



Measures on access to justice in environmental matters
(Article 9(3))

Report for Portugal

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Executive summary

The protection of the environment is established in the Portuguese Constitution¹ as simultaneously a task of the State (Art. 9º) and a fundamental right of every citizen, who has the right to a healthy and ecologically balanced human environment, which also implies the obligation not to harm it (Art. 66º). The same obligation is established by the Framework Law on Environment.

The right of *actio popularis* to seek the prevention, suppression or prosecution of offences against the preservation of the environment is also granted by the Constitution and regulated by the Popular Action Law which protects general or diffuse interests such as the environment and establishes the right to participate in administrative procedures and to initiate judicial procedures.

Violations of environmental law can be brought before administrative authorities by members of the public in general and NGOs which fulfil the requirements established by law, in accordance with the rules defined by the Code of Administrative Procedures. The public administration is, *inter alia*, obliged to grant access to justice cost-free. The Portuguese legal system allows appeals against an administrative decision before a court of law.

Citizens and Non-Governmental Organizations (NGOs) have also legal standing to initiate judicial procedures against definitive and enforceable decisions made by the competent authority.

Indirect citizen's enforcement of environmental legislation is therefore allowed (Art. 108(1)(b) of the Constitution).

1. Introduction

1.1. Overview of the administrative and judicial structures in Portugal

Portugal is divided into eighteen districts and two autonomous regions, Madeira and the Azores.

Competence in environmental matters lies with the Ministry of Environment, Land Planning and Regional Development (MAOTDR),² which supervises different public bodies with sectoral competence: the Portuguese Agency for the Environment (which deals with environmental issues in general and waste), the Water Institute, and the Institute for the Conservation of Nature and Biodiversity. The distribution of powers between these public entities has recently been reviewed with the entry into force of the new organic law.³

There are also entities that coordinate the operation of the environmental sector at the regional level via the Commissions for Coordination and Regional Development, which act as decentralised MAOTDR services.

Together with Municipalities and the geographically competent Commission for Coordination and Regional Development (CCDR), the General Inspection of Environment and Territorial Planning (IGAOT) is the authority at central level competent for environmental control and inspection.

The Portuguese Constitution grants all citizens the right to initiate public interest actions and to be informed in due course of the results of the findings (Art. 52/1, 1976). Citizens and NGOs have the right to contest definitive and enforceable decisions by the administrative authorities which violate environmental law, either through administrative procedures or by lodging a judicial appeal.

The procedures and conditions for recognising qualified entities to “challenge acts and omissions by public authorities which contravene provisions of Portuguese law relating to the environment” (Article 9(3) Aarhus Convention) are defined by national law.

The general rules of law require the public administration to ensure legality in the decision-making process and promote the individual’s security in accordance with the following general principles:⁴

- Principle of legality, according to which the competent authority shall act in accordance with the law and within the limits set by it;
- Principle of proportionality, which requires that decisions taken by the competent authority are proportional to the citizen’s private rights;
- Principle of justice, impartiality and good faith;
- Principle of collaboration between the administration and all citizens, ensuring their effective participation through providing the requested information and taking account of their suggestions and recommendations;
- Principle of participation of individuals and associations in the decision-making process;
- Principle of decision, which ensures that, whenever requested, a decision is taken by the competent authority within a specific time frame;
- Principle of efficiency and countering bureaucracy, to bring the administration closer to citizens and ensure celerity in the decision-making process.

²http://www.portugal.gov.pt/Portal/EN/Governos/Governos_Constitucionais/GC17/Composicao/?Tutela=MinistroAmbienteOrdTerritorioDesenvRegional.

³ Law Decree 207/2006 (DR 208/2006, 27.10).

⁴ *Introduction to Administrative Law*, João Caupers (2003).

Moreover, public administration is obliged to promote the **principle of access to justice and cost-free justice** which will be developed below.

The Portuguese legal system allows both administrative and judicial procedures to challenge administrative decisions that violate the law and does not require the exhaustion of the administrative appeals before bringing a case to court.

Courts are independent and sovereign bodies only subject to the law in accordance with the principle of separation of powers. Court's decisions are binding on all public and private entities. Jurisdiction is divided among the different courts in accordance, *inter alia*, with the following criteria: (i) the matter that is being judge; (ii) the hierarchy of the court; (iii) the amount that is being claimed; (iv) the types of procedures of the specific case; (v) and the territory.

Civil and Penal Courts are organised in three instances: (i) courts of first instance (*Tribunais de Comarca*), which can judge cases concerning amounts up to 3,741 Euros; (ii) courts of second instance (*Tribunal da Relação*), which can judge cases concerning amounts up to 14,964 Euros; (iii) and the Supreme Court of Justice (*Supremo Tribunal de Justiça*). The judicial courts⁵ are overseen by the Supreme Court and divided into civil, criminal and social divisions.

Administrative Courts are the competent judicial body to deal with conflicts emerging from administrative juridical relations (Art. 1º Statute of Administrative and Fiscal Courts⁶) and are organised in Circuit Courts (*Tribunais de Circulo*) and Central Courts, from which appeals are possible to the Supreme Administrative Court.

1.2. Environmental protection within that context

administrative decision is appealed to the competent court. NGOs are entitled to give notice of any violation to the competent authority (Art. 55°, Law Decree 433/82). A special regime has recently been adopted regarding violations of environmental law (Law 50/2006), but the level of enforcement by the public authorities is still unknown.

Portugal approved the Aarhus Convention through Assembly of the Republic Resolution 11/2003 of 25 February which was ratified, on the same date, by Presidential Decree 9/2003.

The present study will only focus on the third pillar of the Aarhus Convention. However, Portugal has taken measures to implement the other two pillars through the transposition of the respective EC Directives into national law which complemented the national legislation on the matter already in force. Directive 2003/4/EC, on public access to environmental information, has been recently transposed by Law 19/2006,⁹ which grants applicants (*i.e.*, “natural or legal persons requesting access to environmental information”) access to procedures for reconsidering acts or omissions by the administration when their request for information has been ignored, wrongfully refused or not adequately answered (Art. 14°). A specific non-judicial proceeding to enforce the right to information is established by national law through the Commission on Access to Administrative Documents. This Commission’s activities are well documented¹⁰ but an assessment is not within the scope of the present study.

