevanza*, cit., 609-615.

in accordance with the general principle of the European law about the protection of the right to counsel, the subjects of public powers which damage their interests, must be able to represent rapidly their opinions. In other words they must express their point of view about every elements in question¹⁹. These are , briefly, the issues dealing with the due administrative process. Now we should focus our attention on the specific object of our research, the connections between due process and compulsory purchase are clear only if we consider a first interpretative orientation that was developed in a period consecutive to the unification of Italy with reference to the fundamental law n. 2359 of 1865. We are referring to a contractual and private setting that was developed in those years during the pre-Orlando doctrine on the nature of the compulsory purchase. This kind of setting allows to underline how, since the beginning of the enactment of the law, the principle of equalization between the State and the citizen was affirmed through the interpretation of an eminent domain model which was aimed at equalize , in an analogical way, the institution in question and the purchase agreement²⁰. Actually, as it was underlined recently²¹, this analogy consented the affirmation of a model that – starting from a sub procedure directed to the emanation of the declaration of public utility of the work²² – was totally based on the

¹⁹ *Ex multis*, Sez. I, 25th of January of 2007, n. 407, *Dalmine S.p.A. c/Commissione*, in www.eur-lex.europa.eu, 2007; in terms, Inferior Court U.E., Sez. V, 14th of April of 2011, n. 461, *Visa Europe and Visa International Service c/Commissione*, iv, 2012; Sez. II, 12th of May of 2009, n. 410, *Ju.He., S.L. c/U.A.M.I.*, iv, 2009.

²⁰ On this point, W. GASPARRI, *Il punto logico di partenza. Modelli contrattuali, modelli autoritativi e identità disciplinare nella dogmatica dell'espropriazione per pubblica utilità*, Milan, 2004, 100 et seq.; the Author analyzes the considerations made by Giovanni Manna in 1876.

²¹ By E. FREDIANI, *Partecipazione procedimentale, contraddittorio e comunicazione: dal deposito di memorie scritte e documenti al "preavviso di rigetto"*, in *Dir. amm.*, 2005, 1013-1015.

²² This appeared as “an act which defines in the contradictory of every subjects [...] the public utility of the work”. So “the judgment of the public administration about this profile” was not “esclusive nor unretractable” being conceded to everyone “the authority to debate the title of the real public necessity” (W. GASPARRI, *op. cit.* , 81-82).

exchange and on the negotiation between state actor and private actor²³; this was the only way to realize the equalization between citizen and administration, denying the privileges of the second one and establishing the relationship between authority and liberty –*id est* between public interest and private interest – as an “equal relationship” inspired from the “principle of the civil equality”²⁴.

This kind of planning will be criticized by the later doctrine, which underlines that is difficult to talk about “will”, because the total absence of consent of the subject is so important that we can call into question the entire construction of civil mold²⁵. This can be a further confirmation of the inexistence of the “demarchy” delineated by Feliciano Benvenuti in the matter of administrative procedure²⁶. Herein, however, it is appropriate mention the civil doctrine in the field of compulsory purchase just to underline how some disposition of the law n. 2359 of 1865 (especially the articles 4, 5 and 17) confirm the will

²³ From this setting can derive, a real “exclusion of the possibility, for the administration, to detract the right on a private asset” (W. GASPARRI, *op. cit.*, 107), so the compulsory purchase can be seen as a purchase form according to the forced sale.

²⁴ W.GASPARRI, *op. cit.*, 3 et seq.

²⁵ See theoretical reconstruction about coercive transfers edited by Salvatore Pugliatti and Enzo Silvestri (this modernity has been underlined by N. SAITTA, *I trasferimenti “non volontari” da Salvatore Pugliatti a Enzo Silvestri...*, in *Scritti per E. Silvestri*, Milan, 1992, 487 et seq.). In the category of coercive transfers, in which “are included all the transfer of rights that are executed without the determination and the participation of the owner or of a solicitor”, must be integrated the eminent domains for public utility or for public interest: E. SILVESTRI, *Trasferimenti coattivi*, in *Enc. dir.*, XLIV, Milan, 1992, 979 and 981.

²⁶ See F. SAITTA, *Il procedimento amministrativo “paritario” nel pensiero di Feliciano Benvenuti*, in *Amministrare*, 2011, 457 et seq.. See also F. SALVIA, *Una cittadinanza asimmetrica (tra suppliche privilegi e garanzie)*, in *Studi in onore di A. Romano*, cit., II, 851, where he excludes that the new openings of the procedures and the expansion of the consensual models made the administration more transparent and receptive to the fulfillment of the common interests.

of the legislator to consider the compulsory purchase as a typically “controversy” process²⁷. Furthermore, the decline of the negotiation nature of the eminent domain, ergo the identification of a superior authority which can acquire without the consent of the subject his property right, caused the definitive promotion, in the XX century, of the eminent domain process²⁸. This happened even in the countries in which was in force the inviolability of property right such as England²⁹, which was obliged to accept the invasive presence of public power in citizens’ life. As consequence, it developed an organic discipline of the procedure guarantees³⁰. In our research we will try to establish, examining

²⁷ See E. CASSETTA – G. GARRONE, *Espropriazione per pubblico interesse*, in *Enc. giur.*, XIII, Rome, 1989, 3.

²⁸ G.M. MARENGHI, *Le garanzie nei procedimenti espropriativi*, Turin, 2010, 61 et seq.

²⁹ See J.E. CULLINGWORTH, *Town and Country planning in Britain*, London, 1952, 82 et seq.

³⁰ The doctrine states that “the English case law, for a long time, offers the best opportunities of no jurisdictional defense against the illegitimate activity of the public administration” (see A. POLICE, *La tutela del privato nel diritto urbanistico inglese: le garanzie del procedimento* in *Riv. giur. urb.*, 1991, 661; see also M.P. CHITI, *L’affermazione della giustizia amministrativa in Inghilterra. Dalla Common Law al Droit Administratif?*, Milan, 1992). In fact, analyzing the evolution of the English norm, we can note that the «compulsory purchase», highlighting the participation profile, has reinforced the importance of the contribution of the citizen (on this point T. PROSSER, *Democratisation, accountability and institutional desing: reflection on Public Law*, in *Law, Legitimacy and the Constitution*, London, 1985), preferring an equal model in which the participation of the subject has a real influence on the decision of the public administration (about the involvement of the private subject on the decision, see G. HART, *The value of the Inquiries System*, in *Journal plan. env. law*, 1997). The reinforcement of the instruments of control on the administration’s decisions has been established by the English system in order to guarantee the respect of the «fairness» principle. This last has been functioning, within the «compulsory purchase», for the reception of the «obligation to listen to the subjects’ opinions, grouping fundamental elements not just for the administration’s decision but also for the re-examination of its legitimacy». (S. CASSESE, *La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato*, in *Riv. trim. dir. pubbl.*, 2007, 13 et seq.; more in general, on the application of the due process in England, cfr. D.J. GALLIGAN, *Due Process and Fair Procedures*, Oxford, 1996).

the “real modalities of the process of eminent domain”³¹, if the above-mentioned process can be considered “due”.

2. THE PROCESS OF EMINENT DOMAIN IN THE LIGHT OF THE LAW N. 241 OF 1990: OPEN UP NEW PERSPECTIVES

The participation of private subjects to the process of eminent domain (they can have access to the acts and they can also present observation) has been guaranteed by the fundamental law of 1865, and later by the law of 1971. More generally, we can say that in continental Europe, the process of eminent domain was one of the first processes to be disciplined by a law with the guarantee of a preliminary cross-examination to the owner³². The increasing spread of the model of the declaration of public utility, contained in several statutes, caused the deprivation of participatory guarantees of the owners. These guarantees were anticipated by the law of 1971³³: according to a decision of the plenary session of the Council of State the fulfillment of the guarantees (articles 10 and 11) of the “housing bill” was considered deferred to a further moment to the acceptance of the project, but previous to the adoption of the process of eminent domain³⁴. Such planning seemed to be arguable, because the delay of these compliances and the emanation of the decree of emergency occupation, deprived them of any meaning and practical interest. Actually, the subjects

³¹ See A. ZITO, *op. cit.*, 509.

³² M. D’ALBERTI, ‘La visione’ e ‘la voce’: le garanzie di partecipazione ai procedimenti amministrativi, in *Riv. trim. dir. pubbl.*, 2000, 30.

³³ R. CARANTA, *Espropriazione per pubblica utilità*, in *Enc. dir.*, Agg., V, Milan, 2001, 410.

³⁴ Dec. 18th of June 1986, n. 6, in *Giur. it.*, 1987, III, 1, 20, according to which, the approval of the public work project (that follows art. 1 3rd January 1971 which states that it is equivalent to the declaration of public utility, of emergency and it is not deferrable), is legitimate even if it is not preceded by the formalities of guarantee of artt. 10 and 11 22nd October 1971, n. 865. We should add, also, that these formalities must be employed during the process of eminent domain.

were deprived of the authority to influence the administrative choice before the material acquisition and the irreversible transformation of the asset (it is important to remember that all this meant the cancellation of the property right of the private subject and the acquisition of the property of the builder institution)³⁵. The jurisprudence was in agreement with the indications of the plenary session of the Council of State and these indications were been reiterated some months after the same assembly³⁶, but the question has been re-opened with the arrival of the law n. 241 of 1990, which induced the accurate doctrine to review the dispositions previously in forced in the field of process of eminent domain (the articles 10 and 11 of the law n. 865 of 1971) in the light of the new general discipline contained in Chapter III of the law on administrative procedure. All this was made to conclude that the thesis of the Council of State must be considered obsolete, and that the activation of the cross-examination, with the presence of the private subjects before of the approval of the project valid as declaration of public utility and before the adoption of the emergency occupation procedure, must be considered due “because they can have the right to uphold

³⁵ F. SAITTA, *Esigenze di celerità e contraddittorio in tema di occupazione d'urgenza*, in *In iure praesentia*, 1986, 225 et seq.; similar critical considerations on the decision of the plenary session of the Council of State were made by A. ROMANO TASSONE, *Dichiarazione di pubblico interesse e contraddittorio amministrativo*, ibidem, 220 et seq.. Before, another author was contrary to the delay of the contradictory: P. VIRGA, *Dichiarazione di pubblica utilità implicita e contraddittorio con gli espropriandi*, in *Giur. it.*, 1983, IV, 97 et seq.. See also G. CORREALE, *Procedimenti ablatori reali accelerati e partecipazione del privato*, in *Riv. giur. urb.*, 1987, 199 et seq.. On this point see also G.F. CARTEI, *Procedimento di espropriazione ed osservazioni degli espropriandi*, in *Foro amm.*, 1988, 2711 et seq.. D. SORACE, *Espropriazione per pubblica utilità*, in *Dig. disc. pubbl.*, VI, Turin, 1991, 191, according to the author the participation in the procedure of development of the city plans could have been considered sufficient to satisfy the necessities of the participation in the procedure of declaration of public utility, with the exception of the hypothesis, in which the approval of the project of a public work is equalized to a variation of a city plan.

