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Legal mobilisation and environmental activism in Wallonia (Belgium): where is Environmental Justice?

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Abstract

Environmental justice (EJ) is an important field of research in the USA (Mohai and Bryant 1992, Schlosberg 1999, Bullard 2000, Pellow 2000, Agyeman 2002, Kurtz 2003, Holifield 2009) as well as a framework for grassroots movements and activists who seek to defend their rights to a healthy environment. Environmental inequalities, as they are commonly called in Europe (Emelianoff 2006, Cornut, Bauler et al. 2007, Walker and Eames 2008, Faburel 2012, Walker 2012), are a growing field of research but they are not seen as a specific frame for action and collective mobilisation in Belgium.

The use of legal mobilisation as a strategy to fight environmental inequalities in Wallonia (Belgium) is discussed in this paper. I propose to examine access to justice in the field of environmental protection and to link it to considerations in terms of environmental justice, that is to say cases in which groups see themselves as victims of a disproportionate burden of environmental bads (such as exposure to pollution, vicinity to industrial plants, or waste dumps).

This paper explores (1) how environmental NGOs and activists can mobilise the law to denounce environmental conflicts and inequalities providing insights into an environmental inequalities perspective on access to justice in Belgium. It also offers an innovative approach to environmental inequalities and justice in Belgium (2) by asking: how is EJ conceived and integrated in environmental research and litigation? Starting on the premise of a weak literature and scholarship on environmental inequalities, I will propose some new avenues for research on these topics in Belgium.

For this paper, empirical evidence is based, on the one hand, on legal texts and litigation in Belgium and, on the other hand, on open-ended interviews with stakeholders in Wallonia – main political parties, environmental NGOs, legal practitioners, trade unions, and public institutions.

Introduction

Environmental justice (EJ) is an important field of research in the USA (Mohai and Bryant 1992, Schlosberg 1999, Bullard 2000, Pellow 2000, Agyeman 2002, Kurtz 2003, Holifield 2009) as well as a framework for grassroots movements and individuals who seek to defend their rights to a healthy environment. Environmental inequalities, as they are commonly called in continental Europe (Emelianoff 2006, Cornut, Bauler et al. 2007, Walker and Eames 2008, Faburel 2012, Walker 2012), are a growing field of research but they are not seen as a specific frame for action and collective mobilisation in Belgium. Environmental inequalities invite us to think about litigation and legal opportunities for individuals and groups in environmental conflicts.

The use of legal mobilisation as a strategy to fight environmental inequalities in Wallonia is discussed in this paper. I propose to examine access to justice in the field of environmental protection and to link it to considerations in terms of environmental justice, that is to say cases in which groups would see themselves as victims of disproportionate burden of environmental bads (such as exposure to pollution, vicinity to industrial plants, or waste dumps).

Environmental Inequalities (EI) – the term more commonly used in continental Europe – are a field of research at the crossroads of political science, socio-legal studies, and urban research. Originating from the environmental justice movement in the US, I analyse the integration of environmental injustices and inequalities into the Belgian context where environmental justice research has been totally disregarded in scholarly studies on access to justice and legal mobilisation and litigation, especially in environmental matters.

In a first section, I explore the concepts of environmental justice and environmental inequalities. This field of research has not been deeply explored in Belgium yet and this paper is part of a broader doctoral project from which a litigation and legal mobilisation approach is only one aspect. Litigation is one strategy among others that can be mobilised by environmental justice activists in their search of more equality in environmental policies. However, the term 'EJ' supposes that litigation and justice are central concerns in the movement and literature associated to it.

In a second section, I explore litigation opportunities for environmental NGOs and activists in Belgium (and more specifically in the Southern region of Belgium, Wallonia¹). The main challenges and barriers to legal mobilisation and litigation in Belgium are examined, in the wider context of the European Union and of the UNECE Aarhus Convention. The idea here is

¹ I will come back later on the specific political and institutional organisation of the Belgian state.

to study legal opportunities for activists but also to highlight unequal aspects of legal procedures.

In a third and last section, I propose a first investigation into the links between legal mobilisation, access to justice, on the one hand, and environmental inequalities in Belgium, on the other. My purpose is to provide some insights into an approach to litigation and justice integrating considerations of environmental justice and inequalities research. Is environmental justice considered in the Belgian context? What could be an added value of this approach? What are the obstacles to incorporate this important body of research within the specificities of the Belgian institutional, political and legal systems?

I will finally discuss the new perspectives allowed by an environmental justice approach in Belgium, as well as the major differences, preventing a simplistic implementation of these concepts without any adjustment in our political and legal system.

Section 1. Environmental Inequality and Justice in Belgium, where are we?

The concept of environmental inequalities postulates that socio-economic inequalities are strengthened by environmental factors, such as the accessibility to green spaces, to an environmental quality in general, and to a quality of living and housing conditions. Despite the lack of a common and unquestionable definition of the terms ‘environmental justice’ and ‘environmental inequality’ (or equity), the basic idea on which EI are based is that people or groups do not bear the same burden of pollution and environmental risks and do not have the same access to urban and environmental services (Emelianoff 2006).

This body of research, linked to urban geography and inequalities scholarship, questions, in the perspective chosen for this paper, the use of litigation as a strategy to challenge environmental injustices/inequalities.

An environmental justice approach entails a specific and wide notion of the environment comprising access to services and goods such as green spaces as well as public transportation, housing; in short, the living environment².

This first section introduces the main concepts and their origin and suggests a first approach to environmental inequalities in the Walloon context.

In the United States

Introduced in continental Europe as environmental inequalities, Environmental Justice scholarship first arose in the United States. Environmental justice is, in the US, a well-grounded framework mobilised by grassroots movements, NGOs, and activists, particularly

² I will distinguish later between the wide notion of the environment and the concept of ‘pure environmental damage’.

before the courts, to act against, and to contest, the uneven distribution of environmental goods and 'bads' among space and population.