The second pillar, which deals with public participation in environmental procedures, is implemented through both Law Decree 130/2005¹¹ and Law Decree 197/2005¹² that transpose Directive 2003/35/EC.

The third pillar provides a last resort in the enforcement of environmental law through access to administrative and judicial procedures to individuals and NGOs. The right of *action popularis* is granted by the Portuguese Constitution, namely “to promote the prevention, the suppression and the prosecution of offences against public health, consumer rights, the quality of life, the prevention of the environment and the cultural heritage” (Art. 52/3), and will be assessed below.

2. Access to justice in environmental matters

2.1. Administrative procedure

2.1.1. General aspects

The ***Actio Popularis and Participating Procedures Law***¹³ (Popular Action law) grants the right to participate in administrative procedures which include the right to participate in the preparation of plans, location and execution of works and public investment (Art. 4°, Law 83/95), to:

- Any citizen in full enjoyment of his/her civil and political rights having or not a direct interest in the claim;
- Associations and foundations that fulfil specific legal requirements (which are identified below); and
- Municipal authorities in order to protect the general interests of residents within their respective area of competence.

⁹ DR 113/06, from 12.06.2006.

¹⁰ <http://www.cada.pt/modules/smartsection/item.php?itemid=64>.

¹¹ DR. 156/06, from 16.08.05.

¹² DR 214/05 from 08.11.2005.

¹³ Law 83/95 from 31.08 (DR 201/95, 31.08).

Hierarchical appeal can either be addressed to the superior in the hierarchy of the public servant that took the decision (which constitutes an auto-control measure compelling the administration to review its own decision) or to an independent body with supervision powers over the one that took the decision (Art. 158°, CPA). Hierarchical appeals must be brought within 30 days (Art. 168°, CPA), and a decision needs to be taken within 30 days of that; this may be extended to 90 days whenever complementary investigation is required (Art. 175°, CPA). The appeal suspends the effects of the administrative act that is being challenged hierarchically (Art. 170°, CPA).

General principles of administrative law

The relationship between individuals and the public administration is regulated by the **Code of Administrative Procedures**¹⁴ (CPA) which applies to all administrative bodies, *i.e.*, those that take decisions on behalf of the public administration, at central and local level, as well as autonomous regions and public institutes (Art. 2°, CPA).

Public administrations are bound by the principle of celerity, which determines that administrative bodies shall act quickly, streamlining and clarifying processes whenever possible, avoiding everything that may not be needed and promoting whatever is needed for a fair decision (Art. 57° and Art. 58°, CPA). This principle of law is complemented by the principle of publicity of procedures, in order to provide interested parties effective means of participation (Art.55°, CPA).

Administrative bodies are also allowed to collect evidence and act beyond the application made by the interested parties in accordance with the principle of inquisition (Art. 56°, CPA).

The administration shall also promote public participation by citizens and associations in the administrative decision-making process (Art. 8°, CPA). In accordance with the principle of collaboration (Art. 60°, CPA), interested parties may not present illegal applications or illegal facts, nor require any measures with the sole purpose of delaying the decision-making process.

2.1.2. Legal standing and participatory status

According to Portuguese Law it is possible to challenge both acts and omissions by the administration. Art. 22° of the Portuguese Constitution establishes that: “the State and the public authorities are subject to joint civil liability for acts and omissions committed during the exercise of their functions which violate rights, liberties and guarantees”. This rule is interpreted by Portuguese scholars as being directly applicable and granting citizens the right to compensation for the damages caused in violation of their rights, freedoms and guarantees,¹⁵ based in the general principle of law that those who cause damage shall be made liable.¹⁶

When the violation of environmental law results from an act or omission by the State or public authority, the public administration can be subject to: (i) fault-based liability for any illegal acts committed (Art. 1°); (ii) objective liability for damages resulting from the development of public services exceptionally dangerous (Art. 8°); and liability for legal acts for “special and abnormal damages” (Art. 9°).

Case Law n° 0035211 of 07.05.2002¹⁷ condemned the Portuguese State to pay compensation in the amount of 90,000 Euros for a lack of specific regulations in an aquatic park from which

¹⁴ Approved by Law Decree 422/91 (*DR 263/91, 15/11*) and modified by Law-Decree 6/96 (*DR 26/96, 31.01*).

¹⁵ Annotated version of the Portuguese Constitution Prof. Gomes Canotilho and Vital Moreira, Coimbra, 1993.

¹⁶ Prof Fausto Cuadros, Coimbra Faculty of Law, <http://www.gplp.mj.pt/home/rcece/Fq340.pdf>.

¹⁷ Case-Law N° 0035211 from 07.05.2002:

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/4b6c392c230c5a0980256bf30034dc87?OpenDocument>

resulted the death of a child. According to the *Tribunal da Relação de Lisboa*, the fact that the activities undertaken in the aquatic park were not regulated constituted an omission of the legislative function of the State and, based in Art 22° of the Portuguese Constitution, made the State liable for this omission and subject to the obligation to pay compensation for the damage caused.

The CPA grants legal standing and participatory rights to all citizens having a legally-protected

