
COMMUNITY PARTICIPATION IN THE ANALYSIS OF THE ENVIRONMENTAL IMPACT ASSESSMENT AS A DEMOCRATIC MECHANISM TO INSURE SOCIAL-ENVIRONMENTAL RIGHTS

Romeu Thomé

Juris Doctor in Public Law with a focus on Environmental Law at the Pontifical Catholic University of Minas Gerais (PUCMINAS).
Master of Laws in Economic Law with a focus on Environmental Law at the Federal University of Minas Gerais (UFMG).
Professor at the Law Postgraduation Program at Escola Superior Dom Helder Câmara:
Master of Laws in Environmental Law and Sustainable Development.
Lawyer and consultant on Environmental Law.
Email: romeuprof@hotmail.com

José Cláudio Junqueira Ribeiro

Juris Doctor in Sanitation, Environment and Water Resources at the Federal University of Minas Gerais (UFMG).
Master of Laws in Genie Sanitaire et Urbanisme at Ecole Nationale de La Sante Publique, Rennes, France.
Specialist in Sanitary Engineering at UFMG's Engineering School.
Graduation in Civil Engineering at the Federal University of Minas Gerais.
Environment Management Professor at the Engineering and Architecture Faculty of Fumec University and Professor at the Law Postgraduation Program at Escola Superior Dom Helder Câmara and
Master of Laws in Environmental Law and Sustainable Development.
Email: jcjonqueira@yahoo.com

ABSTRACT

This paper aims at analyzing popular participation mechanisms in environmental impact assessment as a result of the application of the democratic principle to the environmental field. It is found that, in Brazil, despite being already covered by the environmental standards in force, popular participation is limited to specific times of the environmental permitting procedure, weakening its role of supporting decision-making by the Government and making it difficult to adopt socially and environmentally fair measures. One of the assumptions of a Democratic and Environmental Rule of Law is that citizens have the right (and duty) to actively participate in decision making that may affect environmental balance. The research used, in addition to the legal-comparative method, the legal and propositional one in order to suggest the necessary improvements and the expansion of the participation instruments in the environmental assessment evaluation procedures in the Brazilian legal system through the analysis of foreign environmental standards.

Keywords: Democratic principle. Environment. Participation. Environmental impact assessment.

PARTICIPAÇÃO COMUNITÁRIA NA ANÁLISE DA ANÁLISE DE IMPACTO AMBIENTAL COMO MECANISMO DEMOCRÁTICO DE GARANTIA DOS DIREITOS SOCIOAMBIENTAIS

RESUMO

O presente trabalho tem como escopo analisar os mecanismos de participação popular na Avaliação de Impacto Ambiental como decorrência da aplicação do princípio democrático em matéria ambiental. Verifica-se que, no Brasil, apesar de já prevista nas normas ambientais em vigor, a participação popular é limitada a momentos específicos do procedimento de licenciamento ambiental, enfraquecendo sua função de subsidiar a tomada de decisão pelo Poder Público e dificultando a adoção de medidas socioambientalmente justas. Uma das premissas de um Estado Democrático e Socioambiental de Direito é a de que os cidadãos têm o direito (e o dever) de participar ativamente da tomada de decisões que possam vir a afetar o equilíbrio ambiental. Foram utilizados, na pesquisa, além do método jurídico-comparativo, o jurídico-propositivo, a fim de sugerir, a partir da análise de normas ambientais estrangeiras, o necessário aperfeiçoamento e a ampliação dos instrumentos de participação nos procedimentos de Avaliação de Impacto Ambiental no ordenamento jurídico pátrio.

Palavras-chave: *Princípio democrático. Meio ambiente. Participação. Avaliação de Impacto Ambiental.*

INTRODUCTION

The origins of the environmental impact assessment process go back to the late 60's, a time when the National Environmental Policy Act – NEPA was created in the United States (January 01, 1970). Once the mechanisms were implemented by North-Americans, the mechanisms foreseen by NEPA were also adopted by central economy countries in similar stages of development that also had the need to prepare an environmental impact assessment to subsidize decision making by the Public Power, especially regarding large size projects. Initially, the spread of this environmental impact assessment process took place in countries from a British origin such as Canada (1973), New Zealand (1973) and Australia (1974), probably due to their similar political and legal systems.

In Europe, Directive 337/85 (on the evaluation of the effects of certain public and private projects on the environment) is seen as the milestone for the formal adoption of the environmental impact assessment process, compulsorily applied to all member countries from then on. It is important to register the pioneer initiative of France that, in 1976, legislated on that subject, bringing its application forward in the European territory.

The discussions on the complexity of the environmental theme, international cooperation and the relations created with international banks, especially the World Bank, became relevant factors for the environmental impact assessment to be also introduced to developing countries.

In Brazil, while some states such as São Paulo, Rio de Janeiro and Minas Gerais were already testing some environmental impact assessment procedures since the mid 70's, their implementation nationwide only assumed convincing traits in the beginning of the 80's by means of Law 6.938 dated August 31, 1981, which lifted the environmental impact assessment to the category of instrument of the national environment policy.

