



ENVIRONMENTAL MEDIATION AND URBAN PROBLEMS

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1. Environmental mediation¹ is, in a wide sense, not only reported to situations of environmental guardianship but as an instrument of resolution of conflicts regarding problems of urban safety, environmental themes and urban matter (construction of a highway, of a dump, of power plant, institution of protected areas, works of urban retraining, etc).

The diffused dissatisfaction² for the techniques and the traditional methods of approach to the environmental conflicts have provoked the progressive development of alternative ways of managing such conflicts.

The mediation, therefore, can represent an alternative tool, for the involved parts, to manage the conflicts and eventually to reach a solution that also considers their interests. An environmental mediation particularity is in the fact that often the conflicts are inherent to the relationship between citizen and public administration and matter of conflicts are, therefore, often public interests, with the consequence of a necessary balancing between the public character of the object and the demand of a private approach. During the conciliatory procedures, sees the delicacy of the sector and the plurality of the involved affairs, it is important to respect the laws, rules, directives and politics in force.

1.1. Starting from the search executed through the study of the previous experiences, especially American and Canadian, but also the still immature Italian

¹ C. TROISI, *Brevi considerazioni in tema di mediazione ambientale*, in *Il Diritto dell'Agricoltura*, Napoli, 2, 2005.

² L. SUSSKIND, A. WEINSTEIN, *Towards a theory of environmental dispute resolution*, in *9 Environmental affairs*, 1980.



experience, it's necessary to question the suitability, the necessity and efficiency of the mediation instrument in the management of the environmental conflicts, also enriched by critical remarks.

It is necessary to consider that every Country manifests different demands and reactions because of their specific cultural identity, and it will need a specific intervention.

The scarce diffusion in Italy, especially in the south, of the culture of the mediation and of environmental mediation has made the search complex but at the same time particularly fascinating, given the innovative and experimental character of the treated theme.

2. The idea that techniques of arbitration and mediation in environmental politics can be applied for resolving conflicts is not new, rather, is as ancient as the human communities³.

In the last few decades the awareness raising about the damages that an uncontrolled development provokes to the ecosystem and in the local centre, to ample layers of the population directly involved in the safeguard of the environment in which they live, has brought many years of conflict and antagonism. To defend the ecological-natural values, the environmentalists and the local communities touched by problems of particular relief they have almost always looked for the comparison, the juridical case and the opposition as regard to generic and traditional principle of the "public interest". Only in the last years we are seeing, also in Italy, a greater opening about these issues toward the dialogue and the collaboration among social subjects of different interests⁴.

This doesn't mean that the Public Administration had to strip its prerogatives to pursue the common interest of the whole civil society; it's necessary, rather, that PA consider and redefines the procedures through which the public interest is pursued continually developing a renewed and essential role in the management of conflicts that rise in the formation and in the application of public politics. New techniques of negotiation and mediation directed to the attainment of a consent among all the parts, although more "tiring", they offer however greater guarantees of stability in the time and of opportunity to improve the results and the performance of the public function.

The main difficulty is in the cultural area, because, despite in other countries it is extremely popular, in Italy the mediation is still little widespread, not only as a technique of management of the disputes, but also as *forma mentis*, a way of approach to any conflicting relationship.

³ G. GULOTTA, G. SANTI, *Dal conflitto al consenso*, Milano, 1988.

⁴ I. KOPPEN, *Qui ci vuole un mutual gain*, in *Spazio Ambiente*, 2000.



In the United States and in the north European countries, this approach, that provides for the application of techniques and methodologies of negotiation, has had recognition and application in the public politics and in business management.

Everything in the respect of the regulation in force in environmental theme (the parts, could not agree in violation, even mutual, of the juridical norms). The accord has, in fact, nature of act of private autonomy so (to be binding for the parts) it has to overcome both the "negative" judgment of worthy guardianship from the legal system (in the sense that it is not in contrast with the norms of the legal system), is the "positive" judgment of worthy guardianship (in the sense that it has to have the tendency to realize appreciable interests): art.1322 Italian Civil Code.

2.1. The awareness of the rash technological and industrial development has brought the theme of environmental damage, of environmental guardianship and of management of the conflict, to the vertexes of the social, political and juridical debate. The attention for the problem of environment protection has provoked, in Italy, the legislative intervention productive of the l. 349/86, institutive of environmental Ministry.

After this law, the whole discipline of the environmental guardianship has suffered a deep innovation resulting in a change of the principles regulators of matter.

Fundamental contributions of the l. 349 are constituted by the institution of a special Ministry (which raises to legally remarkable interest the environmental guardianship) and from the introduction (art.18) of a new and specific legal paradigm of civil liability.

The law attributes to the representative associations and to the citizens power of complaint and intervention in the judgments about environmental damage (adhesive intervention, which excludes the ownership of a power of action in judgment exercisable in autonomous and principal way); it attributes, besides, to the associations the power to apply, in the administrative process, for the refusal of illegitimate actions.

The rule in examination has suffered, however, more than a few criticisms, having been held restrictive of the rights of the citizens, both as individuals and both as part of environmental associations⁵.

The art. 18, in fact, attributes mere functions of stimulus, which, besides, are legitimated only by those associations that have received recognition through previous art.13; provoking an excessive compression of individual rights and an intolerable obstacle in the access to justice.

Such dissatisfaction has brought the search of modality to settle conflicts that doesn't necessarily involve the jurisdictional tool.

⁵ G. CASSANO, C. COSENTINO *Il danno ambientale. Lineamenti. Giurisprudenza. Normative*, Milano, 2000; F. CARINGELLA, *Giustizia amministrativa*, Napoli, 2002.



The mediation, as an alternative tool of conflict management, could be useful to face conflictual situations that involve subjects which a specific juridical guardianship is not granted.

It's important, however, to specify that the mediation is not destined to formally prevent a legal dispute or to compensate the juridical gaps under the profile of the guardianship, but to return the ability to govern the conflict to the parts in conflict (therefore, apart from the possible alternatives available).

