Procedural Environmental Rights Giving Access to Justice: lessons from Vermont and other courts handling environmental cases around the world

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Prepared for the 3rd UNITAR-Yale Conference on Environmental Governance and Democracy, 5-7 September 2014, New Haven, USA - Please do not cite without permission

Paper type: Review and Discussion Paper
Conference theme(s): This paper relates to Theme 3: Procedural Environmental Rights: Why and How Do They Matter. To a lesser extent it also relates to Theme 5: Effective Participation of Civil Society and Vulnerable Groups.

Abstract

Environmental human rights may unfortunately remain theoretical unless they are accompanied by procedural rights to access remedies in courts and other tribunals. This paper explores specific mechanisms giving standing, that is, the rights to bring environmental and development litigation to court and to participate and be heard in litigation brought by other parties. It examines procedural environmental rights of access for individuals who may have suffered environmental harm, for groups of neighbors of projects seeking to challenge planning permission or other development or environmental permits and impact assessments, for non-governmental organizations, and for representatives of vulnerable groups potentially affected by development. The paper presents practical areas in which court and tribunal judges can facilitate effective access, as well as a frame of reference for exploring the advantages and disadvantages of various models of access, drawing from existing research in countries including Brazil, Sweden, Pakistan, Kenya, China, South Africa and the EU, and in the states of New South Wales (Australia), Vermont (U.S.), and Amazonas (Brazil).
1. Why procedural rights matter

Environmental human rights may unfortunately remain theoretical unless they are accompanied by procedural rights to access remedies in courts and other tribunals. Principle 10 of the Rio Declaration states that “[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level,” and calls for access to information, the opportunity for public participation in decision-making, and “effective access to judicial and administrative proceedings, including redress and remedy. . . .”

Predating the Rio Declaration, and in response to the Rio Declaration and its related principles, different jurisdictions have provided different levels of access to environmental proceedings for different categories of groups and individuals. These differing levels of access are based on explicit or implicit assumptions or policies about the degree of connection, importance or influence each category of participant should have in relation to the proceeding. The question of whether a group or individual has the right to file a legal proceeding or to participate in a proceeding filed by someone else is referred to as that party’s ‘standing.’ (This term does not translate easily out of English, but I will use it for the purposes of this paper). The procedural rules governing standing vary widely and wildly from one jurisdiction to another for different types of proceedings and participants.

This paper examines a range of provisions for standing in environmental proceedings, focusing on the “concerned citizens” who are the subject of Principle 10, and discusses practical ways in which judges can implement those procedural rights to facilitate their “effective access” to judicial and administrative proceedings.

2. Comparative Law and Procedure of Standing in Environmental Proceedings.

The discourse on standing is sometimes obscured by differences in terminology and legal culture between the common law and the civil or Roman law legal systems, and among the different levels of proceedings available to citizens at the national and local levels, and in federal systems at the state level as well. In order to discuss this issue in the comparative law context, it is necessary to examine the types of proceedings to which citizens or citizen groups might seek access, and to compare functionally similar proceedings. (Darpö and Nilsson 2010, 316-19)

Some proceedings, such as criminal prosecutions, can generally only be brought by a government agency or prosecutor. The victim in a criminal case may be called upon to testify but does not seek or obtain party status. Lack of private standing in criminal cases, even criminal environmental cases, also does not appear to be controversial.

Other proceedings involving personal injury and, in legal systems recognizing private ownership of property, injury to private property, may be brought by the individual who has been injured, seeking compensation for the injury and cessation of the injurious activity. Standing to bring such cases is not controversial in any legal system.
The controversies regarding standing arise instead in cases involving challenges to governmental administrative action in ruling on regulatory and development permits, on the one hand, and in administrative and civil enforcement actions, on the other.

Standing to challenge administrative decisions may be broadly or narrowly defined by a statute or even a constitutional provision. In some systems, standing is limited to those who can show that their individual rights have been affected, while other systems allow citizens generally to challenge administrative decisions or omissions on environmental matters. (Darpö 2014, 12) Under European Union law, some member countries’ standing regimes have been broadened to allow standing to challenge governmental action as contrary to EU law. For example, under traditional Swedish procedural law, only the government can represent the public interest in court, however, Swedish courts have applied EU law to interpret its national procedural law to allow environmental NGOs to challenge administrative decisions that might contravene EU environmental law. (Epstein and Darpö 2013).