Art. 9 – These are instruments of the National Policy for the Environment:

I – establish environmental quality standards;

II – environmental zoning;

III - the environmental impact assessment; (bolded by us)

IV – permitting and reviewing effectively or potentially pollutant activities;

V – incentive to production and installation of equipment, and the creation or absorption of technology aimed at improving environmental quality;

- VI – creation of territorial spaces especially protected by the federal, state and municipal Public Power, such as areas of environmental protection, of relevant ecologic interest and extractive reserves;
- VII – national information system on the environment;
- VIII – the Federal Technical File for Environmental Defense Activities and Instruments;
- IX – disciplinary or compensatory penalties for non compliance with measures necessary for the preservation or the correction of environmental degradation.
- X – the creation of the Environment Quality Report to be published annually by the Brazilian Institute of Environment and Renewable Natural Resources - IBAMA;
- XI – insure the supply of information regarding the Environment, and the Public Power agrees to produce them in case of inexistence;
- XII – the Federal Technical File of potentially pollutant activities and/or using environmental resources.
- XIII – economic instruments, such as forest concession, environmental right of way, environmental insurance and others. (CONAMA, 1986).

Although the environmental impact assessment was confirmed by Law 6.938/81, the regulation of the procedures for its effective application only took place in 1986, through Resolution 01/86 of the National Environment Council – CONAMA, which established the definitions, responsibilities, basic criteria and general guidelines for the use and implementation of the Environmental Impact Assessment as one of the instruments of the National Policy for the Environment.

It is important to highlight the main idea that bases the National Environmental Policy Act - NEPA (1969), the European Directive (1985) and CONAMA's Resolution (1986): the importance assigned to public participation in the environmental impact assessment process as a guarantee of the exercise of citizenship and democracy.

This paper aims at presenting the core concepts on environmental participation, identifying audience diversity and investigating available models and tools for the effective engagement of the society in this process that offers interested people the significant role of actors in decision making by the Public Power. Besides, it is important to implement a participation program and to incorporate its results to the evaluation process related to the Environmental Impact Assessment at the light of the standards that regulate its procedures in the international and the Brazilian legal orders.

1 THE DEMOCRATIC PRINCIPLE (OR THE PRINCIPLE OF COMMUNITY PARTICIPATION) IN ENVIRONMENTAL MATTERS

In the Democratic and Social Environmental Rule of Law ⁽¹⁾, citizens have the right (and the obligation) to take part in decisions that may affect environmental balance. There are several mechanisms to protect the environment that allow for the effective application of the democratic principle (or the democratic participation).

Principle ten of the Rio 92 Declaration (Eco 92) expressly foresees that

[...] the best way to deal with environmental issues is to insure the participation, at the appropriate level, of all citizens involved. At the national level, each individual has to have appropriate access to information related to the environment that is available to public authorities, including information on dangerous material and activities in their communities, as well as the opportunity to take part in decision making processes. States should facilitate and stimulate public awareness and participation, making information available to all. Effective access should be given to legal and administrative procedures, including in regards to the compensation and recovery of damages. (bolded by us).

Democracy nowadays is not fulfilled with the deliberative instances of elected representatives and bureaucratic bodies faithful to legal commands. As Sampaio (2003, p. 93) teaches, “the principle of the Democratic Rule of Law fails to find comfort just in the figure of the formal political representation, simultaneously requiring popular participation and responsible judicial collaboration when making fundamental rights concrete”.

When defending the idea of implementing new mechanisms based on the ethics of extended range responsibility in human actions, especially in what regards environmental issues, Hans Jonas (2006, p. 64) doubts the capacity of the contemporary representative government to meet the new

^{1 3} In literature, there are terms such as “Environmental Rule of Law”, “Social-Environmental State”, “Environmental Democratic Rule of Law” and “Social-Environmental Democratic Rule of Law”, among many others, to name a State committed to environmental sustainability. Strictly speaking, Democratic Rule of Law would take over that commitment from the beginning. We maintained Social-Environmental Democratic Rule of Law to emphasize, among the emancipatory projects of the Democratic State, the intergenerational pact and sustainable development in a world of risks and uncertainties.

requirements of the risk society, adding that “the ‘future’ is not represented in any instance; it is not a force one can weigh on a scale. Something that does not exist does not lobby at all, and the non-born are powerless”. From that point of view, it is essential to act, nowadays, under the light of precaution, community participation and sustainable development principles, taking the needs of future generations into account.

For Hermitte and David (2004, p. 96), the political system “is facing the need to rebuild a mechanism that allows the evaluation of scientific and technical facts so that the evaluation leads to a political decision according to democratic standards”. For such, the authors say that “it is necessary to reach the ‘decisory content of knowledge’, to produce scientific knowledge through procedures that enable judgement from third parties”.

As we can see, one cannot do without the direct participation of the people or the community for both macro decisions (plebiscite, referendum and popular legislative initiative), and sectorial decisory processes (administrative, condominium, business decisions, for example), as those deliberations directly or indirectly affect individuals. (THOMÉ, 2015).