3. A modern concept of management of the conflict requires a greater share of all the parts that have interests at stake in an optics of democratisation of the forms of government of the conflict as much more participated as possible. The new approach suggests a radical change in the canons of the interaction among the actors. This is achieved through a driven process of communication, reaching the result considered "the best" for all the parts in conflict; turning into a form of negotiation based on the mutual profit (Mutual Gains Approach)⁶.

It is important to consider, speaking about an environmental conflict, the fact that the parts always have some interests in common, otherwise they would not be found around the same table.

However, it is necessary all the parts are aware that they "have in common a problem" and they cannot solve it by themselves and holding their aprioristic positions. Only later, in a second moment, they will be able to speak about their conflicting interests. The interests must be defined in order to permit multiple solutions that help to widen the variety of potential options used for solving a conflict, but also help, as a filter, to consider the different options. When the interests of the parts have been known, will be possible to decide what options each part prefers.

In a situation of conflict it is very difficult to change the formulation of the communication from antagonism to collaboration. The introduction of the role of environmental mediator has served in other countries to interrupt the chain of negative events and paralysis of the activities, created after years of conflict or years in court.

In the case of the environmental conflicts, the role of the mediator is to promote the search of some solutions to several objections and disputes, arisen from a plan, that both parts can accept. The purpose of the mediation is not to impose a solution, but rather to make negotiations and communication among the parts easier, so that the parts manage to formulate by themselves a common agreement. So, the role of the mediator is to conduct the parts in this process⁷.

⁶ IRES, *Di questo accordo lieto. Sulla risoluzione negoziale dei conflitti ambientali*, Torino, 1994.

⁷ J. POITRAS, *Quelques éléments clefs de la médiation en environnement*, Intervention to the Master european in mediation, Institut Universitaire Kurt Bosch, Sion, 2002.



The mediation is, therefore, more than a simple discussion aimed at reconciling the interests of the parts. It is, instead, a complex process that changes its characteristics, issues and objectives depending on every single case.

3.1. Five principles are at the base of the philosophy of environmental mediation⁸:

- openness of participation
- voluntary character of the share
- informal area of discussion
- impartiality of the mediator
- transparency of the trial.

All the subjects, individual or collective, involved in an environmental conflict must have the possibility to participate in the mediation process. The objective of such trial is to promote a positive and creative discussion in which all the interested parts have the possibility to tackle the environmental problem proposing the use of a resource, of a solution or a project. A lasting solution has to include the interests of everybody, so all the interested parts must be invited to participate in the process of mediation. The participation in to the discussions has to happen voluntarily. The parts that will be forced to participate, will probably boycott in every way both the trial and the search of a solution. Only in case of voluntary share the parts will be motivated to realize and to respect it.

Within a process of mediation, the mediator doesn't take a final decision about a project nor take political choice. However the mediator has a deep impact on the negotiations for managing the trial. The parts generally esteem equitable the solution if they hold equitable the trial. So the impartiality of the mediator is very important. This doesn't mean that the mediator must give up his personal vision of the problem; it is important, nevertheless, that he controls his opinions so that these do not influence the process of mediation.

Also preserving an informal character and privileging a certain level of confidence, the mediation of the environmental conflict must be inspired to a principle of transparency. The basic idea is to make sure that the absent parts during the negotiation, but equally involved by the consequences of the conflict and by its results, are kept informed on what happens.

3.2. The conflicts in an environmental circle, concerning a diffused interest, distinguish themselves from those having as an object a merely individual interest

⁸ J. POITRAS, *Quelques conseils pour amorcer une médiation*, in *Revue de droit de l'Université de Sherbrooke*, 2002.



because of the number of the people involved⁹. The parts in conflict are made up not single people but, usually, of groups, organizations, institutions, associations, committees etc. Besides the number of the parts is not small, conditioning the whole process of mediation.

Considering that the mediation needs an intense work of talks with all the interested, the parts that intervene in mediation cannot structurally be too numerous; this makes the necessity to conduct the process of mediation with some representatives of the single groups.

Essential presupposition is the ability or real possibility from the groups to designate some representatives that all group trust them, that are able to guarantee the flow of the information and the feedback toward the group¹⁰.

When two or three parts participate during mediation, the procedure to come to an agreement requires more time and becomes more complex. Besides, it's dangerous, the temptation to not participate by the same parts in conflict to simplify the procedure, because in this way new conflicts are produced and probably the excluded will boycott the result of the negotiations.

The fact that in the environmental conflicts almost always different groups are compared (constituted in their turns by more subjects) that communicate among themselves only through single representatives, it engraves on the importance, inside the setting of mediation, of the relationships and of personal feelings.

What brings people to undertake a run of environmental mediation is not a problem tied up to their personal relationship, but on the contrary, their social role.

Attempts of approach, through the communication on a personal and mutual plan of the subjects involved in the negotiations, can be useful to the understanding of the respective not only material demands, but also social and personal ones.

4. The most popular, even if not totally correct, way of estimating the result of a mediation is simply to consider the success or the failure of the negotiation as regard as the formulation of an agreement. Nevertheless, as for the environmental mediation, it is necessary to consider other variables¹¹:

The suggested solutions should be satisfactory to all the interested parts. There are many ways to define agreement. When it aims to an unanimous approval among the parts, it is called "total agreement". When it aims to an arrangement among most of the parts, it is called "partial agreement". In the field of the environmental conflicts, unless one of the parts makes futile or improbable proposals, an agreement has to include all the parts. In fact, a solution is lasting only if it includes all the points of view.

⁹ C. BESEMER, *Gestione dei conflitti e mediazione*, Torino, 1999.

¹⁰ J. FOLBERG, A. TAYLOR, *Mediation. A comprehensive guide to resolving conflicts without litigation*, San Francisco, 1984.