Roberts distinguishes between common environmental activists who "are concerned with leisure activities, wildlife, pollution abatement, and industrial regulation" from environmental justice activism that is "concerned with civil rights, social equity, and institutional discrimination" (Roberts 1998). Cole proposes, in the same direction as Roberts, three elements that distinguish mainstream environmentalism from EJ: motives (protection of wilderness vs. a focus on the direct impacts of environmental policies on populations and the health), background (middle class vs. the poor and ethnic minorities, and their consequent vision of and distrust for the use of legal strategies), and perspective (environmental vs. more global and holistic vision of a necessary change in society) (Cole 1992). Is that to say that 'traditional' environmental NGOs do not represent different segments of the population? The relevance of these premises, elaborated in the US context, would need to be accurately evaluated in the Belgian one. I would be cautious about this assumption and the supposed gap between mainstream environmentalism and EJ activism – sometimes seen as the third wave of environmental activism (Cole 1992) – because I believe there is not inevitably a separation between the pursuit of the protection of the environment, on the one hand, and the struggle for environmental justice, on the other. However, it is a specificity of EJ research to highlight the unequal consequences of environmental policies and decisions, especially on disadvantaged populations.

EJ has been investigated since the 1980s in the United States. In the direct tradition of the Civil Rights' movement, these unequal situations are considered to deny fundamental rights of individuals. 'Victims' of environmental injustices, seeing themselves as 'right-bearers' have, as a consequence, use litigation as a strategy. EJ movement condemns the unequal and prejudicial impact of facilities location choices on people of colour and the poor (Wenz 1988, Mohai and Bryant 1992, Bullard 2000, Pulido 2000, Holifield 2004, Schlosberg 2004).

Environmental justice was recognised by President Clinton in Executive Order 12898 of February 11, 1994:

'Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations', as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies"³.

³ U.S. Environmental Protection Agency: <http://www.epa.gov/environmentaljustice/>.

The US Environmental Protection Agency (EPA) created the Office of Environmental Justice (OEJ) in 1994 to address these inequities⁴.

The expression 'environmental inequality' is, however, also used in the United States. Pellow believes this expression "addresses more structural questions that focus on social inequality (the unequal distribution of power and resources in society) and environmental burdens" and brings broader dimensions to environmental justice: how are environmental injustices formed through historical, political and institutional processes (Pellow 2000).

While environmental justice scholarship tends to imply that litigation and legal mobilisation are logical strategies to fight environmental injustices, some scholars have contradicted this assumption. Marshall strongly affirms that "environmental justice activists vigorously discourage the use of strategies such as litigation, primarily because such strategies take control over the movement out of the hands of the local leadership and turn it over to professionals" (Marshall 2010), mainly lawyers, excluding ordinary activists and residents from their own 'environmental struggles'. Cole, who was an EJ attorney, also argued:

"Because the struggles in the environmental justice movement are primarily *political* and *economic* struggles, not legal ones, as lawyers in the movement we strongly recommend *against* lawsuits whenever possible. But given the fact that sometimes a community group must go to court, the group should understand not only the legal angles of the suit, but its potential political ramifications as well. Environmental justice lawsuits must be brought in recognition of their political nature, in order to lift a community's morale, strengthen the community group, raise the profile of the group, and build the political momentum necessary to win such struggles" (Cole 1993).

I will come back on this premise later but the major role of the judges in circumscribing access to justice in Belgium echoes this analysis. Moreover, an EJ research should encompass a study of litigation and legal strategies, taking into account that political and legal strategies are intertwined.

EJ and EI research challenges "the dominant ecological paradigm utilized by environmental researchers [that] failed to recognize and/or adequately address the fact that environmental problems are contextual and experienced unevenly across the population (Krieg and Faber 2004)". In Belgium, 'environmental inequalities' in this perspective would invite us to consider the social impacts of environmental policies and decisions, in their broad meaning, which have been largely underestimated so far.

If first scholarly studies carried out in the US on environmental justice aimed to highlight how

⁴ The OEJ was named Office of Environmental Equity from 1992 until 1994.

ethnic minorities and the poor experience discrimination by demonstrating the unequal distribution of polluting facilities, many scholars have expanded this field by opening up research to different conceptions of justice (distributional, procedural and 'recognition'), and to the causal explanations of environmental inequalities: history, capitalism, urban dynamics, new forms of domination (Holifield 2004, Schlosberg 2004).

"In substantive terms there has been a broadening of the environmental and social concerns positioned within an environmental justice framing moving beyond only environmental burdens to include environmental benefits and resources in various forms"(Walker 2009).

Political theorist Schlosberg adds two dimensions to the mainly distributive approach to – environmental– justice, following I. M. Young and N. Fraser: recognition and public participation. "A study of justice needs to focus on the reasons and processes behind and determining maldistribution; recognition, or the lack thereof, is key" (Schlosberg 2004). Distributional justice is a too narrow perspective on environmental justice, where cultural, identity, institutional and policy design, as well as historical conditions are important part of the 'explanation' for inequalities.

The first dimension, procedural justice – the fairness of the decision-making process –, asks 'who should be included in the process'. I plan to further explore the 'spatial element' as an important aspect of environmental inequalities in this doctoral project. "Walker highlights that there is a clear spatial element to these sorts of questions – defining who can be involved must have some form of spatial location and territorial extent" (Walker 2012, Simcock 2013). Joining a 'geography of difference' (Harvey 1996) approach, I believe including public participation to the decision making process in EJ research allows to go beyond a purely distributional justice and to question the fairness of policy design, by opening up a new avenue for 'those affected' paradigm (Simcock 2013) and to question mainstream visions of activism and NIMBYism. This leads however to an important potential paradox: are inclusivity and effectiveness of the process mutually supportive or in tension? (Stevenson⁵)

The second dimension is recognition or "the respect afforded to diverse ways of seeing and knowing –a critical intervention in the science–based domains of environmental and natural resource policy" (Shilling, London et al. 2009). What does 'street-based' science bring to environmental inequalities research and analysis? A wider vision including environmentally subjective perceptions are a further step to a better understanding of environmental

⁵ Hayley Stevenson, *Democratizing global climate governance*, ECPR Environmental Politics and Policy Summer School, Keele University, 26th June 2013.

inequities. 'Recognition' of the different aspirations and perceptions of groups and individuals is assumed to be central to understand and provide an adequate answer to environmental injustices.

