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PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

Introduction

People have influenced the environment since the beginning of human civilization. Environmental problems had to be solved in cities where the concentration of inhabitants exceeded the natural absorption capacity of the environment. In ancient towns, the sewage was the main topic. In ancient Rome, the *"ius cloacae"* enabled the municipal authorities to build wastewater drainage and at the same time the Romans were authorized to discharge their wastewater.

In the Middle Age, little attention was paid to environmental matters. Problems of religion and wars against other faiths seemed to have been the priority. However, St Francis was able to combine religious spirituality with the concept of the protection of all living creatures. A similar concept may be found in some eastern religions, which have become recently very popular among the youth in Europe.

In the 19th century, the environment started to be considered as a matter of public health. England´s National Public Health Act passed in 1848-9 and in 1876, the River Pollution Act made it an offence to discharge sewage into streams. By the end of the 19th century, similar laws have entered into force in most States of Europe and North America. However, the progress was not general, e.g. Pittsburg did not get a sewage plant until 1959. It was not until the 1950´s that attention was paid to the pollution of air, owing to many cases of deadly smoke pollution. The London smog in 1952 caused 4000 deaths. Similar cases occurred in 1930 in Meuse Valley, Belgium in 1930, New York 1966 and elsewhere (Kiely, 1998, p.5-6).

The environment has become a topic in Science and Law after World War II, owing mainly to the increasing number of people living on the Earth: during the last fifty years the population has doubled, from 3 billion to 6 billion. In the OECD countries, 1.2 million tonnes of solid waste was generated per day in 1995 (Kiely, 1998, p. 623). The environment has become a burning political issue and a matter of public interest. There are many non-governmental organizations and political Parties whose activities are orientated to the protection of environment.

Legal instruments

In all States of the world, the activities influencing environment are subject to administrative procedures. From a legal point of view, there is a crucial problem of participation in such an administrative authorisation process. The amount of participants has become ever larger, corresponding to the idea that the environment is a public matter and everybody is entitled to take part in the decision process. There is also an important economic impact since the pollution of the environment is an externality which may be a relative advantage in the economic competition. So, e.g., the Chinese production is much cheaper than the European or American one. This is caused by the extraordinary diligence of the Chinese people, but also by less severe environmental standards. It is thus urgent to define a common international level of evaluating the environmental risks.

Up to now, this level is achieved only in the procedural law while the material standards are mostly left to national or EU legislation. The procedural rules are defined by the Aarhus Convention

(Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters), signed in Aarhus (Denmark) on 25 June 1998.

The Aarhus Convention is based on the assumption (which is explicitly stated in the introduction) that, in the field of the environment, improved access to information and public participation in decision-making enhances the quality and the implementation of decisions, contributes to public awareness of environmental issues, give the public the opportunity to express its concerns and enables public authorities to take due account of such concerns.

Under the Aarhus Convention, "Environmental information" includes any form of information concerning elements of the environment (atmosphere, water, soil, biological diversity), factors such as substances, noise or radiation, environmental policies, plans and measures, the state of human health and safety and conditions of human life including cultural sites and built structures. "The public concerned" means the public affected or likely to be affected by or having an interest in the environmental decision-making. Non-governmental organizations promoting environmental protection and meeting any requirements under national law are deemed to have an interest. Public authorities must make environmental information available to the public in the desired form, including copies of documentation, without an interest to be stated and within one or two months at the latest when the requested information is very complex and voluminous. The request for environmental information may be refused only when an explicitly defined reason occurs, such as:

- the public authority does not hold the requested information,
- the request is manifestly unreasonable or too general,
- the confidentiality is provided for under national law,
- international relations, national defence, public security,
- the course of justice,
- the confidentiality of commercial and industrial information,
- intellectual property rights,
- the confidentiality of personal rights,
- protection of the breeding sites of rare species.

Beyond the right to information, the Aarhus Convention also enforces the right to participation in administrative procedures with environmental impact. The Aarhus Convention contains a list of activities which are subject to the Environmental Impact Assessment (EIA) procedure. The list contains e.g.