Figure 1: Claims brought before the IGAOT

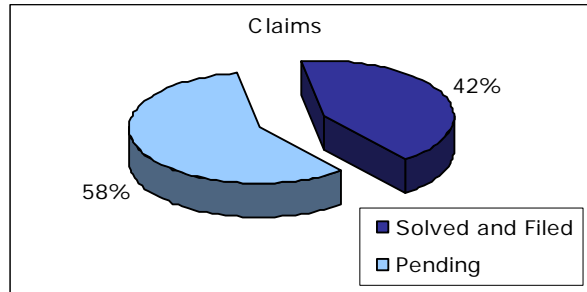
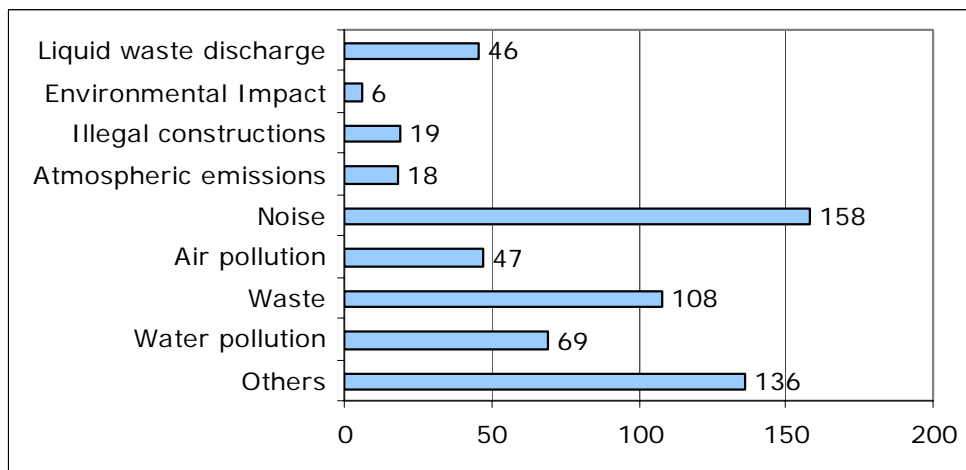


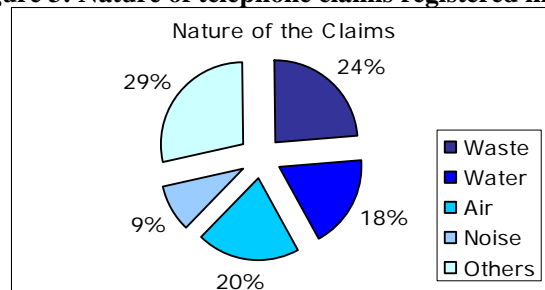
Figure 2: Distribution of the claims presented in 2005 to IGAOT by sector



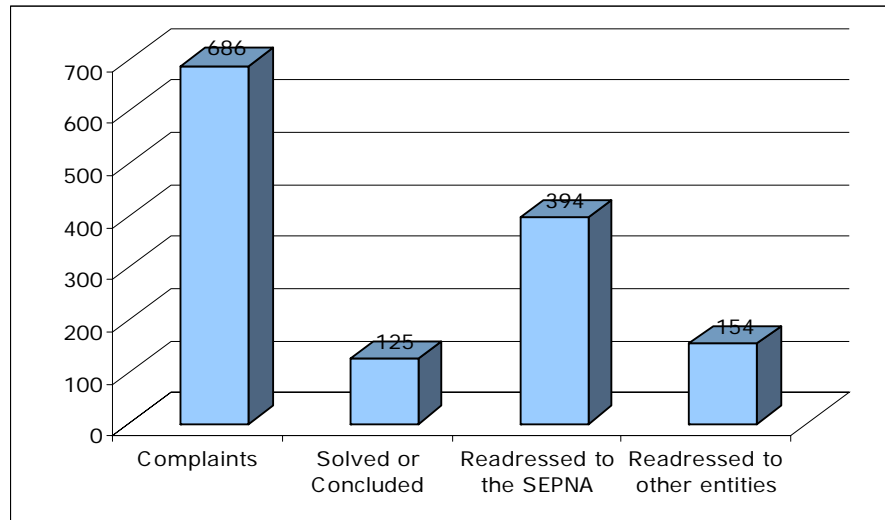
In 2002, an SOS line was established through which all types of environmental breach can be denounced: http://gnr.pt/portal/internet/sepna/12.denuncias/form_sepna.asp.

In 2005 a total of 686 telephone claims were registered.

Figure 3: Nature of telephone claims registered in 2005



As demonstrated under Figure 4 below, of the total complaints received in 2005 only 125 were solved or concluded, whereas the majority were sent for further investigation to the Service for Nature and Environmental Protection (SEPNA) within the Civil Police, which is in charge of control and surveillance measures. Other entities include municipalities, CCDR and other specific bodies of the MAOTDR.

Figure 4: Status of claims received through SOS line in 2005

The information collected from IGAOT has, however, demonstrated that only in approximately 5% of the cases reported above were complaints initiated against an act or omission by the administration; the majority were brought against private legal persons.

2.1.3 Possibilities for appeal

National legislation allows judicial appeal of definitive and enforceable decisions made by the competent authority.

The right of judicial appeal is granted by Art. 12° of the CPA which, under the heading *Principle of Access to Justice*, entitles all citizens to review decisions by the administration through judicial procedures in order to protect their legally guaranteed rights and interests. Administrative decisions can be subject to judicial appeal without there having first been any administrative procedure. The procedure before a court will therefore be dealt with in section 2.2. Judicial appeal has to be brought within 2 months of notification or publication of the public administration's decision (Art. 15°, Administrative Courts Procedures Code, which will be presented under the judicial procedures section).

A substantial number of judicial cases on environmental matters arise from appeals against administrative decisions before the administrative courts.

2.1.4 Costs and length of procedure

The FLE exempts citizens from prepayment in procedures for claiming compensation for damages caused by violation of environmental regulations (Art. 44°).

Art. 11° of the CPA states that, unless otherwise established by special law, the administrative procedure is free of charge. It was confirmed before IGAOT that submissions of claims are not subject to any fee. Citizens and NGOs may nevertheless have to pay attorney's fees if they seek representation before the administrative authorities.

Public administration is bound by the principle of celerity (Art. 57°, CPA), according to which administrative procedures shall be effective and be concluded within 30 days, extensible to a maximum of 90 days (Art. 58°, CPA).

According to information collected from IGAOT, the average time of reply is between 30 to 90 days. Sometimes other entities are called to take part in further investigations, however, and this may take up to 180 days.

2.1.5 Other issues

As of 1975, the national legal system foresees an Ombudsman (*Provedor de Justiça*) to whom citizens may submit complaints "against actions or omissions by the public authorities". He/she shall assess these complaints and address the public authorities concerned, make recommendations, where appropriate, so as to prevent or remedy the injustice, but without legally binding effect (Art 23°, Constitution).

