International Journal for Court Administration

Special Issue, Vol. 8 No. 3, July 2017
ISSN 2156-7964
URL: http://www.iacajournal.org
Cite this as: DOI: 10.18352/ ijca.232

Access to Environmental Justice in Brazil

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Abstract:

This article aims to show how equal access to environmental justice occurs in Brazil, even with litigants in inequality, discrimination in the environmental matter, problems with interpretation of the law and little jurisprudence and information. The increase in access to justice in Brazil is evident including in the environmental area. With access to justice, we must understand the two basic principles of the legal system: that the system has to be equally accessible to everybody and that it produces individually and socially fair results. It is not just the simplistic conceptualization of the number of lawsuits. True access to justice is achieved once the rights of the population are effectively guaranteed. The number of environmental lawsuits has been increasing each year, mainly due to the Brazilian Federal Constitution of 1988. Article 225 provided the right for an ecologically balanced environment for present and future generations, and determined that the government and the community have a duty to preserve it.

In addition, the problems are not being adequately resolved at the administrative level. Access to environmental justice should be understood as access to the law, a fair, well-known and effective legal system, with access to the courts, alternative mechanisms (especially preventive ones), with the population materially and psychologically able to exercise their rights, by overcoming objective and subjective barriers.

For access to environmental justice, it is necessary to ensure appropriate procedural instruments are in place to address the conflicts in environmental protection, and to overcome barriers in accessing that protection.
In Brazil, some procedural instruments have been introduced to guarantee access to environmental justice. They are, mainly: “popular action” and “public civil action”. Both have a specific provision for admission with actions of this nature and it is important to highlight that they aim to protect mainly the collective rights and have been widely used in Brazil, facilitating citizens' actions. Also, they break down some barriers that hindered access to environmental justice, providing for non-condemnation in fees, non-payment of costs, payment for expertise only at the end of a matter by the losing party etc. Thus, this article seeks to demonstrate how access to environmental justice in Brazil has grown. Whilst not yet being the ideal, it is indicating how this situation can be reached. Some ways of increasing this access are pointed out, not only focusing on the number of lawsuits but also as a way of developing environmental law in search of the desired effectiveness.

Keywords: access to justice; environmental law; appropriate procedural instruments; effectiveness; lawsuits

1. Introduction

In Brazil we have a clear situation of environmental insecurity. Although the situation has developed, compared to the period before the Federal Constitution of 1988, the depletion of natural resources is still a reality. Environmental disasters continue to occur, individualism and disinterest for future generations persist. The environmental legislation, although satisfactory, still has some gaps and the Executive Power, being somewhat inactive, has reduced effectiveness. For this reason, a many of the environmental problems Have become the responsibility of the Judicial arm of Government to resolve.

For a number of reasons, it is noticed that in practice, t public powers have not managed to appropriately perform the duty of controlling activities harmful to the environment or to put into practice action programs and environmental public policies.

Therefore, this article aims to show how access to environmental justice occurs in Brazil even with different levels of litigants, discrimination regarding environmental matters, problems of hermeneutics, little jurisprudence and inadequate environmental information.

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Firstly, access to justice will be analyzed; secondly, the specific access to environmental justice and, finally, the procedural tools available to Brazilians.

2. Access to Justice

With access to justice, two basic goals of the judicial system should be considered, as stated by Mauro Cappelletti and Bryan Garth, which are: the system should be equally accessible to all and produce individual and socially fair results; moreover, the simplistic conception of bringing lawsuits (numbers) should not be used.[2]

Therefore, according to Cappelletti and Garth, "Access to justice can be seen as the fundamental requirement - the most basic of human rights - of a modern and equal judicial system, which intends to guarantee, and not only to proclaim, everybody's rights".[3]

There has been an expansion of what can be called access to justice. It transposes the mere guarantee of access to the Judicial Power to encompass the commitment with prevention and treatment of legal conflicts, within certain parameters of justice and equality. It represents a commitment to the achievement of democracy, with a view to enhancing the inclusion of citizens in the decision-making areas.

