

THE ROLE OF THE OMBUDSMAN IN ENVIRONMENTAL CONFLICTS: THE CASE OF THE MATANZA RIACHUELO BASIN

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Introduction

In Latin America, access to, use and control of natural resources are sources of conflict (Carruthers, 1999). There are various structural causes for these conflicts. The region possesses a large amount of natural resources which have multiple, though not always compatible, uses. Disputes over the use of land and water, as well as deforestation and the use of agrochemicals are some of the main direct and indirect causes of environmental conflicts (Jaber, 2012). According to Acselrad (2004), environmental conflicts involve groups which have different ways of appropriating, using and assigning meaning to natural assets.

Environmental conflicts are essentially: territorial - as they emerge from a view of actors rooted in space, resulting in a serious clash between the living and economic spaces (Sabatini, 1997); distributive - what is at stake is the incompatibility in relation to inequity and illegitimacy in the distribution of rights and resources; and finally, political - since they involve debating not only the use and management of natural resources but also control over territory (Mele, 2003; Merlinsky, 2010; Sabatini, 1997).

The debates around these conflicts focus on the limits of development in protecting the environment and future generations. There are two important consequences to understanding environmental rights as the human right to clean air, water and soil (Hiskes, 2009): the first is the recognition of collective rights where present generations are responsible for future generations and where legal actions can be pursued not only directly by those affected but also by organizations which represent collective interests; the second is that environmental rights are a matter of justice, because they generate distributive effects on people's rights (Gutiérrez, 2010).

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For Hajer, environmental conflicts are socially constructed and involve a complex and continuous struggle over the definition and formulation of the environmental problem (Hajer, 2008). From this perspective, the conception of the conflict is discursive and appeals to the construction of an intermediate public space to set the conditions which will take into account all discourses and their subsequent transformation into political decision-making. Other theories, such as Environmental Justice (Harvey, 1996; Carruthers, 1999), focus on the distributive and territorial aspects of the conflict. As an example, in Argentina, groups tend to be identified by their territory rather than by their social status, and take into account the terrible distribution of the negative effects of natural resource exploitation. Within this perspective, environmental conflicts can emerge among actors of a particular locality due to contrasting interests in relation to environmental impacts or externalities of a particular activity or project (Sabatini, 1998; Martinez Allier, 2004).

Social actors use legal resources to settle conflicts. Thus, some legal instruments become a mechanism for the action of organized groups (Merlinsky, 2010). In Argentina, defending the environment, as a legally recognized and protected objective, has not only led to adding new substantive demands within a process in which local laws are upgraded, but has also become the best strategy to delimit the consumption of natural resources, including “the right” to make local choices at the provincial level (Delamata, 2012).

We propose to understand conflict as being inherent to society (Simmel, 1964) and contributing to changes in the social order. This perspective does not see conflict as dysfunctional, but focuses on its productivity. Here, the theory developed by the *Confurb*² investigation group will be employed to analyze these characteristics. It involves observing the social productivity (social effects) of conflicts and classifying them into three types of processes (Azuela, 2008; Merlinsky, 2010; Mele, 2003; Melucci, 1999):

1. Territorialization (territorial productivity).
2. The establishment of intermediary public spaces or arenas of public deliberation (political productivity).
2. The process of upgrading local laws or juridification in order to address issues (*legal productivity*).

Territorialization refers to the network of residents who carry out collective actions and behave in a way that involves territoriality, strongly rooted in space (Mele, 2010). Political productivity relates to what Alberto Melucci (1999) calls an intermediate public space, a new form of political space where conflicts are not institutionalized, but where the conditions are set so that discourses can be heard and transformed into political decisions (Mele, 2010). Finally, legal productivity is understood as the juridification of conflict.

According to Azuela, the juridification of conflicts is the social process in which conflicts are redefined when they are taken into the legal sphere (2006). That is, when the repertoires of social actors are reproduced within the legal arena, resulting in an exchange of arguments strongly influenced by legal rationality. This new

significance and re-evaluation of law leads to a process of localisation and territorial expansion of environmental laws which takes place in parallel to the procedural forms which are carried out by institutional actors such as members of parliament, judges and/or ombudsmen in interpreting and applying the law (Delamata, 2012).