Environmental issues, due to their nature, extension and severity, are framed as a subject in macro democracy (environmental popular consultation, as it happened in Italy and Sweden regarding the nuclear policy) (MACHADO, 2004, p. 86) and micro democracy (popular and social participation, especially NGOs, in public hearings and collective environment proceedings). (SAMPAIO, 2003, p. 80).

In Brazil, the principle of community participation is forecasted in article 225, caput of the 1988 Constitution, in the provision that assigns to the Public Power and the collectivity the obligation to protect and preserve the environment for present and future generations.

Then, the society starts to hold some mechanisms of direct participation in the protection of the quality of life and natural resources, instruments that are able to guarantee the maintenance of the right to an ecologically balanced environment it has the right to (THOMÉ, 2015).

Community participation in what regards the environment can be made concrete in different ways, such as in proceedings to create the environmental law (through popular initiative in legislative proceedings, for example) and the performance of the Judiciary Power and the Public Prosecution (through a popular action or a public environmental civil action).

However, this paper is going to emphasize the popular participation in the creation and execution of environmental policies through the performance of citizens and representatives of the civil society in collegiate agencies in charge of preparing guidelines for public policies and the discussion over environmental impact studies in public hearings.

The participation of the society in those cases has the purpose of presenting the knowledge and the perceptions of citizens and interested groups to public managers in charge of decisions over environmental subjects. That consultation mechanism is being called citizen participation or participation of citizens, public participation or involvement by the doctrine. Interested groups may represent sectors of the industry, mining, commerce, infrastructure, planning, health, environmental preservation and conservation, among others. It is important to recognize that the participation of different groups of interest widens the debate and is essential for the development of a fair and balanced environmental administrative procedure.

One has to bear in mind that the participation of representatives of the different sectors of the society starts from a dialectic process to promote the understanding of the characteristics of the project or activity to be implemented and the environmental studies prepared to identify and quantify the possible significant impacts on the physical, biological and social-economic means. In addition to that, the citizens have to be able to understand the processes and mechanisms to assess economic and social-environmental demands, with the respective mitigation and compensation proposals for negative impacts on the environment. They have to be properly informed of the current status and the development of the studies, their results and possible interferences.

On the other hand, it is important to highlight that the opinions and perceptions of the society, especially individuals or groups under direct impact, are relevant in order to define a feasible solution that considers their priority interests and sets forth management strategies for the area and its natural resources. Under that perspective, the active participation of the citizens also has the ability to legitimate the decision of the Public Power.

Likewise, the participation of the individuals has to encompass information feeding and retrofeeding. Feeding is the process through which information on the project or activity and its possible impacts is made available to citizens and groups of interest. Retrofeeding is the process through which the perceptions of the society concerning the social-

environmental impacts of the project are received by the Public Power and changed into information to be effectively considered by decision makers.

The singularities of the public participation program in the process of Environmental Impact Assessment force data to be synthetically presented and adjusted to the reasonable understanding of recipients, with clear and objective information. Thus, dialogue techniques applied to the entire community and able to promote the active participation of interested individuals and organizations have to be applied.

It is important to stress the fact that the right to participation implies in the right to information once there is an unbreakable link between them. It is worth remembering Édis Milaré's doctrine (2006, p. 163) when pointing out that "citizens who have access to information have better conditions to act on the society, to efficiently articulate wishes and ideas, and to take active part in the decisions that directly interest them."

Thereby, the effective implementation of the Democratic and Socio-Environmental Rule of Law requires the principle of the mandatory performance of the government and the democratic principle to be strengthened, counting on the participation of the society in environmental issues, including the joint action of the government and the collectivity in the preservation of natural resources. (THOMÉ, 2015).

2 THE PUBLIC PARTICIPATION IN THE SOCIAL-ENVIRONMENTAL IMPACT ASSESSMENT AS AN INSTRUMENT TO IMPLEMENT THE DEMOCRATIC PRINCIPLE

The main objective of the public participation is to insure the exercise of citizenship and democracy in the environmental impact assessment process, a time when the different actors who are involved and possibly directly or indirectly affected by a project or an activity should have full access to the information related to its positive and negative social-environmental impact so that they can inform the relevant public agencies of their opinion.

When Canter (1977) analyzes the importance of the popular participation foreseen in NEPA, he highlights the following relevant objectives: a) information, education and understanding; b) identification of problems, needs and important values; c) generation of ideas and handling problems; d) reaction and retrofeeding about proposals; e) evaluation of alternatives and f) consensus and conflict resolution.

The first objective identified by Canter is related to the education of citizens concerning the meaning of environmental impact and the importance of citizen participation for democracy, besides the disclosure of information on the progress of the study and its results, as well as data on potential environmental impacts.

The identification of problems, needs and important values, on the other hand, is linked to the relevance of environmental resources for different segments in an area. Besides, that objective would be related to the definition of areas with environmental problems and needs (CANTER, 1977).

The third point is connected to the identification of alternatives to solve identified needs such as the implementation of mitigating measures to eliminate or decrease negative social-environmental effects caused by the project.

The fourth objective concerns the understanding by the Public Power of community perceptions on the project, its impacts and possible solutions.