³⁶ Cfr. Ad. plen., 9th of October 1986, n. 10 (in *Foro amm.*, 1986, 2057), which reiterates that the implementation of the compliances of artt 10 and 11 22nd October 1971, is not a necessary preliminary for the approval of the project of public work, even if it acts as declaration of public utility. followed by Sez. IV, 29th of December 1989, n. 994 (in *Cons. Stato*, 1989, I, 1517).

their rights when the situation is still reversible”³⁷. Indeed, according to the agreement between procedural guarantees introduced by the law n. 241 of 1990 and the laws previously in force, an intense debate has been open, and even if herein we can not talk about this³⁸, the better solution was: the rules of the administrative process have a supplementary function of the circumstances already regulated by previous procedures. In this way the “regulation of the law n. 241 of 1990 can not be described as unusable and, instead, it will integrate the regulation articulated by the sector legislation”³⁹. The law of the administrative process was been configured as a law which establish minimal guarantees, so “it constitutes a ‘least common denominator’ of the regulation of the agreements in question, offering guarantees to subjects involved in the procedures”: the logical consequence of this is that the conflict between non written general principles and rules established by the law of the process come to an end stating that the guarantees offered by this law “are an essential platform on which the guarantees already guaranteed by the general principles and by the single sector law are added”⁴⁰.

³⁷ See G. CARUSO, *Nuove prospettive in tema di partecipazione nei procedimenti espropriativi dopo la legge n. 241 del 1990*, in *Foro amm.*, 1991, 1308, et seq., spec. 1319- 1320.

³⁸ References in T. TESSARO, *Comunicazione individuale, normativa sul procedimento e procedimenti già ‘normati’: appunti per una riflessione*, in *Foro amm.*, 1995, 1644 et seq.

³⁹ See A. CORPACI, *La comunicazione dell’avvio del procedimento alla luce dei primi riscontri giurisprudenziali*, in *Reg.*, 1994, 315.

⁴⁰ G. MORBIDELLI, *Il procedimento amministrativo*, in *Diritto amministrativo*, edited by L. Mazzaroli, G. Pericu, A. Romano, F.A. Roversi Monaco e F.G. Scoca, Bologna, 1993, 1002. On this point D. SORACE, *op. cit.*, 192, stated, before the approval of the law n. 241 of 1990, that “even if the presence of the subjects is essential, this does not mean that the direct process is always necessary to declare the public utility of a work [...] but, instead, we should insert participative moments within the other process”.

3. THE «DUE» PROCESS OF EMINENT DOMAIN IN THE PLENARY

SESSION OF THE COUNCIL OF STATE

The new perspectives, opened by the law of the process, have been received by the jurisprudence and, after some valiant declarations of the administrative judges of first instance⁴¹ and the solicitations of the doctrine to analyze again the problems⁴², the question has been re-opened in the plenary session of the Council of State. This last, with a decision, stated that the rules of the law n. 241 of 1990 of participation to the process are applied also to the processes of eminent domain, especially to the which ones that end with a declaration of public utility. Instead, it is not necessary to communicate the start of the emergency occupation process; “because the due process must exist in the field of the process turned into the declaration of public utility which conserves moments of discretionary choices, but not in the field of the emergency occupation, with mere actuations of the measures”⁴³.

⁴¹ See T.A.R. Calabria- Catanzaro, 3rd of May 1998, n. 160, in *Giust. civ.*, 1988, 3305, with note of S. DE SANTIS, *Dichiarazione di pubblica utilità implicita, formalità garantistiche e partecipazione al procedimento amministrativo*.

⁴² See M.A. BAZZANI, *In tema di garanzie di partecipazione al procedimento espropriativo*, in *Urb. e app.*, 1997, 613 et seq.

⁴³ Dec. 15th of September 1999, n. 14, in *Giur. it.*, 2000, 412, with note of S. VERZARO, *Il principio del “giusto procedimento” nelle procedure di esproprio*; in *Foro it.*, 2000, III, 26, with note of R. FERRARA, *Procedimento amministrativo e partecipazione: appunti preliminari*, in which the author states that «the guarantees system [...] introduced by the law n. 241 of 1990 represents a kind of ‘core’ of principles. These principles can be just increased, in order to enhance the ‘rights’ of information and participation of citizens»; in *Dir. proc. amm.*, 2000, 775, with note of L. GILI, *Partecipazione al procedimento espropriativo: ovvero delle garanzie e della celerità*. This very important decision starts from the following consideration: «art. 7 7th August 1990 n. 241 establishes the obligation to communicate the beginning of the administrative process to the private subjects who suffer the

Some months after, besides, the same plenary session of the Council of State states that the illegitimacy of the declaration of public utility for the violation of the rules of the participation “determines the overturning of the emergency occupation for derived illegitimacy”⁴⁴.

Basically, someone thought that it was obvious⁴⁵ saying that a participation postponed to the approval phase of the project is quite useless if we want to recognize to the citizens the possibility to interfere on the administration’s choices. It took several years to recognize this right to the citizens.

This decision, besides, did not satisfy everybody⁴⁶. In fact, the institutional defenders of the public administration complained about the extension of the time of realization of the public works due to the anticipation of the guarantees of the articles 10

final measure, and this is an important element of civil requalification, which represents the introduction of the ‘democraticity’ of the decisions and the accessibility of the administrative documents. The adequacy of the preliminary activity is valued positively or negatively if the citizens have the opportunity to contradict or not». From here the affirmation that «the obligation of the Public Administration to communicate the beginning of the administrative process (art. 7 n. 241/1990) exists even in the case in which the declaration of public utility is implicit in the approval of the project of public work ».

⁴⁴ Dec. 24th of January 2000, n. 2 (in *Urb. e app.*, 2000, 271, with note of F. CARINGELLA, *Al vaglio del Consiglio di Stato i rapporti tra legge 241/90 e proroga della dichiarazione di pubblica utilità*), which reiterates that the obligation to communicate the beginning of the administrative process (art. 7 n. 241/1990) exists even in the case in which the declaration of public utility is implicit in the approval of the project of public work.

⁴⁵ See L. GILL, *op. cit.*, 791.

⁴⁶ S. LICCIARDELLO, *Profili giuridici dell’uso del territorio*, Turin, 2003, 116: “A progress of the organization towards a new ‘democracy’ based on the administration and not on the other poker of the State. It is built on the equal comparison between administration and citizen”.

and 11 of the law n. 865 of 1971⁴⁷; however, someone else observed –anticipating the legislator’s choices⁴⁸ - that if we want to extend the forms of guarantees of the citizen, the moment of the beginning of the cross-examination must be anticipated to the phase of identification of the area in which the public work will rise, ergo to the phase of approval of the preliminary project⁴⁹.

The following jurisprudence has received the indications of the plenary session of the Council of State⁵⁰, and these indications, even if with known substantial traits⁵¹, have

⁴⁷ See M. BORGIO, *Il “giusto procedimento espropriativo”. Prime riflessioni sulla sentenza 15 settembre 1999 n.14 dell’Adunanza plenaria del Consiglio di Stato*, in www.lexitalia.it, n. 9/1999.

⁴⁸ See *infra*, § 4.

⁴⁹ See M. ALESIO, *Il giusto procedimento espropriativo secondo gli orientamenti dell’Adunanza plenaria (nota a C.d.S., Ad. Plen., n. 14/1999 e n. 2/2000)*, in www.lexitalia.it, n. 2/2000. The author made critical considerations referring to the guarantees of participation and their inapplicability to the emergency occupation process. He states, besides, that on the contrary of the affirmation of the plenary session of the Council of State, also within the emergency occupation process do exist moments of discretionary choice.

⁵⁰ See D. PALLOTTINO, *La comunicazione di avvio del procedimento nella dichiarazione di pubblica utilità implicita tra profili formali e sostanziali. Un nuovo orientamento del giudice amministrativo?*, in *Foro amm. – TAR*, 2002, 1093 et seq.; R. LEONARDI, *Il principio della partecipazione al procedimento espropriativo tra esigenze di celerità ed esigenze di garanzia*, in *Riv. giur. edil.*, 2002, 447 et seq.; M. LONGO, *La dichiarazione implicita di pubblica utilità e l’obbligo di comunicazione di avvio del procedimento*, in *Foro amm. – CdS*, 2002, 3221 et seq.

⁵¹ See Cons. St., Sez. VI, 20th of June 2003, n. 3684 (in *Foro amm. – CdS*, 2003, 3060, with note of I.M.G. IMPASTATO, *Vizi formali, procedimento e processo amministrativo: il Consiglio di Stato alle prese con la (troppo) “sottile linea rossa” tra semplificazione partecipata e partecipazione semplificata*), according to this the author states that the neglected communication of the beginning of the compulsory purchase process does not have strong consequences if the private subject is already aware of the process, basically he could have not procured any useful contribution; see also Sez. IV, 29th of October 2001, n. 5628, in www.giustamm.it, n. 10/2001; T.A.R. Umbria, 13th of February 2002, n. 88, in *Comuni d’Italia*, 2002, 577; T.A.R. Campania- Salerno, Sez. I, 6th of July 2005, n. 1105, in *Riv. giur. edil.*, 2006, 653, with note of C. PAPETTI, *Note in tema di servitù pubbliche: legittimità della riedizione dell’attività amministrativa come sanatoria di un’occupazione illegittima, natura ed*

allowed to move out the following conviction: the loss of guarantees of participation of the private subject “can be compensated through an attractive cross-examination with the presence of the same subject in the moment of the approval of the urban instruments”⁵².