¹¹ J. POTRAS, *Op. cit.*, 2002



The mediation has to use all the information useful to search of the best solution. If a solution is not feasible from the ecological point of view, it is not a lasting one. It is important, therefore, to make sure that the agreement creates a good balance between the intention and the ecological reality. For this reason, it is fundamental that the agreement is based on all the information and the pertinent scientific principles.

The result of the agreement has to observe laws, rules, directives, and politics in force. The purpose of the environmental mediation is not to offer only to a part the opportunity to haggle a resource at the expense of the parts away from the table of negotiation. It is not even the opportunity to get favouritism from the government. To avoid these situations, the solutions have to be in keeping with laws, rules, directives, and politics in force.

The mediation should allow to improve the relationship among the parts.

One of the main advantages of the mediation is to allow the parts to preserve, or even to improve, their relationship, even though the dispute follows through. It is an important element in environmental conflicts because the sharing of a resource involves a short and long- term “neighbourhood” among the parts.

5. Fundamental, in the effected search, is the comparative analysis with environmental mediation models of other countries.

In the conflicts that concern the environment, the mediation method has assumed increasing importance especially in the United States, subsequently in Canada and in Japan, then also in Europe, primarily on the plan of the theoretical reflection and also in practical experience.

In the United States since the seventies the initiatives in matter of environmental guardianship (quality of the air, construction of obstructions) have multiplied. The federal States after having noticed the considerable percentages of result of mediation practice applied to these themes, has held profit to incorporated interventions of mediation within the administrative procedures.

The novelty of the use of mediation generally applied to the environmental themes and the progressive discovery of the tool of the mediation, has also provoked a rapid diffusion of mediation in other countries (Germany, Great Britain, etc.).

5.1. In United States, in Holland and in Germany the profession of mediator has recently been institutionalized through the creation of a regular professional roll.

In the United States of America¹² in the last twenty years a certain attention for a new model of resolution of social conflicts has spread; starting to analyse as an

¹² Same cases are: *Footbills Case*, in detail described in H. BURGESS, *Environmental Mediation*, in L. SUSSKIND, L. BACOW, M. WHEELER, *Resolving environmental regulatory disputes*, Cambridge Massachusetts, 1980; *Jackson case*, in S. HILL, *Intergovernmental grant negotiation*, in L. SUSSKIND, L. BACOW, M. WHEELER, *Op. ult. cit.*



alternative approach to the administrative and judicial authorities the possibility to use techniques of negotiation¹³.

Such attention is the result of the diffusion of the practices of negotiation and of the mediation and it is also index of the dissatisfaction increasing respect to the attitude of the traditional tools to effectively resolve these types of controversies¹⁴, due above all to the dysfunction of the actual United States administrative and judicial system, and became in the years more and more slow and expensive¹⁵.

The phenomenon of environmental mediation was born, therefore, as a reaction to the expansion of the costs and the delays of the conflicts managed by the government and the judicial authority.

The solutions reached through the negotiation tend, instead, to be more equitable than the traditional one, when all the parties have the same condition of access and of information.

The agreement reached by mediation process tend to be more stable because the potential opponents was made joint responsible in the decision¹⁶.

Another recurrent remark is that the judicial system incentives the conflicts among the different conflicting parties, due to the same structure of the process in which the parts have to convince an impartial third person, judge, of the prevalence of its own position in comparison to those of the adversary one, on juridical plan.

All that involves to structure the social conflicts in antagonistic models, not tending to the conciliation of the different interests but rather to the prevalence of the one on the others (*win-lose* model)¹⁷.

The criticisms to the *adversary systems* are founded on the fact that they promote the development of social conflicts and stiffen the parts in conflicts making them unavailable to a spontaneous realization of the final decision¹⁸.

The mediation model, instead, would extend to harmonize the opposite interests towards a pleasant solution for all the parts, which purpose is to reach an accord, and they have to mitigate their own positions to make it acceptable to the counterparts. So to the *win-lose* model, source of tension also because of the contraposition between victors and vanquished that rise, would be replaced by the *win-win* model, characterized by techniques of compromise that would educate the

¹³ L. SUSSKIND, D. MEDIGAN, *New approaches to resolving disputes in the public sector*, in 9 *Justice System Journal*, 1984.

¹⁴ L. SUSSKIND, A. WEINSTEIN, *Towards a theory of environmental dispute resolution*, in 9 *Environmental affairs*, 1980.

¹⁵ S. G. BREYER, *Regulation and his reform*, Harvard University Press, 1982.

¹⁶ L. SUSSKIND, J. CRUISKSHANK, *Breaking the impasse. Consensual approaches to resolving public disputes*, New York, 1987.

¹⁷ D. J. AMY, *The politics of environmental mediation*, New York, 1987.

¹⁸ D. J. AMY, *Op. cit.*; L. SUSSKIND, A. WEINSTEIN, *Towards a theory of environmental dispute resolution*, in 9 *Environmental affairs*, 1980; L. Susskind, D. Madigan, *Op. cit.*



parts to the respect and the understanding of other people's positions, favouring the civil cohabitation¹⁹.

The environmental mediation is, according to the most popular definition, a process to solve the environmental disputes, in which the participation of the parts in negotiations for the search of an agreement is absolutely voluntary, and the parts are supported by a neutral third person, the mediator, who has to make the achievement of an agreement easier²⁰.

The task of the mediator is to set equality among the parts both on the plan of knowledge and on that of power; it is, in fact, fundamental so as reaching an agreement. Concerning this, it has been asserted that only the equality among the parts would allow the achievement of an agreement²¹.

As a further guarantee for the parts, the mediator must have acknowledgement and an alibi in order to guarantee the ability and professional ethics²². Moreover, as a guarantee for confidence among the parts, essential to achieve an agreement, it is important to protect the professional secrecy in front of the judge²³.

Unlike arbitration²⁴, the parts are not subject to the decision of a third person, but are free to achieve an agreement or not; in such sense, the voluntary nature of the process is even more accentuated and it avoids the risk that the parts will be bound by an agreement that they don't want to accept.