- oil and gas refineries,
- thermal power stations over 50 MW,
- nuclear power stations,
- production and processing of metals,
- production of cement,
- production of asbestos,
- production of glass and melting mineral substances more than 20 tons per day,
- many types of chemical production,
- incineration of municipal waste more than 3 tons per hour,
- any treatment of hazardous waste,
- disposal of non-hazardous waste exceeding 50 tons per day,
- waste-water treatment plants with a capacity exceeding 150000 population equivalent,
- railways, airports, motorways and express roads,
- groundwater abstraction exceeding 10 million cubic metres,
- extraction of petroleum exceeding 500 tons per day and extraction of gas exceeding 500000 cubic metres per day,
- dams holding back more than 10 million cubic metres of water,
- intensive rearing of poultry or pigs,
- quarries exceeding 25 hectares,
- electrical power lines with a voltage of more than 220 kV and length of more than 15 km,
- storage of petroleum and similar products exceeding 200000 tons.

The public concerned must be informed early in an environmental decision-making procedure about the proposed activity. In the decision, due account is taken of the outcome of the public participation.

Under the Aarhus Convention, the public concerned has the right to challenge before a court of law or another impartial and independent body the substantive and procedural legality of any decision concerning the above- mentioned activities as well as any wrong information.

Implementation into the Czech Law

Availability of environmental information (Articles 4, 5 of the Aarhus Convention) has been implemented into the Czech Law by the Environmental Information Act Act No 123/1998Sb. This Act contains in explicit form most of the items required by the Aarhus Convention, the only exception being the information concerning cultural sites and built structures. On the other hand, the Aarhus Convention makes it possible to refuse a request which is manifestly unreasonable, which is not mentioned in the Czech national law.

Public participation in decision-making is provided for by several Acts, such as the Environmental Impact Assessment Act No 100/2001Sb., the Water Act No 254/2001 Sb. and the Nature Protection Act No 114/1992Sb. The Environmental Impact Assessment (EIA) Act concerns preliminary evaluation of important activities, without establishing rights or duties. Any NGO is entitled to enter into the administrative process at this early stage, and thus has the right to be a Party to the later administrative procedures, concerning rights and duties in building or mining or other activities. No limitation is imposed on the NGO´s even though the Aarhus Convention makes it possible to impose requirements by the national law, e.g. free membership without preliminary conditions. The quantitative characteristics of activities subject to the EIA procedure are more severe under the Czech national law than those required by the Aarhus Convention, e.g. extraction of oil is compulsory subject to the EIA procedure since 50 t/day and extraction of gas since 50 000 cubic metres per day, as well as any quarry (however small) etc.

Any NGO promoting environmental protection is entitled to be a Party to an administrative procedure under the Water Act, including the right to challenge the administrative decision before a court of law. The same applies for an NGO whose aim is the protection of nature, within the Nature Protection Act.

The backside of environmental protection

The Aarhus Convention and its implementation to the national legislation is based on the assumption that individuals and NGO´s promoting environmental protection are either peaceful fathers and mothers defending their homes and children against reckless businessmen or unselfish people striving for clean rivers and beautiful landscape. In fact, this is true but it is not the whole truth. Environmental protection is a human activity and as such it may be used to any aims, including politics, economics or deliberate disgusting one´s neighbour.

The access to environmental information is used mostly by students who need data for their theses. This is quite innocent up to a certain level, but beyond reasonable limits this procedure denies the aim itself of the student´s thesis, which is to demonstrate his or her ability to find and evaluate appropriate data. During my 12-years long experience in environmental administrative bodies, I answered many sets of questions which were generally quite cumbersome, requiring many hours of investigation, studying old documents etc. This work should have been done by the student himself.

Another type of question is asked just to argue in disputes which are far beyond environmental protection – many times by someone who simply dislikes the public authorities. In the Czech Republic, there is a village Šimanov (near the town of Jihlava), which became notorious by the fact that no one

wanted to be elected chairman or village clerk, and thus the public life has stopped, including investments, building of roads, water management etc. There is a local NGO “Stop Illicit Dumping, ” which was asking so many questions that no one was able to reply, and immediately after any answer a new set of questions followed. As a result, presently no one takes care of the environmental protection in the village, which is the opposite of the noble ideas of the Aarhus Convention.

The access to information itself is less controversial than the possibility of any NGO to become a Party to environmental administrative procedures. The NGO´s have no duties, but only rights, which enables them to appeal and impose unreasonable conditions without ever suffering any adverse impact of their behaviour. Several NGO´s are offering their services to investors (mostly writing some useless analysis) with the implicite threat of relenting the administrative procedure in case that the offer was rejected. It is presumed that many NGO´s have been created with the only purpose to help one company against another in the economic competition. Of course, the proof is very difficult, but it is essential that the system makes it possible to proceed this way.

