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Brazil's Environmental Legal Framework: Environmental Goods Regulation

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Abstract

Brazil's environmental legal framework has peculiar practices and characteristics linked to its federalist system. This article provides an overview of the Brazilian environmental system, and it aims to demonstrate how the system applies a double regulation on environmental goods. The paper explains Brazil's regulation on water, forests, and climate change regarding Brazil's environmental policy. From descriptive and expositive methodology, it is possible to show and to understand how normative principles and rules are articulated in the system, including judicial case analyses. The overall thesis is that judicial, social, cultural, and ecological problems must be considered together.

Keywords

Brazilian Environmental Law, Environmental Goods, National Environmental Policy, Climate Change, Water and Forest Regulation

1. Introduction

This article intends to provide an overview of Brazil's environmental law system. The environmental normative framework in Brazil must be analysed by taking into account the political structure of Brazilian federalism and the Constitutional base of the system. In this way, the article seeks to identify the normative fundamentals of Environmental Law in Constitutional and legal levels.

In addition to that, this article's approach is to overview environmental goods regulation. This second goal is connected to the first one. So, the analysis of environmental goods regulation is linked to how federal entities apply their competences. To demonstrate the normative practices, this article analyzes judicial cases and judicial decisions from Brazilian Courts.

It is not possible to cover all the details of the plural normative fields in Brazilian Environmental Law in only a few pages. Therefore, this is an express clip-

ping on this theme. The topics I will cover are constitutional environmental rules, water regulation, forest system regulation and environmental policy regulation. I selected these themes due to their relevance and because from these principles it is possible to understand the meaning point of Brazilian environmental legal framework.

This article uses the descriptive and expositive methodology. The main goal of the article is to explain the structure and basis of the Brazilian legal framework. So, the article homes in Brazilian environmental authors. Here, I do not intend to compare the Brazilian system to other systems. On the contrary, I aim to propose here the basis for understanding the Brazilian legal system. In this way, other studies can make the comparative legal analysis. The conclusion is guided to explain that in Brazil it is important to distinguish criminal, administrative, and civil environmental regulations. According to each of these fields there are particular legal practices and specific competences spread between federative entities.

2. Constitutional Rules and Environmental Law in Brazil and Climate Change

The first step to understand Brazil's environmental system is to approach Brazil's political state structure. On this point, it is important to understand that Brazil has a political federative system. It means that Brazil has not only one legal framework source, but three. Brazil's federative system has three levels. These levels are federal law, state law, and local law. In Brazil's constitutional system, there are not two, but three federative levels. The federal level is occupied by the "Union of States", the state level is occupied by twenty-six states and by the federal district, and the local level is occupied by the counties or cities. Nowadays, Brazil has more than 5500 counties or cities.

There is no hierarchy between the "Union of States", States and Counties. Each of them has its own competences (Padilha, 2010: pp. 155-160). These competences are defined in the 1988 Brazilian Constitution. The Constitution states four kinds of competences. I summarize these competences in its characters. First, the exclusive competence. This competence includes executive acts. For instance, it is the "Union of States's" competence to manage nuclear services and facilities of any nature and exercise a state monopoly on research, mining, enrichment and reprocessing, industrialization and trade in nuclear ores and their derivatives. Only the Union can act in these activities. The exclusive competence is detailed in article 21 (Brasil, 1988).

Besides exclusive competence, there is the privative competence. The privative competence is a legislative competence, and they are settled in article 22 (Brasil, 1988). In this case, only the "Union of States" can enact legislative norms about the themes included in the article. For instance, in Brazil, only the Union can regulate civil or criminal law and only the Union can regulate mineral law or indigenous issues. But there is the possibility that States can regulate these subjects. If Congress enacts a national and specific Act, what is called a "*lei com-*

plementar", the states can regulate the point stipulated in the Act. In other words, the Union allows the States to exercise a specific regulation on the subject. Presently, there is just one law with this permission. It deals with labor law.