The methods used to report environmental inequalities have been criticised (Been 1993, Bowen 2002) and questions are asked: which scale of analysis should be used to point up environmental inequalities? In a constructivist perspective, scholars have highlighted the 'spatial ambiguity of environmental inequity' and observed that there is "no indisputable rationale for favouring one scale of resolution and analysis over another" (Kurtz 2003). The way in which scales are mobilised by environmental justice activists is an important dimension of EJ activism in the US, between spatial scale of societal meaning and spatial scale of public regulation (Kurtz 2003). The scale chosen by scholars to study environmental justice phenomena constitutes a major source of contentious debate. The time period analysed to provide insights into environmental justice instances is important to show longitudinal changes in areas characterised by low environmental quality.

In Europe

In the United Kingdom, where environmental justice issues are discussed as a social movement framework as well as a scientific field of research, more than in the rest of the continent (Agyeman and Evans 2004, Lucas, Walker et al. 2004, Walker 2007, Fairburn, Butler et al. 2009) environmental justice and inequalities are a growing body of research and interest. However, with the exception of the UK, there are not many mobilisations of an environmental justice framework by activists in Europe.

In Europe, scholars note the lack of connection between social justice and environmental concerns (Theys 2007, Blanchon, Moreau et al. 2009). 'Social values attributed to the environment' (Faburel 2010) and environmental justice scholarship remind us that the poor also feel concerned about their environment: where they live, the cleanliness and the level of pollution in their neighbourhood. The rise of an environmental consciousness is presumed related to the growing material security in Western countries after Second World War that allowed people to develop environmentalist values. However, environmental justice activism contradicts this postulate and invites to go beyond this assumed trade-off between objective problems and subjective values, between environmental values and material considerations (Inglehart 1995).

Closer to our context, in France, environmental inequalities are mostly studied by urban geographers (Emelianoff 2006, Faburel 2008, Faburel and Gueymard 2008, Laigle 2009), who have notably tried to illustrate the lack of integration of environmental considerations into

urban policies (Laigle 2009) giving priority to a spatial approach to environmental inequalities.

In Belgium

Overall and as a first review of environmental inequalities and justice research in Belgium, we must admit the poor literature and scientific research on this issue, with the exception of a few studies (Cornut, Bauler et al. 2007, Dozzi, Lennert et al. 2008, Lejeune, Chevau et al. 2012).

Environmental inequalities and injustice encompass the study of access to justice and the mobilisation of legal strategies by activists and NGOs. Access to justice and litigation strategies do not form a sound field of research apart from a strictly legal analysis of the rule of law delimiting the action of NGOs in environmental matters in Belgium⁶. Numerous studies from lawyers (Larssen and Pallemmaerts 2005, Born 2010, Jadot 2010, Delnoy 2011) propose a thorough analysis of the legal opportunities activists and NGOs have but, as far as I know, no study has been carried out until now in Belgium on the legal strategies elaborated by actors and organisations seeking to protect the environment. Lawyers, centred exclusively on legal methods focusing on the rule of law, have not sought to study discourses, behaviours, strategic choices, resource mobilisation or political structure organisation, which in other countries have contributed to analysis on environmental justice and litigation. I argue here that this lack of consideration for an environmental justice perspective on litigation and access to justice is an important gap in the literature on environmental activism in Wallonia (Belgium).

As this field of research is underexplored, I propose to take into consideration the differences between Belgium (and more specifically in the southern region, Wallonia) and other countries, where environmental justice and inequalities are already studied.

Section 2. Litigation and Legal Procedures for NGOs in Wallonia, Belgium

In this first section, I set out the main elements with regard to access to justice and litigation in environmental matters in Belgium. For this purpose, I introduce, in a first sub-section, general considerations on access to justice and environmental justice research and identify the main international rules on this topic. In a second sub-section, I study access to justice in Belgium and, more specifically, for environmental NGOs. In a third and last sub-section, I analyse the main obstacles to environmental litigation in Belgium (costs, standing rules, etc.).

⁶ The main jurisprudence is developed at the federal level in Belgium, by federal courts, such as the Cassation Court or the Council of State.

General Considerations

In this sub-section, I distinguish between environmental justice and access to justice and then introduce to European and international rules on environmental matters.

Access to Justice and Environmental Justice

Access to justice is one aspect of the environmental justice/inequality perspective but in my opinion, impossible to overlook when dealing with environmental inequalities; even though legal action is not the only instrument for actors who want to act against environmental decisions or legislation: participation, information, political lobbying, media coverage can be mobilised way early in the process.

‘Access to justice’ comes from the USA where it is in particular conceived in the environmental field. However, the American system of environmental protection is different from the European and Belgian one. In the USA, environmental protection law emerged earlier than in Europe, in the 1970s, and was conceived as a ‘rights’ approach, allowing EJ movements to develop in the direct tradition of the Civil Rights’ Movement, using litigation strategies (Nicholls and Beaumont 2004, Kelemen and Vogel 2010).

A study of access to justice limited to standing opportunities do not offer a complete vision of the legal opportunity structure (LOS) that includes other approaches, such as participation as an expert during a trial, etc. The concept of Legal Opportunity Structure (LOS) represents “the degree of openness or accessibility of a legal system to the social and political goals and tactics of individuals and/or collective actors” (Vanhala 2012). The question of access to justice and litigation opportunities asks ‘who has the right to take legal action?’ Only those who are directly the recipients of the policy (and have a ‘direct interest’ in it, are directly impacted by it) or also groups that seek, as a collective interest, to protect the environment? In this paper, I will focus on this specific question and not on the whole question of LOS in Belgium, which would necessitate an in-depth analysis beyond the scope of this paper.

The LOS is not the only argument explaining the choice by environmental NGOs of litigation as a strategy. I argue here that other considerations might be useful: the historical use of litigation, the procedural predominance of participation throughout the decision-making process, and a lack of diffusion of EJ scholarship in Belgium.

