
Finding Path to the Institutionalization of Deliberative Democracy: The Pilot Legislative Practices of Environmental Governance

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Abstract

The deficiency of legalization of Deliberative Democracy restricts its further development, and it needs learning from experiences of other legislations. In fact, environmental protection, as the earliest and the most dynamic area of practices of Deliberative Democracy, has great progress in the legislation of public participation, with development in legal principles, contents and procedural guarantee. It can be examples for the other areas of Deliberative Democracy.

Keywords: public participation in environmental protection, deliberative democracy, institutionalization, legislation

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INTRODUCTION

Since the promulgation of *Decision on Comprehensively Deepening the Reform of Some Major Issues* (hereinafter referred to as *the Decision*) in 2014, China has clearly stated that it is necessary to promote the extensive and multi-layered institutionalized development of deliberative democracy and promote the institutionalization, standardization and procedure of socialist democracy. At present, the practice of deliberative democracy has emerged in an endless stream, such as Hangzhou's "open decision-making", "our round table", Wenling "democratic symposium", "participatory budget" and other local typical examples, but because of their own politics, they are spontaneously dispersed and lacking of order, the phenomenon of mutual imitation, "repetitive labor" and "mere formality" are prominent, and there are serious deficiencies in institutionalization and standardization. In order to strengthen the rule of law in deliberative democracy, we need to draw relevant legislative experience. Environmental protection legislation is the earliest practice area for deliberative democracy and it can provide us with useful lessons.

THE STATUS QUO OF THE INSTITUTIONALIZED OF DELIBERATIVE DEMOCRACY

Beginning in 1949, the system of multi-party cooperation and political consultation has been established. However, until 2005, the Central Committee of the Communist Party of China proposed the concept of deliberative democracy for the first time in the form of official documents in *Opinions on Further Strengthening the Construction of the Multi-Party Cooperation and Political Consultation System under the Leadership of the Communist Party of China* and *Opinions on Strengthening the Work of the People's Political Consultative Conference*. In November, 2012, the Party's report to the 18th National Congress officially proposed to promote deliberative democracy from a form of democracy to an institutional form. At present, the central, provincial and municipal governments have promoted the red-headed documents, such as various *Opinions* of deliberative democracy, which constitutes the main policy basis for the current norms and the promotion of the development of deliberative democracy (Dingjian 2010). However, there are very few provisions concerning deliberative democracy at legislative level.

The opinion that "deliberative democracy is the unique form of China's democratic politics" in *the Decision* is a new formulation in recent years. At present, there is no "deliberative democracy" term in the

Constitution or laws. At the legal level, it is currently clearly stipulated that the main part of citizen participation is legislative consultation (such as Articles 5, 34 and 58 of *Legislative Law*) and political consultations with the Political Consultative Conference. In the fields of government work that is most closely related to the lives of the people, it is rare to see other ones besides environmental protection and planning and construction. *Price Law*, implemented in 1998, pioneered the introduction of hearing procedures into our administrative decisions (White 1993).

Overall, the current deliberative democracy has the following deficiencies at the legal level:

Firstly, the legal status is not clear. As a “special form and unique advantage of socialist democracy”, deliberative democracy is a basic system, a civil right and only a tool. These are not clear. Secondly, the statutory form of deliberative democracy is single and the effectiveness is not strong. At present, the main form of deliberative democracy stipulated by law is the hearing which focuses on “listening to the opinions” which is only the lowest level of citizen influence decision-making (He Baogang: *Deliberative Democracy: Theory, Methodology and Practice*, China Social Sciences Press 2008). In practice, due to the lack of normative procedures, there are tendencies of “only focusing on listening to the opinions but not on negotiations” or even “being mere formality”, which stifles the credibility of the hearing. Thirdly, the negotiation procedure stipulates that the operability is not strong. At present, the biggest problem in the practice of deliberative democracy is the arbitrariness and the lack of negotiation procedures. Take the system of hearing opinions in *Legislation Law* and *Regulations on the Formulation of Administrative Regulations* as an example, there is only one clause, and no provision is made on the time, obligation subject, specific object or procedure for listening to the opinions.