The evaluation of alternatives is closely linked to the reaction and retrofeeding in what regards the flow of proposals, which may contain valuable information related to environmental shades that have not yet been considered (CANTER, 1977).

The last objective highlighted by the researcher concerns the resolution of existing conflicts connected to the proposed action. It can be exploited by mediating the differences and conflicts between the different groups of interest, developing mechanisms to compensate environmental impacts that cannot be mitigated and through the effort to reach consensus and avoid burdensome and unnecessary judicial litigations (CANTER, 1977).

Rodrigo Zouain da Silva (2012) says that,

guided by the social reality and the legal order, Environmental Law aims at establishing environmental social justice through rational and relevant criteria, responding to the new requirements of contemporary Environmental Law and promoting the harmonic dialogue with related sciences.

That effort towards consensus regarding the negative social-environmental impacts of the project and its respective mitigating and compensatory measures has the objective of legitimating a decision that

reflects social-environmental justice for each concrete case.

Large projects nowadays, besides trying to meet the requirements set forth by permitting environmental agencies, are concerned about the adoption of codes of conduct in order to avoid possible social conflicts. Thereby, they develop their activities not only to get government approval for the exploration of an activity that results in impacts (environmental permitting), but also to obtain the so called “social permit”. (DAIZY; DAS, 2013, p. 73).

3. IDENTIFICATION OF THE DIFFERENT AUDIENCES FOR PARTICIPATION

Investigating the participation of society in Environmental Impact Assessment processes implies in identifying the groups involved, highlighting the features belonging to each one of them. For NEPA, the first group consists of people directly affected by the project who live nearby or in the areas that are possibly going to be impacted by the project. The second group consists in organizations to protect the environment that, in general, intend to make sure that the development of the project does not result in ecosystem imbalance. The components of this group frequently require the adoption of measures that may incur in relevant financial costs or even make project implementation impossible.

Entrepreneurs, businessmen and third parties that benefit from project implementation and people aspiring the future work positions form the third group. We can also notice the participation of a group formed by government agents who are interested in bringing investment to their areas of influence to generate income and dynamize the economy.

There are also groups with different interests such as the ones in charge of academic research or the ones formed by individuals who only have personal, punctual and not always legitimate interests such as real estate speculators and lobbyists.

In the United States, in case of projects with interventions to water resources, the organization called Body of Engineers proposes the following considerations: a) individual citizens who express their preferences individually and are not members of any groups or organizations; b) sports groups; c) environmentalist groups; d) rural owner organizations; e) Industry and Trade associations; f) professional associations such as the American Institute of Planners, the American Society of Civil Engineers

and others; g) teaching institutions, including universities, secondary schools and professional schools; h) service clubs and civic organizations, including Rotary Club, Lions Club, among others; i) unions; j) state and local government agencies, including commissions, government and individual agency planning councils; k) state and local elected politicians; l) federal agencies; m) other urban groups and organizations, groups for economic opportunities, political clubs and associations, minority groups and religious groups; o) means of communication including people in newspapers, radio and televisions.

Directive 337, dated 1985 and issued by the European Community, established the need for public participation in the decision making process regarding projects resulting in significant impacts on the environment subject to the Environmental Impact Assessment, and the possibility of making information regarding other projects subject to other forms of evaluation available to the relevant audience, including information related to exemption and the reasons for granting the permit. Directive 35, dated May 26, 2003, changed Directives 337/85 and 61/96, extending that obligation to plans and programs with possible impacts on the environment, in addition to the access to justice.

Those directives consider two kinds of audience: the first one, broader, consisting of individuals or legally created organizations and associations. The second one, called interested audience, consisting of people or groups that are directly affected and non-governmental organizations whose purpose is to protect the environment and that follow the provisions in the national legislation.

In Brazil, CONAMA Resolution 01/86, which addresses public participation to discuss a project and its environmental impacts considers, besides administration agencies, only one kind of audience.

Article 11 – Industrial secrecy respected, thus requested and demonstrated by the interested party, the RIMA is going to be available for the public. Copies are available for those who may be interested, at IBAMA's documentation centers or libraries and at the corresponding state environmental control, including the period for technical assessment.

§ 1 – The public agencies that may show interest or that have a direct connection with the project are going to receive a copy of the RIMA for awareness and comments,

§ 2 – When deciding the execution of the environmental impact study and the presentation of RIMA, the relevant state agency or IBAMA or the municipality when

acceptable shall define a timeframe to receive comments from the public agencies and others that may be interested (bolded by us) and, whenever necessary, it shall promote a public hearing for information on the project and its environmental impacts and discussions on the RIMA. (CONAMA).

However, we can notice that the request for public hearings, only place in the Brazilian legal order forecasted for the participation of individuals, presupposes the previous inclusion in the list of people having legitimacy to do so. CONAMA Resolution n. 9, dated December 03, 1987, established the procedures for public hearings on the environmental impact reports (RIMA) and identified civil entities, the Public Prosecution and groups of fifty citizens or more as the groups entitled to request them (art. 2).