It also promotes equality and freedom, aiming at equal conditions of guarantee and protection of rights, as well as of autonomy and independence of the parties, regarding their performance in the search of decisions for conflicts of interests that may entail limitations to their rights.[4]

In Brazil the Judicial Power became quite accessible after some events, such as Law n. 1050/60[5], which provided for the benefit of free legal assistance; the institution of the Special Courts; judicial representation by unions, associations; provision for the filing of collective actions; increased transparency and information, etc.

It is true that the number of lawsuits in Brazil has been clearly increasing being evidence that people always seek a guarantee of their rights, especially the constitutionally provided ones (like the environmental rights). The Brazilian Constitution of 1988 elaborated on in the post-military dictatorship period, is extremely 'guarantist', and it seeks to protect each and all forms of individual or collective rights. Thus, the number of lawsuits that aim to declare unconstitutionality, as well as those that intend to interfere in issues which are pertinent to the Public Administration, related to public policies, increase every year.

In fact, strictly political issues, which were previously resolved within their sphere of political competence, are now brought before the Judiciary. It cannot be forgotten that the problems to be solved by this power are extremely complex.

Justice Herman Benjamin, from the Superior Court of Justice, emphasizes the issue of access to justice by mentioning that it is access to the law, i.e., to legal order that is fair (= enemy of imbalances), well-known (socially and individually recognized) and implementable (= effective). Access to Justice involves contemplating and combining, at the same time, an appropriate list of rights and access to courts, access to alternative mechanisms (mainly preventive ones). It also means the right-holders are fully aware of their rights and materially and psychologically qualified to exercise them, by overcoming the objective and subjective barriers analyzed below: it is in this last extended meaning that access to justice means access to power.[6]

Thus, it can be said that access to justice is access to power, by creating the necessary structural conditions for the exercise of environmental citizenship, which provides adequate means for the prevention and treatment of legal-environmental conflicts, having environmental justice as a parameter.[7]

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[2] CAPPELLETTI, Mauro; GARTH, Bryant. Acesso à justiça. Porto Alegre: Fabris, 1988, p. 8.
[3] Ibid., p. 12.
[4] CAVEDON, Fernanda de Salles; VIEIRA, Ricardo Stanziola. Acesso à justiça ambiental: um novo enfoque do acesso à justiça a partir da sua aproximação com a teoria da justiça ambiental. 2007. Available in: http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/campos/fernanda_cavedon_e_ricardo_vieira.pdf, access in 06.04.2017.
[5] "Establishes norms for granting legal aid to those in need".
[6] BENJAMIN, A. V. H. A insurreição da aldeia global contra o processo civil clássico – apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor. Apud: MILARÉ, Edis. (coor.). Ação Civil Pública (Lei 7.347/85 – Reminiscências e Reflexões após dez anos de aplicação). São Paulo: Revista do Tribunais, 1995.
[7] CAVEDON, Fernanda de Salles; VIEIRA, Ricardo Stanziola, op. cit.

There are some barriers that prevent full access. The first ones are objective and relate to the risks of the process, from the point of view of costs, time and effort required. In turn, the subjective barriers refer to the psychological obstacles of the party protected by the law against the language and formalities of the legal area, the position of economic and informational superiority of the other party and the lack of information on legal issues.

Today, the greatest challenge to achieving effectiveness is no longer related only to the superficial aspect of access to justice (costly and time-consuming process, lack of time for legitimized ones, psychological and cultural barriers), but to substantial access to true justice. In the substantial aspect, the material dimensions of effectiveness deserve special mention.[8]

3. Access to Environmental Justice

In view of the serious environmental problem and the situation described here, there has been an increase in the number of judicial lawsuits that deal with this issue. As pointed out, with the development of access to environmental justice, which happened in Brazil mainly after the Constitution of 1988. Considering that art. 225[9] provided for the need of an ecologically balanced environment for present and future generations, besides determining that the Public Power and the community have a duty to preserve it.

However, the problems are not being adequately resolved at the administrative level. Access to environmental justice should be understood as access to the law, a fair, well-known and effective legal order, with access to the courts, access to alternative mechanisms (especially preventive ones) and with the population materially and psychologically conscious to exercise them, by overcoming objective and subjective barriers.