The following sentences have reiterated the same concept of plenary session of the Council of State⁵³, but they have specified that:

applicabilità dei termini ex art. 13 l. n. 2359 del 1865, compatibilità dell’occupazione acquisitiva con i diritti reali su cosa altrui, comunicazione di avvio del procedimento; T.A.R. Campania-Napoli, Sez. V, 2th of September 2008, n. 9983, in www.giustamm.it, n. 9/2008; Cons. St., Sez. IV, 3th of March 2009, n. 1207, *ivi*, n. 3/2009.

⁵² See G. BACOSI – A. PICARDI, *La dichiarazione di pubblica utilità tra termini perentori e “canzonatori”*. *Spunti sull’esercizio dell’interesse legittimo*, in *Foro amm. - CdS*, 2003, 3737, which observe how this was proved by the law n. 241/1990. This law, in the art. 13, excludes just the planner acts. In the jurisprudence, “in the compulsory purchase processes the town planning does not complete the object of the juridical situations”, Cons. St., Ad. Plen., 26th of August 1991, n. 6, in *Cons. Stato*, 1991, I, 1089.

⁵³ See, i.e., Cons. St., Sez. IV, 28th of January 2000, n. 413 and 7th of July 2000, n. 3817, in *Foro amm.*, 2000, 58 and in *Urb. e app.*, 2000, 1146; Sez. V, 10th of July 2000, n. 3850, in *Foro amm.*, 2000, 2647; T.A.R. Campania-Napoli, Sez. V, 13th of March 2001, n. 1098 and 26th of March 2001, n. 1302, in *Comuni d’Italia*, 2001, 777 and in www.giustamm.it, n. 4/2001; Cons. St., Sez. IV, 12th of April 2001, n. 2278 and 14th of June 2001, n. 3169, in *Riv. giur. edil.*, 2001, I, 681 and in www.giustamm.it, n. 7/2001; T.A.R. Campania-Napoli, Sez. V, 17th of December 2001, n. 5475 e 11th of June 2002, n. 3386, in *Foro amm.*, 2001, 3306 and in www.giustamm.it, n. 6/2002; T.A.R. Emilia Romagna-Bologna, Sez. I, 21th of August 2002, n. 1092, *ivi*, n. 9/2002; Cons. Giust. Amm. Reg. sic., 27th of September 2002, n. 579, in *Foro amm. - CdS*, 2002, 2198; Cons. St., Sez. II, 4th of December 2002, n. 636, in www.giustamm.it, n. 2/2003; T.A.R. Campania-Salerno, Sez. I, 24th of December 2002, n. 2420, *ivi*, n. 12/2002; Cons. Giust. Amm. Reg. sic., 20th of January 2003, n. 25, in *Foro amm. - CdS*, 2003, 289; Cons. St., Sez. VI, 3rd of September 2003, n. 4897, *ibidem*, 2615; T.A.R. Lazio-Roma, Sez. II, 19th of January 2004, n. 357, in www.giustamm.it, n. 2/2004; Cons. St., Sez. VI, 8th of March 2004, n. 1077, in *Vita not.*, 2004, 210; T.A.R. Lombardia-Milano, Sez. II, 2nd of February 2005, n. 197, *ivi*, n. 2/2005; T.A.R. Calabria-Catanzaro, Sez. I, 21st of November 2005, n. 2115 e 30th of January 2006, n. 1500, in www.giustizia-amministrativa.it; Cons. St., Sez. IV, 30th of December 2006, n. 8261, *ibidem*; T.A.R. Lombardia-Milano, Sez. II, 29th of November 2007, n. 6524, *ibidem*; Cons. St., Sez. IV, 29th of January 2008, n. 258 and 15th of May 2008, n. 2246, *ibidem* and in www.giustamm.it, n. 7/2008; Cass., Sez. un., 27th of February 2008, n. 5080, in *CED Cassazione*, 2008; T.A.R. Campania-Napoli, Sez. V, 10th of June 2009, n. 3194, in www.giustizia-amministrativa.it; Cons. St., Sez. IV, 4th

- the communication of the beginning of the process is not necessary in the case of approval of the preliminary project, but it is necessary only if the definitive projects have been approved. This last is connected implicitly to the declaration of public utility (*ex art. 14, clause 13, of the law n. 109 of 1994, then-current*)⁵⁴;

- it is necessary also in case of renewal of the declaration of public utility⁵⁵;

- if, in the phase related to the declaration of public utility, the process was incorrectly developed, it is necessary the previous communication of the beginning of the process useful also for the emanation of the occupation process⁵⁶;

- the necessity of the guarantees of participation is valid also if the declaration of public utility is a consequence of the approval of a project by a subject that operates as a limited company with private right acts⁵⁷.

of April 2011, n. 2107, in www.giustamm.it, n. 4/2001; T.A.R. Sicilia-Catania, Sez. II, 19th of October 2012, n. 2466, in *Giurisd. amm.*, 2012, II, 1721; Cons. St., Sez. IV, 15th of July 2013, n. 3861, in www.lexitalia.it, n. 7-8/2013.

⁵⁴ Cons. St., Sez. IV, 14th of December 2002, n. 6917, in www.giustamm.it, n. 12/2002.

⁵⁵ T.A.R. Campania-Napoli, Sez. V, 29th of January 2004, n. 851, in www.giustamm.it, n. 2/2004.

⁵⁶ Cons. St., Sez. IV, 4th of December 2000, n. 6487, in *Riv. giur. edil.*, 2001, I, 486; Cons. Giust. Amm. Reg. sic., 22nd of December 1999, n. 658, in *Comuni d'Italia*, 2000, 918.

⁵⁷ Cons. St., Sez. VI, 25th of March 2004, n. 1617, in www.giustizia-amministrativa.it, see comments edited by: R. LEONARDI, *Il principio della partecipazione e la dichiarazione di p.u., indifferibilità ed urgenza mediante atto di diritto privato di una S.p.A.: il Consiglio di Stato riafferma il primato delle garanzie sostanziali previste dalla l. n. 241 del 1990*, in *Riv. giur. edil.*, 2004, 1018 ss.; P. PATATINI, *Le garanzie partecipative del provato a fronte di un atto di diritto comune*, in *Serv. pubbl. e app.*, 2004, 558 ss.; N. PECCHIOLI, *La delibera di approvazione del progetto di un'opera da parte di Ferrovie S.p.A.: effetti preordinati all'esproprio e soggezione alle garanzie di partecipazione procedimentale*, in www.giustamm.it, n. 3/2004.

4. THE «DUE» PROCESS OF EMINENT DOMAIN IN THE UNIQUE TEXT OF 2001 AND IN THE LAST DECADE OF CASE LAW

This was the situation at the moment when the Unique Text of 2001 entered into force.

In relation to the last, the first consideration that we should make is that art. 2, classified as “principle of legality of the administrative action”, stating that “ eminent domain can be disposed just in those cases ordered by laws and regulations” (clause 1), and adding that “the procedures of this text are inspired from the economic principles, efficacy principles, effectiveness principles and principles of simplification of administrative action” (clause 2), does not mention expressly the due process principle.

However, we can fill this gap if we consider that “the due process must be attracted within the principle of legality, as necessary completion”⁵⁸. Now we should verify how the Unique Text (during its editing the guarantees of participation have been mitigated as much as possible⁵⁹) has absorbed the indications of jurisprudence⁶⁰ applying the due

⁵⁸ I.M. MARINO, *Principio di legalità e procedimenti ablativi*, in *Foro amm. – TAR*, 2010, 734.

⁵⁹ It is a sort of physiological antinomy: in this point see also: F. SAIITA, *Garanzie partecipative ed «ansia» di provvedere* (Intervention to the Conference: «Il ruolo dei privati nelle nuove amministrazioni: verso l'emersione di una «cittadinanza amministrativa»?») - Turin, 14th-15th of June 2002), in *Nuove autonomie*, 2002, 319 ss.

process to the single phases of the process. Actually, the main news of 2001 concerns the fact that the establishment of the participation to the compulsory purchase process have received “a specific discipline in order to assure the total observance within every single phase of the complex activity of eminent domain, because all these phases have the same aim”⁶¹.

a) the creation of the predestined restriction of the eminent domain process

The analysis comes from art. 11, titled “The participation of the subjects”, that ratifies the obligation to communicate the beginning of the procedure to the owner of the asset on which the eminent domain will be officiated (clause 1).

This represents a great news, if we consider that before the year 2001 just a part of jurisprudence had recognized the applicability of art. 7 of the law n. 241 of 1990, independently from the declaration of public utility because the modification was registered anyway in an eminent domain process⁶². The well-known constitutional jurisprudence of eminent domain restrictions has been valued and the private subject is allowed to object also in the phase of identification of the area subject to the eminent domain⁶³. The

⁶⁰ There is to say that the Unique text approved with d.p.r. n. 327/2001 “owes very much to the sentence of the plenary session of the Council of State n. 14 of 1999 in the field of participation”: A. DI MARIO, *La partecipazione al procedimento di imposizione del vincolo espropriativo*, in *Urb. e app.*, 2004, 873.

⁶¹ S. GATTO COSTANTINO – P. SAVASTA, *Manuale dell’urbanistica, dell’edilizia e dell’espropriazione*, 2nd ed., Rome, 2012, 920-922.

⁶² See A. DI MARIO, *op. cit.*, 874.

⁶³ Suggestions of M. ALESIO, *op. cit.*. Jurisprudence is now totally aware of the fact that the communication of the beginning of the posterior process to the decision of the Council about the adoption of a variation of the general

authority to detract a private asset for reason of public utility is employed with the predestined restriction for the eminent domain imposed during the town planning, and, the eminent domain process has acquired a deceptive relevance of actuation⁶⁴.