Access to Justice in International and European Law

Access to justice has been sanctioned in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed the 25th of June 1998 in the framework of the UNECE, and is in force since 2003 in Belgium. This major agreement without being directly applicable for member states (MS)

strengthens the potential role of NGOs in environmental protection litigation, as it is based on the premise that greater public awareness of and involvement in environmental matters will improve environmental protection. The Convention, which contains mainly procedural rights, has had an important impact on internal law. The major focus of this paper is on the third dimension of the Convention: access to justice; but it is strongly linked to the other two (access to information and public participation).

The European Union, which also signed the Convention, plays a major role in environmental regulation, imposing to member states to implement many environmental rules, including directive 85/337 on the assessment of the effects of certain public and private projects on the environment and the directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, approved by the EU following the adoption of the Aarhus Convention. The European Court of Justice (ECJ) is also an important player in environmental litigation and its jurisprudence guides member states, clarifying many concepts.

Political and Institutional Organisation of Belgium

Belgium is a federal state composed of three regions and three communities. Without entering into specific considerations, I need to precise that the environment is mainly a regional competency in Belgium. Wallonia, the southern region of the country, is amongst others in charge of housing, land planning and environment (water, air quality, biodiversity, etc.). The European Union also guides environmental law as mentioned above and has had an important impact on the level of protection reached by member states.

In Belgium, the organisation of the judiciary remains a federal competency as well as the design of new jurisdictions. However, regions have the opportunity to create specialised administrative jurisdictions in the framework of their competencies. The Flemish region has created specialised administrative jurisdictions to deal with environmental cases for which the Region has authority. This dualistic approach between the environmental arena, which comes within the competency of the Regions, and the judicial organisation, falling under the federal authority, complicates legal and judicial processes in Belgium.

This duality of competences between the federal state and the federated entities gets more complex in environmental matters as there is also a duality of jurisdictional orders in Belgium (Delnoy 2011). A distinction needs to be made between access to judicial courts and tribunals, on the one hand, and access to administrative courts, on the other. Moreover, the European Court of Justice can also be referred to, as well as the European Court of Human Rights based in Strasbourg, after exhaustion of domestic remedies (Art. 35, § 1 ECHR). The

jurisprudence of the two European courts is decisive and should be followed by MS.

Litigation Opportunities for Environmental NGOs – Jurisprudence

Overall, environmental NGOs do not have a comfortable position in terms of access to justice in Belgium, even if they can rely on the Aarhus Convention that requires member states to give a favourable status to environmental NGOs. A recent case law might however challenge this first assumption in coming months. This second sub-section will be divided in two parts: access to judicial courts and access to administrative jurisdictions.

Judicial: The Cassation Court

Since the *Eikendael* decision in 1982, the Cassation Court (CC), the highest judicial court in Belgium, has followed a relative consistent case law and has limited access to justice for environmental NGOs that have to demonstrate a direct interest to be able to go before the judicial courts (for civil and penal actions). With the exception of a few conflicting judicial precedents, environmental NGOs have been, as a consequence, denied access to judicial courts (Born 2010). However, the CC pronounced a new judgement in June 2013⁷, which overturns the mainstream conception about standing rules for environmental NGOs, using the Aarhus Convention to expand legal opportunity (Vanhala 2012). Considering the Aarhus Convention, the CC admitted the appeal of an environmental organisation and explained this reversal saying it has not had the opportunity since the adoption of the Aarhus Convention to modify its jurisprudence. This important shift in the jurisprudence of the highest judicial court in Belgium should be followed in coming months and years to see how it is going to change the use of litigation strategies by environmental NGOs, which have acted in a context of legal insecurity for many years.

The 12 January 1993 law regarding a right of direct action in environmental protection matters, which offers a right, in particular for environmental NGOs, to litigate before judicial courts to stop a prejudicial act against the environment has not been mobilised frequently by NGOs. This law, which gave *locus standi* for environmental NGOs, has indeed been largely restricted by criteria NGOs must respect to be able to go before the courts.

Administrative: Council of State

In terms of administrative legal action, the Council of State (CS), the highest administrative jurisdiction in Belgium, developed its own conception of the interest of NGOs for taking legal

⁷ Hof van Cassatie van België, Arrest, Nr. P.12.1389.N, 11 Juni 2013.

action⁸. The CS has authority to suspend or annul administrative acts that are contrary to legal rules⁹. Its case law interprets standing rules for NGOs less narrowly than the judiciary's though the legal precedents impose some conditions to the action of NGOs: the social purpose needs to be the protection of the environment, the geographic scope of action of the organisation has to be limited, its representativeness – number of members in relation to its scope of action – has to be acknowledged. Delnoy, in an analysis of the implementation of the Aarhus Convention in Belgium, notes:

“It is difficult, at the time of writing [2008], to determine with certainty if the Council of State has altered its jurisprudence in order to comply with the Committee's recommendations [the ACCC], since NGOs, in the meantime, have shown extreme caution in both the definition of their corporate objectives as well as in their choice of actions to be filed. Nevertheless, it seems that there are positive developments” (Delnoy 2011).

In 2005, the BBL (*Bond Beter Leefmilieu*, a Flemish environmental NGO) has challenged those criteria before the Aarhus Compliance Committee (ACCC)¹⁰, which has recognised that they might constitute a violation of the Aarhus Convention. This use of the ACCC by an environmental NGO in Belgium supports the idea of the mobilisation of an international LOS when the national one fails to answer organisations' requests for a broader access to justice (Hilson 2002). Vanhala notes:

“The increasing reliance on supranational protections and the ability to turn to international judicial venues means that the scope of legal opportunity has expanded vertically for the [British] green movement” (Vanhala 2012).

This statement also applies to the Belgian context¹¹. In the specific case at stake, the Committee could not admit any breach of the Convention by Belgium, as “none of the cases referred to by the Communicant prove that Belgium currently fails to comply with the

⁸ Before going before the Council of State, NGOs can ask for an administrative review of any public decision before the Walloon Government (regional power). The Walloon Government can judge the opportunity and the respect of the procedure and can invalidate the decision. Even at this step, the interest for NGOs to contest a public decision hasn't always been recognised by the Walloon Government.