There are two different forms of juridification: legislative and procedural (Azuela, 2006). Legislative juridification is observed when social expectations are turned into a set of legal principles. This is where the normative mentality predominates, in other words, once normative criteria have been established in law, only political will is needed in order for them to be applied. The risk here is exceeding the capacity of legal systems to process conflicts.

Procedural juridification refers to the processing of individual cases. There are two types of procedures: administrative and judicial. The former corresponds to processes of a bureaucratic-administrative nature. They rarely contribute to the legitimacy of environmental law. The latter refers to the processing of individual cases in legal procedures. One way of analyzing this latter form is, as we have mentioned, observing the process of upgrading local legislation in relation to actors who access to institutions such as: local courts, non-governmental organizations, and local and national ombudsmen who can draw on environmental laws to defend the causes they uphold (Merlinsky, 2010; Mele, 2003).

However, the law is not able to address all the expectations of actors involved in environmental conflicts. The aim of this research, therefore, is to further develop the debate around: *What other institutional roles are needed in order to translate the repertoires found in the social sphere?* And within the same perspective, by analyzing productivity: *How do actors make use of the law (legal productivity)? Which public arenas emerge and in which arenas does the dispute for the reformulation of the conflict take place (political productivity)? What are the new social repertoires which emerge from a territorial perspective (territorial productivity)?*

The role of the Ombudsman

Ombudsmen originated in the 19th Century in Sweden in order to control and/or supervise the activities of public bodies. Since the 1980s, and more specifically during the 1990s, almost all the countries in Latin America adopted new constitutions. It was through these constitutional reforms that the majority of National Ombudsmen emerged in South America. Almost all reforms were generous in recognizing constitutional rights, not only by incorporating civil and political rights but by moving towards the recognition of certain collective rights, in particular environmental rights (Rodríguez Garavito, 2011), thus reinforcing forms of constitutional justice. The Latin American model which emerged in the 20th Century was more concerned with defending first and second generation rights through accountability processes (Oszlak y O'Donnell, 1976).

This meant that most constitutions included the concept of an "ombudsman" or a "public defender" in order to provide citizens with efficient mechanisms for upholding their rights.

In Argentina the Ombudsman's Office was established by the Argentine Congress in the National Constitution of 1994. It is an autonomous institution with capacity to propose legislation. There are 12 provincial and approximately 20 municipal offices across the country.

According to article N 1 of the law establishing Ombudsmen (law N.24284 and amendment 24.379):

"The fundamental objective of this institution is to protect the rights and interests of individuals and the community in face of acts and omissions by the national public administration".

The mechanisms they employ are based on procedural juridification: both administrative and judicial, also called "*locus standi*", and in order to carry out their objectives they often build coalitions with non-governmental organizations (NGOs) and grassroots associations affected by health and environmental problems.

One of the hypotheses of this work is: "*Ombudsmen are able to influence the drafting, redrafting and implementation of environmental policies. And their capacity to do so increases when there is an alliance between Ombudsmen and civil society organizations*". Public policy is understood as a set of actions and omissions which represent the way in which the State intervenes in relation to an issue that requires the attention, interest or mobilization of other actors in civil society (Oszlak y O'Donnell, 1981). These effects are manifested when a number of actors position themselves in relation to issues which affect them and also in relation to the responses managed by state authorities.

According to Hannigan (1995) the necessary factors for constructing an environmental problem are: the existence of a scientific authority to validate the complaint, public figures to play the part of bringing together environmental issues through science, media attention, dramatization of the problem both symbolically and visually, and economic incentives to promote positive actions, as well as the recruitment of an institutional sponsor who can ensure the legitimacy and continuity of the process.

The second hypothesis underpinning this study is that "*National Ombudsmen have become an institutional sponsor of environmental conflicts, given that they have played a fundamental part in the development of conflicts relating to the management and use of water resources*". Thus it becomes clear that the adjustment of the expectations within the law and in courts of actors involved in conflicts requires institutional sponsors capable of interpreting the interests and rights of the various actors involved.

The case of Matanza Riachuelo Basin

There is growing tension around the issue of the contamination of water basins in metropolitan regions. This region encompasses 40 municipalities, as well as the Autonomous City of Buenos Aires, and a population of approximately 14,800,000 inhabitants, around 37% of the country's population.