The communication of the beginning of the process can be realized “through public notice” when the subjects are more than fifty (clause 2)⁶⁵; in this case, the choice of the collective communication does not require a specific motivation because it is clear that the individual communication would be excessively onerous⁶⁶. The notice must be posted on the Communes’ registers where the assets are located, on a national newspaper and on a local newspaper⁶⁷. With any kind of communication, the notice must be apt to reach the goal of the real awareness, in order to allow the subject to opt for the participation in the process⁶⁸. Just the owner of the asset (indicated in the cadastral register) must be

town planning is useless in itself : T.A.R. Veneto, Sez. II, 14th of February 2013, n. 211, in www.giustizia-amministrativa.it; T.A.R. Calabria-Catanzaro, Sez. I, 15th of November 2011, n. 1370, *ibidem*; T.A.R. Abruzzo-L’Aquila, 15th of March 2005, n. 109, in *Corr. merito*, 2005, 728 e in www.giustamm.it, n. 3/2005.

⁶⁴ L. MARUOTTI, *I rapporti tra la pianificazione urbanistica ed il procedimento espropriativo, nella giurisprudenza costituzionale e nel testo unico sugli espropri*, in *Il diritto urbanistico in 50 anni di giurisprudenza della Corte costituzionale* (Acts of the Conference of Naples, 12th-13th of May 2006), edited by M.A. Sandulli, M.R. Spasiano and P. Stella Richter, Naples, 2007, 114.

⁶⁵ On this point, *ex multis*, Cons. St., Sez. V, 5th of October 2011, n. 5453, in www.giustizia-amministrativa.it; before, Sez. VI, 8th of March 2004, n. 1077, in *Dir. e giust.*, 2004, 42, with note of E. BELISARIO, *E alla fine il diritto di partecipazione prevalse sulle esigenze dell’Enel*.

⁶⁶ T.S.A.P., 29th of November 2012, n. 156, in *Giurisd. amm.*, 2012, III, 891.

⁶⁷ Posting the notice just on a single newspaper is sufficient but the newspaper must have a national and a local circulation, T.A.R. Lazio-Roma, Sez. II *ter*, 7th of February 2011, n. 1162, in www.giustizia-amministrativa.it; Sez. I, 14th of April 2009, n. 3789, in www.giustamm.it, n. 4/2009.

⁶⁸ Cons. St., Sez. IV, 15th of April 2013, n. 2070, 9th of February 2012, n. 691 e 27th of January 2012, nn. 407 e 408, in www.giustizia-amministrativa.it; Sez. VI, 13th of June 2011, n. 3561, *ibidem*, that considered a form of notice insufficient and not apt to describe appropriately which grounds are involved in the process because they

informed⁶⁹, therefore the omitted communication to the real owner who is not indicated in the cadastral register cannot be invalidating, but at the most, it can impede the phase of the eventual appeal⁷⁰. The recent jurisprudence states that the dispositions of the article 11 must be interpreted in relation to the purposes for which they have been considered by the legislator. It has judged, besides, as non-influential the fact that the communication has not been posted also on the web page of the administration and/ or they have been posted following the instructions of the clause 2 of the article 11 albeit the number of the owners was less than fifty⁷¹.

The participation is totally excluded for the approval of one of the preliminary projects of the infrastructure and of the productive interventions included in the art. 1, clause 1, of the “objective law” (now in the code of public contracts). In fact, they are considered strategic or relevant to relaunch the productive activities (clause 3)⁷².

The notice of the beginning of the process is, obviously, aimed at the expression of “observations that will be evaluated by the authority which carries out the eminent domain” (clause 3)⁷³.

lack in the indications of the cadastral units involved in the process of approval of the project and in the list of the companies that carry out the eminent domains.

⁶⁹ T.A.R. Abruzzo-Pescara, Sez. I, 13th of September 2012, n. 386, in www.giustizia-amministrativa.it.

⁷⁰ T.A.R. Calabria-Catanzaro, Sez. II, 3rd of May 2011, n. 590, in www.giustizia-amministrativa.it; T.A.R. Piemonte, Sez. II, 15th of April 2011, nn. 378 e 380, *ibidem*; T.A.R. Campania-Salerno, Sez. II, 21st of March 2011, n. 500, *ibidem*.

⁷¹ See Cons. St., Sez. IV, 29th of August 2013, n. 4315, in www.lexitalia.it, n. 9/2013.

⁷² T.A.R. Puglia-Lecce, Sez. I, 14th of April 2012, n. 663, in www.giustizia-amministrativa.it.

⁷³ «According to the transparency rules and the good management rules, the Administration must decree why the area is appropriate for the public use, in order to go on with the declaration of public utility and with the eminent domain».

Jurisprudence have specified that (as before in the light of the art. 14, clause 13, of the law n. 109 of 1994, now in the art. 12, clause 1, a), of the d.p.r. n.327 of 2001) the communication of the beginning of the process must precede the approval of the definitive project because this last is implicitly connected to the declaration of public utility⁷⁴.

b) editing and approval of the project of public work or of public utility

The participation of the private subject is allowed also in the approval of the definitive project, which is one of the project with which can be declared the public utility of the area.

During the redaction of the project, the art. 15 of the Unique Text, detaching from the articles 7 and 8 of the fundamental law of 1865, takes in consideration the participative necessities of the owner⁷⁵.

To this last and to the real person who uses the area must be notified the request to enter into the area, so they can present observations; the authority must consider these observation (clause 2).

domain»: L. MARUOTTI, *Art. 11*, in *L'espropriazione per pubblica utilità*, edited by F. Caringella, R. De Nictolis, G. De Marzo and L. Maruotti, 2nd ed., Milan, 2003, 142. In facts, the participation does have sense only if the administration that carries out the eminent domain takes in consideration with an adequate motivation the observations of the subjects: A. DI MARIO, *op. cit.*, 876. See, but, T.A.R. Umbria, 14th of February 2008, n. 78, in www.giustamm.it, n. 4/2008, according to the art. 21-*octies*, clause 2, l. n. 241/1990, the art. 11 must be considered not broken when the proposed and not evacuate observations have been proposed again, with a new notice, *ex art.* 16, and rejected by the director (with a note for the Commune)

⁷⁴ See, *ex plurimis*, T.A.R. Molise, Sez. I, 27th of December 2012, n. 785, in www.giustizia-amministrativa.it; T.A.R. Puglia-Bari, Sez. I, 6th of December 2012, n. 2064, *ibidem*; T.A.R. Campania-Salerno, Sez. II, 3rd of December 2010, n. 13087, *ibidem*.

⁷⁵ L. MARUOTTI, *Art. 15*, in *L'espropriazione per pubblica utilità*, *cit.*, 173.

They can also be present through a trusted person (clause 4).

The following art. 16 regulates the participation to the approval process of the definitive project, and it establishes besides, that the notice is communicated to the owner⁷⁶ with the same modalities of the art. 11 with reference to the obligation process of the eminent domain restriction⁷⁷.

This disposition is “characterized by a substantial review of the rules contained in the fundamental law and by the valorization of the necessities of participation”. The jurisprudence has noticed the necessity to establish the cross-examination before the phase of approval of the project, in order to improve the agreements between the authority and the owner, who can propose alternative solutions⁷⁸. From a certain point of view, this is the most important phase of participation because now “there is a project intended as a proposal , so it can be modifiable”. In this way the private subject has the possibility to influence concretely the choices of the administration⁷⁹.

⁷⁶ There is to say, “just to the owner of the area subject to the eminent domain”: T.A.R. Puglia-Bari, Sez. III, 17th of December 2008, n. 2891, in *Riv. giur. edil.*, 2009, 553.

⁷⁷ As in the case of the art. 11, the omitted communication of the beginning of the approval process of the definitive project to the real owner, different from the owner registered in the cadastral register, is not invalidating and it does not justify a tardive defense. In fact, the private subject has the obligation to verify the cadastral correspondences and the real juridical situation of the asset subject to eminent domain: Cons. St., Sez. IV, 27th of January 2012, n. 409, in www.giustizia-amministrativa.it, according to which, the cadastral owner who receives the notification, has the obligation to inform the real owner; see also T.A.R. Campania-Salerno, Sez. II, 10th of May 2010, n. 5912, *ibidem*; T.A.R. Lazio-Roma, Sez. I ter, 14th of April 2009, n. 3788, *ibidem*; T.A.R. Sicilia-Catania, Sez. III, 27th of March 2007, n. 540, *ibidem*; Cons. St., Sez. IV, 30th of November 2006, n. 7014, in *Giur. it.*, 2007, 2073.

⁷⁸ L. MARUOTTI, *Art. 16*, in *L'espropriazione per pubblica utilità*, cit., 180-183.

⁷⁹ S. GATTO COSTANTINO – P. SAVASTA, *op. cit.*, 925.

The omission of this communication (which cannot be absorbed by the communication of the beginning of the process of imposition of the eminent domain restriction, regulated by the previous art. 11⁸⁰, neither by the communication of the beginning of the process for the declaration of public utility of the area, ex art. 12, clause 1⁸¹, neither by the act which approved the definitive project, regulated by the art. 17⁸²), causes the illegitimacy of the followings acts of the process⁸³, included the eminent domain decree⁸⁴. In order to avoid the cancellation of the acts, under the art. 21-*octies*, clause 2, of the law n. 241 of 1990, it is necessary that the administration prove during the trial, that these acts, for their restricted nature, could not be different from those emanated⁸⁵.

Also in this case, the owner and every other interested person, can formulate observations. Before this was permitted until the approval of the project, but now, in the current text of the art. 16, clause 10, resulting from the modifications of the

⁸⁰ A. DI MARIO, *op. cit.*, 882. There is to say “it must have a double obligation of communication”, T.A.R. Calabria-Catanzaro, Sez. I, 15th of November 2011, n. 1370 and 5th of October 2009, n. 1016, in www.giustizia-amministrativa.it; T.A.R. Puglia-Bari, Sez. III, 24th of June 2010, n. 2665, *ibidem*.

⁸¹ T.A.R. Toscana, Sez. III, 27th of November 2006, n. 6048, in www.giustamm.it, n. 12/2006.

⁸² T.A.R. Lazio-Latina, Sez. I, 9th of February 2007, n. 113, in www.giustizia-amministrativa.it.