In the South of Moravia (Czech Republic), there is a system of artificial lakes on the Dyje (Thaya) River, with a total volume of water exceeding 100 million cubic metres of water. Such a great water-work must be equipped with a document called manipulating rules, i.e. rules saying how much water is retained and how much is discharged depending on the inflow and the water level. This document is particularly important in emergency situations, such as flood or lack of water. In spite of the crucial importance of this document, it was not possible to achieve its approval by the water-board owing to endless protests and appeals of an NGO called Service of Ecological Law. Most of the local people wanted the manipulating rules to be approved so as to make possible the use of the water and protection against floods. The main point of disputing was the protection of several species of wild birds. The NGO says that it would be better for nesting birds to keep the water level was as low as possible. Yet the birds have lived on the lakes or near the lakes, they would not have lived there if the lakes didn´t exist, and the primary purpose for which the lakes were built was irrigation. Even if the water level was reduced, the favourable nesting conditions would disappear very soon because the sandy beaches would be covered by trees and hedges. Moreover, the trees inside the dams would be dangerous in case of a flood because fallen trees would give blows to the dams and possibly even destroy them. However, the NGO achieved a delay of many years, the problem has not yet been solved. The members of the NGO are living at a safe distance from the lakes and do not feel the negative impact of their activities.

Endless delays in the administrative procedure are achieved mostly by presenting very long lists of questions and objections, each of which must be answered even though many of them are unreasonable. Some time ago, I was involved in an administrative procedure, whose aim was an incinerator near the town of Blansko. An NGO presented a list of objections, saying among others that a local ozone hole would be formed over the incinerator. Even though manifestly unreasonable, such an objection must be dealt with and it must be proved that no ozone hole would arise – an almost impossible task. However, in case of a trial the court of appeal examines whether all questions and objections have been completely answered. If not, the court would cancel the administrative decision and the administrative process would have to restart. When there are some fifty of such objections, it is almost sure that any decision contains one or more points which may be found insufficient or wrong.

Another obstruction, very often used, is casting doubt upon the impartiality of magistrates. It is generally almost impossible to prove whether a magistrate is impartial or not.

Many times, obstructions are used against activities which are desired by local people, e.g. by-pass roads. This is e.g. the case of the town of Břeclav. Local people would like to remove the heavy transport out of the town, but objections are presented by NGO´s concerning protection of animals or flowers or landscape. On the other hand, local inhabitants scarcely take part in the EIA process. Several quarries have been opened recently without any serious objections, and only afterwards the people found out that there was much noise and air pollution.

Conclusion

Geoethics cannot miss the topic of environmental law. Ethics is the science of moral, and law is said to be the "minimum of moral." Within environmental ethics, law is that part which is best suited for scientific examination. The analysis of real impact of the given rules is necessary – law in action against law in books.

I have described in this paper the rules concerning the public participation in the environmental decision-making, both on the international and national level. Subsequently, I demonstrated several examples of how the rules work in practice.

The main conclusion is the striking lack of equilibrium between rights and duties of persons and corporations involved in the decision-making.

In the History of Law, an equilibrium between rights and duties has been aimed since the Antiquity. There are several periods when privileged persons had only rights with no duties or responsibilities, e.g. the aristocrats in France at the end of the 18th century. The following tragedy is well known.

Extremely broad privileges are given by the Aarhus Convention and the following national legislation to organized groups on the only basis of their self-denotion as "environmentalists." There is no doubt that most of them are honourable men and women. However, no duties nor responsibilities are connected with the privileges. The experience shows that the access to information and decision-making is only very little used to the purpose of defending local people against destroying their homes and environment.

Any attempts to limit public participation in environmental decision-making have been subject to criticism (e.g. Bělohradský, 2009, p.292). It has not been taken into account that the present legislation contains the danger of abuse, blackmailing and unfair economical and political competition.

It would be far beyond the scope of my talk to propose a solution – this is a task for politicians. The only aim of my paper was to demonstrate that the otherwise plausible idea of transparency and participation in environmental decision-making involves undesired collateral effects, quite similar to the ideas of Christian virtues (collateral effect: "*Malleus maleficarum*"), the idea of *"liberté, égalité, fraternité"* (collateral effect: Jacobin terror), the idea of social justice (collateral effect: oppression of human rights), the idea of freedom and democracy (collateral effect: bombing Belgrade hospitals) and the idea of free trade (collateral effect: the present world-wide financial crisis).

References:

Gerard Kiely, *Environmental Engineering*. McGraw-Hill, Singapore, 1988.
Václav Bělohradský: *Společnost nevolnosti* (Society of Sickness). Sociologické nakladatelství, Praha, 2009.