**ENVIRONMENTAL PUBLIC
PARTICIPATION IS THE EARLIEST AND
THE MOST ACTIVE FIELD OF
DELIBERATIVE DEMOCRACY PRACTICE**

Deliberative democracy means that the main body of the consultation participates in decision-making through free and equal public consultation, seeking common ground while reserving differences, cooperating, participating and negotiating to maximize tolerance and absorb various interests. The most typical form is public participation. As a modern and emerging form of democracy, “public participation” has become a

vivid practice of exploring and developing democracy around the world. The public participation in China has been implemented earlier in the legislative field and the environmental protection field. It has certain laws and institutional support, and the public has a wide degree of attention and high participation (Zhu and Shu 2011). In particular, environmental protection is the earliest field of public participation practice. Although there is no systematic or comprehensive public participation in the unified law, the procedures and guarantees for public participation are scattered in relevant legal documents, coupled with the trend of dissemination and promotion of online media. The strengthening of the legal system is relatively complete. Environmental public participation has become an experimental field for the practice of deliberative democracy.

Environmental Protection Law (Trial) issued in 1979 has already imposed a principled provision on environmental public participation. Article 8 stipulates: “Citizens have the right to supervise, report and sue for units and individuals that pollute and damage the environment.” Article 5 of *Environmental Protection Law*, amended in 2014, further clarifies that environmental protection should adhere to the principle of public participation. This provision provides a principled legal basis for public participation in environmental protection. Article 10 of *Decision of the State Council on Several Issues Concerning Environmental Protection* issued in 1996 stipulates: “To establish a public participation mechanism, to play the role of social groups, to encourage the public to participate in environmental protection work, to report and expose various violations of environmental protection laws and regulations.”

On September 1, 2003, the important environmental legislation *Environmental Impact Assessment Law* which guarantees public participation was officially implemented. This legal stipulation clarifies the legal status of the scope, procedures, methods and the opinions of the public and experts involved in the environmental impact assessment of planning and construction projects, making the public’s opinions an indispensable part of the environmental impact report. In February of 2006, the former State Environmental Protection Administration issued *Interim Measures for Public Participation in Environmental Impact Assessment* which does not only clarify the public’s right to participate in the EIA, but also stipulates the specific scope, procedures, methods and deadlines for public participation in the EIA. For example, specific forms of public participation include public opinion

surveys, expert opinions, symposiums, arguments and hearings.

While strengthening public participation in legislation, the premise of public participation information disclosure has also been comprehensively regulated. In April of 2007, the former State Environmental Protection Administration issued *Measures for the Disclosure of Environmental Information*, which was the first departmental regulation for the disclosure of information after the State Council formulated *Measures for the Openness of Government Information*. In November of 2013, the Ministry of Environmental Protection promulgated *Guidelines for the Openness of Government Information on Environmental Impact Assessment of Construction Projects*, which put forward specific requirements for information disclosure in the EIA process, further strengthened the information disclosure and provided a solid legal basis for EIA public participation (Pearson 1994).

In addition, there are laws, regulations and rules, such as *Environmental Petition Regulations*, *Environmental Protection Management Regulations for Construction Projects* and *Environmental Administrative Reconsideration Measures*, which constitutes a relatively complete legal system for public participation in environmental management.

On the whole, the current public participation in the environment can be carried out effectively, which proves that if a society has a system that guarantees the full participation of the public and a smooth channel for accommodating the interests of ordinary people which can be used before the decision-making of major issues, and can carry out full communication with the public before decision-making process, deep-seated contradictions can be avoided and the government's management will show democracy and participation in civilization (Mol and Carter 2006).

THE ENLIGHTENMENT OF LEGISLATION OF ENVIRONMENTAL PUBLIC PARTICIPATION

The legislative experience of environmental public participation has the following three important reference significance for the institutionalization of deliberative democracy in China.

Establish Deliberative Democracy as a Way of Government Governance through Legislation

As China's "special form of socialist democracy", the current constitution and legal system do not clarify the legal status of deliberative democracy. Whether it is a basic system, the value of a law, or it is just a tool.

Whether it is a right that is universally enjoyed by the people? In this unclear situation, whether to negotiate or not, when to negotiate and what to negotiate has become an arbitrary behavior. The environmental public participation legislation has taken the lead in making an attempt.