⁸³ Cons. St., Sez. III, 4th of June 2013, n. 3048, in *Guida al diritto*, 2013, 26, 85, with note of D. PONTE, *Detti i criteri per quantificare il risarcimento dopo l'annullamento dell'esproprio illegittimo*; before, T.A.R. Toscana, Sez. III, 22th of April 2005, n. 1813, in www.giustamm.it, n. 5/2005, according to which, in lack of the communication ex art. 16 d.p.r. n. 327/2001, the eventual innovations of the known project edited during the definitive planning phase result illegitimate when they take distance from the previous planning hypothesis; T.A.R. Calabria-Catanzaro, Sez. I, 17th of September 2004, n. 1819, in www.giustamm.it, n. 9/2004.

⁸⁴ T.A.R. Veneto, Sez. II, 14th of February 2013, n. 211, in www.giustizia-amministrativa.it; T.A.R. Calabria-Reggio Calabria, 22nd of March 2007, n. 243, in www.giustamm.it, n. 3/2007; T.A.R. Piemonte, Sez. I, 2nd of February 2005, n. 209, in www.giustizia-amministrativa.it.

⁸⁵ T.A.R. Lazio-Roma, Sez. II, 5th of January 2010, n. 41, in www.giustizia-amministrativa.it.

decree n. 302 of 2002, we talk of “peremptory terms of 30 days from the communication or from the publication of the notice”, so the observations received after this terms will be considered inadmissible⁸⁶.

According to the clause 12, the administration should pronounce a reasoned statement⁸⁷, considering precisely “the prevalent interests and the reasons of this determination”⁸⁸.

However, the jurisprudence formed with reference to the obligation of evaluation regulated by the art. 10, b), of the law n. 241 of 1990 is too much tolerant towards public administrations. This last, actually, even if considers legitimate the procedure that does not imply evaluations of the privates’ contributions⁸⁹, excludes that the administration must rebut every argument used by the private subject, being sufficient a motivational development that justifies the reason of the missed adaptation of the administrative determination to the conclusions produced by the participant⁹⁰.

⁸⁶ See L. MARUOTTI, *op. ult. cit.*, 185.

⁸⁷ T.A.R. Sicilia-Catania, Sez. II, 7th of April 2008, n. 622, in www.giustizia-amministrativa.it, which notes how the total or partial acceptance of the observations can cause the modification of the project.

⁸⁸ L. MARUOTTI, *op. ult. cit.*, 186.

⁸⁹ See, *ex multis*, Cons. Stato, Sez. VI, 15th of July 1998, n. 1074, in *Cons. Stato*, 1998, I, 1190; more recent, T.A.R. Toscana, Sez. II, 6th of July 2011, n. 1149, in www.giustizia-amministrativa.it, which observes that, it is necessary to evaluate the citizens’ observations and these evaluations must be registered in the final procedure, just to honor the due process.

⁹⁰ Cons. St., Sez. VI, 6th of June 2011, n. 3354, in www.giustizia-amministrativa.it; T.A.R. Toscana, Sez. III, 13th of May 2011, n. 845, *ibidem*.

It is a balanced orientation, but we cannot approve too tolerant attitudes⁹¹ that allow the administration to ignore totally the contribution of the private subject, making useless his/her participation⁹².

Moreover, only a more strict approach to the problem of the motivation of the conclusive measure, with regard to the contributions of the private, can value – according to the suggestions of the attentive doctrine⁹³ - the high quality participation. We mention the kind of participation that, based on a “reasonable presumption”, can influence the process’ result⁹⁴.

c) extension of terms and renewal of the declaration of public utility

There is necessity of guarantees during the cross-examination both when the terms (regulated by the declaration of public utility) within the decree of eminent domain must be emanated are extended (art. 13, clause 5, of the Unique Text) and when the same declaration (ineffective because of the expired terms) is renewed.

Even before that the institution was disciplined by the Unique Text, the jurisprudence had clarified that the extension of the terms of the declaration of public utility

⁹¹ It is an allusion to a part of jurisprudence that ignores that the previous administration had to mention the content of the participants’ observation: Cons. Giust. Amm. Reg. sic., 28th of September 1998, n. 533, in *Giust. amm. sic.*, 1998, 739 e in *Nuove autonomie*, 1999, 578, with note of F. SAIITA, *Partecipazione al procedimento amministrativo e motivazione del provvedimento*.

⁹² With reference to the art. 16 d.p.r. n. 327/2001, T.A.R. Campania-Napoli, Sez. IV, 27th of March 2007, n. 2857, in www.giustizia-amministrativa.it.

⁹³ S. COGNETTI, *“Quantità” e “qualità” della partecipazione*, Milan, 2000, 87-88, it is not a case if the author finds in the art. 10, b), l. n. 241/1990 a very important rule, that, supports the jurisprudence’s interpretations that devalue the formal violations which do not orient in an alternative sense, the administrative choice (*ivi*, 75).

⁹⁴ F. SAIITA, *Garanzie partecipative*, cit., 330-331.

constitutes, as the same declaration, a discretionary, detrimental measure that can be appealed. For this reason it is illegitimate when it is not preceded by the communication of the beginning of the process⁹⁵. It is true that "the awareness of the principal procedure exempts the administration from the notice of the art. 7 of the law n. 241 of 7th of August of 1990, only if the sub procedures that belong to the process exist [...]. But the sub procedures of extension for the finalization of the public works and those for the compulsory purchase are not the same. In fact, they are considered as merely contingent: in this case the obligation exists if we consider that the extensions, procrastinating the subjection of the private beyond the ordinary terms, influence the property rights and the economic integrity rights which are constitutionally guaranteed"⁹⁶.

This orientation has been confirmed also after the introduction of the Unique Text, which does not consider expressly the participation to the relative sub procedure⁹⁷ because of the discretionary nature of the extension. Referring to this last, the "participation of the private is not useless but, on the contrary, it can be useful to highlight the existence of the exceptional requirements for the acceptance of the measure"⁹⁸.

⁹⁵ On this point, *ex plurimis*, Cons. St., Sez. IV, 18th of October 2002, n. 5755 e 19th of January 2000, n. 248, in www.giustizia-amministrativa.it e in *Urb. e app.*, 2000, 271, whit note of F. CARINGELLA, *Al vaglio del Consiglio di Stato*, cit.; Sez. VI, 10th of October 2002, n. 5443, in *Riv. trim. app.*, 2004, 731, with note of F. DALLARI, *Ancora in tema di occupazione appropriativa*; on the same point, T.A.R. Sicilia-Palermo, Sez. II, 11th of October 2004, n. 2226, in www.giustamm.it, n. 10/2004; T.A.R. Emilia Romagna-Parma, 4th of December 2002, n. 877, in *Urb. e app.*, 2003, 466; T.A.R. Emilia Romagna-Bologna, Sez. I, 4th of July 2001, n. 958, in www.giustamm.it, n. 7/2001; T.A.R. Umbria, 4th of May 2000, n. 385, in *Rass. giur. umbra*, 2000, 875.

⁹⁶ Cons. St., Sez. IV, 16th of March 2001, n. 1578, in *Giur. it.*, 2001, 1501.

⁹⁷ As noted by A. DI MARIO, *La proroga dei termini di espropriazione tra vecchio e nuovo*, in *Urb. e app.*, 2010, 1449-1450.

⁹⁸ Cons. St., Sez. IV, 30th of June 2010, n. 4176, in *Urb. e app.*, 2010, 1448, with note of A. DI MARIO, *La proroga*, cit.; lastly, T.A.R. Lazio-Roma, Sez. I ter, 10th of December of 2013, n. 10615, in www.lexitalia.it, n. 12/2013.

Actually, a certain branch of the jurisprudence had sustained that the extension would intervene in a concluded procedure (from the point of view of the contents of the administrative action), so it should not be preceded by the communication of the beginning of the procedure. However, this can occur only after the realization of the works⁹⁹.

In this way, nevertheless, the participation to the choices made with the declaration of public utility get confused with the ones referring to the extension. These last, in fact, act in accordance with the missed respect of the terms¹⁰⁰.

The obligation to communicate the beginning of the process exists, *a fortiori*, if the public work has not been realized within the terms and the administration approves again the relative project also for the declaration of public utility; the renewal, certainly admissible, must be preceded by a new administrative procedure, which requires the same guarantees of participation established for the subjects who are involved in a process of eminent domain for the first time¹⁰¹.

It is clear that, if we recall the use of a discretionary authority in the mere procedure of terms' extension for the declaration of public utility, the discretionary nature appears more obvious when the administration must adopt a new declaration in replacement of the expired one. In this last hypothesis, motivating the public interest for the eminent domain and considering the modifications made¹⁰², the administration must open a new

⁹⁹ T.A.R. Sardegna, Sez. II, 23rd of September 2009, n. 1478, in www.giustamm.it, n. 10/2009.

¹⁰⁰ A. DI MARIO, *ibidem*.

¹⁰¹ On this point, *ex multis*, Cass. civ., Sez. un., 26th of April 2007, n. 10024, in *CED Cassazione*, 2007; Cons. St., Sez. IV, 24th of July 2003, n. 4239, in *Riv. giur. edil.*, 2004, 702, with note of A. MAFFETONE, *Riapprovazione del progetto di opera pubblica: garanzie procedurali ed effettività della tutela dei privati*.

¹⁰² Cons. St., Sez. IV, 21st of November 2001, n. 5905, in www.giustizia-amministrativa.it.

preliminary investigation in order to acquire all the public interests involved and in order to satisfy the necessities of the subjects who suffer the eminent domain. The guarantees of these last, should be stronger than the guarantees recognized during the first declaration of public utility, because the subjects will demand for explanations. In fact, they have a threat of eminent domain on their assets, so they will expect meaningful and impressive reasons for the enduring public interest in the realization of the work¹⁰³.

Only if the renewal of the declaration of public utility has been accepted according to the law, the omitted communication of the beginning of the process cannot be considered invalidating “because in this case the contribution of the private would have been useless. In fact the authority acted in order to realize a program of works which approval has transformed *ex se* the property right of the privates in legitimate interest. According to the law, it could have not assumed any other conflicting determination ”¹⁰⁴.

d) reiteration of eminent domain restriction

There is, besides, the old question of the reiteration of the expired restrictions of eminent domain, where we can note problems of guarantees.