The Matanza Riachuelo Basin is 64 km wide, covers 2240 km² (Ministry of the Environment and Development, 2013) and is home to over 4 million people. It includes

the Province of Buenos Aires, the city of Buenos Aires, and 14 municipalities within the Province of Buenos Aires (Almirante Brown, Avellaneda, Cañuelas, Esteban Echeverría, Ezeiza, General Las Heras, La Matanza, Lanús, Lomas de Zamora, Marcos Paz, Merlo, Morón, Presidente Perón and San Vicente). The Matanza Riachuelo Basin is an area which spreads from the edge of the Pampas plains to La Plata River and comprises the densest urban-industrial zone in the country. There are 28,000 companies based in the region, according to the latest data from the Secretary of Environment and Sustainable Development; of these, 1,300 are contaminating industries and 80% are small and medium-sized companies.

A series of works and projects over recent decades have sought to rescue the Riachuelo from its condition of being a canal with 'dead (polluted) waters'. Some of these initiatives were quite significant and therefore they were carried out in the visible tracts of the river, for example, the works carried out to control flooding in La Boca and Barracas, as well as in Paseo Costero in Vuelta de Rocha, during the 1990s. Most works, however, involved expensive plans and studies which were only partially executed. Others ended up on the list of notorious failures, such as the initiative to clean the Riachuelo in 1000 days promoted by the Carlos Menem government and his Secretary for the Environment, María Julia Alsogaray, in 1993. The 2002 economic crisis resulted in funds which had initially been allocated by the IADB - the Inter-American Development Bank - to the Río de la Plata and Matanza-Riachuelo coastal strip to be employed for other social purposes. In 2002, the Buenos Aires municipalities in the basin had the highest levels of unemployment within the Province. According to the habitat plan, the basin was described as the most socio-environmentally degraded area within the Province of Buenos Aires.

At the end of 2002, the *Asociación Vecinos de La Boca* (La Boca Neighbourhood Association) filed a complaint with both the national and the city of Buenos Aires ombudsmen because of the serious problems of contamination and flooding affecting residents in the area bordering the Matanza Riachuelo Basin. They complained about the lack of action and policies on the part of the responsible government authorities. Shortly afterwards, the ombudsman received another complaint, this time made by María del Carmen Brite, a resident of the "Villa Inflamable" [Inflammable City] in Dock Sud. She denounced that her three children were suffering from serious health problems due to the high level of contamination caused by the Dock Sud Petro-Chemical Complex. These accusations were added to a number of other complaints made to the Ombudsman's Office by organizations or individual citizens in relation to conditions and problems concerning socio-environmental issues in the Matanza Riachuelo Basin. As a result, the National Ombudsman filed complaint N. 9924/02, which led to an investigation with the objective of mobilizing public opinion.

During 2003, the Ombudsman brought together a group of well-known NGOs who drafted the first special report on the situation of the Matanza Riachuelo basin - together they formed the umbrella organization *Espacio Matanza Riachuelo*. This report was followed by a second Special Report Monitoring the Case of the Matanza Riachuelo Basin 2003-2005, which was strategically presented during a press conference, at the

same time in which one of the most important environmental conflicts in the country was taking place: the dispute concerning the paper mills in Gualegaychú (Merlinsky, 2010). It made the headlines of all national newspapers and a visit by former President Néstor Kirchner to the affected area was expected. The inquiry led to a set of recommendations by the ombudsman, set out in resolutions 31/2003, 112/2003, 43/2006, 44/2006, 46/2006, 47/2006 and 48/2006, amongst which we highlight the resolution which suggested the establishment of an inter-jurisdictional Basin Authority.

On 20th June 2006, the National Supreme Court of Justice (NSCJ) declared original jurisdiction over the case “Beatriz Mendoza”. The Court demanded, through an innovative process of public hearings, information from the defendant companies and required the different levels of government responsible for the basin to draft an integrated and progressive recovery plan for the area (Merlinsky, 2007). In face of this request from the Court the government responded by establishing the Matanza Riachuelo Basin Authority (ACUMAR). This led to changes in the power arrangements of the different governments responsible for the area.