Also in Canada the public and environmental mediation has developed. Quite a lot of provinces have institutionalised the mediation in their process of environmental conformity verification²⁵.

Despite the advantages of the mediation in the environmental field, different resistances²⁶ to its use from the citizens, from the promoters and from the public administrators have initially blocked its integration in the gears of the public administration.

5.2. The resolution of the environmental disputes out of the courtrooms is always more popular in the United States of America.

¹⁹ L. SUSSKIND, C. OZAWA, *Mediated negotiation in the public sector*, in 27 *American Behavioral Scientist*, 1983.

²⁰ G. CORMICK, *Mediatine environmental controversies: Perspectives and first experience*, in 2 *Earth law Journal*, 1976.

²¹ L. SUSSKIND, A. WEINSTEIN, *Op. cit.*, contra D. J. AMY, *Op. cit.*

²² L. BACOW, M. WHEELER, *Environmental dispute resolution*, New York, 1982.

²³ K. L. LIEPMANN, *Confidentiality in environmental mediation: should third parties have access to the process?* In 14 *Boston College Environmental Affairs Law Review*, 1986.

²⁴ B. A. PHILLIPS, A. C. PIAZZA, *The role of mediation in public interest disputes*, in 34 *Hastings Law Journal*, 1982-83.

²⁵ P. RENAUD, J. POITRAS, *Mediation and reconciliation of interests in public conflict*, Carswell, Toronto, 1997.

²⁶ J. POITRAS, *La médiation dans le secteur public : de la réserve à la propension*, Université de Sherbrooke, Canada, 2002.



Firstly, the technique of the mediation has successfully developed in other spheres such as collective bargaining and domestic disputes.

In the early seventies some *Agencies*, specialized in the mediation and supported by private foundations' money, began to deal with local disputes especially regarding racial conflicts and the protection of the civil rights. Only later they began to deal with environmental conflicts²⁷.

The first successful environmental mediation²⁸ concerned a dispute related to the construction of a dike on the river Snoqualmine, near Seattle, for the control of the periodic floods. The dispute lasted since 1959 and the long resistance to the construction of the dike was considered a victory from the environmentalists. In May 1974 the mediation stated and after seven months the parts, supported by a mediator, managed to achieve an agreement: the dike could be built but in a different area promoting a project of territorial management more respectful of the environment.

On the enthusiasm of this success the use of the mediation to solve the environmental disputes quickly spread, increased the cases assisted by a mediator and the specialized agencies, simultaneously to the birth of a supporting cultural movement²⁹.

An example of a successful mediation among a plurality of interests is the *Foothills Case*³⁰.

The object of the dispute was a project of exploitation of the South Platte River for the civil, agricultural and industrial uses of the district of Denver (Colorado).

All the local political organizations, the industrialists and the agriculturists, the local press were in favour of it; the environmentalists and the EPA (*Environmental Protection Agency*) were contrary.

The opponents pointed out that the project would cause a strong deterioration of the environment and an increase of air pollution as consequence of the development caused by the increased water availability.

There were various profiles of the dispute, from the evaluation of water needs to that of environmental effects.

In this atmosphere, a member of the Congress offered his mediation; the supporters of the project, sure of victory and doubtful of mediator's impartiality, because she was regarded in favour of the environmentalists, refused the mediation.

One year after this episode the parts, exhausted by the long dispute, agreed to the mediation.

²⁷ U. SALANITRO, *L'environmental mediation negli USA : uno strumento alternativo per la risoluzione dei conflitti ambientali?* in *Rivista giuridica dell'ambiente*, 2, 1991.

²⁸ G. CORMICK, *Op. cit.*

²⁹ G. BINGHAM, L. V. HAYGOOD, *Environmental dispute resolution : the first ten years*, in 41 *Arbitration Journal*, 1986.

³⁰ H. BURGESS, *Environmental Mediation*, in L. SUSSKIND, L. BACOW, M. WHEELER, *Op. cit.*



In the meantime, the judicial cases promoted by the supporters of the project in front of the district court of Denver and by the environmentalists in front of the federal court of Washington went on slowly: the legal costs became too much onerous for the environmentalists, unsure of victory as well.

In this situation the EPA and the environmentalists accepted the agreement offered by the supporters of the project: they have to abandon the idea of any opposition in exchange for the guarantee of a least course of the river to safeguard the aquatic environment, for the commitment to starting a programme of rationalization of water and to being in agreement with the environmentalists on new works in the basin, for buying seaboards and building facilities (dock for kajak) to promote the recreational use of the area, and for paying all legal costs.

The agreement should be sanctioned by a consent decree enacted by the judicial authority, that would make possible the prompt forced execution; but the judge refused to enact it because he regarded the payment of legal costs as immoral and illegal.

Another practical case, quoted from literature, is the *Jackson case*³¹.

This dispute was between Jackson city, Wyoming, and the county of Teton. Jackson wanted to construct a depurator of the water flowed into a city (South Park) under the jurisdiction of the county; the county was afraid it would cause the expansion of the city and the deterioration of one of the most beautiful place of USA.

The negotiation among the parts were mediated by the EPA; it was interested to construct the depurator, in pursuance of federal laws. The achieved agreement apparently reflected the interests of the parts; but in fact it was the product of the disparity among the parts. The construction of the depurator should be returned for the commitment to control residential development through a restriction of connections of the sewer system outside the city limits. In fact, as there were no regulations that received the agreement, there was no chance of making it respect and limiting the connections of the sewer system.

Some considerations can arise from this case on how make the parts respect the agreement, the legitimacy of a non legal tie to the activity of a public corporation, the necessity of an effective contractual power of both parts, the role of a mediator (the EPA) who is always bound by institutional functions.

Some scholars noted that negotiations don't contrast with administrative and judicial procedures, but, on the contrary, they complement each other³².