Art. 1 – The Public Hearing referred to in CONAMA RESOLUTION n. 001/86 aims at exposing to interested people the content of the product under assessment and its corresponding RIMA, clearing doubts and collecting from the audience criticism and suggestions on the subject.

Art. 2 – Whenever necessary or when requested by a civil entity, by the Public Prosecution or by 50 (fifty) or more citizens, the Environment Agency is promoting the public hearing.

§ 1 - The Environment Agency, as of the date it receives the RIMA, is setting on a public notice and publishing on the local press the opening of a timeframe of at least 45 days to request a public hearing.

§ 2 - In case a public hearing is requested and in case the State Agency fails to hold it, the permit that was granted is not going to be valid.

§ 3 - After that timeframe, the call is made by the Permitting Agency through registered mail to requesters and disclosure on the local press.

§ 4 – The public hearing has to happen in a place of easy access to the interested parties.

§ 5 – Due to the geographic location of requesters and the complexity of the subject, there may be more than one public hearing on the same project for the respective Environmental Impact Report - RIMA.

Art. 3 – The public hearing is going to be directed by the representative of the permitting agency who, after the objective exposition of the project and its respective RIMA, is going to open the discussions to interested parties.

Art. 4 – At the end of each public hearing, a summarized minutes of meeting is going to be drawn.

Paragraph Only – All the written and signed documents handed to the president during the session are going to be attached to the minutes.

Art. 5 – The minutes of meeting of the public hearing and its attachments are going to be used as the basis, together with the RIMA, for the permitter to assess and give the final opinion regarding the approval or not of the project. (CONAMA 09/87)

State administrative standards also specify mechanisms for participation regarding environment issues, such as the Normative Deliberation of the State Council for Environmental Policies - COPAM n. 12, dated December 13, 1994, issued by the State of Minas Gerais and that details the call and the public hearings, presenting the procedures and the groups that have legitimacy to participate, according to the following terms:

Art. 1 – Public Hearing is the meeting to give the community information on works or activity that has a potential to result in significant environmental impact and the respective Environmental Impact Study - EIA, clarifying doubts and collecting criticism and suggestions to subsidize the decision regarding the permitting.

Paragraph only - COPAM may define Public Hearings to assess plans, programs, activities and projects that do not require EIA and RIMA and that may be causing or may cause significant environmental degradation, stating on the call the essential information to subsidize the hearing.

Art. 2 – The Hearings are public events that accept the presence of anyone or any entity that is interested in the subject that is the center of the discussion.

Art. 3 – Public Hearings are promoted by the Executive Secretary of COPAM, whenever it may be necessary or whenever the President of the Council, the Plenary or any Specialized Chamber determines, and due to request:

I – from the State or Municipal Public Power of the State of Minas Gerais;

II – from the Federal or the State of Minas Gerais Public Prosecution;

III – from nonprofit civil entity created over one year before and whose social purpose is the defense of economic, social, cultural or environmental interest that may be affected by the works or activity object of the respective EIA and RIMA.

IV – from a group of 50 (fifty) or more citizens that have a legitimate interest that may be affected by the works or the activity, with the appointment of a representative on the respective requirement.

§ 1 – COPAM's Executive Secretariat, from the date the EIA and RIMA are received, shall publish a notice to open the timeframe, of at least 45 (forty-five) days, for a

Public Hearing to be requested.

§ 2 – The call for the Public Hearings is published on a mass-circulation newspaper in the State of Minas Gerais, a local or regional journal, and the Official Gazette of the State of Minas Gerais, at least 15 (fifteen) business days in advance.

§ 3º - Public Hearings are always held in the city or area of influence where the works, activity, plan or program is located, priority given to the city where the environmental impacts are more significant.

§ 4º - If the area of influence of the works or activity encompasses two or more cities, COPAM's Executive Secretary may call more than one Public Hearing. It may also be held in the State's capital city.

§ 5 – COPAM's Executive Secretary shall define the location, with suitable infrastructure and access conditions, that insures an independent meeting, as well as the time and other measures for the Public Hearings to be held.

§ 6 – The call for the Public Hearing shall supply, at least, the following information:

I – Location of the project or activity;

II - Name of the Entrepreneur;

III – Availability of RIMA (dates, times and location);

IV - Date, time and place where the Public Hearing is going to be held.

Art. 4 – Public Hearings regarding projects or activities subject to EIA and RIMA are going to be held during the analysis and proceedings process of the Environmental Impact Study at the State Foundation for the Environment, prior to presentation to COPAM's Chambers of the Technical Opinion prepared by the Foundation.

(...)

Art. 7 – The entrepreneur and the coordinator of the multidisciplinary team in charge of the EIA and RIMA are going to be called to talk in the Public Hearing with the assistance of the technicians necessary for all the clarifications on the matter.

Paragraph only – In case of the Public Hearings foreseen in Art. 1, Paragraph only of this Deliberation, the entities responsible for the subject under examination are also going to be invited.

(...)

Art. 11 – The entrepreneur shall make the RIMA available to all interested parties for at least fifteen business days prior to the Hearing in the city where the Public Hearing is going to be held.

Paragraph Only – Previous and broad publicity shall be given in respect to the fact mentioned in the caput of this article.