A legal strategy was drawn up in parallel to the reports; the ombudsman in association with the NGOs acted as independent third parties before the Supreme Court in the Beatriz Mendoza case. The ombudsman acted in accordance to Art.86 of the Argentine Constitution and advocated and defended the protection of human and other rights, guarantees and interests safeguarded by the Constitution.

On 8th July 2008, the Supreme Tribunal ruled on the “Beatriz Mendoza” case requiring the recovery of environmental assets and compensation for collective damages within the terms of the General Law on the Environment (Ley 25.675, art.28 and 30). Thus, it held the National State, the Province of Buenos Aires and the Autonomous City of Buenos Aires liable and demanded actions and concrete results on their part in order to recover the environment (Napoli y Espil Garcia, 2011). The Court’s order for cooperation changed the rules of the game.

From this ruling, the “mixed” legal and political-institutional set-up (Abramovich, 2009) which emerged to execute and monitor the case was set out as follows:

– First, the Quilmes Court of First Instances, presided by Judge Armella, was charged with monitoring the actions emerging from the cause. Due to irregularities in its management procedures, at the end of 2012, the Supreme Court removed Judge Armella from the case and appointed new jurisdictions: National Court N.12 and the Federal Court of Morón. This division of responsibilities aimed to provide greater control and transparency to the enforcement of the decision.

In the Resolution passed on 7th August 2012, issued by the Federal Court of Quilmes, the former Judge explained the way in which the law interprets the policy.

“...Environmental cases require extraordinary judicial activity underpinned by the legal framework established in the aforementioned legislation (Art.32, law n. 25.676). However, in practice, this legislation is further enhanced by the nature of the social-environmental conflict itself... in this context, the traditional pattern of judicial activities does not provide a

pragmatic solution to environmental conflicts. Environmental law, therefore, requires extensive judicial activism, of a less formal nature, in order to prevent and recover environmental damage”.

– The National Office of the Auditor General took over the role of monitoring budgetary implementation.

– A Collegiate Body was established: a participatory model to monitor the case, involving the local ombudsman and the same claimant NGOs which set up the umbrella organization responsible for controlling the implementation of the judicial decision. However, this negotiation space is much more than a watchdog. It became a space for building discursive coalitions (Hajer, 2008) within the collegiate body and networking with other actors involved in the environmental conflict. The Collegiate Body acts as a third party in the case and its objective is to promote actions geared towards ensuring that the decision is implemented, as well as to promote the effective participation of citizens. However, the objectives of the Collegiate Body go further than those formally established, principally because it has become a space for building collective action for implementing the judicial decision. The Collegiate Body discusses strategies to influence, at times collectively at times individually, the environmental policy for the Matanza Riachuelo basin.

The Collegiate Body

The Collegiate Body is set up within the National Office of the Ombudsman who holds the position of Executive Secretary. Other organizations involved are: Fundación Ambiente y Recursos Naturales [Environment and Natural Resources Foundation], Centro de Estudios Legales y Sociales [Centre for Legal and Social Studies], Asociación de Vecinos de la Boca [La Boca Neighbourhood Association], Greenpeace Foundation Argentina and Asociación Ciudadana por los Derechos Humanos [Citizen’s Association for Human Rights].

The Collegiate Body’s responsibilities are to:

- Comply with the orders established by the Supreme Court.
- Promote the participation of citizens in monitoring the orders established by the court.
- Foster activities to monitor the Matanza Riachuelo Basin Recovery Plan.
- Establish mechanisms for receiving suggestions from the population.
- Present concrete demands to ACUMAR and other relevant authorities.
- Comply with the objectives resulting from court orders which may be introduced by the Courts in charge of the case.

The Collegiate Body is in charge of transmitting and translating the expectations of the NGOs and neighbourhood associations to the executive, judicial and legislative authorities.

