CHAPTER FIVE

LAW AND PARTICIPATION

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A. Problem focus

The issue of participation is of interest to scholars in law because of its relation to new forms of governance and regulation (Black 2000, 2001; de Burca and Scott 2006). Empirical studies of participation in biotechnology licensing show however that such procedures “itself may cause serious trouble when it is embedded in a formal procedure with a relatively strong legal framework.” (Bora & Hausendorf 2006: 478) Taking this as an example, the main problem discussed in this paper is that the legal system might be dysfunctional to various political participatory ambitions. Participation implies inclusion, but we see examples of exclusion that originate from the internal operations of the legal system. Considering the many instances of participatory instruments embedded in legal frameworks in many sectors of society, for instance environmental matters, it is important to ask what kind of problems the law might cause and the reasons behind these problems. With environmental law and regulation of genetically modified organisms (GMOs) as an example, this essay analyses the paradoxical tendencies of the legal system to exclude citizens even when regulations have the purpose of including citizens. The scientific residence of this essay is sociology of law.

B. Public participation\(^1\) in environmental law

Environmental law is a good example of an area where there has been a political need for public engagement. Fiorino (1990) has provided an overview of such mechanisms with respect to environmental risk. According to him, there are at least five types of such mechanisms:

\(^1\) Rowe & Frewer (2005) have argued that the concept of public engagement include public participation, public communication and public consultation. However, here the concept public participation will be used as the general term.
public hearings (workshops, seminars etc.), initiatives (enabling citizens to place issues on the ballot for voter approval), public surveys, negotiated rule-making (‘decentralised’ rule-making with the authority) and citizen’s review panels (‘jury like model’). There are numerous examples of these types and different ways to institutionalise them. The mechanism chosen in each case is considerably dependant not only upon the matter in question and the political ambitions, but also the regulative culture. The mechanisms can be more or less made legal, i.e. brought into the legal system or the administrative system. In an overview in Abels & Bora (2004), one type is labelled ‘Legal public hearing’, but it is rather a question of how much these mechanisms depend on the legal-administrative system. Of special interest in this essay are those instances when the participatory mechanisms are brought into the legal system and when a normative conflict arises as a consequence.

If we look to Sweden and the Nordic countries (with a fairly similar, Nordic legal tradition), there are several examples of studies made in order to investigate the effects of different participatory regulations. In environmental law, there is, for example, the Institute of Environmental Impact Assessment (EIA) which provides for ordinary or extended consultations with concerned citizens, depending on the matter. These consultations are directed both to those who are particularly affected by a project in a specific sense, as well to those who are affected in a more general sense. The scope of the consultations is dependant upon the severity of the project. Other examples include regulations to ensure the right to information, or access to justice. The subsequent questions are: how do these participatory mechanisms work, and, are they effective?

When five large Nordic development projects were assessed, the over all conclusion was that “in three of these cases the EIA process seems to have had limited influence on planning and decision-making. In one case the EIA process clearly had an impact and in one the role is unclear.” (Hilding-Rydevik 2001: 223) Reference to international work indicates the same results (Petts 1999). A socio-legal study made on the consultations within the EIA process on a large infrastructure project concludes that “the law has not been an active, living part of the process.” (Wickenberg 2003: 113, translated here)

Another comprehensive study with focus on the deliberative aspects in the process came to similar conclusions. Linda Soneryd investigated the deliberative aspects of the EIA’s planning of an airport. The author found similar results when it comes to legal aspects of these processes and noted that some local residents hired a lawyer who could speak for