In some systems, such as Vermont’s, standing to challenge a development permitting decision, either under the statewide land use law, or the municipal permitting process, requires that the appealing party have participated in the proceeding appealed from. These two types of permits are ruled on in a local or state hearing allowing for public participation and requiring notice to potentially interested parties; the requirement ensures that issues are raised and may be addressed by the applicant as early in the process as possible. The appeal to court is not limited to the issues raised before the administrative body, because those boards are informal boards with lay members and may not have addressed all the relevant legal issues. Further, the court may allow party status despite non-participation if the appealing party was not given the required notice to allow earlier participation. This provision reflects a balance between the permit applicant’s desire not to be ambushed late in the proceedings, and the interested party’s right to participate and to appeal. Other parties who did not have standing to bring an appeal may nevertheless move to intervene in the appeal and participate if the appeal was brought by a party with standing. The procedural rules governing environmental court proceedings provide for challenges to party status to be ruled on by the court, but that parties filing their appearance retain that status unless it is successfully challenged. (V.R.E.C.P. 5(c),(d)). On the other hand, for environmental permits that are simply handled administratively, with no prior hearing and only public comments, there is no requirement of prior participation; anyone with the requisite standing can appeal and intervene in the appeal.

The 1988 Brazilian constitution provides an broad grant of standing in Article 5 for citizens to file a legal action to nullify an act injurious to the environment, among other public interests, and allows for exemption from judicial costs and from paying the winners costs in the case of defeat, except in the case of proven bad faith.

The Brazilian constitution provides multiple levels of protection for what it terms “diffuse and collective interests” such as the environment. Article 129 of the constitution lays
out as one of the duties of the public prosecutor – a position independent of the three branches of government – to “institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests.” (Bryner 2012, 482). This civil enforcement authority is a broader grant of authority than the citizen action provided by Article 5.

Finally, it is important to distinguish standing to challenge administrative action from standing to bring a civil enforcement action directly against a private party alleged to be violating environmental law. This type of action, often called a “citizen suit” in the United States, but more accurately termed a citizen enforcement action, is provided under the U.S. federal and some state environmental statutes (Thompson 2000) and is increasingly available in other countries, with varying degrees of success. (Casey-Lefkowitz, et al. 1996, 559-62, 68-70) (Kravchenko, 2004).

It is also important to note that an environmental NGO’s standing to bring such an action in the U.S. is not dependent on its registration, as it is in China (Wang and Gao 2010, 43-46), nor its size, nor how long it has been in existence. All that is required is that its mission is related to the subject matter of the litigation and that one or more of its members has an interest potentially affected by the defendant’s activities and protected by the statute under which the suit is brought.

Other countries have adopted even broader standing for citizen enforcement actions to enforce environmental laws. Notably, the Philippines has recognized the “Writ of Kalikasan” in protection of nature and the environment. (Davide 2012, 597) The rule implementing the writ allows standing to any person or group of persons representing themselves or others, including generations yet unborn, to file a class action involving a violation or enforcement of environmental laws. The rule requires the class action to include NGOs and public interest groups, as well as local communities and indigenous peoples (Pring and Pring 2009, 34).

South Africa also has adopted broad statutory standing for persons acting in their own interest, on behalf of others who cannot act in their own name, in the interest of a group or class, in the public interest, or an association acting in the interest of its members. (Kotze and de Plessis 2010, 163).

Such citizen enforcement actions often seek injunctive relief to stop ongoing harm and to prevent future harm. The injunctive remedy may continue over time under supervision of the court. They may result in monetary compensation for harm to individuals, or payment for a supplemental environmental project, for example, to restore an area of wetlands or mangrove, or plant trees or other vegetation. They may result in the payment of monetary civil penalties – not a criminal fine but a penalty related to the magnitude of the violation and the harm to the environment.

As the jurisprudence of these new systems develop, it will be instructive to study each of these classes of cases, and especially the citizen enforcement cases, comparing the filings and outcomes in jurisdictions with broader and less expansive standing provisions.
3. Implementing Effective Access

It is not enough to have procedural rights of access to judicial and administrative proceedings. How these procedural rights are implemented in actual practice also matters—rights of access are not effective if they are not implemented fairly and consistently, treating all participants with respect, while maintaining control of the proceedings so that no party can use the legal proceedings for delay or to increase the expense of the proceeding. Moreover, the exercise of those rights can be defeated by the indifference or disrespect of court personnel. Of necessity judges and judicial systems around the world have been developing techniques that work for environmental cases at the trial court and grass roots level. Judges and policy makers have been sharing their ideas about these techniques with each other for at least the past twenty years or so, at symposia and in speeches, articles and presentations such as the ones cited below. But it would be useful to make a more systematic and specific study of each of these and other techniques and how they may best be applied in practice.