⁹ See: <http://www.raadvst-consetat.be>.

¹⁰ Aarhus Compliance Committee, *Findings and Recommendations, Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium)*.

¹¹ Another case confirms this tendency to mobilise European and international courts when national ones fail to widen standing rules. IEW, Inter-Environnement Wallonie, a 150-member federation of environmental organisations, has challenged an important regional decree (DAR) before the European Court of Justice and has won the case.

Convention, [as none] was initiated after its entry into force for Belgium”¹². However, the Compliance Committee confirmed that there might be one in the future if no change is made:

“While the Committee is not convinced that the Party concerned fails to comply with the Convention, it considers that a new direction of the jurisprudence of the Council of State should be established; and notes that no legislative measures have yet been taken to alter the jurisprudence of the Council of State”¹³.

The criteria for NGOs were judged to be so restrictive as to impede their action in environmental matters. For instance, the geographical criterion would prevent national or regional wide NGOs from standing before the courts for a very localised case although they have more financial and human resources and expertise to manage one than local NGOs, I will come back on this account later in this paper. The unpredictability of the Council of State, which also produced conflicting jurisprudence, has led to legal insecurity for NGOs.

Access to Justice for Environmental NGOs in Belgium

In this sub-section, I present a series of issues concerning access to justice in Belgium: limits and concerns.

Standing Rules and the ‘Sufficient Interest’ in Belgium, a Definition by the Judge?

In Belgium, the ‘interest to take legal action’ is not defined in any rule of law. However, this notion of ‘sufficient interest’ is central in our legal system, particularly in environmental litigation. The concept has been defined directly by the judges when deciding whether NGOs had the right to stand before the court in environmental litigation. They favoured a restrictive notion of legal standing for NGOs, which are almost ruled out of legal procedures – at least until recently. Why have the judges decided to exclude NGOs? This position is found on a large mistrust for *actio popularis* and collective interest action in Belgium: a ‘fear of a disproportionate use’ of such a rule that would stem from a more open LOS (Born 2010). Against this apparently negative LOS, Belgium has signed the Aarhus Convention and the CC recently challenged the restrictive *Eikendael* jurisprudence. Legal amendments have been proposed to open legal standing for collective interest action.

Indeed, a proposition of law (supported by the green parties¹⁴) was brought in the Chamber of Representatives – federal level – to create a framework for collective interest action in

¹² Ibid, p. 5.

¹³ Ibid, p. 11.

¹⁴ In Belgium, the green parties are Ecolo, in the Southern region and in Brussels (for the French-speaking people) and Groen! in Flanders (and for the Dutch-speaking people of Brussels). They are positioned on the left of the political spectrum. Belgian Parliament is composed of two Chambers: Chamber of representatives and Senate. Ecolo and Groen! have 3 seats in the Senate (2 for Ecolo, 1

Belgium¹⁵. This law would offer a major opportunity for environmental NGOs to play a bigger role in environmental litigation cases; this proposition being also largely promoted by IEW (Inter-Environnement Wallonie), a 150-member federation which gathers together many environmental NGOs from the South of the country. However, this proposition has not passed yet.

It is likely that these new elements are evidence of an impending turn in standing rules for environmental NGOs in Belgium as well as a turn in the rule of law if collective interest action is adopted. As a consequence, in a more open LOS and political opportunity structure (POS) in Belgium, NGOs might develop new strategies in order to protect the environment. The opening of standing rules (LOS) and of the POS in Belgium is not however the only barrier to environmental litigation by NGOs.

The Costs of Legal Action in Belgium

Costs for judicial and administrative procedures are also important barriers to litigation for environmental NGOs and activists, when legal standing is recognised. The 21 April 2007 law on lawyers' and legal fees¹⁶ creates a "loser pays" fee-system in Belgium. If legal action fails, the claimant has to pay a part or even the totality of the other claimant's lawyers' fees. This is a major obstacle for the action of NGOs and activists that usually do not have enough money to support this kind of costs. Delnoy claim that "this new mechanism is unlikely to favour access to justice in environmental matters, at a time when the judges' power with respect to litigation is becoming ever more important in the Belgian legal system" (Delnoy 2011).

This dissuasive legislation has not, however, prevented IEW from challenging an important decree adopted by the Walloon region. The objective of the decree (called 'DAR') was to allow the Walloon Parliament to adopt on his own important decisions concerning 'projects of great importance for the region' (such as the extension of an airport). The fact that the decision is taken directly by a legislative power prevents any legal action against it before administrative courts. This principle has been challenged before the Constitutional Court, which asked a preliminary ruling to the ECJ about the general right to a review procedure. The Constitutional Court, following the ECJ's decision, decided to invalidate the decree. This case shows how an environmental organisation, as IEW, facing potential costs that could challenge its very existence, chose to go before the court to fight what they saw as an

for Groen!) out of 40, and have 13 seats in the Chamber (8 for Ecolo and 5 for Groen!, out of 150. Ecolo is, in Wallonia, in the ruling coalition with the Socialist party (left) and the Humanist-democratic party (centre). Groen! Isn't in the ruling coalition in the Northern region (Flanders).

¹⁵ Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, Ch. repr., 2ème sess. ord. de la 53ème législature, 2010-2011, 1680/001 du 14 juillet 2011.

¹⁶ Loi sur la répétibilité des honoraires et des frais d'avocats, du 21 avril 2007.

unlawful decree, which deliberately denied the right to legal action against public decisions and authorisations¹⁷ recognised by EU law and the ECHR.

Moreover, the ECJ specified the notion of ‘not prohibitively expensive’ judicial proceeding in the Case C-260/11 of the 11th of April 2013: “Any such procedure shall be fair, equitable, timely and not prohibitively expensive” (such procedure being a review procedure).

In Wallonia, we do not have a legal aid system for helping environmental NGOs stand before the courts to support public interest cases. The issue of costs and the absence of a legal aid system ask the question: ‘who is protecting the environment in our society?’ Public authorities or private organisations? Is there an independent representation of the environment in general in Wallonia? This question leads to another key aspect (see below).