Art. 12 – During the public hearing, at least one copy of the EIA and RIMA shall be maintained for free consultation by the audience.

Art. 13 – All the necessary expenses to pay for the Public Hearing are the entrepreneur's responsibility.

On the one hand, the limited list of people having legitimacy to request an environmental public hearing is criticized; on the other hand, the initiative of the Public Power to insure, through an environmental standard, the possibility for the society to take part in that stage of the environmental permitting is praiseworthy. It is worth saying that, once the public hearing is requested by the legitimate parties, it becomes a mandatory part of the environmental permitting procedure. Thus, if the public hearing fails to take place, the environmental permit is not valid.

4 NEED TO IMPROVE THE MECHANISMS TO INFORM THE PUBLIC

The international legislation, such as NEPA and the European Directives, forecasts that information to the society regarding social-environmental impacts resulting from projects is given through public notices (such as communications on signs in the project area), in the written and spoken media and on television (newspaper ads, for example) and in the international computer network. That information has to follow the main reports and opinions attached to Environmental Impact Assessment proceedings, giving interested groups the opportunity to prepare questions and request additional information on the assessments already carried out.

It is worth saying that, pursuant to the European Directives, member States have to define reasonable timeframes for the interested parties to effectively participate in decision making concerning the quality of the environment.

In the European Union, public participation is also insured to a State that may be affected by significant impacts resulting from another member State's plans, programs and projects, insuring access to information on eventual transfrontier effects.

The results of consultations in the different modalities of public participation should always be considered when making a decision on the approval of plans, programs and projects, as foreseen by Directive 35/2003. Besides, it is mandatory to disclose decisions regarding environmental issues, which have to address the reasons they are based on, their respective

conditions, the measures to avoid, mitigate or compensate the negative impacts of the activity, the opinions given by the interested audience in what regards the environmental impact of the activity, in addition to other information related to the procedure, for public participation.

Member States in the European Union should make sure, in their internal legislations, that those who are interested have access to the courts to impugn acts, decisions or omissions regarding public participation in the environmental impact assessment process, no harm to the possibility of making a preliminary appeal at the administrative level.

The Brazilian legal order is timid when welcoming information and participation instruments related to the environment impact assessment. At a federal level, CONAMA Resolution 09/87 establishes that the permitting environmental agency announces receipt of Environmental Impact Assessments and sets the timeframe for a public hearing to be requested on a public notice. In case a hearing is necessary, the permitting agency has to effectively call the interested parties through the local press.

In Brazil, we notice that some member states (for example, Minas Gerais) impose additional obligations in regards to information given to the audience. Normative Deliberation issued by the State Council for Environmental Policies - COPAM n. 12 of the State of Minas Gerais, dated 1994, foresees the entrepreneur's obligation to disclose public hearings not only in the local but also in the regional press.

Nonetheless, there is a lack of communication mechanisms between the Brazilian society and the entrepreneur on the social-environmental impacts of the potentially harmful activities. It is worth saying that the obligation to inform cannot simply be formal, but it has open space for dialogue that can, effectively and materially, influence the decisions of the environmental authority.

5 CRITICAL ANALYSIS OF THE PUBLIC PARTICIPATION

As we can see, the active participation of people in the environmental impact assessment investigation process can legitimate the decision made by the public manager as people who were directly affected by the activity that is being investigated are represented during the entire environmental evaluation, taking this environment impact investigation process into the category of essential mechanism for the Democratic and Social-Environmental Rule of Law. The perspectives of different groups

provide useful elements to base decision making, especially when some values or factors cannot be easily quantified.

Besides, the public participation process helps reinforce the credibility of government agencies especially in what concerns decision making. It remains clear that the evaluation of the Environmental Impact Assessment is legitimated by the participation of interested groups and also the ones directly affected by project implementation.

On the other hand, mechanisms for popular participation in decisions regarding the environment are also criticized. Arguments against enlarging the range of people with legitimacy to take part in the environment impact investigation process are based on the pressure put by interested parties on managers in charge of decision making. We also have to bear in mind that the several different timeframes and the high costs related to popular participation make those procedures bureaucratic and expensive for the Public Power. In addition to that, there is a risk of opportunistic claims that are not connected to the purpose of the project and its environmental impacts that, when added to the debate, complicate and delay the decision made by the relevant environmental agency. It is worth saying that some interested parties end up by disregarding information on the project that is made available and negatively interfering on the progress of public hearings due to the unnecessary prorogation of procedure phases.

It is also important to stress some singularities of developing countries. In Brazil, the existing social deficit perverts the environmental administrative procedures. That happens, for example, when the Public Power is defining compensatory measures as conditioning factors linked to the environmental permitting. Popular participation signals by driving the compensation for the negative impact of the project to the implementation by the entrepreneur of improvements to urban infrastructure, sanitation, education and health sectors. Those measures are not always the best ones to effectively compensate the impacts on the natural environment and they are often imposed to the State itself and not to those who are responsible for the project.