Overlooking, for reasons of space, the difference between eminent domain restrictions and confirmatory restrictions¹⁰⁵, we note that the jurisprudence considers as

¹⁰³ A. MAFFETTONE, *op. cit.*, 708.

¹⁰⁴ T.A.R. Toscana, Sez. I, 15th of March 2012, n. 544 e 1st of September 2011, n. 1353, in www.giustamm.it, n. 4/2012 e in www.giustizia-amministrativa.it, referring to the art. 25 l. n. 210/1985, in the field of railway project.

¹⁰⁵ On this point, Cons. St., Sez. IV, 28th of December 2012, n. 6700, in *Urb. e app.*, 2013, 425, with note of G. SCIULLO, *La distinzione fra vincoli conformativi ed espropriativi negli strumenti urbanistici*; P. URBANI, *Le nuove frontiere del diritto urbanistico: potere conformativo e proprietà privata*, in www.astrid-online.it (2013), 17, according to which “if we analyze the branch of the jurisprudence referring to an area destined to a public or private green space, it is clear that the limit of the authority of the institution does not belong to the *ius aedificandi*”

admissible the reiteration of expired restrictions (today within the art. 9 of the Unique Text), “even if within the limits of an adequate and specific motivation about the lasting modernity of the prevision, comparing this last to the private interests”¹⁰⁶.

An adequate procedure is fundamental¹⁰⁷ because the administration must do a research relative to the single areas in order to consider the different public or private necessities. In fact, it should verify that the public interest is still present and it should verify if this interest can be satisfied in other ways. So, the administration must indicate the concrete initiative assumed or the initiative of next realization, and it must organize the fund for the payment of the allowance for eminent domain¹⁰⁸. Furthermore “the destination of the areas organized by the municipal administration would avoid the procedure that establishes (apart from the interventions of the subjects) the double verification of the

but to the possibility of the private to benefit from the asset (use value) also through economic initiatives not reserved just to the public authority (exchange value)”.

¹⁰⁶ Cons. St., Sez. IV, 21st of April 2010, n. 2262, in www.giustizia-amministrativa.it. For further indications, see V. SALAMONE, *I vincoli urbanistici preordinati all'espropriazione per pubblica utilità*, in www.giustizia-amministrativa.it (2010), § 6.

¹⁰⁷ Cons. St., Sez. IV, 11th of March 2013, n. 1465, in www.lexitalia.it, n. 3/2013.

¹⁰⁸ In case of reiteration of the restrictions, “a process of the verification of the lasting interest to the industrial development in relation with owners’ interest”, on this point, Corte cost., 20th of July 2007, n. 314, in *Corr. giur.*, 2008, 339, with note of L. MARZANO, *Incostituzionalità della legge-provvedimento che si traduca in una reiterazione non procedimentalizzata dei vincoli espropriativi*). However, according to G. SCIULLO, *op. ult. cit.*, 1165, “[t]he attention of the Constitutional Court focuses on the necessity that the reiteration must be preceded by a verification for the single areas according to the necessity of their renewal, and not on the formative *iter* of the act organizing the reiteration (at most we can consider that the reiteration is organized by the administrative act and not by the law)”. It is clear that, when we verify the necessity of an *ad hoc* procedure for the comparison of contrasting interests, the same procedure can not exist without the owners being informed. Cons. St., Sez. IV, 11th of March 2013, n. 1465, in www.lexitalia.it, n. 3/2013.

institution which program the land-use planning through the double moment of the adoption and the approval of the rule relative to the land-use planning”¹⁰⁹.

The motivation of the reiteration, properly requested by the jurisprudence, is not sufficient to guarantee the sense of democracy of the urban choice, which moves from the citizens’ participation to the process of reiteration of the restrictions¹¹⁰.

As consequence, the reiteration of an eminent domain restriction aimed at a specific intervention, is destined to influence a determined juridical position, and it must be preceded by the communication of the beginning of the process. This communication cannot be considered redundant even if it refers to a renewal process of a previous project of public work or of a project of declaration of public utility¹¹¹.

e) emergency occupancy

It is known that, the original text of the d.p.r. n. 327 of 2001 contemplated the temporary occupation (artt. 49 and 50) while the legislative decree n. 302 of 2002, in spite of the fact that the art. 22, clause 1, considered the possibility to emanate the eminent

¹⁰⁹ On this point Cons. St., Sez. IV, 7th of June 2012, n. 3365 (in *Urb. e app.*, 2012, 1156, with note of G. SCIULLO, *La reiterazione dei vincoli a contenuto espropriativo: conferme e novità per le garanzie dei destinatari*)

¹¹⁰ S. LICCIARDELLO, *I vincoli urbanistici*, in *Scritti in memoria di R. Marrama*, Naples, 2012, I, 588.

¹¹¹ Cons. St., Sez. IV, 9th of December 2010, n. 8688, in www.giustizia-amministrativa.it; Ad. plen., 24th of May 2007, n. 7, *ibidem*, according to which, “when the object is another type of reiteration of the eminent domain restrictions, even if these last are organized ‘en bloc’ o for a consistent part of the municipal area, and also in the case in which the communication of the beginning of the process is not requested (recalled in art. 9, clause 6, the relevance of the adoption and the approval of the urban instruments). The principles established in the art. 9, clause 4, underline the importance of the ‘necessity to satisfy the standards’” (according to the art. 9 of the Unique Text of construction, approved with d.P.R. n. 380 of 2001”).

domain decree “without special researches and formalities” when the beginning of the works is urgent, has introduced again the institution of the emergency occupation aimed to the eminent domain (art. 22-*bis*).

This is not the right place to remove all doubts¹¹² of the new regulation of an institute that, even before the introduction of the unique text, had generated the interest of the doctrine. This last wanted to combine, in the field of the compulsory purchase, the State’s principles with the necessities of the social State¹¹³. The institute above-mentioned, had developed into “a surrogate of the eminent domain”¹¹⁴.

Limiting, also in this case, the close examination of the aspects of the procedure, it is necessary to remember that, in the previous configuration of 2001, there were not profiles of guarantees which could be dated after the occupation decree. Especially, the principle of the cross-examination was not respected and it was confined in the observations referring to the publication of the project¹¹⁵.

The current art. 22-*bis* of the Unique Text is clearly aimed to permit the administration to begin the works acquiring materially the asset before to emanate the eminent domain decree, *ergo* before to register the temporary allowance. So, in the public administration, this put behind the participation phase to a later moment¹¹⁶.

¹¹² See R. CONTI, *Il nuovo volto del t.u. espropriazione dopo il d.lgs. 302/2002*, in *Urb. e app.*, 2003, 253.

¹¹³ Reference to the dear F. PUGLIESE, *L’occupazione preliminare nel procedimento espropriativo*, Naples, 1984, 7-8.

¹¹⁴ See D. SORACE, *op. cit.*, 178.

¹¹⁵ F. PUGLIESE, *Occupazione nel diritto amministrativo*, in *Dig. disc. pubbl.*, X, Turin, 1995, 269.

¹¹⁶ M. SGROI, *La disciplina del procedimento espropriativo tra empiria e rigore: la partecipazione dell’espropriato alla determinazione dell’indennità di esproprio*, in *Riv. giur. edil.*, 2011, 176-177.

The jurisprudence had justified the omission of the communication of the beginning of the occupation process because of the restricted nature of the process. In fact, the process was merely implementing of presupposed procedures¹¹⁷, and it was connected to the declaration of public utility¹¹⁸. The jurisprudence seems to receive the suggestions of the doctrine, which had stated as more urgent the art. 7 of the law n. 241 of 1990¹¹⁹, considering that the declaration of public utility and/or the acts of restriction of eminent domain do not imply necessarily the emanation of an occupation decree¹²⁰. In the more recent sentences, in fact, we can observe that the procedure of emergency occupation does not need *ex se* the previous communication of the beginning of the relative procedure. This communication is not requested in the art. 7, clause 1 of the law n. 241 of 1990 “when there are problems deriving from special necessities of promptness of the process”¹²¹.

Furthermore, the urgency that justifies the derogation to the participation principles could be considered in *re ipsa* in the case in which, in lack of the “special urgency, which does not consent, in relation with the nature of the works, the application of the disposition within clauses 1 and 2 of the art. 20”, this urgency must be taken in

¹¹⁷ Cons. St., Sez. IV, 31st of May 2007, n. 2874, in www.giustizia-amministrativa.it.

¹¹⁸ T.A.R. Campania-Salerno, Sez. I, 19th of April 2007, n. 418, in www.giustizia-amministrativa.it.

¹¹⁹ C. TAGLIANTI, *Occupazione d'urgenza preordinata all'esproprio*, in www.giustizia-amministrativa.it (2008), § 2.6.3.

¹²⁰ The more recent jurisprudence mentions the “intrinsic difference between procedure and measure of emergency occupation and between procedure and measure of eminent domain”: Cons. St., Sez. IV, 5th of September 2013, n. 4463, in www.giustamm.it, n. 9/2013.

¹²¹ See Cons. St., Sez. IV, 15th of July 2013, n. 3861, in www.lexitalia.it, n. 7-8/2013, with a comment of G. IUDICA, *Brevi note in tema di notifica di atti espropriativi*, *ivi*, n. 10/2013. Cons. St., Sez. V, 26th of September 2013, n. 4766, *ibidem*, it keeps stating that the communication is not compulsory because it is an act of mere implementation of the declaration of public utility.

consideration during the motivation of the measure¹²², the early occupation *ex art. 22-bis* must be considered precluded.

We can say the same for the other presuppositions in the clauses 2 of the articles *22-bis*, in the presence of these articles a special motivation is not required¹²³.

This does not mean an authorization to make generic references to the urgency in the realization of the works regulated in the declaration of public utility. It is necessary, in fact, to motivate specifically the urgency to start the works, otherwise we risk to lose the character of the institute within the Unique Text¹²⁴.

f) determination of allowance for eminent domain

The participation of the owner is established also in the sub procedure aimed to the determination of the allowance for eminent domain. The owner must be “informed of the fact that he can supply all the useful elements in order to determine the value of the

¹²² T.A.R. Puglia-Lecce, Sez. I, 13th of April 2011, n. 682, in www.giustizia-amministrativa.it.