Article 10 of *Decision of the State Council on Several Issues Concerning Environmental Protection* which was first issued in 1996 establishes a public participation mechanism. Article 6 of *Environmental Impact Assessment Law* of 2003: The State encourages relevant units, experts and the public to participate in environmental impact assessment in an appropriate manner. These provisions establish that public participation is the basic principle of environmental protection law.

In addition to these principled provisions, *Interim Measures for Public Participation in Environmental Impact Assessment*, issued in 2006, also establishes the statutory basis for public participation rights from the perspective of empowerment. By specifying the general requirements and procedures for public participation, it defines the specific rights (i.e., the obligations of the construction unit, planning organization and environmental protection department) in the public participation process, including the right to know (Article 7), the right to be notified (Article 22), the right to criticize and to comment (Article 14), the right to debate (Article 30), the right to obtain records (Articles 16, 23, 31), etc., so that the content of citizen participation rights is greatly enriched, which also clearly defines the obligations of construction units and environmental protection departments in information disclosure, public opinion collection and public participation protection.

The Measures also clarifies that as a legal procedure in environmental impact assessment, public participation is legally effective. Article 6 stipulates that the public participation chapter must be prepared in the construction project environmental impact report; for the construction project that should solicit public opinions, if there is no public participation chapter in the environmental impact report, the environmental protection administrative department may not accept the public participation, which makes legal effectiveness be improved.

These public participation legislation provides citizens with a possibility to communicate with the government in an institutional way, and promotes the standardization and institutionalization of deliberative democracy. The greater significance of this is to

improve the way of government governance and timely reflect and coordinate all levels of interest appeals of the people, in order to achieve a benign interaction between government governance and social self-regulation. At present, the channels through which citizens and the government are connected are the power contacts that take place in specific law enforcement actions, and the other is the confrontational contact between administrative reconsideration, administrative litigation and even petition. Apart from this, there is no other. This kind of administration is the government under the control of the concept of control, not the concept of a service-oriented government. Such administration is cold and rigid. It is precisely that deliberative democracy provides a flexible administrative system channel. Therefore, we should firstly establish the concept of governance from the principle of law: deliberative democracy is a form of government governance.

Gradually Improve the Basic System of Deliberative Democracy from Practice

The vitality of deliberative democracy is implied in practice. If legislation only has principled provisions and does not have realistic operability, it is difficult to exert the coercive power that legislation should have. The form and content of deliberative democracy is extremely rich and colorful, and there are still controversies about its basic concepts, such as domain, form and subject. Under the circumstances that theoretical research and legislative practice are still not sufficient, we should gradually stipulate the basic systems that are more mature in practice with basically determined connotations and little debates in the legislation. In this regard, the legislative practice of environmental public participation provides us with a wealth of reference materials.

The applicable scope of deliberative democracy

At present, the legal level does not stipulate which areas of deliberative democracy apply. *The Decision* clarifies that the scope of application of deliberative democracy is based on major issues of economic and social development and practical issues involving the vital interests of the public. But there is no further refinement.

The legislative experience of environmental public participation is to implement classified governance. According to the degree of impact of the project on the environment, the breadth and depth requirements of public participation are also different. Article 16 of *Environmental Impact Assessment Law* stipulates that if it is likely to cause significant environmental impacts, it

shall prepare an environmental impact report to conduct a comprehensive evaluation of the environmental impacts; if it may cause mild environmental impacts, it shall prepare an environmental impact report form to analyze or specially evaluate the environmental impact; if the environmental impact is small and environmental impact assessment is not required, the environmental impact registration form should be reported. The Ministry of Environmental Protection has also developed a directory of classified management of environmental impact assessments. In the first case, the relevant entities should take the initiative to conduct public investigations in forms of arguments and hearings and solicit opinions from relevant experts; in the latter two cases, public inquiries about the construction projects shall be accepted. (Article 14 of *Measures for Environmental Protection Management of Construction Projects in Zhejiang Province*)

The specific forms of deliberative democracy

According to *the Decision*, the deliberative democracy includes social publicity, symposiums, hearings, expert consultations, and full negotiation with all aspects of the society before major decisions. However, the various forms of connotation and requirements have not been fully developed. In practice, due to the lack of normative procedures, the phenomenon of “mere formality” is very serious. In this regard, the legislative experience of environmental public participation is worth learning. Article 11 of *Environmental Impact Assessment Law* and Article 12 of *Interim Measures for Public Participation in Environmental Impact Assessment* stipulate that the construction unit and relevant departments shall publicly solicit public opinions, including taking public opinions, consulting expert opinions, symposiums, arguments, hearings, etc. In the third chapter of *the Measures*, a total of 11 provisions stipulate the above specific forms of implementation procedures, different forms of interactivity are also different, such as the procedural requirements of the hearing is stronger than that of the symposium, which is the most detailed explanation of the public participation organization form in the regulations of the current law; in particular, the detailed provisions on the participants, the rules, the time limit and the steps of participation make the hearing be operational.