The Ombudsman is an independent body whose main duty is to defend and promote citizens' rights, freedoms, guarantees and legitimate interests, ensuring, through informal means, that the public administration act pursuant to justice and the law, within the meaning of Art. 1 of the **Statute of the Ombudsman**.¹⁹ The *Provedor de Justiça* has a four-year mandate in which to take action based on his/her own investigations or on written and oral complaints from citizens to this body free of charge (Art. 3° and Art. 25°, Law 9/91). During 2005, a total of 6226 complaints were received in view of which recommendations and requests for constitutional assessment were delivered.

In 2004, the area of environment and natural resources constituted 12,8% of the claims brought before the Ombudsman. This percentage increased to 14,3% in 2005 with a total of 700 claims,²⁰ as demonstrated below.

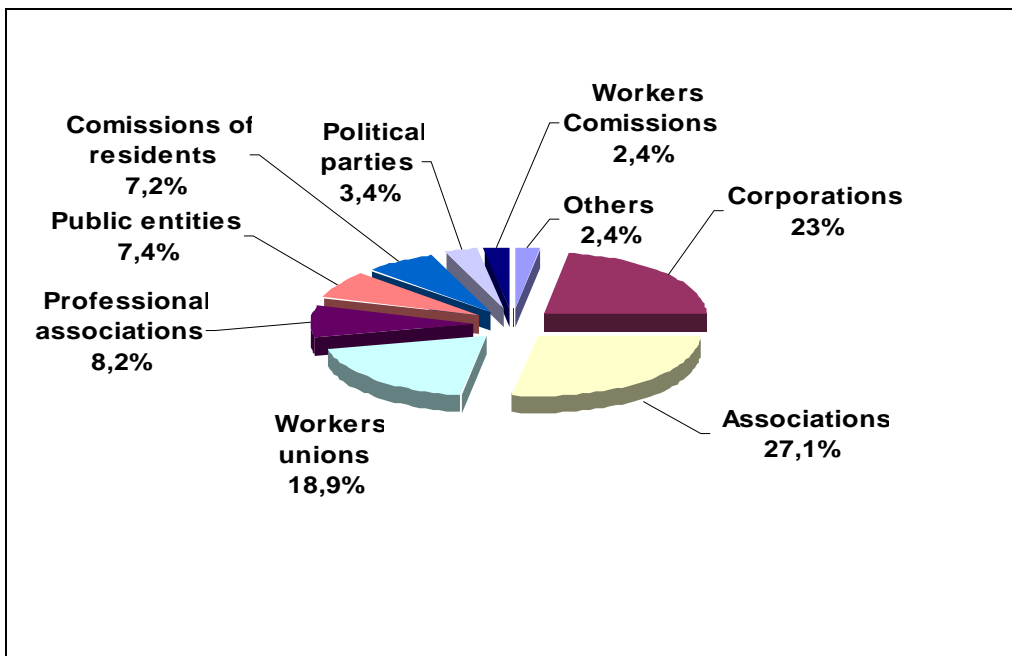
¹⁹ Law 9/91, of 09.04 (*DR 82/91, Series I-A*) amended by Law 30/96, of 14.08 and by Law 52-A/2005, of 10.10.

²⁰ http://www.provedor-jus.pt/restrito/pub_ficheiros/Relatorio2005_vol_I.pdf.

Figure 5: Number of complaints brought before the Ombudsman in 2004 and 2005

Area	2004		2005	
	Number	%	Number	%
Environment, natural resources; urban planning; Territory planning; public works; leisure	633	12.8%	700	14.3%

Figure 6: Type of legal person claiming before the Ombudsman in 2006



2.2 Judicial procedure

2.2.1 General aspects

The public has the constitutional right to seek protection of its rights and freedoms through judicial procedures brought before administrative, civil and criminal courts in accordance with Art. 20° of the Constitution: “everyone is granted access to law and to the courts in order to defend his or her rights and legally protected interests”.

The Portuguese Constitution establishes the right of popular action, extending access to justice to any person claiming the protection of diffuse interests regarding a specific case in question (Art. 52 (3)). Diffuse or protected interests include: public health, consumer rights, the quality of life, preservation of the environment and the cultural heritage, the property of the State, of the autonomous regions and of the local authorities.²¹

The conditions to exercise this constitutional right were only defined in 1995, with the adoption of the Popular Action Law, which states that diffuse interest can be protected by “everyone, personally or through association (Art. 2/1, Law 83/95) in order to promote the prevention, the suppression and the prosecution of offences against the preservation of the environment” (Art. 1/1, Law 83/95). Legal standing is therefore granted to citizens and NGOs; they are entitled to enforce substantive and procedural provisions before administrative or civil courts (Art. 12°) and have access to criminal judicial procedures (Art. 25°).

Judicial procedures against administration decisions can therefore take the form of: civil action (Art. 2° Code of Civil Procedure) when the administration is not exercising its public powers (e.g., it is the owner of the facility); or administrative action (Art. 53°, Code of Administrative Procedures) when the administration exercise its public powers.

Portuguese law provides citizens with legal procedures that are characterised by celerity and priority, in order to provide effective and timely protection in the face of any threat to or violation of such rights.

Another important principle of law is that court hearings are public, except when the court itself decides otherwise, either for the purpose of guaranteeing and safeguarding the dignity of persons and public morals or ensuring their normal operation.

2.2.2 Legal standing and participatory status

Citizens and NGOs are entitled by the Constitution to initiate judicial procedures alleging violation of environmental law by the public authority (Art. 52). The FLE grants all citizens and municipalities the right to bring judicial procedures which include the right to compensation for damages (Art. 40°).

Apart from the right to participate in administrative procedures as stated under 2.1.2 above, the Popular Action Law (Art. 2°) recognises *locus standi* before administrative, civil and criminal courts to the same entities: **any citizen** in full enjoyment of his/her civil and political rights having or not a direct interest in the claim; **associations and foundations** for the protection of

²¹ See Supreme Court of Justice Case Law n.° 75593, from 06.01.1988:
http://www.diramb.gov.pt/data/basedoc/TXT_JN_8871_1_0001.htm.

the interest at stake that fulfil the requirements stated above; and **municipal authorities** in order to protect the general interests of the residents of the respective area of competence.