The Collegiate Body's activities are focused on,
externally:

- Improving access to information by producing a news bulletin on the basin, an internet page, seminars and publications.
- Proposing methodologies and innovative systems to improve the environmental management of the basin through written material and special reports, etc.
- Monitoring the Court's decision - through meetings with ACUMAR staff as well as other meetings with staff from the Courts in charge of the decision, etc.
- Promoting citizen participation - through meetings with neighbourhood and district associations belonging to the Basin's municipalities, holding seminars, visiting the most affected areas and monitoring complaints due to resettlement.

internally:

- Consensus building on collective and individual advocacy strategies.
- Establishing roles and expectations for each member, given that individuals' experiences of their environment is different in each case and change in relation to their alliance and interest networks on environmental concerns. For example, something that for a particular organization may be a great honour within a meaningful social space - where according to Lefebvre (1974) production relations are reproduced - may become a "burden" for other organizations. This is especially the case if the residents affected do not have funding to finance their participation in the Collegiate Body, where institutional and individual resources are definitely key.
- Negotiating the view of nature, that is, the limit of an 'environmentalization' of the topic.
- The power to appoint and codify (Bourdieu, 2005) the capacity of the Collegiate Body to institutionalize concepts, ideas and actions under an irrevocable legal order.

It is possible to think about the role of the Collegiate Body as a group of experts and/or specialists who debate the socio-technical controversies within a particular space and make subjective interpretations of facts (Callon, M, Lascoumes, P y Barthe, Y, 2001). In order to assess critical issues on the nature of the damage and the legitimate procedure to be employed, the Collegiate Body needs to be expanded to include a greater variety of technical skills (urban planners, hydrologists, etc.) so as to assess the implementation of public policies for the basin.

The productivity of the conflict

Legal Productivity

The Ombudsman has become an institutional sponsor capable of dealing with the conflict and juridifying it. In Bordieu's words (2005), it is a body independent from conflicting groups which is able to transform irreconcilable conflicts into legal exchanges based on rational arguments between equal individuals.

The juridification of the conflict which occurred due to the Court's decision generated changes in the way it was processed. The non-governmental actors mobilized in conjunction with the ombudsman, as independent third parties, became the paladins of environmental justice. Recasting the conflict in legal terms resulted in reconfiguring participation, where the voices of residents directly affected were subsumed into the capacity of the actors in the Collegiate Body to translate legal aspects, in a process which is developed within a legal and regulatory framework involving fewer people.

A process which started as a mobilization for rights by those affected, who through an institutional sponsor managed to put the issue of the environment on the public agenda, led to the recasting of the conflict, not only in metropolitan terms, but in terms of enhancing and improving the basin region in relation to living standards and a conception of water as a human right (Hiskes, 2009).

Political Productivity

Although every conflict is political, what defines political productivity is the creation of intermediate spaces where conflicting actors can deliberate in public arenas. These arenas can be developed at different levels, and they themselves can be the source of disputes and consensus.

In the case of the Basin, the conflicts were settled, in the first instance, by the Supreme National Court, where public discussion arenas were represented by the public hearings which took place before the 2008 decision, and subsequently by an innovative process in which they continued to take place. At a slightly lower level to the legal arena, the conflict was settled before the judge responsible for the case, in meetings held between the different actors to agree on a path for enforcing the decision. Furthermore, it could be said that, through its decision, the Court regulated the General Law on the Environment.

Another level of implementing environmental policy was ACUMAR, where actors negotiated the different guidelines for implementing the Environmental Recovery Plan (PISA) for the Matanza Riachuelo Basin. The process of conciliating PISA with the local environmental policies of the municipalities in the basin takes place at yet another level. Here the implementation of environmental policies goes hand in hand with other policies, such as those in health, housing, infrastructure and social development.

Finally, the Collegiate Body is another public arena where, as we have previously observed, monitoring and advocacy strategies relating to the implementation of the decision and the promotion of citizen participation are discussed. Nevertheless, this space for deliberation needs to be expanded, that is, it needs to hear the voices of the residents affected, not only by means of visits to the area, but also by creating intermediate spaces, such as the round tables for social participation which ACUMAR has just started to implement. During the last public hearing, the ombudsman requested that public hearings be held with residents affected by resettlements, which the Court agreed to. Thus, the ombudsman is able to make best use of the political productivity which emerges out of the conflict and becomes an inter-institutional co-ordinator between the different voices involved in the region.

Territorial Productivity

According to Harvey (2009) there are two conceptions of power in the urban space, the State and the capital, in which neither bases their decisions on the idea of social justice. However, in this case, the ombudsman was able to install the concept of social justice within the question of territorial planning in the Basin.

The juridification of the conflict led to:

- Demands for environmental planning of the Basin.
- Questioning the metropolitan system of territorial planning.
- The social construction of what public opinion understands as the Matanza Riachuelo Basin.