6 TECHNIQUES FOR PUBLIC PARTICIPATION

The public participation programs are implemented from several techniques of information feeding and retrofeeding. Public hearings are the most traditional form of public participation that is frequently adopted by

the different international models analysed. A public hearing is a formal meeting to which individuals and groups participate orally or in writing and the meeting is registered on a minutes.

Besides the public hearing, there are other techniques that enable the participation of interested parties in the environmental impact assessment: presentations during the planning phase, participative preparation of reference terms, informal sessions for public information, workshops regarding the project, seminars, field visits, material about the project and its consequences for the environment, definition of mitigating and compensating measures, among others.

To mention a successful example of public participation, it is worth talking about the joint program between the states of Oklahoma and Kansas, in the basin of the Arkansas river. That program consisted in seven public information sessions and thirteen specific workshops related to the project. Those twenty meetings were held in different cities and villages at the basin. The following results can be listed: a) The twenty meetings counted on a total of 1,600 participants. b) The participants were not only the people who lived in the places where the meetings were held. Over forty per cent of them traveled over ten miles to get there. Thus, people were attracted from all over the basin. c) Questions and answers during each meeting counted on the active participation of many participants. d) Opinion questionnaires on different aspects of the study were received from over seventy per cent of the participants. e) The analysis of questionnaire results showed that most of the participants thought that the meetings were very productive. (CANTER, 1977).

One of the key aspects for the success of the North American program was the partnership between entrepreneurs and local sponsors to promote the twenty meetings. Each meeting consisted of the presentation of slides followed by an informal session for questions and answers during which all the best efforts were made to provide the audience with relevant information. In addition to that, each participant received information material about the project, its impacts on the environment and the respective mitigating and compensatory measures.

The public participation program created for the Arkansas river basin used different modalities of popular participation techniques that made the effective participation of representatives of the civil society possible according to the democratic principle in environmental issues. In that case, the Public Power promoted the use of techniques that enabled

active public participation before deciding the environmental issues. That is an example to be followed by other popular participation programs.

FINAL CONSIDERATIONS

Brazilian standards (CONAMA Resolutions 01/1986, 09/1987 and 237/97) that rule the environmental impact assessment process followed the models established in the United States (NEPA, 1969) and the European Directives (CE 337/1985, 61/1996 and 35/2003). Despite the fact that Brazil imported the above mentioned frames, it is important to notice that there are relevant differences in what regards the stage when the participation of the civil society is made possible. The Brazilian legislation limits the participation of people as the public hearings only take place during the final phase of the procedure, a time when the public manager is already convinced. At that time, external perceptions have very little influence on the manager's decision.

It is not enough to offer the civil society the opportunity to formally participate in the environmental impact assessment process. The forecast of this democratic participation institute in the current Brazilian legislation fails to insure the effective influence of individuals. Calling interested parties to take part in the environmental impact assessment process only during its last stage is not enough to oppose decisions made during procedural acts.

The Brazilian experience does not adopt the practice of preparing a public participation program that goes through the entire administrative procedure. The process starts despite interested parties, which are not even identified and called to take part in this stage of the environmental impact assessment process. This initial stage encompasses the definition of the scope of the environmental studies to be developed, development follow up, project implementation and operation monitoring. Those acts should not be installed before the necessary identification and calling the civil society that may be interested in the final environmental decision, under the penalty of not respecting democratic participation in the Social-Environmental Rule of Law.

Another aspect of popular participation in the environmental impact assessment process that needs adjustment regards criteria adopted in Brazil for implementation. In fact, there are no objective criteria for the investigation of environmental impacts. That process is marked by the lack

of specification of positive and negative aspects of the project. That data would make public participation during project phases more effective once those elements are essential for the construction of a real citizenship and democracy participative process.

The materialization of popular participation in that process could be reached, for example, by forcing the entrepreneur to make more than one possible alternative for project implementation available, with their respective information and clarifications on positive and negative impacts, in addition to the presentation of mitigating and compensatory measures. The future use of the affected area should also be subject to the presentation of alternatives by the entrepreneur to offer the participants the opportunity to actively participate in the decision to be made by the Public Power.

As emphasized, the usual practice in the national territory of only presenting one alternative for the project proposed by the entrepreneur changes popular participation, already restricted to public hearings, into a simple counter where interests – not always legitimate - are negotiated, reason why it has been subject to a lot of criticism. It also disqualifies that traditional popular participation technique for environmental issues.

As we can notice, for public participation to be seen as an effective exercise of citizenship and democracy in Brazil, it is essential to review legal mechanisms for participation linked to the environmental public hearing. The current model for public participation in the environmental impact assessment fails to attend to the complexity that features the institute.

The material dimension of democratic participation requires power to influence decisions. Hearing interested parties is something to be considered by the judging authority, who can only be convinced by the external perceptions when faithful and timely means are offered for conviction formation.

REFERENCES

ALLES, Delphine. *Le principe de precaution et la philosophie du droit - Evolution certaine, revolution en puissance*. Grenoble: Université Pierre Mendès-France - Institut d'Etude Politique de Grenoble. 2011.

BARROSO, Luís Roberto. *A proteção do meio ambiente na Constituição Brasileira*. Cadernos de Direito Constitucional e Ciência Política, out.-dez. 1992. v. 1. p. 115-140.