Environmental justice is characterized by having fair treatment regarding distribution of power, risks, environmental costs and benefits, together with the democratization of decision-making processes. Environmental injustice, on the other hand, is a kind of environmental discrimination, as far as it imposes a disproportionate burden of environmental costs on groups already weakened by socioeconomic, racial and informational conditions in comparison to the costs imposed on society in general.

Therefore, there is a so-called environmental exclusion, which shows a deficit of citizenship. since the main factor of exclusion is precisely the deficiency in the exercise of the environmental rights of access to information, public

[8] BODNAR, Zenildo and CRUZ, Paulo Marcio. Acesso à justiça e as dimensões materiais da efetividade da jurisdição ambiental. In: Revista Jurídica CCJ. V. 15, n. 30, p. 111-136, ago/dez 2001, pp. 116/117. Access in: http://periodicos.unifor.br/rpen/article/view/2293/pdf.

[9] Article 225. All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.
Paragraph 1. In order to ensure the effectiveness of this right, it is incumbent upon the Government to:
I – preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems;
II – preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in research and manipulation of genetic material;
III – define, in all units of the Federation, territorial spaces and their components which are to receive special protection, any alterations and suppressions being allowed only by means of law, and any use which may harm the integrity of the attributes which justify their protection being forbidden;
IV – demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public;
V – control the production, sale and use of techniques, methods or substances which represent a risk to life, the quality of life and the environment;
VI – promote environment education in all school levels and public awareness of the need to preserve the environment;
VII – protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.
Paragraph 2. Those who exploit mineral resources shall be required to restore the degraded environment, in accordance with the technical solutions demanded by the competent public agency, as provided by law.
Paragraph3. Procedures and activities considered as harmful to the environment shall subject the infractors, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused.
Paragraph 4. The Brazilian Amazonian Forest, the Atlantic Forest, the Serra do Mar, the Pantanal Mato-Grossense and the coastal zone are part of the national patrimony, and they shall be used, as provided by law, under conditions which ensure the preservation of the environment, therein included the use of mineral resources.
Paragraph 5. The unoccupied lands or lands seized by the states through discriminatory actions which are necessary to protect the natural ecosystems are inalienable.
Paragraph 6. Power plants operated by nuclear reactor shall have their location defined in federal law and may not otherwise be installed.

participation in the decision-making processes and access to justice in environmental matters. Thus, it can be seen that those who face difficulties in exercising environmental citizenship are those who bear the heaviest burden of environmental costs and risks, and consequently would need more frequently and more intensely to have access to justice and instrumentalization. However, they also face the biggest barriers to access to justice.

It is in this context that the movement of access to justice in the environmental sphere is highlighted, aiming to guarantee the realization of environmental rights, not only by the availability of procedural instruments appropriate to legal-environmental conflicts, but also by the search for solutions to the realization of environmental justice.[10] This is the approach that should be used, including from the point of view of the administration of justice.

Access to justice in environmental matters was recognized as one of the basic environmental rights advocated in the Aarhus Convention, adopted on 25 June 1998 in Denmark, by claiming that "Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced".[11]

The purpose of this Convention is: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention".

The Convention aims to contribute to overcoming the barriers of access to justice, especially as regards the parties' capacity and the issue of legitimacy to bring a suit, which arise from the use of inappropriate concepts of civil procedure. In this sense, it establishes the obligation of the parties to promote environmental education and awareness, so that everyone can become aware of the possibilities of bringing a suit in the defense of environmental interests, as well as the recognition and support of environmental protection organizations, which implies the recognition of their legitimacy to go to court in defense of the environment.