The Environmental Non-governmental Organisations Law grants NGOs, regardless of whether they have a direct interest in the claim, the right to (Art. 10°):

- Initiate legal action necessary for the prevention, correction, suspension and cessation of actions and omissions by public and private entities that represent, or may represent, a cause of environmental degradation;
- Initiate legal action to enforce civil liability regarding these actions and omissions;
- Resort to litigation against actions and administrative regulations that violate legal environmental protection provisions; and
- Submit a complaint or accusation, observe criminal processes on crimes against the environment and monitor the process of compliance.

NGOs are therefore entitled to initiate procedures and become a party in judicial procedures as long as they fulfil the requirements established by Art. 2/1 of Law 35/98, identified under 2.1.2 above (Art. 3°, Law 83/95). No distinction is made between national and non-national NGOs.

The right of *access to administrative courts* is expressly foreseen in the Constitution in order to defend legally protected rights or interests (Art. 268 (4) and (5)) and regulated by the **Administrative Court Procedures Code**²² (ACPC) which establishes that: “Any citizen, including associations and municipalities, have legal standing in order to defend public health, environment, urbanism, territorial planning, cultural heritage and quality of life in general” (Art. 9/2, ACPC).

To challenge an act or omission by a competent authority, individuals need either to have a direct and personal interest (Art. 55°, ACPC) or act to defend the public interest, including the environment (Art. 68°, ACPC). Citizens and NGOs can therefore initiate administrative judicial procedures requesting the court, *inter alia* (Art. 2°, ACPC) to:

- Take action against a decision of the public administration, requesting the annulment of the administrative act or declaration of its non-existence;
- Condemn the public administration to undertake an administrative act which was illegally refused or omitted; and
- Adopt interim measures.

When the administration is not acting within its authority (for instance, as the owner of a polluting facility or contaminated site), it can be challenged through civil popular action (Art. 12°, Law 83/95) before civil courts in accordance with the **Code of Civil Procedures** (CCP).²³ Any citizen, environmental NGO, municipal authority and the public prosecutor can initiate a civil judicial proceeding to protect the environment (Art. 26-A, CCP) and ask the court, separately or in the same petition to (Art. 2°, CCP):

- Declare the existence of its right to a healthy environment;
- Prohibit an activity that is damaging or threatening to damage the environment;
- Compensate for the damage (Art. 4°).

²² Approved by Law 15/2002, of 22.02 (DR 45/2002, Series I-A) and amended by Law 4-A/2003, of 19.02 (DR 42/2003, Series I-A).

²³ Approved in 28.12.1961 and last reviewed by Law 183/2000 (DR 184/2000, 10/08).

2.2.3 Possibilities for appeal

Civil procedures apply *mutatis mutandis* to appeals against administrative decisions as subsidiary law (Art. 140°, CAP). The right to lodge an appeal against a judicial decision is granted by national legislation whenever the judgement has been unfavourable to the plaintiff and the value of the lawsuit exceeds by half the value the court where the decision was taken is entitled to deal with (Art. 678°, CPC and Art. 142°, CAP).

Parties that have lost a case are entitled to appeal from the judgement as well as “those persons that have been directly and effectively affected by the decision” (Art. 680°, CPC).

Appeals can be brought within 10 days from the date when the judgement was notified and no urgent cases are foreseen (Art. 685°, CPC). In administrative procedures, appeals can be brought within 30 days (Art. 144/1, CAP) or 15 days in urgent cases (Art. 147/1, CAP).

As a general rule, administrative appeals suspend the initial judgement (Art. 143/1, CAP) except when specific regulations establish otherwise (Art. 143/2, CAP) or the judge so decides (Art. 143/3, 4, 5, CAP). In a recent case, the Central Administrative Court determined the suspensory effect of a decision to apply interim measures.²⁴

On the other hand, civil appeals do not suspend the effects of the previous judgement (Art. 692° and Art. 723° CAP).

In order to prevent irreparable or difficult to recover damages to the environment, the Popular Action Law allows suspensory effect of the judicial appeal in cases where the procedural law does not provide it (Art. 18°, Popular Action Law).

2.2.4 Costs and length of the procedure

Access to justice cannot be denied for economic reasons. This principle is established under the Law on Access to the Law and Courts (Law 34/3004²⁵) and by the Code of Judicial Costs (Law Decree 324/2003) which exempts from court fees any citizens, association or foundation that plays an active role in protecting constitutionally granted rights (Art. 2 (1) d).

Legal protection may be granted for the resolution of any type of legal dispute or litigation and includes legal advice and legal aid through total or partial exemption from court fees and appointment and payment of attorney’s fees. In order to ensure effective access to justice, all Portuguese and EU citizens, as well as foreigners and stateless persons living in another EU Member State, that demonstrate partial or total disability to meet the costs of procedures as a result of their economic situation can be granted legal aid which includes legal assistance in bringing the case before the court and exemption from court and attorney’s fees (Art. 7° Law 34/2004). The scope of legal aid includes all jurisdictions (Art. 17° Law 34/2004).

The FLE exempts citizens from prepayment of costs in procedures for claiming compensation for damages caused by violation of environmental regulations and when the amount of the case does not exceed the competence of the Court (Art. 44°).

²⁴ Case Law n.º 0087/04 from 20.03.2007

<http://www.dgsi.pt/jtcampca.nsf/a10cb5082dc606f9802565f600569da6/bf15e430d0f1518b802572ab002ddcd5?OpenDocument>.

²⁵ This law is presently under review - see draft law on access to the law and courts:

<http://www.oa.pt/upl/{f6a91aaa-3984-4597-96d1-9ef217d1ac5e}.pdf>.

In popular action, prepayment of costs is not required (Art. 20/1, Law 83/95) and the plaintiff is exempted from payment of court fees if he/she wins the case, or if it is declared partially won (Art. 20/2, Law, 83/95). If the case is dismissed the judge will, based in the economic situation of the plaintiff and the reason for the dismissal of the case, determine reduced court fees of between 1/10 and 1/2 of the total cost (Art. 20/3, Law 83/95) and the “loser pays” principle will apply.