¹²³ See T.A.R. Veneto, Sez. I, 21st of March 2006, n. 627, in www.giustizia-amministrativa.it (with a comment of R. CONTI, *L'occupazione d'urgenza ex art. 22 bis T.U.*, in *Giur. merito*, 2006, 1777 et seq.), according to which when the number of the subjects of the procedure of eminent domain is more than 50, it does not need a specific motivation in order to support the occupation measure, being implicit the requisite of the urgency.

¹²⁴ On this point, G.M. MARENGHI, *op. cit.*, 169-173, the author is aware of how his thesis collides with an orientation of the jurisprudence that is decisively the great majority.

area” (art. 17, clause 2 of the Unique Text); all this procedure is aimed to determine correctly the allowance for eminent domain and to facilitate the voluntary disposal¹²⁵.

According to the art. 20 the list of the assets subject to eminent domain must be notified to each owner, who, within 30 days, can present observations and register documents (clause 1). This kind of notification, which substitute the notification established before by the art. 24 of the fundamental law of 1865, is equitable to a real communication of the beginning of the process¹²⁶.

Besides, when the administration considers that it is appropriate¹²⁷, the owner can “specify [...] which is the value of the area” (clause 2): once again the objective is to facilitate a determination of the allowance in accord with the owners in order to avoid every possible legal argument¹²⁸.

The verification of the value of the area and the consequent determination of the temporary allowance for eminent domain, will be made by the authority with the necessary technical supports, only after the “evaluation of the subjects’ observations” (clause 3).

If the owner refuses the temporary allowance, he can use the process of evaluation and in case of affirmative answer he should indicate a trusted technician (art. 21,

¹²⁵ L. MARUOTTI, *Art. 17*, in *L'espropriazione per pubblica utilità*, cit., 191.

¹²⁶ R. DE NICTOLIS, *Art. 20*, in *L'espropriazione per pubblica utilità*, cit., 212.

¹²⁷ On this point, R. DE NICTOLIS, *op. cit.*, 212-213, according to the Author it is an incontestable reference, because the omission of this moment does not compromise the process. We can agree until a certain point, because the owner must have the possibility to prove the shortage of the data acquired in order to determine the value of the area and/or the insufficiency of the necessities of promptness of the process which is not compatible with the preliminary phase (*ivi*, 213).

¹²⁸ R. DE NICTOLIS, *ibidem*.

clause 1). If the owner does not answer promptly, the allowance will be determined, at the instance of the authority¹²⁹, by a commission established by the art. 41: in this way the beginning of the evaluation process would be communicated¹³⁰.

On the other hand, if the owner wants to use the evaluation process, the authority will nominate two technicians, including, possibly, the one nominated by the owner (clause 3). This appointment must be communicated to the owner, who, otherwise could not appeal to the President of the Tribunal in order to nominate a third technician. In fact, this is a “owner’s right” (clause 4)¹³¹.

Overlooking, once again for reasons of time, the specific problem of the release of the allowances¹³², there are some notation which deserves the hypothesis of the urgent determination of the temporary allowance, established in the art. 22, as substituted by the legislative decree n. 302 of 2002 and partially modified by the art. 2, clause 2, of the law n. 244 of 2007.

This disposition states that, when there is urgency and/ or other indications of law¹³³, the determination of the temporary allowance and the emanation and execution of

¹²⁹ The procedure established by the art. 41 cannot be activated by the owner, who can only participate in the determination of the temporary allowance: Cons. Giust. Amm. Reg. sic., 25 gennaio 2013, n. 46, in www.giustamm.it, n. 2/2013.

¹³⁰ Sharable suggestion of R. DE NICTOLIS, *Art. 21*, in *L'espropriazione per pubblica utilità*, cit., 257.

¹³¹ On this point, R. DE NICTOLIS, *op. ult. cit.*, 259, according to the Author the beginning of the evaluation process can be considered communicated through the invitation which is sent to the owner asking if he wants to use it or not, followed by his affirmative answer.

¹³² See the monograph of G. GRAZIOSI, *Lo svincolo delle indennità dormienti e il giusto procedimento espropriativo*, Padova, 2010.

¹³³ As for example, the presence of more than 50 subjects, situation in which reasons of special urgency are omitted: T.A.R. Lombardia-Milano, Sez. III, 13th of May 2011, n. 1235, in www.giustizia-amministrativa.it.

the decree of eminent domain must exist in absence of cross – examination. In fact, the authority to not apply the “disposition of the art. 20” and to proceed “without special researches or formalities” is translated in the omission of a series of guarantees of participation. Among these guarantees there is, *in primis*, the communication of the beginning of the sub procedure of determination of allowance¹³⁴.

A part of the formalities of participation above-mentioned, there is no need of other formalities for the emanation of the eminent domain decree. This explains the fact that, the participation of the private in the discretionary choices of the administration is sufficiently guaranteed by the articles 11 and 16¹³⁵.

We can observe, however, a model of the procedure that is characterized from a wide solicitation of the collaboration of the subject, whom participation to the phase of determination of the allowance for eminent domain – especially if we recognize the multi-functionality of the institute¹³⁶ – cannot be considered as a mere instruments of

¹³⁴ According to R. DE NICTOLIS, *Art. 22*, in *L'espropriazione per pubblica utilità*, cit., 283, it is possible, in presence of real urgency reasons, to omit also the communication of the beginning of the process aimed to the emanation of the eminent domain decree; but it should be a “more qualified urgency with respect to the urgency that can omit the only phase of the determination of the temporary allowance during the cross-examination with the owner”.

¹³⁵ L. MARUOTTI, *Art. 23*, in *L'espropriazione per pubblica utilità*, cit., 313.

¹³⁶ See F. SAIITA, *Gli artt. 7 e 8 della legge n. 241 del 1990 al vaglio della giurisprudenza: «contraddittorio» o «partecipazione?»*, in *Nuove autonomie*, 1995, 261 et seq., and F. FRACCHIA, *Manifestazioni di interesse del privato e procedimento amministrativo*, in *Dir. amm.*, 1996, 11 ss.. In jurisprudence, with reference to the eminent domain process, the double function of the participation of the subject is highlighted by T.A.R. Puglia-Lecce, Sez. I, 7th of July of 2010, n. 1696, in www.giustizia-amministrativa.it. The EU jurisprudence has contributed to the improvement of the citizens' rights - (G. MORBIDELLI, *Corte costituzionale e corti europee: la tutela dei diritti (dal punto di vista della Corte del Lussemburgo)*, in *Dir. proc. amm.*, 2006, 317-318, who refers to the right of “cross-examination”) –and it underlines the guarantees profile of the participation, recognizing a greater value when the administration has a wide margin of discretionary appreciation (G. PIZZANELLI, *Tutela della concorrenza e garanzia del giusto procedimento: il ruolo della Commissione come autorità antitrust e l'apertura del giudice*

prevention of the legal argument¹³⁷. The participation, in fact, can contribute also to the impartiality and to the good evolution of the administration¹³⁸.

g) execution of the eminent domain decree

Nor the phase of execution of the decree for eminent domain is immune from guarantees of participation.

The art. 24, clause 3, of the Unique Text states that the value of the asset and the report of inclusion must be edited during the cross-examination with the subject¹³⁹. Or, in the case in which this last is absent or is contrary, “with the presence of two witnesses who are not employees of the subject”. Also who has real or personal rights on the asset can participate to the operations.

*comunitario alla responsabilità delle Istituzioni comunitarie ed alla risarcibilità del danno per cattivo uso di potere. Il caso Schneider, in Riv. it. dir. pubbl. com., 2007, 1436). The difficulty of the EU jurisprudence to open a critical and collaborative dimension of the cross-examination is due to the fact that the “droit” and the “défense” have not merged into the due process yet (A. MASSERA, *I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario*, in *Dir. amm.*, 2004, 734).*

¹³⁷ See Cons. St., Sez. IV, 28th of January 2011, n. 676, in *Giorn. dir. amm.*, 2011, 425, according to which “the determination of the allowance” constitutes “only the beginning of the voluntary disposal of the asset”.

¹³⁸ M. SGROI, *op. cit.*, 170.

¹³⁹ In the past, the jurisprudence had specified that the communication of the advice notice of the survey must be made correctly in order to assure the effectiveness of the cross-examination. Cons. St., Ad. plen., 7th of May 1982, n. 8, in *Giur. it.*, 1983, III, 44.

These fulfillments are very important, if we consider that the value of the asset and the report of inclusion¹⁴⁰ (which are not substitutable with evidences supplied by the witnesses¹⁴¹) during the cross-examination with the owner represent that the administration is the owner of that asset. As consequence, the loss of the asset fall on the beneficiary and not on the owner. So, the beneficiary should prove, possibly, that the eminent domain process was not made¹⁴².

5. CONCLUSIVE REFLECTIONS: CAN THE PROCESS OF EMINENT DOMAIN BE CONSIDERED «DUE» TODAY?

Our research shows that the path towards a “due” process, even if slow and uncertain, has been almost completed.

The emanation of the Unique Text in 2001, considered inappropriate from who thought that the field of the compulsory purchase should be innovated, could not be sufficient to eliminate an obstacle for the owner to influence the choice of localization of the works and the area. In fact, in the previous system of the fundamental law of 1865 this choice corresponded to the declaration of public utility. The following affirmation of a general urban planning marked the difference between the moment of localization (general

¹⁴⁰ This means that «among the automatic effects of an eminent domain decree for public utility, we can not comprehend the property of the asset of a subject, nor the change in presence of the increasing of the benefit of the same asset. In this case, in fact, the subject of the eminent domain should state an act of insertion in the property of the asset», Cass. civ., Sez. II, 14th of November of 2013, n. 25594, in www.lexitalia.it, n. 11/2013.

¹⁴¹ Cass. civ., Sez. I, 18th of May 2012, n. 7930 and 3rd of May 2010, n. 10651, in *CED Cassazione*, 2012 e 2010.