The difficulties of access to information for the recognition and exercise of rights is one of the factors that lead to the characterization of a group as fragile, in the process of distribution of environmental costs and benefits. This is why environmental citizenship is a prerequisite for environmental justice, especially with regard to the equitable distribution of power in environmental matters. The knowledge of basic environmental rights and the possibility of exercising and defending them in the legal-institutional sphere integrate the content of environmental citizenship.[12]

It is important to note that in order for environmental injustices and disrespect for human rights to be addressed, it is necessary to create, both within the domestic law of each nation and in the framework of international law, legal mechanisms that strengthen the rights of information, participation and access to justice.[13]

There is no doubt, however, that strengthening access to justice in environmental matters as it has been advocated, inevitably requires, as it could not be otherwise, the improvement of the judicial bodies responsible for giving vent to the initiatives of civil society in the protection of the environment. This implies, on the one hand, increasing awareness among judges regarding environmental issues and, on the other hand, more specialization of judges, including the establishment of courts of first and second instance specialized in environmental issues. The experiences of several countries, and also of Brazil, in the specialization of tribunals in this field, have been reported, for the most part, to be successful, and for that reason may be expanded.[14]

4. Procedural Instruments

It should be noted that there is no point in a complete or almost complete normative framework, as is the case in Brazil, without proper instrumentalization to make it effective.

In the case of environmentalism there is a peculiar situation, taking into account the trans individual and diffuse nature of these interests. The consequence is the lack of motivation of its holders in seeking the guardianship, considering the lack

[10] CAVEDON, Fernanda de Salles; VIEIRA, Ricardo Stanziola, op. cit.
[11] AARHUS CONVENTION. Available in: https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf, access in 06.04.2017.
[12] CAVEDON, Fernanda de Salles; VIEIRA, Ricardo Stanziola, op. cit.
[13] RAMMÊ, Rogério Santos. O desafio do acesso à justiça ambiental na consolidação de um estado socioambiental. Available in: https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/2563/1272, access in: 06.04.2017.
[14] MIRRA, Álvaro Luiz Valery. O acesso à justiça em matéria ambiental no cenário pós Rio+20. Available in: http://www.conjur.com.br/2016-set-24/ambiente-juridico-acesso-justica-materia-ambiental-cenario-pos-rio20#_edn1, access in: 06.04.2017.

of personal and direct advantage. Appropriate procedural instruments are needed for collective conflicts and for the issue of environmental protection, in order to facilitate the protection of environmental assets in court and to overcome barriers of access to justice in this area.

In both Environmental Law and Consumer Law, the issue of access to justice occupies a prominent position. Under the commandment that "the individualistic principles of the last century must be forgotten when it comes to solving conflicts of environment and consumption", in both disciplines the objective is always threefold:

- definition, within the scope of the process and the substantive law, of a preventive structure (and, more recently, the adoption of the precautionary principle);
- reduction, if not elimination, of objective and subjective barriers of access to justice; and,
- "relaxation" of the rules of legitimation to act, facilitating collective access to justice, turning small injustices pulverized into supra-individual damages, with the consequent awareness of individuals that, in the position of victims, suffer as a group and not as isolated units, and that any possibility of change inevitably passes, as we will see, by their organization.[15]

In Brazil, some procedural instruments came as a means of guaranteeing access to environmental justice. They are mainly the popular action (article 5, LXXIII,[16] of the Federal Constitution, and Law n° 4,717/65[17]) and the public civil action (Law n° 7,347/85[18]). Both have a specific provision for bringing a lawsuit of this nature, and it is important to highlight that they aim to protect exactly the collective rights, and have been widely used in Brazil, facilitating citizens' actions. Likewise, they break with certain barriers that hindered access to environmental justice, providing for non-condemnation in fees, non-payment of costs, payment of expertise only at the end of a matter by the losing party, etc.

However, it should be noted that, given the nature of the barriers previously mentioned, the formal possibility of access to justice in environmental matters only through the provision of procedural instruments for collective protection does not guarantee their effective use by the owners of the environmental asset. It is necessary for the environmental right-holders (collectivity) to have access to information and to be able to identify environmental aggressions as an injury to their rights. That is, they must have at their disposal the means, material and information, so that environmental conflicts will reach the legal-institutional sphere.

Cole and Foster point out the difficulties faced by less favored communities in participating and influencing decision-making processes, and in developing sufficient skills to adequately represent the environmental interests. On the other hand, they recognize that information and knowledge are a means of empowerment within decision-making processes, which places such communities in a position of inferiority in legal-environmental conflicts.[19]

Thus, from the point of view of court administration, providing information is also essential.