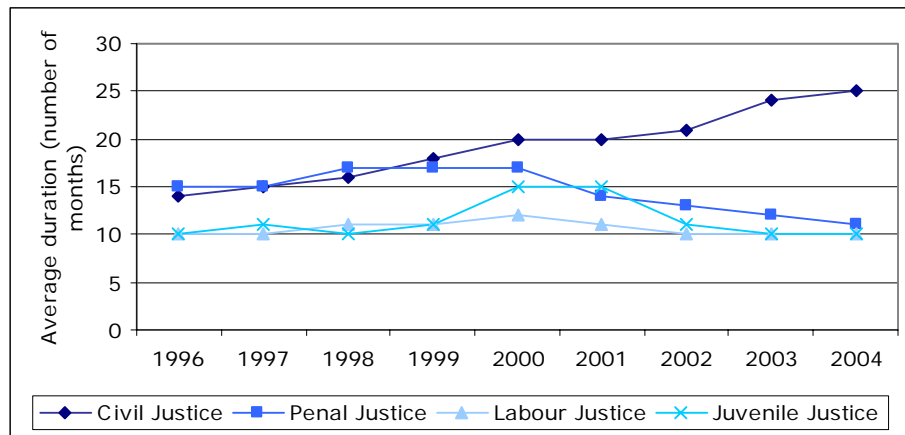
NGOs, on the other hand, are exempted from payment of any legal charges and court fees in the procedures initiated by them or when they act as assistants to the prosecution (Art. 11°, Law 35/98), even when they lose. From contacts undertaken with NGOs, the main obstacle to initiating judicial procedures seems to be attorneys’ and experts’ fees.

According to information obtained from the Portuguese Bar, legal aid was granted in a total of 5194 cases in 2006.²⁶ However, since, in accordance with Law 34/2004, the assessment of the conditions to grant legal aid is made by the Social Services (application forms may be obtained free of charge at the Social Security website: <http://195.245.197.196/ingles/>) the Bar does not have a record of requests and cannot therefore determine the percentage of legal aid requested for environmental cases.

The Legal Policy and Planning Office of the Ministry of Justice (<http://www.gplp.mj.pt/home/>) is responsible for judicial statistic in Portugal. They were unable to provide information on average court fees. NGOs were also contacted, but since they are exempted from court fees no information could be obtained.

Contacts were also made with the Ministry of Justice in order to obtain information on the length of a typical recent procedure but the information reported only covers the period between 1996 and 2004, as demonstrated under Figure 7 below.

Figure 7: Average length of judicial procedures (1996-2004)



The average length of civil justice has increased over the past years whereas the average length of penal justice has decrease and is comparably quite timely.

It was extremely difficult to have access to statistical data for administrative judicial procedures. After several contacts with the Legal Policy and Planning Office of the Ministry of Justice, it was possible to obtain the statistical information provided below on the following issues: (i)

²⁶ <http://www.oa.pt/upl/%7b9f96412f-cb8a-4f91-ac1e-e703f972a1ac%7d.pdf>.

total n° of popular action cases brought before the Administrative Courts between 1991 and 2003 (Figure 8); (ii) total n° of cases solved in the same period (Figure 9); and status of administrative appeals in 2004 (Figure 10).

Figure 8: Total number of judicial cases brought through action popular before the *Tribunal Administrativo de Circulo* (1991- 2003)

Year	Total number of cases	Administrative appeal	Others	Final Decision approving the appeal
1991	73	56	17	17
1992	22	8	14	11
1993	17	8	9	6
1994	27	12	15	7
1995	10	3	7	4
1996	38	17	20	12
1997	21	12	9	
1998	14	7	7	
1999	23	13	10	4
2000	59	28	28	13
2001	11		9	5
2002	9	4	5	3
2003	15	10	5	7

Figure 9: Total number of cases solved in the *Tribunais Administrativos de Circulo* brought by holders of legal interests or in popular action cases and average length of the procedures before the court

Length of Procedure	Holder of legal interest		Popular Action	
	Total number of cases	Average length in months	Total Number of cases	Average length in months
Year				
1991	1831	14	73	13
1992	2461	14	22	14
1993	2528	13	17	14
1994	3106	13	27	11
1995	3252	13	10	14
1996	3337	13	38	14
1997	2814	13	21	14
1998	3054	13	14	14
1999	3416	13	23	14
2000	3785	13	59	14
2001	4554	13	11	13
2002	4389	14	9	13
2003	3933	13	15	11

Figure 10: Number of administrative appeals brought before the Supreme Administrative court in 2004 and pending cases

Pending cases before 2004	Cases initiated in 2004	Total cases ended in 2004	Cases pending to the next year
1643	1068	1365	1346

As stated above, NGOs are exempted from court fees. The Bar provided the official chart of attorney's fees²⁷ below (Figure 11); despite being in force, this is used as reference mainly for cases where legal aid has been granted.

Figure 11: The official chart of attorney's fees

Type of Action	Amount	Attorney's fees
Special administrative action		13€
Common administrative action	• From 3740.98 to 5985.56	8€
	• From 5985.57 to 9975.94	10€
	• From 9975.95 to 14693.91	14€
	• From 14 963.91 to 24 939.85	21€
	• From 24939.86 to 49879.70	24€
	• From 49879.71 to 149639.10	32€
	• 149 639.11 to 399 037.60	57€
	• 399037.61 to 598 556.40	90€
	• Superior to 598 556.40	126€

According to the experience of the NGOs contacted, judicial procedure can last in average more than one year and frequently more than three years and the average cost of a judicial case, including attorney's and expert's fees, is between 2.000 and 3.000 Euros.

²⁷ http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=5&idsc=161.

2.2.5 Other issues

In accordance with the principle of formality, judicial decisions shall always be made in writing and within a reasonable period of time by means of an equitable process.

The burden of proof lies with the person that invokes a right so that the validity of the argument presented by that person in court can be assessed.