The trials carried out in USA till now allow optimistic evaluations. In 1986 a study³³ of 132 cases of environmental negotiation developed in the decade 1974-84

³¹ S. HILL, *Intergovernmental grant negotiation*, in L. SUSSKIND, L. BACOW, M. WHEELER, *Op. cit.*

³² L. SUSSKIND, A. WEINSTEIN, *Op. cit.*

³³ G. BINGHAM, *Resolving environmental disputes. A decade of experience*, Washington, 1986.



showed a high degree of success. An agreement was achieved in 103 cases (78%), while it was partial in 21 cases.

5.3. Generally, in base to the imported model by the American experiences, the procedure of mediation is divided in three separate phases³⁴:

- pre-negotiation
- negotiation
- post-negotiation

In the preliminary phase of the pre-negotiation the mediator is assigned to a fundamental role. To identify the interested parts and to involve its representatives.

The phase of negotiation is characterized by the search of a solution that receives the general consent trying to focalise the interests that justified the positions of the parts and to individualize options that allow, also through mutual exchanges, the satisfaction of all the parts.

More remarkable is the search of instruments that, once agreement is reached, binds the parts to the carrying outphase; they are tools that are decided before the signature of the agreements, but that, for their finality, are considered typical of the phase of implementation or post-negotiation. This last phase, following the agreements, is aimed to implement the decisions of the parts. It is necessary to simulate the competent authorities to deliver the necessary decisions and to bind the participant subjects to effect the amount of power they have. The result of a negotiation should be an equitable agreement, wise, stable and reached without wasting time and resources. It can appear, at first, complex and long, but the foreign experience has shown that the invested time will broadly be recovered in the phase of the realization, when protests and judicial procedures can be avoided, because all the parts will have been jointly responsible and they will have participated in the decision³⁵.

6. In our Country the practice of mediation applied to the environmental problems is not yet very diffused. Don't miss however openings, also in Italy, to use mediation as a management tool for environmental problems, both at project level and already in application plan.

The most brilliant and original experiences of environmental mediation project in Italy can be found, in prevalence, in those regions (Piemonte, Lombardia, and Umbria) where mediation, as a general technique of conflict management is consolidated and tested.

The environmental mediation seems to be above all prerogative of the university scientific sphere or of the sector of private associations, except for the

³⁴ L. SUSSKIND, D. MADIGAN, *Op. cit.*

³⁵ I. KOPPEN, *Op. cit.*



insertion in some regional project³⁶. Surely, the sector- inside the environmental themes- in which in Italy the mediation has found more often application is the urbanism theme.

Examples of urban problems are: works of urban retraining, construction of dumps, power lines, power plant, shopping centres, highways, airports, institution of protected areas, etc.

6.1. Every operation of these gives birth to the usual problems of social and environmental acceptability. A kind of decision frequently subject to these obstacles are constituted by that infrastructural intervention or those public works that appear of sure collective utility, but that, at the same time, involve unpleasant effects for the communities involved more directly. As the system is crucial for the functioning of industrialized societies, the repercussions of the conflicts are economic and politics as well as environmental. In these cases the dilemma is known as *Nimby syndrome*³⁷ (Not In My Back Yard: you can carry out your project, but not in my garden), but it has to be clear that the refusal of unpleasant installations “near home” cannot be always considered as demonstration of niggardly egoism. It makes lever on unavailable and inalienable rights (as the right to health or to the quality of the environment) and in general on the principle of equality³⁸, real in virtue of a different effectiveness of such rights recognized to the subjects that were found to suffer a harmful environmental choice.

The reasons of the opposition are several. On one side there was a change of values, as consequence of the increased economic welfare and of a greater environmental sensibility. Once the system has been regarded as a chance of development and employment, today it has been considered as a menace to security and health.

The frequency of the impasses which such interventions go toward show the inadequacy of the technical and legal rationalities with which the administrations aim to face these dilemmas. The legislation has moved, in fact, on three lines that confirm, even though with numerous innovations, the traditional formula.

It aims to submit the responsibility of the final decision to the highest possible level (for example the environmental Ministry, in the case of environmental impact valuation) so that general interest (national, regional, etc.) can prevail. But often the effect is to relieve of responsibility the entities of inferior rank that feel encouraged to assume positions of radical refusal³⁹.

It aims, then, to guarantee the construction of the consent through a long chain of local authority and of specialized institutions opinions, that nevertheless has the

³⁶ Paragraph 5.1.

³⁷ A. MOLOCCHI, *Non nel mio giardino*, Napoli, 1998.

³⁸ IRES, *Di questo accordo lieto. Sulla risoluzione negoziale dei conflitti ambientali*, Torino, 1994.

³⁹ IRES, *Op. cit.*



effect to dilate in excess the procedure times, excluding from the trial just the subjects that have more intense preferences and that therefore feel badly represented by the institutions that pretend to talk instead of them.

It aims to offer the maximum of guarantees on the technical-scientific plan, with the idea that, if the technical results are sufficiently solid, the consent will naturally follow. The procedure of environmental impact valuation⁴⁰ constitutes the most important innovation in this sense. Nevertheless, such approach reveals inadequate in the cases in which the knowledge isn't very consolidated, the technologies are uncertain, the relationships of cause and effect aren't well known and the variables in play are numerous.

When a decision is formally assumed, the conflict is moved to the phase of realization. The defeated parts try to exploit the legal borders at disposition to assert their interests.

It is not infrequent that the final solution (when and if it arrives) displeases all the parts, with a consequent general deterioration of the relationships among community, groups and institutions.

Mediation, because it found solutions in the common agreement of the parts, seems to be the only tool able to offer greater guarantees of stability and duration of the solutions themselves.

6.2. Among the practical experiences the following deserve a mention:

- “*Progetto periferie*”⁴¹ of the Province of Turin, finalized to the diffusion of processes of community share to the urban politics. This project doesn't replace the various competences, but it tries to be better in collaboration and in communication. It tries to practise the approach of "integrated planning", in the awareness that every structural change (on the residences, on the common spaces, on the practicability...) changes people behaviour and the possibilities of access to the various opportunities.