The Concept of ‘pure ecological prejudice’

In Belgium, the problem of standing rules for environmental organisations is particularly problematic when dealing with what can be called a ‘pure ecological prejudice’. In fact, scholars distinguish between the environmental damage that has a direct impact on populations (health impacts, pollution) and the ‘pure ecological prejudice’, the damage caused “only” to the environment: birds, landscapes, etc. This is when admitting *locus standi* for environmental NGOs is the most difficult, as no specific interest except the purpose for which the association was created can be acknowledged. In the case of a ‘pure environmental damage’, NGOs are pursuing the general and public interest of environmental protection. This ‘important’ difference between more classical environmental activism and a grassroots activism, more focused on the impacts on populations, should however certainly be cautiously presented.

This debate is linked to another one seeing NGOs taking the role of a public prosecutor when they litigate to protect the environment. Environmental NGOs defend against this assumption that the protection of the environment is only a part of the general interest. Their action wouldn’t interfere in the competence of the prosecuting authority, only body able to pursue the general interest of the society in Belgium.

Conclusion of Section

As mentioned before, EJ and EI research suffers from a lack of interest or awareness in Belgium. More precisely, the dimension of EJ research, dedicated to the study of access to

¹⁷ The current Minister in charge of Environment and Land Planning in Wallonia, member of the green party (Ecolo) has recently proposed, within the context of a broad reform of the Code of Land Planning in Wallonia, a new version of the famous ‘DAR’ decree, now called PeP (for ‘Parliamentary permit’), again strongly criticised by some environmental NGOs.

justice, is as well mainly analysed by lawyers and legal scholars focusing strictly on a legal approach.

Vanhala, when exploring legal actions by environmental NGOs in the UK, states that:

“At a theoretical level, the logic behind a LOS [legal opportunity structure] approach would suggest that activists who see themselves as situated within a relatively closed LOS will be less likely to use legal action. The empirical evidence suggests otherwise” (Vanhala 2012).

Potential positive impacts of legal action from environmental NGOs, even in a negative ‘LOS’ in Belgium, would need to be further analysed: potential social and political benefits, fund-raising, public consciousness and publicity, political education¹⁸ (Cole 1993).

The strategies developed by environmental organisations, activists and more radical groups to challenge environmental rules and to protect the environment, are largely neglected by political scientists and socio-legal scholars in Belgium. This paper proposes a first introduction to this field of research and seeks to open new avenues for research. The next section proposes some links between access to justice in environmental litigation, legal mobilisation, on the one hand, and environmental justice and inequalities scholarship, on the other.

Section 3. Legal Mobilisation, Access to Justice and Environmental Inequality Research in Belgium

In Belgium, there is little concern and research about the issue of inequality in the process of justice and legal action in environmental and urban planning matters.

First, I show how the importance given to a conception of equality in Belgian law has contributed to push into the background discriminations and injustices framework.

Second, in order to expose the added value of an environmental inequalities perspective, I propose a comparison between an EI framework to apprehend environmental and land planning disputes and a more ‘classical’ NIMBY approach to these phenomena, which somehow exclude disadvantaged populations from the decision-making process.

Third and finally, I analyse quickly some historical and organisational aspects related to the Belgian State and the room given to organisations since its foundation in 1832.

¹⁸ As for individuals’ litigation opportunities in environmental matters, Belgian law also requires a specific interest to taking legal action. The claimant must prove his/her direct implication in the situation.

The Equality Perspective

Belgium is characterised by a tradition of equality that comes directly from its Constitution. Art. 23 states that “everyone has the right to lead a life in keeping with human dignity”, which includes “the right to live in a healthy environment”. This article is based on the idea that people have to be considered equal. The idea of discrimination was not historically central in our legal system, especially in environmental policies¹⁹. We distinguish ‘equality in law’ – the provision of the same rights to all citizens – from a concrete equality between citizens (Laigle 2009). Belgian law focuses upon providing the same rights and the same level of protection for the whole population that can however concretely leads to unequal situations.

‘Discriminations’ are however a growing body of legislation coming from the European Union (directive 2000/78/CE on access to employment and occupation and directive 2000/43/CE implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; including access to public services like housing). The dividing line between inequalities, discriminations and injustices approaches remain anyhow unclear in the European – continental – context, as well as adequate and specific tools to tackle them at the government or local level.

Environmental Inequality vs. NIMBY

I propose here to compare environmental inequalities with another important body of research and mobilisation analysing citizens’ responses to noxious facilities or unwanted land uses (LULUs): NIMBYism (Not In My Backyard). My point here is to clarify some issues regarding those two bodies of research and their implications in terms of actors’ modes of mobilisation and the perceptions associated to it. Some environmental justice scholars tend to differentiate EJ activism from a ‘negative’ vision of NIMBY. Kurtz underscores the fact that “social movements scholars [in the US] demonstrate that environmental justice activists reject the localization of their grievances and the aspersions of NIMBYism that come with it” (Kurtz 2003). The environmental inequality ‘methodology’ that I want to further explore in this doctoral research focuses on a spatial approach to urban areas and seeks to show how people protest (or not) against environmental and urban planning choices and public decisions that have unequal consequences on populations and territories and doing so not focusing only on the point of view of those who ‘give voice’ (which is ‘closer’ to NIMBYism).

‘NIMBY’ is, however, often conceived as a pejorative label given to mainly well-off populations who reject the location of locally unwanted land use (LULUs) but who however accept the principle of its existence in another place. Kraft and Clary posit that “NIMBY is a

¹⁹ In the last few years the European Union has however put in place considerable body of legislation to deal with discriminations that member states have to implement in national law.

multidimensional phenomenon that differs from prevailing construct” (Wolsink 2006). An important study conducted by Freudenburg and Pastor in 1992 aimed to deconstruct the NIMBY concept and recognised three approach to NIMBY activism: ignorant/irrational, selfish or prudent (Freudenburg and Pastor 1992). They questioned the added value of the NIMBY concept in understanding public responses to decisions regarding facilities location. NIMBY has become “the ultimate legitimization for not considering the arguments that are put forward” (Wolsink 2006). On the other end of the spectrum are those who use to their own advantage the NIMBY discourse to reach goals that have nothing to do with the protection of the environment. In terms of environmental justice, this kind of ‘misuse’ of NIMBYism contributes to discrediting the regulations on which those disputes are based: ‘the more they are invoked in disputes, the more grows distrust among public authorities regarding these regulations’, affirms C-H Born.