Conclusions

In the first instance, the role of the Ombudsman was to ‘juridify’ the conflict through providing procedural legitimacy. That is, according to our first hypothesis, the office of the ombudsman increased the possibilities of affecting environmental policy through establishing associations with civil society organizations.

The work commissioned by the National Supreme Court to the ombudsman reflected the work of the Collegiate Body, situating it within a different space. This is an innovative and systemically complex space which requires the ombudsman to become a facilitator of different visions, representing the voices of those affected and ensuring the topic remains on the agenda, promoting territorial planning and monitoring the public management process, with the final objective of contributing to the construction of a metropolitan environmental policy in an area that has been historically marginalized.

In its role as an institutional sponsor of the Matanza Riachuelo Basin, the ombudsman has the twin responsibility of reaching an agreement between parts and affecting changes. Inside the Collegiate Body there are different types of environmentalisms which range from conservationism to environmental justice to

livelihood ecology. It is within a coordinating framework which promotes consensus that the office of the ombudsman can provide a strategic vision in the different arenas for deliberating the conflict. Furthermore, it is in its advocacy work that the ombudsman can argue for water as a human right and the incorporation of social justice within the environmental agenda.

Ten years have passed since the first special report on the Mantanza Basin was carried out by the ombudsman's office in conjunction with NGOs. The problems of the basin are no longer ignored. They have now become actions of environmental public policy which arose out of the Court's decision. However, the processes of juridifying complex environmental conflicts involving social, economic and political trans-jurisdictional aspects require the development of integrated strategies which include both actions and the creation of arenas for deliberation.

There is still a long way to go, particularly because joint inter-jurisdictional actions are very difficult to conduct, as there is no political culture of inter-jurisdictional (this ugly sounding word once again) cooperation or addressing environmental conflicts in an integrated way.

Therefore, the office of the ombudsman has the opportunity to move the conflict away from a legal-centric sphere and re-direct it towards a space for fostering political productivity of the conflict. This can be achieved by establishing arenas for public deliberation as a fundamental step in developing an institutional space for addressing environmental conflicts in Argentina.

Note

¹ Confurb (Conflits de proximité, dynamiques urbaines) is a research network coordinated by Patrice Melé at Tours University.

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Resumen: Las reformas constitucionales latinoamericanas de la última década, crearon y/o reforzaron las formas de justicia constitucional. La mayor parte de las constituciones previeron el rol del “ombudsman” o las “defensorías del pueblo” para la defensa y promoción de los derechos. El surgimiento de múltiples conflictos ambientales sobre el uso y acceso a los recursos naturales ha puesto de manifiesto la necesidad de contar con mecanismos institucionales, como los que posee la Defensoría, para su abordaje. El objetivo de este artículo es analizar el rol de la Defensoría del Pueblo en el abordaje del conflicto ambiental de la Cuenca Matanza Riachuelo.

Palabras Clave: Conflicto Ambiental. Política ambiental. Juridificación. Defensoría del Pueblo.

Resumo: As reformas constitucionais latino-americanas da ultima década criaram e/ou reforçaram as formas de justiça constitucional. A maior parte das constituições incorporou o papel de “ombudsman” para a defesa e promoção dos direitos. O surgimento de múltiplos conflitos ambientais sobre o uso e acesso aos recursos naturais evidenciou a necessidade de mecanismos institucionais, como a Defensoria Pública, para gerenciá-los. O objetivo deste artigo é analisar o papel da Defensoria Pública na abordagem de conflito ambiental na Bacia Matanza Riachuelo.

Palavras-chave: Conflito Ambiental. Política Ambiental. Jurídico. Defensoria Pública.

Summary: During the last decade Latin American constitutional reforms have established and/or enforced constitutional forms of justice. Most of the constitutions in the Continent have incorporated the role of the “ombudsman” for defending and promoting rights. The emergence of environmental conflicts around the use and access of natural resources is evidence of the need for institutional mechanisms such as the Ombudsman, to manage them. The aim of this paper is to analyze the role of the Ombudsman in the Matanza Riachuelo Basin environmental conflict.

Keywords: Environmental Conflict. Environmental Policy. Juridification. Ombudsman.