- *Observatory Management Environmental and Territorial Conflicts (OGCAT)*, to prevent and to manage these situations of environmental conflict through alternative decisional approaches, based on dialogue and on negotiation between the different subjects, through the knowledge and the mastery of techniques for the construction of shared decisions. The *OGCAT* is promoted from " *Avanzi*"⁴², a search centre for the planning of innovative tools for the environmental, economic and social sustainability, that acts as facilitator of change processes in the enterprises, in the public administrations and in the third sector, favouring the consultation and the share of all the interested to the decisions.

⁴⁰ A. ALBERTI, M. BERRINI, A. MELONE, M. ZAMBRINI, *La valutazione di impatto ambientale. Istruzioni per l'uso*, Milano, 1989.

⁴¹ www.comune.torino.it/periferie

⁴² www.avanzi.org



▪ *ADR Centre*, first society in Italy specialized in conflict management and alternative resolution of the controversies, able to offer a variety of modern procedures to prevent or to effectively manage the civil and commercial litigations.

▪ Association “*Avventura Urbana*”⁴³, constituted by experts in the sector of the urbanism, that have a competence in the field of the approach to the participated planning. To *Avventura Urbana*, in 2000, from the Province in Turin the assignment to follow the course of the project “*not refuse to choose*”⁴⁴ in subject of disposal of the refusals has been submitted.

▪ The *Region Umbria*, inside the project “*VISPA*” (Evaluation of the Social impact of the Environmental Politics) in 1997/99, has diffusedly and critically introduced experiences and methodologies of management participated of the environment and of the territory, based on the phenomenon of the active citizen and the civic participation. General principles of the project are the implementation of the concept of *governance*, as a widened system of government, characterized by conditions of reciprocity, interdependence, cooperation and co-responsibility.

7. Despite a diffused atmosphere of favour towards the mediation as alternative tool of environmental problems management, there are opinions that show the same application problems and limits.

Besides, it very often seems to me that there is not, especially in the most tested American experiences, a real meditation but a negotiation, considered as a process where the parts try to find a satisfactory solution that solves disputes about the different preferences for a common problem⁴⁵.

The pattern of the environmental mediation, according to the supporters of such opinion, doesn't avoid criticism over the traditional means of solution⁴⁶.

It has been pointed out that the use of means of voluntary solution is generally effective only if the dispute has achieved a certain degree of maturity, because on one side it makes a more suitable search of problems and the interested parts possible, on the other side it makes the achievement of an agreement among tired parts easier.

Besides, the weakness of the contractual pattern is confirmed by the fact that the negotiation can be compromised by a petition of only one part with judicial authority, especially if the part thinks that it can protect its interests better in front of it. However, the agreement can be carried out only through the wish of the public corporation involved in the negotiation⁴⁷.

⁴³ M. SCLAVI, I. ROMANO, S. GUERCIO, A. PILLON, M. ROBIGLIO, I. TOUSSAINT, *Avventure Urbane. Progettare la città con gli abitanti*, Milano, 2002.

⁴⁴ www.provincia.torino.it/ambiente

⁴⁵ S. CASTELLI, *La mediazione. Teorie e tecniche*, Milano, 1996.

⁴⁶ D. J. AMY, *Op. cit.*

⁴⁷ G. BINGHAM, L. V. HAYGOOD, *Environmental dispute resolution: the first ten years*, in 41 *Arbitration Journal*, 1986.



The necessity to involve the public administration in the negotiation and, therefore, to carry out the agreement can require the need, in order to legalize the act, to consider the interests in accordance with the values fixed by the system, in the same way of traditional resolutive conditions⁴⁸.

The environmental mediation seems to be, according to some scholars, a partial answer to dissatisfaction with traditional resolutive patterns, where the risks seem to be superior to advantages. It doesn't succeed in getting free from the traditional pattern, because the public administration often takes part in the negotiation, but also it risks increasing its discretionary power, getting free from the formal observance of laws through the agreement with the most representative parts⁴⁹.

The consequences could be the crumbling of the procedural guarantees and the rules fixed by legislative branches and the imbalance of contractual power towards stronger economically and more organized structurally groups⁵⁰.

Among these reflections a place of relief will have the theme of:

- institutionalisation of mediation process
- impartiality of the mediator

7.1. The institutionalisation⁵¹ of mediation inside the decisional trial in environmental field is a theme very much debated among the researchers and among the mediators themselves. The institutionalisation of the mediation procedure will behave in the constraint of the agreement resulted by the negotiation also for the involved public authority. The people that regret the uncertainty in the realization of the agreements want that in the administrative procedures in environmental subject conciliatory be inserted a moment where the parts become protagonists of the final decision⁵².

Against the importance that the element of the willingness and the information for a good result of the negotiation is shown. Fundamental premise of the mediation is, in fact, the willingness and spontaneity of the choice to undertake the mediation procedure as well as the informal context of its development.

⁴⁸ With the same critical remarks L. BACOW, M. WHEELER, *Environmental dispute resolution*, New York, 1982.

⁴⁹ D. SCHOENBROD, *Limit and dangers of environmental mediation*, in *58 New York University Law Review*, 1983.

⁵⁰ D. J. AMY, *Op. cit.*

⁵¹ About this theme: D. J. AMY, *op. cit.*, J. FAGET, *L'institutionalisation de la médiation, point de vue juridique*, Intervention to the Master european in mediation, Institut Universitaire Kurt Bosch, Sion, 2002; N. KUBASEK, G. SILVERMAN, *environmental mediation*, in *26 american business law journal*, 1988.

⁵² U. SALANITRO, *L'environmental mediation negli USA: uno strumento alternativo per la risoluzione dei conflitti ambientali?* in *Rivista giuridica dell'ambiente*, 2, 1991.



The formalized insertion inside a pre-arranged procedural “*iter*” would risk to depreciate and to mortify the essential element of the voluntary choice in favour, instead, of automation and rituality.