Submission of evidence does not always require the intervention of one of the parties. On the contrary, the law allows for the collection of evidence to be carried out on the initiative of the judge. It is the judge's responsibility to carry out or order, including *ex officio*, all the actions necessary to determine the truth and the true nature of the dispute with regard to the facts which should be known. Moreover the judge may, at any stage in the procedures, call for the parties to appear in person to give evidence regarding the facts which are of relevance to the decision in question.

In Popular Action Law the initiative of bringing evidences is a duty of the judge; no burden is on the parties. (Art 17°, Law 83/95)

The ACPC establishes under Art. 112/1 that: "those who have legal standing to bring an action before the administrative courts may request the adoption of interim measures that may be needed to ensure that the final judgment can be enforced". The interested parties (*i.e.*, those parties with legal standing relating to the main procedures) may request the administrative court which is judging the main procedures, *inter alia*, to take one of the following actions (Art. 112/2, ACPC):

- Suspend the effects of an administrative act;
- Request the administration to act; or
- Request the administration to stop acting.

The competent judge must take a decision to adopt interim measures within 5 days (Art. 119/1, ACPC) when it is evident, in context of the main procedures, that such measures pertain to the substance of the application, or that there is a serious risk of damages being caused to the matter at stake (Art. 120°, ACPC).

The **Penal Code (PC)**²⁸ typifies the following crimes against the environment:

- Damage to the environment (Art. 278°);
- Pollution (Art. 279°) and;
- Pollution with exposure to harm (Art. 280°).

Criminal sanctions can only be imposed on natural persons and, depending on the nature of the violation and whether it was caused by fault or negligence, may result in imprisonment within the limits established by the PC (between 1 month and 20 years, Art. 41/1) or payment of a fine (between 10 and 360 days, Art. 47/1) at the daily rate of 1 Euro to 498.80 Euro (Art. 47/2).

Due to the public nature of these violations, they are enforced by the State through the Public Prosecutor. In accordance with the **Criminal Procedures Code**²⁹ (CPC) and regardless of having suffered any of the environmental crimes identified above, citizens and NGOs can

²⁸ Approved in 23.09.1982 and last modified by Law 59/99(DR 51/99, 30/06).

²⁹ Approved by Law Decree 78/87 from 17.02 and last reviewed by Law 59/98, from 25.08.

intervene in criminal procedures by providing information to the Public Prosecutor, based on which he/she may or may not initiate a procedure, or by acting as assistants to the prosecution.

The role of the Public Prosecutor is limited to the control of legality and representation of the State, minors, absentees and public legal persons whenever the law so determines (Art. 16, Law 83/95). The Public Prosecutor has often initiated cases concerning environmental protection on behalf of NGOs or citizens.

3 Assessment of the legal measures for implementing Article 9(3) requirements on access to justice

This study has demonstrated the existence of sufficient mechanisms to promote public participation in administrative decision-making and in challenging decisions that violate the law. Legal standing and participatory rights are granted to all citizens having a legally-protected right or interest as well to as associations which act for the defence of those rights. They are entitled to challenge a decision by the administration by making a complaint through administrative channels. Definitive and enforceable decisions made by the competent authority may be subject to judicial appeal and both hierarchical and judicial appeals are allowed.

It was found however that these mechanisms are scarcely used and, as was demonstrated under section 2.1.2, the majority of administrative procedures are initiated by individuals against legal persons that violate the law and not against the public administration.

The preferred route to contest acts or omissions by the public administration is through judicial procedures before an administrative or civil court. The NGOs contacted agreed that judicial procedures are the most effective way of challenging administrative decisions, used in almost all cases. According to the Fund for the Protection of Wild Animals (FAPAS) and Quercus, two NGOs active in the environmental field, administrative procedures are rarely used except to require access to administrative documents which are usually not delivered within the time-frame set on the CPA and identified under section 2.1.2.

One recent case that lasted six years was quoted as a successful example of their work. In 2000 the FAPAS initiated legal procedures against the Portuguese State requiring removal from the façade of the Court of the town of Nisa of any device that could prevent wild animals, more specifically swallows, from making their nest in the building. After 6 years of appeals, the Supreme Court of Justice condemned, for the first time, the Portuguese State to remove from the walls of the court devices that harmed wild birds. The Supreme Court Decision was based on the fundamental right to the environment established in Article 66° of the Portuguese Constitution.³⁰

What most often prevents NGOs from initiating procedures are the high cost of attorneys' and experts' fees, whereas the main obstacles identified for individuals to challenge acts or omissions by the administration though judicial procedures are the length of the procedures and the "losing party pays" principle.

The study has also demonstrated that the principle of access to free justice is ensured by national legislation. Administrative procedures are free of charge and those that take action to protect constitutionally granted rights are exempted from court fees.

³⁰ Case-law N.413 STJ Supreme Administrative from 11.05.2006.

4 Conclusions

The Portuguese Constitution grants all citizens access to the law and courts for the protection of their rights and legally protected interests and establishes that access cannot be denied in the event of insufficient financial resources. Since the protection of the environment is a State obligation, violations of environmental law are mainly challenged through administrative judicial procedures.

From the legislation assessed (see Annex I), it can be concluded that in Portugal, both citizens and NGOs can take an active role in challenging environmental violations caused by an act or omission by the public administration.

The obligations resulting from the third pillar of the Convention were to a certain degree already in force in Portugal at the time the Convention was ratified. It was found, however, that their level of enforcement varies in accordance with the nature of the procedures.

In line with Art. 9^o paragraph 4 both administrative and judicial decisions seem to be “fair and equitable” in accordance with principles of law in force but the “not prohibitively expensive requirement” was only demonstrated in administrative procedures. Administrative and judicial penal procedures seem to be “timely”.

Both administrative and judicial decisions are given in writing and court decisions are accessible to the public through the websites of the respective courts, as was demonstrated throughout the study. The search mechanisms in place are not user friendly, however and may in many cases limit access to this information.

The need to ensure that information is provided to the public on access to administrative and judicial review procedures is not adequately enforced in practice. Competent authorities have limited information and the reforms that are taking place in the judicial system, and at the public administration level, have made this task even more difficult.

