



# PRINCIPLE 10 IN BRAZIL: AN OVERVIEW, CASE STUDIES AND THE POTENTIAL OF THE REGIONAL AGREEMENT

Since the process of redemocratization and using the 1988 Federal Constitution as a landmark, Brazil has advanced in the creation of laws, policies and practices aimed at guaranteeing participation rights, information rights, and access to justice in environmental matters: the so called access rights.

Nevertheless, decision-making processes on - among other things - projects, policies and infrastructure work without effective transparency and participation of society, or for that matter effective access to justice and compliance with environmental legislations, are still widespread. Such incongruities result in decision-making processes that cause conflicts and environmental injustices, affecting the environmental quality and the population, especially the most vulnerable groups.

A new impetus on environmental democracy may be given in Brazil and in other Latin American and Caribbean countries with the approval of a regional agreement based on Principle 10 of the Rio-92 Declaration. This process, which started in 2012, during the Rio+20, already has a preliminary document around which negotiations are taking place.

This is the context that has motivated this Newsletter, which seeks to contribute to this debate by presenting a brief overview of the guarantee to access rights in Brazil, introducing cases in which those rights were not fully met and an analysis of the potential of the regional agreement.

## 1 A BRIEF OVERVIEW OF THE ACCESS RIGHTS IN BRAZIL



**ACCESS TO PARTICIPATION** | Different laws which establish national environmental policies create mechanisms for the participation of citizens and civil society organizations in environmental issues. The main existing tools are environmental councils, river basin committees, public hearings and consultations. There are also National Conferences for the Environment, which occur on average every three years. At the federal level, there are environmental councils dedicated to different themes, such as biodiversity, water resources and forests. All the states and the federal district have environmental and water resources councils. At the local level, 3784 municipalities (68% of the total) have their own environmental councils. In addition, the country has 194 river basin committees, and also hundreds of councils for protected areas. Brazilian environmental legislation determines that public hearings and consultations should be held for a number of processes, including for Development of Basic Sanitation and Climate Change Plans and for the presentation and discussion of Environmental Impact Studies.



**ACCESS TO INFORMATION** | The right of access to information was established in the Federal Constitution of 1988, and it is detailed in different laws, especially in Law 10,650 / 2003, which deals with environmental issues, and the Access to Information Law (Law No. 12,527 / 2011), which lays down the procedures and deadlines that federal, state and local public bodies of the three powers should follow to ensure this right on all issues of public management, including environmental. This law determines that transparency is the rule and that secrecy is the exception, which means omitting information can be done only in specific cases. Furthermore, it determines which information must be disclosed by public agencies, proactively and online. The Information should be provided without the need of any claimant's justification and within 20 days. In addition, various environmental laws have transparency and access to information as objectives or guidelines and they create proactive disclosure requirements for governments, such as the creation of Information Systems (Water Resources, Sanitation and Public Forests) and dissemination of specific documents.



**ACCESS TO JUSTICE** | The Brazilian legislation, including the Constitution itself, created institutions and different instruments to guarantee that the citizens have access to justice when it comes to environmental issues. In relation to institutions the main actor is The Public Prosecutor's Office, which is responsible for defending collective rights, including environmental rights. The Public Prosecutor's Office has a specialized sector which acts solely on the subject. As far as the instruments the country has, we can mention public civil actions, which may be raised by prosecutors and civil society organizations. This instrument was created specifically for the protection of collective rights and is widely used in environmental issues. Other instruments are class actions, in which every citizen is a legitimate part to its filing, and civil inquiries, which is a Public Prosecutor's investigative tool as a representation of civil society. Environmental justice can also be ensured through the collective writ of mandamus, an extra-judicial mechanism for conflict resolution, which can be used to stop initiatives that are harmful to the environment.

**DESPITE THESE ADVANCES, THE CASES PRESENTED BELOW DEMONSTRATE SIGNIFICANT SHORTCOMINGS IN SECURING ACCESS RIGHTS IN BRAZIL.**

## 2 WHEN ACCESS RIGHTS ARE NOT ACCOMPLISHED

### TRANSPARENCY IN THE SAO PAULO WATER CRISIS |

Since 2014, part of the São Paulo Metropolitan Area, which has around 20 million inhabitants, has been undergoing a severe water supply crisis, due to lack of rain and the lack of strategic investments in sanitation and conservation of water resources. The Cantareira System, one of its main sources, reached less than 5% of its water storage capacity at the beginning of 2015.

Despite recurring reports of water scarcity there is a great amount of misleading information, and even lack of information, about various aspects of the problem. To assess the transparency of state, regional and federal agencies and officials, the NGO Article 19 carried out a research called "The Cantareira System and the Water crisis in São Paulo: The Lack of Transparency in the Access to Information", released in late 2014 and which found the following results:

#### Active transparency

**11 PUBLIC AGENCIES WERE EVALUATED** | **5 CATEGORIES OF INFORMATION ANALYZED BY 4 CRITERIA: AVAILABILITY, ACCESSIBILITY, QUALITY AND COMPREHENSIBILITY**

**4 BODIES WERE CLASSIFIED AS "NO TRANSPARENCY", 2 AS "LOW TRANSPARENCY", 5 WITH "AVERAGE TRANSPARENCY" AND NO CLASSIFICATION OF "HIGH TRANSPARENCY".**

#### Passive transparency

**7 PUBLIC AGENCIES WERE EVALUATED** | **23 REQUESTS FOR INFORMATION WERE MADE** | **8 (35%) WENT UNANSWERED AND 6 (26%) WERE ANSWERED UNSATISFACTORILY.**

Article 19 concluded that **the governmental agencies responsible for the management and control of water have been insufficiently transparent when it comes to the water crisis in the region**, which further aggravates the situation and hampers the society's participation in this area.