BECK, Ulrich; GIDDENS, Anthony; LASH, Scott. *Modernização reflexiva: política, tradição e estética na ordem social moderna*. Tradução de Magda Lopes. São Paulo: Editora da Universidade Estadual Paulista, 1997.

BECK, Ulrich. *Sociedade do risco: rumo a uma outra modernidade*. São Paulo: Ed. 34, 2010.

BOBBIO, Norberto. *Liberalismo e democracia*. Tradução Brasileira: Marco Aurélio Nogueira. 2. ed. São Paulo: Brasiliense, 1998.

BECHARA, Érika. *Licenciamento e compensação ambiental na Lei do Sistema Nacional das Unidades de Conservação (SNUC)*. São Paulo: Atlas, 2009.

BOTHE, Michael. Le droit à la protection de l'environnement en droit constitutionnel allemand. *Revue Juridique de l'Environnement*. 1994. v. 4. p. 313-318.

CANOTILHO, José Joaquim Gomes. *O direito ao ambiente como direito subjectivo*. A tutela jurídica do meio ambiente: presente e futuro. Coimbra: Coimbra Editora, 2005.

CANTER, Larry W. *Environmental Impact Assessment*. New York, USA: McGraw-Hill Book Company, 1977.

DAYZY, Daizy; DAS, Niladri. *Sustainable development for Indian mining sector* (January 22, 2014), OIDA International Journal of Sustainable Development, Vol. 06, n. 07, pp. 71-82, 2013. Available at: <<http://ssrn.com/abstract=23833433>>

EUROPE. European Court for Human Rights. *Affaire Matthews c. Royaume-Uni* (Requête 24833/94), 18 de fevereiro de 1999. Available at: <<http://zip.net/bsnz9c>>. Access on Jun 02, 2014.

FRANCE. National Assembly. *Rapport de la Commission de Lois Constitutionnelles relatif à la Charte de l'environnement*. Paris: Assemblée Nationale, 2004. Available at: <<http://bit.ly/U36lwi>>. Access on May 29, 2014.

GIBSON et al. *Primary forests are irreplaceable for sustaining tropical*

biodiversity. In: Nature, v. 478, p. 378-381, 2011

GOMES, Carla Amado (Coord.). *Compensação ecológica, serviços ambientais e protecção da biodiversidade*. Lisboa: Instituto de ciências jurídico-políticas, 2014. Available at <http://www.icjp.pt/sites/default/files/publicacoes/files/ebook_comp_eco.pdf> Access on Apr 03, 2015.

GUSTIN, Miracy Barbosa de Sousa. *(Re) pensando a pesquisa jurídica: teoria e prática*. Belo Horizonte: Del Rey, 2002.

HÄBERLE, Peter. A dignidade humana como fundamento da comunidade estatal. In: SARLET, Ingo Wolfgang (Org.). *Dimensões da dignidade: ensaios de filosofia do direito e direito constitucional*. Porto Alegre: Livraria do Advogado, 2005.

HERMITTE, Angèle; DAVID, Virginie. *Avaliação dos riscos e princípio da precaução*. In: VARELLA, Marcelo Dias; PLATIAU, Ana Flávia Barros. *Princípio da precaução*. Belo Horizonte: Del Rey, 2004. p. 93-155.

JONAS, Hans. *O princípio responsabilidade: ensaio de uma ética para a civilização tecnológica*; translation from ther original in German Marijane Lisboa, Luiz Barros Montez. Rio de Janeiro: Contraponto: Ed. PUC-Rio, 2006.

KISS, Alexandre. L'irreversibilité et le droit des générations futures. *Revue Juridique d'Environnement*, 1998. p. 49-57.

LEITE, José Rubens Morato; FERREIRA, Heline Sivini; CAETANO, Matheus Almeida. *Repensando o estado de direito ambiental*. Florianópolis: Fundação Boiteux, 2012.

MACHADO, Paulo Affonso Leme. *Direito Ambiental Brasileiro*. 12^a ed. São Paulo: Malheiros, 2004.

MILARÉ, Edis. *Direito do Ambiente*. 4^a. São Paulo: Editora Revista dos Tribunais, 2006.

PRIEUR, Michel. *L'environnement entre dans la Constitution*. Droit de l'Environnement, n. 106. Paris, 2003. p. 38-42.

SAMPAIO, José Adércio Leite. *Princípios de Direito Ambiental*. Belo Horizonte: Del Rey, 2003.

SILVA, Rodrigo Zouain da. *Os desafios do direito ambiental no limiar do século XXI diante da ineficácia do sistema jurídico ambiental brasileiro*. Belo Horizonte: Revista Veredas do Direito, v.9, n.18, p.57-87, julho/dezembro de 2012.

SANCHEZ, Luis Enrique. *Avaliação de Impacto Ambiental: conceitos e métodos*. São Paulo: Oficina de Textos, 2008.

THOMÉ, Romeu. *Manual de Direito Ambiental*. Salvador: Juspodivm, 2015.

Article received on: 19/Oct/2015.

Article accepted on: 03/Nov/2015.