5. Conclusion

This article demonstrated how access to environmental justice in Brazil has grown, not yet being the ideal, but indicating how it can be achieved. Some ways of increasing this access were pointed out, not only focusing on the number of lawsuits, but also as a way of developing environmental law, in search of the desired effectiveness.

Access to justice should, therefore, be democratized, even by the courts, in order to ensure broad access, enabling the inclusion of the environmentally excluded ones, with the availability of tools and spaces of environmental management, as well as conflict resolution.

It should not be forgotten that access to justice is a prerogative of environmental citizenship since, in order to achieve the effectiveness of environmental law, accessible means must be made available to exercise and operate it.
Hence, the traditional conception of access to justice is superseded. What really matters in the country at the moment is access to the legal-environmental system, the possibility of inserting legal-environmental conflicts in the legal-institutional sphere and directly influencing the elaboration of its final decision, which must be guided by the principles of

[15] BENJAMIN, Antônio Herman. Available in: www.diramb.gov.pr, accessed on 15.jul. 2004.
[16] LXXIII – any citizen is a legitimate party to file a people's legal action with a view to nulli-fying an act injurious to the public property or to the property of an entity in which the State participates, to the administrative morality, to the environment, and to the historic and cultural heritage, and the author shall, save in the case of proven bad faith, be exempt from judicial costs and from the burden of defeat.
[17] Regulates the popular action.
[18] Discipline the public civil action of responsibility for damages caused to the environment, the consumer, goods and rights of artistic, aesthetic, historical, tourist and scenic value and other measures.
[19] COLE, Luke W.; FOSTER, Sheila R. From de ground up – environmental racism and the rise of the environmental justice movement. p. 109.

environmental justice. It also means the possibility of having access to the necessary information and operational means, to efficiently represent the environmental interests and also have the appropriate structure to exercise the environmental citizenship.

In short, it concerns the operationalization of environmental justice, creating communication channels between groups weakened by socioeconomic and informational issues and the environmental legal system. And it should not be forgotten that this operationalization of environmental justice requires structural means and operational instruments equally accessible to all, capable of restoring equality in the distribution of environmental costs, benefits and power. One of the administrative measures of great relevance in Brazil was the specialization of certain courts in environmental matters.

6. Bibliography

- AARHUS CONVENTION. Available in: https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf, access in 06.04.2017.
- BENJAMIN, A. V. H. A insurreição da aldeia global contra o processo civil clássico – apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor. Apud: MILARÉ, Edis. (coor.). Ação Civil Pública (Lei 7.347/85 – Reminiscências e Reflexões após dez anos de aplicação). São Paulo: Revista do Tribunais, 1995.
- BENJAMIN, Antônio Herman. Available in: www.diramb.gov.pr, accessed on 15.jul. 2004.
- BODNAR, Zenildo and CRUZ, Paulo Marcio. Acesso à justiça e as dimensões materiais da efetividade da jurisdição ambiental. In: Revista Jurídica CCJ. V. 15, n. 30, p. 111-136, ago/dez 2001, pp. 116/117. Access in: http://periodicos.unifor.br/rpen/article/view/2293/pdf.
- CAPPELLETTI, Mauro; GARTH, Bryant. Acesso à justiça. Porto Alegre: Fabris, 1988.
- CAVEDON, Fernanda de Salles; VIEIRA, Ricardo Stanziola. Acesso à justiça ambiental: um novo enfoque do acesso à justiça a partir da sua aproximação com a teoria da justiça ambiental. 2007. Available in: http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/campos/fernanda_cavedon_e_ricardo_vieira.pdf, access in 06.04.2017.
- COLE, Luke W.; FOSTER, Sheila R. From de ground up – environmental racism and the rise of the environmental justice movement.
- MIRRA, Álvaro Luiz Valery. O acesso à justiça em matéria ambiental no cenário pós Rio+20. Available in: http://www.conjur.com.br/2016-set-24/ambiente-juridico-acesso-justica-materia-ambiental-cenario-pos-rio20#_edn1, access in: 06.04.2017.
- RAMMÊ, Rogério Santos. O desafio do acesso à justiça ambiental na consolidação de um estado socioambiental. Available in: https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/2563/1272, access in: 06.04.2017.