3.1 Providing Effective Access to Information about Court Procedures and Legal Assistance

The court or tribunal staff should be able to provide clear and simple information to the public about filing procedure, about what to expect procedurally in the initial steps in the case, about mediation, and about where to go for more information, including access to legal assistance or a public ombudsman or law school’s environmental clinic if available. See, for example, the website for the New South Wales Land and Environment Court, (http://www.lec.lawlink.nsw.gov.au/lec/index.html) or the Frequently Asked Questions on the website of the Vermont Superior Court Environmental Division (https://www.vermontjudiciary.org/GTC/Environmental/FAQs.aspx). For example, the information about what happens after an appeal is filed states:

An initial conference will be set, generally within 4-6 weeks from when the appeal was filed, giving the Interested Parties a chance to enter an appearance if they wish to do so. The conferences are generally done by telephone with either the Court initiating the call or by way of a conferencing service where the parties call into a toll-free number.

The information may be made available electronically but should also be available in person or by telephone from the court. It should be available in all the languages used in the area served by the court or tribunal, even if the court requires filings in an official language, and each version should be checked by a layperson for accessible language and sentence structure. (See Foti and de Silva 2010, 8)

3.2 Effective Access Through Geographic Accessibility and Site Visits
Even if standing is broadened to allow citizen lawsuits and participation in cases brought by other parties, if an in-person hearing or trial is necessary in a court location distant from the participants, they often will not be able to make use of the right to bring or participate in the case. As the Prings noted in their study of environmental courts and tribunals, “geography alone can diminish access to justice.” (Pring and Pring 2009, 31)

Although Vermont is relatively small – similar in scale to Jamaica, Wales, the Republic of Macedonia, or Bhutan – a courthouse building is located in each of its fourteen counties. Each in-person hearing is scheduled to be heard in the court facility nearest the location of the dispute, minimizing the travel time and inconvenience for the local parties and witnesses. It is the judge assigned to the particular case who travels to the court location for the hearing. Similarly, in New South Wales, the judges hold hearings in country location near the land that is the subject of the appeal, either in local courts or at the site of the dispute. (Preston 2012, 433-4) The judges of a number of other specialized environmental courts and tribunals, including those in Queensland, Australia, and in Amazonas, Brazil, travel great distances to hold the hearing near the location of the dispute, sometimes by airplane or by boat, or by a vehicle specially equipped as a courtroom. (Pring and Pring 2009, 31)

As well as the advantage to the litigants of not having to travel to a central hearing location, holding the hearing near the site of the dispute enables the judge to take a controlled site visit, with the parties and any lawyers present, prior to or during the hearing, to better understand the evidence and to put it in its real-world context.

3.3 Effective Access Through Judicial Case Management, including Cost Orders

The broader the standing and the greater the participation of citizens in judicial proceedings, the more important it is for the judge to take an active role in managing the case, including sequencing and scheduling the case to control cost and delay. These techniques include holding pretrial conferences to establish a scheduling order for the case, holding the participants to the deadlines undertaken in the order, conducting procedural conferences by telephone or videoconference when possible, or even taking witness testimony electronically in appropriate circumstances. Of course, it may not be appropriate to hold a pretrial conference by telephone in a case with a large number of self-represented parties.

Motions addressing party status issues should be addressed as early as possible, but it should always be the judge, rather than a court clerk, who rules on such matters after the case is filed, applying the standing rules of the jurisdiction in light of any applicable international principles such as Rio Principle 10.

Finally, in a jurisdiction in which the allocation of costs (or the risk of that allocation) impedes the effective access to justice, the early pretrial proceedings should address whether an order suspending that cost allocation is appropriate to allow the case to go forward on its merits.
3.4 Effective access: Self-Representation

Access to administrative and judicial proceedings by vulnerable populations will be likely to mean self-representation, unless the particular case is taken up by a legal clinic or NGO. Especially when parties are participating without attorney representation the judge of the court or tribunal is uniquely placed to create a culture of respect and civility within the courtroom, and, indeed, within the court house. It is up to the judges and the court staff, working together, to create a culture in which participation by self-represented litigants is accepted as normal. (Foti and de Silva 2010, 12§2.6). It will be important to make this a subject of judicial education programs for judges who preside over environmental cases. Such judges need not only to understand the relevant law and to be literate in the science and technical issues they face, but also to understand their role in facilitating the participation of all parties to these important cases, without allowing the case to founder.

4. Conclusion

The anecdotal comparative law information available in the reference list of this paper should be supplemented by a systematic comparative examination of specific standing provisions and on-the-ground techniques used by judges in different countries to facilitate effective access by all concerned citizens who wish to do so. Such research should result in two useful documents: a handbook for policymakers analyzing the range of elements of standing provisions for each type of proceeding, and a handbook for judges laying out useful techniques for facilitating the effective access to justice in their environmental cases, with experienced judges’ commentary on those techniques.
References

The author has drawn on her experience as Environmental Judge for the state of Vermont (U.S.), 1990-2011, and her discussions with other judges who preside over environmental cases, including from Australia, Belgium, Brazil, China, Kenya, Pakistan, and Sweden.


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