¹⁴² Cass. civ., Sez. I, 11th of November 2010, n. 22913, 19th of January 2010, n. 790 e 31st of March 2008, n. 8384, in *Dir. e giust.*, 2010, 517, with note of M. ALESIO, *Immissione in possesso e insorgere dell'indennità di occupazione*; in *CED Cassazione*, 2010 and 2008.

town plan) and the moment of the real realization (detailed plan of execution). As a consequence, today the eminent domain is not the subject from which descend the urban structure and the realization of the public work, as it was in the 19th century¹⁴³. In other words, the connection between urban structure and eminent domain¹⁴⁴ made this last a mere implementation of predetermined choices in the field of territory management¹⁴⁵. So, the realization of the “due” process must face the fragility of the guarantees that the Italian system offers in the field of city planning¹⁴⁶.

The hypothesis, in the Unique Text, of an eminent domain process which has the participation principle¹⁴⁷ as cornerstone, means that, with some exceptions¹⁴⁸, the

¹⁴³ P. STELLA RICHTER, *Una iniziativa improvvida: il testo unico sulla espropriazione per pubblica utilità*, in *Foro amm.* – *CdS*, 2004, 975 et seq.

¹⁴⁴ References in A. CROSETTI, *Urbanistica ed espropriazione: un binomio per il governo del territorio*, in *Il governo del territorio* (Acts of the VI National Conference of the A.I.D.U. – Pescara, 29th-30th of November of 2002), edited by S. Civitaresse Matteucci, E. Ferrari and P. Urbani, Milan, 2003, 309 et seq.

¹⁴⁵ On this point, V. CAPUTI JAMBRENGHI, *L'espropriazione per causa pubblica utilità e gli altri procedimenti ablatori*, in *Diritto amministrativo*, edited by L. Mazzarolli, G. Pericu, A. Romano, F.A. Roversi Monaco and F.G. Scoca, cit., 1148: “Public works must correspond to a urban order of the town plan. The connection between authority of eminent domain and urban planning is completed”.

¹⁴⁶ Recently, on this point, M. D'ALBERTI, *Lezioni di diritto amministrativo*, Turin, 2012, 305 et seq.

¹⁴⁷ M. SGROI, *op. cit.*, 166.

¹⁴⁸ It is a reference to the reintroduction of the urgency occupation, “which incorrect use had facilitated the formation of inconsistency habits with respect to the legality principle” (F.G. SCOCA, *Modalità di espropriazione e «rispetto» dei beni (immobili) privati*, in *Dir. amm.*, 2006, 542; on this point the author is critical G.M. MARENGHI, *op. cit.*, 168, according this reintroduction “has canceled the aim of the unique text to reinstate the guarantee process that does not allow the administration to realize the public work before the transfer of property”; more in general, the necessities of promptness in several cases keep obstructing the due process, M.T. SERRA, *La partecipazione nel procedimento di espropriazione per pubblica utilità*, in *Studi economico-giuridici in memoria di F. Ledda*, Turin, 2004, II, 1218), also to the lack of prevision of participation forms to the process of eminent

legislator has received the indications of the EU jurisprudence. The fundamental idea of this last, in fact, is that “the principle of respect of the private assets causes that their eminent domain complies the public interest’s necessities and a due and correct process”¹⁴⁹.

Some critical remark (as proof that the errors exist in the implementation of the laws and not in the laws¹⁵⁰) can be addressed to the officials and to the administrative jurisprudence.

The formers because develop with difficulty a culture about the participation, which is considered as an inconvenience. We have noted that, even before the law n. 241 of 1990, referring to the citizens’ participation in the process of formation of the town plan: “The observations are a weak instruments in the hand of citizens, for the administration instead, they are a useless fulfillment”¹⁵¹. It is not a case, in fact, that the presentation of the observations had brought to a new localization of the areas, and the subjects, convinced that their observations are useless, often prefer to not highlight the

domain (on this point, A. PORPORATO, *Il principio del giusto procedimento nell’espropriazione per pubblica utilità*, in *Dir. e proc. amm.*, 2009, 330-331, according to the Author the hypothesis of modalities of participation created along the lines of oral hearing or the public inquiry, could have limit the “information costs”), and first of all, to the acquisition remedying past irregularities.

¹⁴⁹ F.G. COCCA, *op. ult. cit.*, 540-541.

¹⁵⁰Someone attribute to our legislator the missed creation of a wider jurisdictional system (“the choices of the areas subject to the eminent domain correspond to discretionary decisions of the administration, which constitute appreciations of merit that are subtracted to the legitimate system of the administrative judge, except if they are invalidated by irrationality or unreasonableness”), Cons. St., Sez. IV, 30th of September 2013, n. 4872, in www.lexitalia.it, n. 10/2013), extended to the categories of the opportunities and of the utility of the eminent domain action of the administration, on the administrative choices influencing the property right, overshadowing the jurisdiction of merit in the litigations in the field of eminent domain. G.M. MARENGHI, *op. cit.*, 205-206.

¹⁵¹ G. SCIULLO, *Il fastidio della partecipazione*, in *Riv. giur. urb.*, 1989, 474.

faults of legitimacy that could appear during the procedural phase and that could be used in the process¹⁵².

We can observe some critical remark even in the administrative jurisprudence, because it has often allowed this procedure being too much permissive with the officials who are prone to ignore citizens' participation. From a certain point of view, in fact, this is graver: "It is not astonishing the fact that the administrator- politician is convinced to better interpret the EU interest, the astonishing fact is that the administrative judge does not contest it"¹⁵³. It is clear, however, that the capacity of the participation to influence the eminent domain process is directly proportional to the "degree of obligation of the attention of the authority and to the adequacy of the consideration of the citizens' reasons"¹⁵⁴. As a consequence, in order to fill the lack of a "normative prevision which recognizes the real importance of the citizens' observations in the decision procedure of the administration"¹⁵⁵, the jurisprudence should require from this last that every single observation is evaluated; the unilateral connotation of the eminent domain procedure will never diminish with a lack of consideration of the citizens' observations.

We should put an accent on the jurisprudence which keeps underestimating the formal faults since the law n. 241 of 1990, through no sharable interpretations of the art. 21-*octies*, clause 2, of the procedural law¹⁵⁶ and which weaken the guarantees of participation.

¹⁵² G. LEONE, *Espropriazione e principio della partecipazione*, in *Dir. e proc. amm.*, 2010, 418-419.

¹⁵³ G. SCIULLO, *ibidem*.

¹⁵⁴ M.T. SERRA, *op. cit.*, 1215-1216.

¹⁵⁵ G.M. MARENGHI, *op. cit.*, 93

¹⁵⁶ This is a rule subject of a strong debate, indications in P. LAZZARA, *Note in tema di vizi di forma e di procedimento di cui all'art. 21 octies, l. 241/90*, in *Scritti in memoria di R. Marrama*, cit., I, 521 et seq.

It would be useful to have a look at the EU jurisprudence, more receptive to the defense necessities of citizens. In fact, it uses to correct the infringement of citizens' rights if there is the possibility that because of the irregularities the procedure could have had a different result. This jurisprudence does not pretend from the citizen that sort of *probatio diabolica* referring to the participation required by the administrative judges, but it pretends a better defense in absence of procedural irregularities¹⁵⁷.

In this way, we can contribute to the path towards the “due” process of eminent domain and, more in general, we can contribute to the “good administration”¹⁵⁸, intended as “participatory” administration, which creates democratically its decision including the subject¹⁵⁹. In lack of this further effort we risk that the “due” process of

¹⁵⁷ On this point, Trib. U.E., Sez. I, 18th of June 2013, in T-404/08, Fluorsid S.p.A., ined.. Further jurisprudential information in G. PIZZANELLI, *op. cit.*, 1439 et seq.

¹⁵⁸ Recently, the due respect for the UE law on this point D.U. GALETTA, *Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l'entrata in vigore del Trattato di Lisbona*, in *Dir. amm.*, 2010, 601 et seq., with reference to the right to a good administration stated by the art. 41 of the charter of fundamental rights of the European Union of Nice; S. FOÀ, *Giustizia amministrativa e pregiudizialità costituzionale comunitaria e internazionale*, cit., 10, 294 e s. According to a certain doctrine, furthermore, in some democratic and liberal system, the “right to a good administration” does not represent a rule nor a principle. It can represents a principle that was already expressed with other general or specific modalities : among these the principles of the due process and the principle of participation: L. PEGORARO, *Esiste un “diritto” a una buona amministrazione? (Osservazioni critiche preliminari sull’(ab)uso della parola “diritto”)* (Report to the «Jornadas internacionales sobre el derecho a la buena administración y la ética pública» - Malaga, 21th-22th of January 2010), in *Ist. fed.*, 2010, 561-562. With reference to the guarantees of participation has been stated that the art. 21- *octies*, clause 2, law n. 241/1990 is in contrast with the art. 41 of the European Charter, even if there is the availability of the internal system to choice the sanction which must follow to the violation of the citizenship rights: M. TRIMARCHI, *L'art. 41 della Carta europea dei diritti fondamentali e la disciplina dell'attività amministrativa in Italia*, in *Dir. amm.*, 2011, 537 ss., spec. 556-560.

¹⁵⁹ For this acceptance of the principle, cfr. D. SORACE, *La buona amministrazione e la qualità della vita, nel 60° anniversario della Costituzione* (Report to the Conference on: «La Costituzione ha 60 anni: la qualità della vita sessant'anni dopo» - Ascoli Piceno, 14th of March 2008), in www.costituzionalismo.it, 8.

eminent domain could become another example of “imperfect utopia” recently illustrated by the acute doctrine¹⁶⁰, and as a consequence, it could not be “due” anymore¹⁶¹.

¹⁶⁰ A. ROMANO TASSONE, *Su diritto ed utopia: le “utopie imperfette” del giurista*, in *Scritti in memoria di R. Marrama*, cit., I, 887 et seq.

¹⁶¹ For an overview of the relevant Italian case law see the *Ius Publicum Reports and Documents, Construction, city planning and zoning - Espropriation/Taking Area*.