#### HYDROELECTRIC PLANTS IN THE AMAZON AND THE USE OF SAFETY SUSPENSION |

As one of its strategies to expand the energy supply, the Brazilian government has planned and built large hydroelectric plants in the Amazon rainforest. These are controversial projects, given the high potential for negative environmental and social impacts, especially for indigenous peoples and traditional communities.

With strong opposing social mobilization, especially in the case of Belo Monte which will be the third largest dam in the world and is located in the state of Pará, some of the conflicts around these projects have been judicialized.

Although many lawsuits against the hydroelectric plants have been upheld and contrary injunctions have been served, Brazilian government has managed to carry on with the licensing and execution of the works by using a legal instrument called Safety Suspension.

**This instrument allows the government to request directly to a Court's President the suspension of any decision contrary to one of their rulings until the final judgment of the process, which can take years. The consideration of the Safety Suspension request is not based on any rights violations, but is rather made from a political and generic evaluation of assurance to "order, health, public safety and economy."**

According to the Instituto Socioambiental (Socio-Environmental Institute - ISA), an NGO that has been following the installation process and the social and environmental impacts of the Belo Monte dam, all the legal decisions against the continuity of the project, which were a result of dozens of actions from public prosecutors, ombudsmen and civil associations, were suspended by the courts indefinitely, due to the Security Suspension.

Amongst the reasons for cancelling the project are: the absence of prior consultation with indigenous peoples, which goes against determinations of the Federal Constitution and the Convention 169; the various flaws in the environmental licensing; and the delay in the implementation of socio-environmental mitigation measures and impact compensation.

It is clear that the use of this procedural instrument represents a barrier to the fulfillment of the access to justice, both in relation to environmental conservation and also for the population affected by hydroelectric projects, with the potential to result in irreparable damage.

### SOCIAL PARTICIPATION IN THE NATIONAL ENERGY POLICY |

Despite strong environmental, economic and social implications, energy policy in Brazil has limited channels for public participation and the existing ones are not made effective. The law that established the National Energy Policy also set up the National Energy Policy Council (NEPC), which has important responsibilities in this matter. But unlike other national councils, the Federal Decree in 3.520/2000 and 5.793/2006 that define the NEPC composition provide for the participation of only one representative of civil society and one representative of universities; being that the remaining twelve vacancies are for government representatives.

Moreover, **this one spot intended for civil society, hasn't been filled since its inception in 2006 due to lack of Presidential nomination.** The very prerogative of the Presidential nomination is questionable, because society should have autonomy in defining their representatives in collegiate bodies.

Different organizations of the Brazilian civil society have repeatedly demanded changes in the energy policy, in order to ensure transparency and public participation in decision making process, and specifically the appointment of their representative to the NEPC. **The case of NEPC shows that Brazilian government is quite reluctant in making room for the public participation, however small, in the debate about the National Energy Policy directives.**

## 3 THE POTENTIAL OF THE REGIONAL AGREEMENT OF PRINCIPLE 10

The case studies illustrate the urgency of moving forward in the implementation of access rights in Brazil and reinforce the need for a regional agreement on the matter.

The water crisis, for instance, points out that transparency in this subject is deficient, with the aggravating factor that this is an emergency situation in which the information should be shared with extreme speed and reliability. The case with the National Energy Policy Council shows that when it comes to issues that are not strictly environmental, but have a strong relation thereto, public participation in Brazil is still deficient. Finally, the case of the hydroelectric plants shows that anachronistic legal instruments, which still exist in the country's legal framework, hinder the effective and timely access to justice in relation to implementation of projects with high potential of creating negative socio-environmental impacts.

In this sense, as well as strengthening the existing laws, the draft document of the agreement aims to establish new rules and practices, that are not included in the Brazilian legal framework, or that are included in unclear or fragmented ways. Here we highlight some of those rules and practices:

- Ensuring that participation process begins when all options and solutions are still possible, which allows a real influence on the decisions; as opposed to participation in the advanced stages

of decision-making, as it is currently common. (Article 8.2)

- When it comes to emergencies and disasters, the authorities should immediately disseminate all information that can contribute to taking preventive and mitigating measures. (Article 7.3)
- The creation of specialized bodies, whether jurisdictional or otherwise, to handle environmental issues. (Article 9.3)
- The creation and strengthening of alternative mechanisms for conflicts and controversies resolution. (Article 9.10)

The draft document of the agreement also approaches other important aspects such as:

- Actions to strengthen the capacities and cooperation between signatory countries, which will contribute to the exchange of experiences and good practices. (Article 10)
- The creation of an Information Exchange Center on Access Rights, which will have a key role in information management and will be an "observatory", which will be essential for monitoring the agreement. (Article 10.4)
- Creating a Conference of the Parties, responsible for ensuring the effectiveness

of the agreement, in addition to being a permanent regional forum on the access rights. (Article 12)

- The need for signatory countries to be accountable for the actions directed towards the execution of the Agreement and the existence of a mechanism for peer review of such execution. (Article 17.1)

Finally, for the effective realization of these advance opportunities in environmental democracy, we point out the importance of the regional instrument construction process resulting in a legally binding agreement, in order to have the legal authority necessary to allow that the improvements which will be set in the final document are, in fact, implemented.

*The references for this newsletter will be available in the full version of the document on the website [www.artigo19.org](http://www.artigo19.org)*