Some scholars have nevertheless tried to go beyond common beliefs surrounding NIMBY attitudes, arguing that “there are also positive constructs of NIMBYists as embracing the ideals of democratic action” (Johnson and Scicchitano 2012). NIMBY responses comprise larger attitudes and reactions to public choices linked to land use and residential quality of life than the common narrow and selfish vision of NIMBYism. As a further step in research, I propose to put into perspective NIMBY responses, on the one hand, and environmental inequalities, on the other, as modes of mobilisation (types of actors involved, tools used, network building) and go beyond a vision limited to residents’ explicit interventions. With Burningham, I think “academics might [rather] usefully study participants’ use of NIMBY, but should distance themselves from the activity of attributing NIMBYism” (Burningham 2000).

This said I believe an environmental justice and inequality perspective environmental conflicts offers three major advantages in comparison with a NIMBY one. First, it is largely disconnected from value-driven perceptions of what is or should be understood as ‘NIMBY attitudes’. NIMBY has been deeply studied abroad and suffers from the confusion surrounding supposedly self-interested and localised attitudes towards location choices. Second, I strongly believe it offers a novel opportunity to widen the scope of ‘those affected’ approach in the decision-making process, to include people who are not usually associated to NIMBY protests. This research aims to open up research by interviewing those who do not usually give voice and do not protest, and the causal explanations to these phenomena of ‘non-mobilisation’. This approach joins the ‘all affected’ conception of participation in the decision-making process as well as maybe a first introduction to what Robert Bullard calls ‘environmental blackmail” or “jobs vs. the environment”, in Belgium –disadvantaged and ethnic minorities are ready to accept noxious facilities if they provide employment opportunities and wealth for their community (Bullard 1992). Third, an environmental inequality perspective

opens up reflection to the 'ordinary environmental spaces of everyday life' and ordinary injustices through a thorough investigation of working and living environments.

Environmental NGOs in Belgium

Belgium, an independent State since 1832, was built on what is called 'the pillars of the Belgian society', representing the main ideological and political divides in the society: Christian, Liberal and Socialist. Each of these pillars has organised into the Belgian welfare state, creating its own trade unions, mutual funds and cooperatives, political parties, education networks and so on. However, we see now in the Belgian society a progressive detachment from this historical organisation. The salience of the welfare state in Belgium has contributed to a specific organisation of its public services and has influenced organisations' actions and concerns (Lejeune 2010). The federalisation of the Belgian State has also contributed to the divide between north and south and given rise to NGOs specialised in the environment at the regional level (which has the authority over environmental, land and urban planning policies).

In this specific political organisation, the question of public grants for NGOs is problematic as it questions the independence of these organisations in their choice of strategies, actions and privileged topics of concern, as they are usually subjected to annual reports and auditions with subsidising bodies. This process is questionable as it reduces the independence of environmental NGOs in the topics and strategies they can engage on and their room for manoeuvre for challenging public decisions and policies, if they still want to receive government grants in the future.

The historical organisation of the Belgian State combined with its tradition of compromises, has contributed to include organisations at different stages of the decision making process. Indeed, many consultative committees, created at the regional level, are invited to express their opinion during the elaboration of laws or important public projects, which might have an impact on the environment. Some NGOs, like IEW, a federation of environmental NGOs in the south of the country, is in this way consulted through some of these committees²⁰.

Belgium has developed an approach of participation centred on procedural rules: public enquiries, consultative committees. However, participation organised during public enquiries are conceived in a way that impede a real co-construction of public decision and projects, as NGOs, activists or ordinary citizens, discuss the project when it has already been agreed on

²⁰ However, this participation could be considered by some as embracing only mainstream environmental activism and be criticised for not being representative of different kinds of environmental activism.

by public authorities which confine the general public to a reactive action more than a proactive role (Born 2010).

Finally, big organisations have usually more resources than local ones, in financial and human terms. However, big NGOs such as Greenpeace or WWF Belgium, mostly independent from public authorities as they mainly rely on private donations, are often denied access to the courts as they do not fulfil the criteria required to take legal action: geographical scope of action and a 'local link'. On the other side, small organisations acting on local problems, which rest mostly on public grants to develop their action, might fulfil the criteria but lack financial resources and legal expertise to file a suit. Large NGOs which purpose is to protect the environment in general should certainly be recognised as valuable actors in environmental protection, having a complementary role in relation to local organisations.

Discussion

In this discussion, I propose a first review of Environmental Justice research and mobilisation: what are the limits, precautions to take, and avenues for research in the Belgian context, and more specifically in Wallonia?

The first studies carried out in Belgium invite to go further into this field of research to see how it can offer new perspectives, data and an original vision on environmental inequalities dynamics.

However, in trying to apply this mainly North American literature in the Belgian context, I am confronted to some challenges. With Debbané and Keil who analyse 'how EJ travels' importing EJ scholarship in the Canadian and South African contexts, I think three dimensions need further considerations: racialization (1), spatialisation (2), and politics/movements (3) in an attempt to import notions and methods of EJ research. These three dimensions comes from a specific definition given to EJ: "conceptually and practically a complex web of multiscalar relationships of contradictions and dependencies that create a unique environment of environmental injustice at a given location" (Debbané and Keil 2004). I would add the legal and judicial specificities of each country, which also call for great precaution.

Beyond major differences in terms of legal and judicial systems between the US and Belgium, taking into consideration the three dimensions proposed above, which are differently revealed in national contexts, is helpful to cautiously import those foreign concepts. Indeed, "systemic political conditions, ideological realities, legal systems, histories of racism, peculiarities of spatialisation, natural conditions, etc. all play a role in how environmental justice is perceived and acted upon" (Debbané and Keil 2004).