7.2. One of the fundamental principles on which the mediator activity is based is impartiality, or better, “equidistance”. In “political” conflicts it is, however, more difficult to maintain impartiality because it is part of human nature to have ideologies and political opinions⁵³.

The mediator is called first of all the attainment of a concrete result without guarantees toward the interested subjects, besides his professional code of ethics. This weakening of guarantees in the mediator activity makes him extremely exposed to the relationships of power among the subjects in conflict and very much influenced by the subject with greater power. It is necessary, therefore, to reflect if the mediation can inhale to replace completely the traditional ways of expression and defence of interests and individual and collective rights (the democratic representation, the control of power and the jurisdictional function) or offers a tool to better decipher the carrying out of the social relationship and to estrange from a sterile optic “competitive” of the conflict⁵⁴.

8. In the experiences recalled in theme of environmental mediation there is not an important and rightful connection among two big problematic areas: the urban safety and the environmental problems (in a wide sense).

The problem of safety is connected to the theme of relationship between the single or the collective with in the territory.

Urban safety cannot be reduced to problems of crime; it is a complex problem, connected to the problems of health, the environment, urbanism and education; it is the result of increasing inequalities in the access to the resources, it entails conflicts of interest, especially in the division and in the use of the public space (nighttime fun, sport, prostitution).

The guarantee of social security means to relate the urbanistic, productive, environmental changes to the interests and reasons that citizens express towards the context of belonging.

The image of a safe city can come from planning actions that give a central position to the role of citizens. The daily dispute produces feelings of insecurity, and, vice versa, the sense of insecurity causes mistrust, fear, individualism and finally conflicts.

⁵³ C. BESEMER, *Op. cit.*

⁵⁴ M. BOUCHARD, *La mediazione: una terza via per la giustizia penale*, in *Questione Giustizia*, n. 3-4, 1992.



It seems, therefore, the dispute succeeded in assuming a form such as to condition social life: any physical or metaphoric environment of our daily life can be involved in a conflict and its consequences.

The explanation could be the excessive complexity and multiplicity of the epoch in which we live, becoming fertile soil for conflicts, because of the clash among the different systems of values and norms.

Post-modern society, has given life to a polycentric society, characterized both by a big differentiation, and by presence of different communicative codes, to loss of relationships among individuals and groups.

The lack of common rules has baited a process of fragmentation: can choose among various symbolic and moral codes prevents subjects from recognize themselves in common projects.

For a long time the social sciences are been interested in conflict both micro conflict and macro conflict.

Simmel asserts that the alternative to the social order is not the absence of conflict, impossible condition for the society, but, on the contrary, the indifference, and that the conflict has fundamental functions for the society, it is “*a form of socialization that carries out social functions as the cooperation*”⁵⁵.

According to Max Weber, instead, “*peace is a change of kind of conflict about antagonists or about objects, or about methods of solution*”⁵⁶. According to Dahrendorf “*conflict is a main characteristic of structure and trials of the society. The conflict has two faces; contribute to the integration of social systems and provoke some changes.... the societies are essentially historical creations and needs propulsive strength of conflict, or vice versa there is change and historical evolution because there are conflicts*”⁵⁷.

It is born, therefore, the demand to rely on systems of regulation of the conflicts that shift the accent from idea of dodge round and resolve conflict, to idea of a management of the conflict; the mediation appears the fittest answer, because recovers the positive and pedagogic validity of conflict, seeing in the conflict not an evil in itself but an event of the human life, whose negativeness and positiveness don't depend by its intrinsic characteristics but by the way to manage it⁵⁸.

Methodologies as “the empowerment” of community, the territorial education, the social mediation through a global approach, are in a close relationship to the safety of the neighbourhoods, to the organization of the collaboration to local level, to the share of citizens. In fact, in presence of a common background of town resident, characterized by generalized insecurity, positive effects on the perception of safety are gotten spreading in the territory a culture in favour of the replacement in communication of the micro-community around common values, an expansion of

⁵⁵ G. SIMMEL, *Conflict*, London, 1951.

⁵⁶ M. WEBER, *Il metodo delle scienze storico-sociali*, Torino, 1958.

⁵⁷ R. DAHRENDORF, *Ordine e mutamento sociale*, Bologna, 1971.

⁵⁸ L. PEPINO, *Comunità e conflitti*, in M. Bouchard, G. Mierolo (a cura di), *Prospettive di mediazione*, 2000.



territory resources propaedeutical to the management of the conflict in a trial that "from the lower part" it favours an assumption of individual and collective responsibility. A run that involves not a limited approach to a partial aspect, related to a discipline, or to a only one project or mission but a general approach, interdisciplinary, that reads the territory in its complexity, that embraces all the approaches related to the facets that a complex and polyhedric social reality, between sectionalisms and globalisms, requires.

In fact, the problem of urban safety needs the carrying out of global politics of management through a global approach to the problems and interdisciplinary answers, refusing, therefore, the traditional separation between the urban sector and the safety sector. All the projects of new management and urban recovery will integrate the safety dimension in the phase of planning and management.

8.1. We are assisting a phenomenon of pressing entry of matters connected to the urban insecurity in the area of priorities in political debate and social emergency.

A diffused temptation is to answer this disorder with the affirmation of the order and to react to the insecurity with the affirmation and the search of old and new forms of safety.

The theme of insecurity becomes an essential and decisive object in the construction of the emergencies and the priorities in the political debate, engraving deeply, and sometimes in an instrumental way, in the processes of political trends forming.

The citizens insecurity is primarily faced with appeals regarding the control of the territory, the action of police, the efficiency of the penal system and local administrative interventions, directed to reduce the subjective insecurity determined by urban and social causes of degrade and uneasiness.

In many European countries, in front of the emotional wave pushed by the citizens and in front of the difficulties connected to any attempt to remodel and to recollect the social interventions, a preference to move the whole security matter inside the narrow confinements of public order and jurisdiction, through tools of sure mediatic impact as politics of "zero tolerance" or of "law and order", of North American matrix.