The sectors and personnel of the negotiation

The Decision lists the subjects of deliberative democracy: the public, state power organs, CPPCC organizations, party groups, grassroots organizations, and social organizations. According to different topics,

the participating entities are also different. Therefore, it is necessary to distinguish between the two concepts of citizen negotiation and related parties negotiation. For example, the opinions can be directed to the general public, and the hearings are small in scope and only face the stakeholders. If the public participation is required to face the general public, there will be problems of insufficient participation and insufficient negotiation. Unlike general public participation, deliberative democracy should be a negotiation between stakeholders.

In this regard, the participation of environmental public participation has fully reflected the spirit of negotiation between relevant parties. Article 15 of *Regulations on Environmental Protection Management of Construction Projects* stipulates that in preparing environmental impact reports, the opinions of relevant units and residents at the location of the construction project shall be solicited in accordance with relevant laws and regulations. Article 15 of *Interim Measures for Public Participation in Environmental Impact Assessment*: The public to be consulted must include representatives of citizens, legal persons or other organizations affected by the construction project.

In the process of public participation, how to ensure openness and fairness, and take into account the interests of all parties, another experience of environmental public participation is to introduce third-party institutions in the negotiation body. Article 5 of *Interim Measures for Public Participation in Environmental Impact Assessment*: The construction unit may entrust an environmental impact assessment agency that undertakes environmental impact assessment work to conduct public consultation activities. This work is undertaken by the unit that obtained the corresponding qualification certificate.

In order to ensure the effectiveness and professionalism of participation, *Environmental Law* attaches great importance to the role of experts and introduces an expert advisory committee system. Article 17 of *Interim Measures for Public Participation in Environmental Impact Assessment*: The environmental protection administrative department may organize an expert advisory committee to review the description of the adoption of public opinions in the environmental impact report, judge its rationality and propose suggestions for handling.

The representative composition and production mechanism of the negotiation

The selection mechanism for deliberative democratic participants is related to effectiveness. If the solicited participants are not representative, such participation can only be in the form. Environmental legislation provides for the selection criteria and methods for the public to be consulted. Article 15 of *Interim Measures for Public Participation in Environmental Impact Assessment*: (related departments) should comprehensively consider the factors, such as geographical, occupational, professional knowledge background, expression ability and the degree of influence, reasonably select citizens, legal persons or other organizations that to be solicited opinions.

Some local regulations have also refined the number of people. Article 14 of *Measures for Environmental Protection Management of Construction Projects in Zhejiang Province*: If public surveys are conducted in accordance with the provisions of Article 12 of *the Measures*, questionnaires, symposiums, arguments, hearings, etc. may be used. In the case of questionnaires, the number of group investigation objects within the scope of environmental impact assessment of construction projects shall not be less than 20, and the number of individual investigation objects shall not be less than 50. If the number of group investigation objects is less than 20 or the number of individual investigation objects is less than 50, they should all be listed as survey objects. In the case of symposium, argument or hearing, etc., the notices shall be released through the media or other means, and social organizations, research institutions, management agencies of relevant environmentally sensitive areas, schools, village (residential) committees, and other units and individuals shall be invited.

Promptly Strengthen the Government's Guarantee Obligations for Public Participation

In the design of deliberative democratic institutionalization, we should firmly establish "government responsibility theory", that is, the deliberative democratic legislation can only ask the government to do something, but cannot ask other subjects to do anything, because the government has exclusive advantages and inevitability in the safeguards of responsibility. The government is obliged to the "shackle" of obligation through legislation, which ensures the achievement of deliberative democracy.

The biggest problem in the current practice of deliberative democracy is that it is more random and the design of the negotiation procedure is lacking.