In terms of racialization, EJ scholarship has given a central position to reflections in terms of ethnic and racial minorities in the US. Environmental inequalities scholarship in Belgium should certainly include the study of immigrants (origins, period of arrival, etc.), in combination with other data on population and poverty (density, socio-economic deprivation, etc.); the correlations between poverty and immigration are already studied in Belgium (Van Robaeys, Martiniello et al. 2008). The way the 'racial' or 'immigration' dimension of environmental justice research is apprehended is really different in the US and Belgium, as for example, we do not collect the same kind of data on racial and/or ethnic minorities, as Belgium was not historically a land of immigrants (Hanseeuw 2012).

In terms of spatialisation, this doctoral research seeks to link EJ and EI, on the one hand, and urban research, on the other. With Pearsall and Pierce, I argue that "urban contexts reveal inequalities and the social dimension of sustainability". Even if environmental inequalities are not absent from rural areas, I claim that cities comprising their large suburban areas and the interplay between suburbs and central neighbourhoods provide insightful elements for studying environmental inequalities (Pearsall and Pierce 2010). This research is in this view not exhaustive in its approach to EI but intends to propose an innovative way to combine urban research and environmental justice. Following Bickerstaff et al., I go beyond what they call "a relative neglect of more mundane and chronic forms of injustice in the urban context" (Bickerstaff, Bulkeley et al. 2009). This lack of integration between EJ literature and urban research suggests developing a new perspective: the urban inequalities and injustices of everyday life, and not only the contestation of a specific facility – joining my proposition to elaborate a new environmental inequalities framework, distinct from NIMBYism. This approach focusing on urban injustices at the local scale inevitably implies major differences in terms of urban contexts, policies, historical development, etc. in each country or region analysed. The historical development of Wallonia and the major policies accompanying this development throughout the years is highly contextual and needs to be taken into consideration when importing EJ scholarship in Belgium.

In terms of politics and social movements, I have already introduced the room given to organisations in the Belgian political and institutional system. However, this last dimension needs to be analysed, as few studies have been conducted to highlight the specificities of environmental organisations in Belgium in terms of strategies, public subsidies, relations between levels of power, organisations' agency.

The challenge to apply EJ scholarship in Belgium imposes to propose new methods for collecting data and for interviewing stakeholders, taking into consideration environmental inequalities issues without being able to use the direct language of EJ/EI research, which has not spread in Belgium. Without answering for good the question of the import of EJ concepts

in Belgium in this paper, I propose here only some primary insights into this innovative field of research.

In the more specific angle of litigation and legal mobilisation, three conclusions can be made. First, in terms of resource mobilisation, the costs and public grants for NGOs provided on an annual basis restrict the scope of action of certain NGOs in Wallonia. Simultaneously, standing rules hinder large NGOs' action; these organisations are much more independent as they do not rely only on public money.

Second, in terms of legal opportunity, the general context of legal insecurity concerning access to justice for environmental NGOs in Belgium, and the difficulty to fulfil all criterions for legal standing explain in part the reluctance to use litigation. The recent opening of standing rules to environmental NGOs might change this assumption.

Finally, in terms of political opportunity and legal opportunity, the premises concerning environmental litigation and more broadly the use of the law, should be combined to an analysis of the cultural and social dimension explaining the neglect of environmental inequalities, injustices and the great amount of scholarship dedicated to this topic. In Belgium, the lack of consideration for the social justice dimension inherent to any environmental protection or planning policy is obvious. Many scholars bring out the lack of integration between the social and the environment and challenge dominant ideas concerning a clear separation between human beings and their environment (Theys 2007). This idea has mostly lead to separated policies centred either on one or the other dimension (Faburel and Gueymard 2008). At present, we miss in Belgium a conceptual framework better able to integrate the environment and social inequalities, and to define environmental ethics, particularly in the cities, joining a similar statement made in the French context (Blanchon, Moreau et al. 2009).

Conclusion

The purpose of this paper was to introduce EJ scholarship and more specifically the use of litigation as a tool for environmental activists – notably for environmental NGOs – in Belgium. In doing so, I have tried to put forth the differences and necessary precautions to take before importing EJ and EI scholarship in Belgium – contextualised, specific legal and judicial organisation and so on. Indeed, litigation and legal mobilisation are only one angle of approach; other strategies, including public participation and policy analysis can be studied.

I proposed in this paper a first attempt in this direction, suggesting an innovative 'environmental inequalities framework' better able to approach the extremely broad and complex question of environmental justice in urban areas in Belgium. Without claiming to offer an exhaustive vision of EJ/EI, I argue that highlighting those phenomena in the cities is

certainly a promising way to deal with this body of research in Wallonia (Belgium), where cities – more precisely inner-cities and old industrial neighbourhoods – greatly suffer from poverty, exclusion, and environmental burdens.

The recent window of opportunity opened as a consequence of the reversal of jurisprudence from the Cassation Court in Belgium is a step towards a greater room for environmental NGOs. However, it still does not answer fully to the question of the integration of environmental justice considerations into litigation and legal practice. New methods should be developed in order to approach this issue, peculiar to the Belgian context where no explicit EJ framework exists at the moment. The interplay between environmental NGOs activism and grassroots activism is important for that purpose as well as the respective role these organisations give to strategic litigation and legal mobilisation.

On several occasions, I have noted the lack of EJ and EI research or framework for activism in Belgium, which seriously asks how the environment is represented in Belgium, what is the independence of the environmental sector; opening a new perspective to think together the environment and social justice.

I have proposed a first introduction to EJ research with a specific focus on litigation and legal action. Without covering all the issues at stake, I have posited some important questions for EJ litigation opportunities in Belgium. This paper is only a first step into the understanding of environmental inequalities dynamics in Belgium and opens stimulating avenues for research, more specifically for urban research. Giving a room for those who usually do not have a voice in decision making process in urbanised areas characterised by numerous environmental conflicts, I account for a first experimentation of EJ research at the local level in Wallonia (Belgium), in an ‘environmental and social justice in the city’ perspective, which should cautiously consider the relevant scales of analysis, the temporality of environmental inequalities, and the national and regional specificities of legal systems and urban dynamics.

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