The politics of contrast to the insecurity can't be, however, exclusively entrusted to the politics of public order and to repression, but they pass through the government of territory and through the opportunities given to citizens to live it. The repressive reaction realized through programs of strengthening of social control aims to the exaltation of the conflict and the increase of social break-up, accenting the formation of a *dual society* founded upon the clear separation among included and excluded⁵⁹. The answer of "zero tolerance" undoubtedly represents the most

⁵⁹ L. PEPINO, *Tolleranza zero: strategie non esportabili*, in *Narcmafie*, 1999.



immediate and winning solution that creates a greater safety illusion in the citizens besieged by security panic. In reality the repressive politics can contain and exorcize the problem of urban insecurity, but can't resolve it from the roots, neither, work as effective deterrents. Departing from the presupposition that the security restlessness is often associated to a sense of distance and abandonment from the institutions, the most qualified answer to face the insecurity emergency could be a synergistic action of those formations delegated to functions of social regulation, aimed at fill such distance between citizens and institutions.

I intend to present myself to those community practices of *proximity*, directed to recreate a community social link and a communication between citizens and territory, through the tool of the accompaniment, of the mediation, of the listening, of the reception, of the management of the fears, of the approach of each one to the services⁶⁰.

8.2. The predisposition of projects would be useful to support the process of urban regeneration, as opposed to the risk of environmental and social degradation and as promotion of the vocations and the resources of the suburbs in a perspective of integrated and participated approach in the relationship between institutions and citizens. It is necessary to promote the involvement of the inhabitants and of the territorial organizations to build politics of local development and to favour, in the different phases of planning and intervention, an active and prepositional role of the local subjects.

Our culture brings us to consider any phenomenon of conflicts as a negative experience to be avoided. The smothered conflicts, not managed or managed badly, often become serious problems on the personal and social plan⁶¹. We need to revisit our conception of "conflict" abandoning the idea of the negativity of the event and considering, instead, the conflict as a constructive moment of comparison and enrichment.

To create a service of "*neighbourhood mediation*" that favours a transparent communication between the inhabitants of a district and the local Administrations which means offering a space of accessible reception on the territory to anyone who is living problems and uneasiness connected to the conflict in an optics of common construction rather than of repression of the conflict or the same uneasiness.

The project of social mediation starts from the principle that the district must be recognized as a qualified place for the institutionalisation of the conflicts, directed to reconstruct the places of socialization beginning from the regulation of these conflicts and to recompose forms of sociality and restructuring of the relationship among the civil society and the State.

⁶⁰ D. SCATOLERO, *Politiche della sicurezza: quando sicurezza vuol dire prossimità*, in *Narcomafie*, 2000.

⁶¹ S. CASTELLI, *La mediazione*, Milano, 1996.



To create a space of mediation of district represents an alternative way to manage the violence of conflicts, an alternative management of the aggressiveness that for many people is the only tool of expression of their own ideas; an instrument that consolidates more and more where the communication is interrupted and the social wound is lacerated.

The space of the mediation is an alternative modality in the “safety contract” that every citizen has signed; it is an innovative extra judicial intervention that has as its only purpose the recreation a dialogue interrupted among the parts.

From these reflections it is immediate the individualization of the narrow connection among the themes of safety and urbanism, deviance and environment, uneasiness and territory, that don't represent worlds and sectors separated but need a combined and parallel approach.

It would be interesting and extremely useful to intervene with the tool of mediation in the environmental problems in hold and connected with those tied to urban safety.

An operative structure mode up of professionals, among mediators and technicians, that take care of conflicts inherent to the complex ambit of “social liveability”, like many problems regarding the different sectors of the social way of living. The population, through the participation approach, wouldn't only live negativity and extraneousness to the choices of the preceded authorities, but could take hold of a positive role and to have collective tools to express, also through moments of constructive conflict that can find institutional tables of management through the instruments of the mediation.

9. The environmental mediation is not, obviously, the solution to all problems. It would be able, however, to be usefully experimented in the presence of some conditions: when an explicit conflict exists that the result of the technical-legal procedures makes uncertain, when the object of the contention is sufficiently circumscribed, when actors exist already constituted and clearly identifiable to represent the main affairs at stake, when the parts really have the wish to face the conflict and to arrive at an agreement trusting in the process of mediation and in the ability of the participants to negotiate.

To start this trial they don't need new laws. The current legislation doesn't forbid the negotiation approach, while a law that imposed moments of negotiation before the final decision (as in some cases has partially already happened), it would have, according to the tide of dominant thought, the effect to denaturalise the same mechanism of mediation characterized by voluntary and by free determination of the parts. In the Italian situation we need preceding positive cases. The main obstacle to the mediation is not juridical, but cultural. Both the proponents and the public institutions or the local groups and environmentalists are reluctant to adopt negotiation strategies because they haven't the necessary *know-how* and they cannot



appeal to precedents crowned by success. In other countries the experiences of environmental negotiation have achieved results that allow certain optimism. Perhaps these results have been favoured by the traditional wealth of the associative area and by a general cultural predisposition for the existing contract in those countries. Our tradition probably doesn't offer the most favourable conditions for similar experiments. But it would be good to try.

From previous considerations, despite the numerous perplexities, it seems to be able to draw a positive and optimistic evaluation on the suitability and potential effectiveness of the mediation techniques in the management of the environmental conflicts.

The experiences of other countries and of Italy have highlighted how, despite the application problems that are introduced, mediation has introduced a valid and efficient alternative to face the hypotheses of conflicts in the environmental field.

Not only from a point of view that if the reduction of the costs, of the times, of the stability of the arranged decisions, to deflate the work of the courts, but above all under the aspect of the joint responsibility of the involved parts, of the dismantling of the social aggressiveness, of the creation of ties socially recognized and participated choices.