Therefore, the most important guarantee obligation for the government is the procedural guarantee (Zhu and Tang 2013). There are three procedural norms in environmental law that are essential for deliberative democratic legislation. The three norms aim to promote the effectiveness of the government's obligation to guarantee democracy, which follows the institutional logic of "open-speaking-accountability".

(1) Information disclosure is a prerequisite. If there is not sufficient information disclosure and background explanation in advance, public participation can only be blind, and the government's open participation can only be a kind of being mere formality. In order to enhance the effectiveness of participation, the open stage needs to be as early as possible, and should cover the entire decision-making process as far as possible and extend to the agenda selection and agenda setting stage.

The corresponding is "**open**" clause, which should clarify the three elements which are the main body of disclosure obligation, the content and the time of disclosure. The first section of the second chapter *Open Environmental Information of Interim Measures for Public Participation in Environmental Impact Assessment* specifies specific requirements including subject, time limit, content and method of publication, such as Article 7: Construction Unit or its entrusted environmental impact assessment organization and environmental protection administrative department shall, in accordance with the provisions of these measures, disclose information on environmental impact assessment to the public in a manner that is easy for the public to know; Article 8: The construction unit shall announce the information to the public within 7 days after determining the environmental impact assessment organization that undertakes the environmental impact assessment work.

(2) Explaining reasons is the core. The public participation of "being mere formality" has a common feature, that is, only open participation and no reason. This kind of treatment is very easy to cause the public's frustration of participation and the crisis of trust to the government. The price of railway will rise after the price hearing and the enthusiasm of participation is increasingly exhausted. The countermeasures against this phenomenon are: the administrative decision explains the reason system, requires the decision-making organs to classify the public opinions in a timely manner, announce the adoption of opinions and provide substantive reasons for the needs which are not adopted.

The corresponding is "**reasonable**" clause, for example, Article 11 of *Environmental Impact Assessment Law*: the opinions of relevant units, experts and the public on the draft environmental impact report should be carefully considered, and the environmental impact report submitted for review should be accompanied by the adoption or non-adoption of opinions. Article 17 of *Interim Measures for Public Participation in Environmental Impact Assessment* also requires to organize an expert advisory committee to review the description of the adoption of public opinions in the environmental impact report, judge its rationality and propose treatment suggestions. To explain the reasoning system can lead decision-making to an objective public rationality level that is independent of the government and the public. To convince the people cannot only guarantee the actual effect of public participation and the sense of public accomplishment, but also can greatly enhance the authority of the government and achieve a win-win effect.

(3) The accountability system is a guarantee, which includes, one is administrative accountability, that is, to establish public participation leadership performance evaluation indicators, conduct special assessments of leading cadres at all levels which will be taken as an important basis for rewards and punishments; at the same time, give serious punishment to the leaders whose major decisions have caused serious consequences without public participation; one is legal accountability, that is, to protect the public's right to know and participate through administrative litigation and force the administrative organs to change their decision-making habits.

The corresponding "**accountability**" clause, for example, Article 32 of *Environmental Impact Assessment Law*: If a construction project is subject to environmental impact assessment according to law but has not been evaluated, or the environmental impact assessment document has not been approved according to law but the examination and approval department approves the construction of the project without authorization, the directly responsible person in charge and other directly responsible persons shall be given administrative sanctions by the higher authorities or the supervisory organs according to law; if a crime is constituted, criminal responsibility shall be investigated according to law.

CONCLUSION

The process of deliberative democratic institutionalization is not working behind closed doors.

In the absence of a legislative basis, the institutionalization of deliberative democracy requires the extraction of nutrients in all aspects. While emphasizing the experience of foreign countries, we must also be wary of the risk of “being endemic” and pay more attention to extracting nutrients from local experience. In fact, as the earliest field of public participation, environmental protection has received considerable attention and development in the institutionalization of public participation for many years, and can provide successful experience for the institutionalization of deliberative democracy in other fields. After more than 30 years of development, China’s environmental public participation legislation has been continuously developed and improved. The mature experience accumulated in this process can

provide useful reference for the future institutionalization of deliberative democracy. Of course, in the process of learning and absorbing experience, we should also fully consider the actual situation and actual needs of different areas of consultation, and adapt the environmental protection legislation experience so that it can truly become an operational legal mechanism in line with the needs of China’s deliberative democracy and the rule of law.

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