CHAPTER 9

Participation and Administrative Procedure

Jutta Stender-Vorwachs

It may be possible to enhance acceptance of political decision making by better and more intensive participation of the public in administrative procedures. It should also be considered whether early participation can improve public acceptance and whether some changes in legislation and administrative procedure are necessary.

1 Public and Citizens’ Participation

The discussion on participation processes in administrative procedures does not make a clear distinction between public participation and citizens’ participation. The latter entails citizen involvement in concrete planning and decision-making processes as well as their participation in public petitions and referendums.1 Public participation, on the other hand, is focused only on their involvement in concrete administrative processes. Understood in a broad sense, such participation requires not only that those directly affected by an administrative measure or decision be involved, but that “everyone” be involved, including individual citizens, associations, organizations and groups (Art. 1 (2) EIA Directive).2 This very broad interpretation has been discussed critically in Germany because of the difficulties in considering the interests of such a large number of participants in a manageable way.3

---

The Role of the Legal Framework for Communication with and Participation of the Public

To improve communication and interaction with the public, a legal framework is needed that considers the aspects of transparency, efficiency and acceptance. Transparent regulations are better understood by society. Legally mandated information and communication with citizens have a strong impact on the efficiency and acceptance of major infrastructure and industrial construction projects.

A state that agrees to implement new technologies has to safeguard and support the fundamental right to life and physical integrity (Article 2 paragraph 2(1) GG). The state is also responsible for the safety of natural resources (Article 20a GG). This is why, for example, the safety of drinking water has the status of a high constitutional right. Legal regulations should therefore not accept or allow damage to life or health. In the case of developing and testing new technologies, the legislator must have the competence to factor risks into his assessments. Only risks which cannot be avoided on the basis of current science and technology are deemed acceptable by the German constitutional court. This “state of the art” provides the basis for safety regulations in society, and together with the principle of democracy, explains the necessity to regulate communication with the public and public participation. However, the question is whether existing legal devices provide enough support for efforts to minimize the risks arising from large construction projects or whether new legal instruments have to be developed and implemented. In this context the legal framework at European level plays a significant role (i.e. the Aarhus Convention).

A major judicial opinion is that regulations and the means by which they are handled by state authorities have a significant impact on public confidence. Fears and anxiety as well as reservations about major projects may therefore be partly mitigated by a legal framework that is transparent, generally intelligible and fair. When clearly regulated by law and applied in a transparent way, public information, communication and participation help to enhance communication processes and increase the options for participation in debates and decision-making processes. However, this hypothesis still has to be tested through an analysis of German and European legal regulations and jurisdiction as well as alternative dispute models and forms of public participation.

---

5 Convention on access to information, public participation in decision making and access to justice in environmental matters, drafted at Aarhus, Denmark, on 25 June 1998.