As mentioned above, costs have an immediate affect on access to justice. In spite of the mechanisms of legal protection granted by law, and described under 2.2.4, the “loser pays” principle prevents many citizens from initiating judicial procedures and attorneys’ fees can stretch to breaking NGOs’s budgets. The length of procedures can also constitute a detrimental factor.

In conclusion, the present study has demonstrated the existence of a complete and progressive legal framework that grants *locus standi* to both individuals and NGOs through administrative and judicial procedures, but which, due to its length, is many times not used to challenge acts and omissions by the Portuguese public administration.

Bibliography

LIST OF RELEVANT DOCUMENTS/ENTITIES CONSULTED	
DOCUMENT	LINK
1º Relatório Nacional sobre a Convenção de Aarhus (Portugal), Janeiro 2005	http://www.iambiente.pt/portal/page?_pageid=73,408080&_dad=portal&_schema=PORTAL&docs=10139499&id_doc=6244
Guide of access to justice in environmental matters	http://www.euronatura.pt/upload/membro.id/ficheiros/i005585.pdf
The Aarhus Convention – an implementation guide UNECE 2000	http://www.unece.org/env/pp/acig.pdf
Access to Justice environmental matters: the legal system and the judicial practice	http://acessojustica.no.sapo.pt/resumo_relatorio_CE.PDF
Interpretation of the Code of Administrative Procedures, Lisbon 1998	http://intranet.uminho.pt/Arquivo/Legislacao/Cpa/CPA.pdf
Crime against nature in the new Penal Code Souto de Moura (1996)	http://www.diramb.gov.pt/data/basedoc/FCH_9287_D.htm
Ombudsman	http://www.provedor-jus.pt/
Report from Ombudsman to Parliament	http://www.provedor-jus.pt/restrito/pub_ficheiros/Relatorio2005_vol_I.pdf
Ministry of Environment Planning and Regional Development	http://www.maotdr.gov.pt/MAOTDR/
Institute of Environment	www.iambiente.pt
Ministry of Justice	http://www.mj.gov.pt/sections/home
Legal Policy and Planning Office of the Ministry of Justice	http://www.gplp.mj.pt/estjustica/
Commission of Access to Administrative Documents	http://www.cada.pt/
Portuguese Lawyers Bar	http://www.oa.pt/default.aspx

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Annex: List of compiled national measures implementing the requirements of Article 9(3) of the Aarhus Convention ANNEX I

LIST OF NATIONAL RELEVANT LEGISLATION	
DOCUMENT	LINK
Portuguese Constitution	http://dre.pt/pdf/ptfiles/crp.pdf
Civil Code approved by Law Decree 47344 from 25.11.66 and last reviewed by Law 59/99 from 30.06	http://www.stj.pt/nsrepo/geral/cptlp/Portugal/CodigoCivil.pdf
Penal Code (PC)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_19790_2_0001.htm
Code of Civil Procedures (CCP)	http://www.stj.pt/nsrepo/geral/cptlp/Portugal/CodigoProcessoCivil.pdf
Code of Administrative Procedures (CPA)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_332_2_0001.htm#b0177
Administrative Courts Procedure Code (ACPC)	http://www.sta.mj.pt/pdf/CodigoDeProcessoNosTribunaisAdministrativos.pdf
Code of Judicial Costs, Law-Decree 324/2003 (DR 298/2003, 27/12)	https://www.dre.pt/pdf1s/2003/12/298A00/86968737.pdf
State Civil Liability Law Decree 48051 from 21.11.1967 (Diário do Governo, I série nº 271)	http://paradigma.pt/~ac/pdf/DL_48051.pdf
Statute of the Ombudsman Law 9/91, of 09.04 (DR 82/91, Series I-A) amended by Law 30/96, of 14.08 and by Law 52-A/2005, of 10.10)	http://www.cga.pt/Legislacao/Lei_199104099.pdf
Statute of Administrative and Fiscal Courts, approved by Law Decree 129/84, from 27.04 and last reviewed by Law 107-D/2003, from 31.12	http://dre.pt/pdf1s/ip/1984/04/09800/14071420.PDF
Law 19/2006, on access to environmental information (DR 113/2006, 12.06)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_27827_1_0001.htm
Organic Law of the Ministri of Environment, Spacial Planning and Regional Development, Law Decree 207/2006 (DR 208/2006, 27.10).	http://www.diramb.gov.pt/data/basedoc/TXT_LN_27758_1_0001.htm
Law 50/2006, Environmental Offences (DR 166/2006, 29.08)	http://www.diramb.gov.pt/data/basedoc/FCH_27698_LN.htm
Law 35/98 Environmental Non-governmental Organizations (DR 166, 18.07)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_9342_1_0001.htm
Law 11/87 - Framework Law on Environment (FLE) (DR 81/87, 07.04)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_21_1_0001.htm
Law 34/2004 on Access to Law and to Courts (DR. n.º 177/2004 , Série I-A 07-02)	http://www.gplp.mj.pt/home/concluidos/LEI-34-2004.pdf
Law 8/95 regulates the Services of the Commission of Access to Administrative Documents and clarifies access to documents of the public administration defined under Law 65/93 (DR 75/95, 29.03)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_344_1_0001.htm
Law 83/95 <i>Actio Popularis</i> and Participation Procedures (DR 291, 31.08)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_6204_1_0001.htm
Law 65/93 - Law of Access to Administration's Documents (DR 200/93, 26.08) as republished and modified by Law 8/95 (DR 75/95, 29.03), and Law 94/99 (DR 164/99, 16.07)	http://www.diramb.gov.pt/data/basedoc/TXT_LN_341_2_0001.htm
General Administrative Offences Regime, Law Decree 433/82, from 27/10, last reviewed by Law Decree 244/95, from 14.09	http://www.diramb.gov.pt/data/basedoc/TXT_LN_1166_3_0001.htm
Resolution 11/2003 of the AR, approves for ratification the Aarhus Convention (DR I- Série A n.º 47, 25.02.2003)	http://www.cada.pt/uploads/d9810a96-94db-1b8e.pdf
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