The privative competence is relevant for environmental law. Environmental goods can be regulated in two normative scenarios. There is the environmental law besides the sectorial law. The sectorial law involves normative fields in the law, for instance, energy law, agrarian law, water law, mineral law, among many others, including, of course, renewable energy (Hernández, 2021: pp. 241-242). Therefore, the same good has two regulations. Regarding water, minerals, and energy sources in the sectorial law view, the regulation is under privative competence rule. It is the role of the Union to regulate this subject. So, if a State regulates the sectorial law field, its rule will be declared unconstitutional by the Brazilian Supreme Court.

However, there is another category of competence constitutional rules. It is the competency concurrent. In this case, article 24 is applied (Brasil, 1988). According to article 24, in competency concurrent all federative entities can have their rules on the subject. But coherence is necessary between the rules. The Union enacts a general act, the states enact a specific rule, according to its particular situation. The Counties can also enact or produce its regulations, according to federal and state law. The Counties' and States' rules produce effects in its own territory. The environmental rules are inside competency concurrent. It means that Union, States and Counties can legislate over environmental law. Article 24 explains:

> Art. 24. It is incumbent upon the Union, the States, and the Federal District to legislate concurrently on:
> VI - forests, hunting, fishing, fauna, nature conservation, defense of the soil and natural resources, protection of the environment and control of pollution;
> VII - protection of historical, cultural, artistic, tourist and landscape heritage;
> VIII - liability for damage to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, tourist and landscape value. (Brasil, 1988)

Hence the same situation, the same good, can have two cumulative regulations. On one hand, they have a sectorial regulation, and on the other hand they have an environmental regulation. The challenge is, of course, to conciliate these two models of normative framework. The Brazilian system has also another characteristic.

In addition to competency concurrent there is the competency mutual, known as "*competência comum*". The competency mutual brings the possibility that all entities (federal, state, and local) can check and police certain private activities. Article 23 determines that it is a task of the Union, States and Counties to protect environmental goods and control pollution. It is also its task to preserve fo-

rests and animals. Therefore, it is possible that a local authority applies federal rules to protect the environment against a specific violation. It's predictable that there may be federative conflicts and conflicts with private agents. After all, if a good, such as energy, is the object of a company activity we may have that situation. For energy, there is a sectorial law to regulate the case enacted by federal Acts. But, if we regard that as an environmental good, there are three levels of rules: federal, state, and local Acts. In addition to that, all of them can check, inspect, and oversee the activity.

The Brazilian Constitution also has a special topic about environmental law. Therefore, besides competences rules, there are material rules of environmental law. Here, article 225 is remarkable. Surely, it is the most important article of the Brazilian Constitution pertaining to the environment. It is important to read and understand how large and binding are the article's determinations:

> Art. 225. Everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to a healthy quality of life, imposing on the Government and the community the duty to defend and preserve it for present and future generations.
>
> § 1 To ensure the effectiveness of this right, it is incumbent upon the Government to:
>
> I - preserve and restore essential ecological processes and provide for the ecological management of species and ecosystems;
>
> II - to preserve the diversity and integrity of the country's genetic heritage and supervise entities dedicated to research and manipulation of genetic material;
>
> III - define, in all units of the Federation, territorial spaces and their components to be specially protected, the alteration and suppression being permitted only by law, any use that compromises the integrity of the attributes that justify their protection being prohibited;
>
> IV - require, in accordance with the law, for the installation of a work or activity potentially causing significant degradation of the environment, a prior study of the environmental impact, which will be publicized;
>
> V - control the production, sale and use of techniques, methods and substances that pose a risk to life, quality of life and the environment;
>
> VI - to promote environmental education at all levels of education and public awareness for the preservation of the environment;
>
> VII - to protect the fauna and flora, prohibiting, under the terms of the law, practices that jeopardize their ecological function, cause the extinction of species or subject animals to cruelty.
>
> VIII - maintain a favored tax regime for biofuels intended for final consumption, in the form of a complementary law, in order to ensure lower taxation than that levied on fossil fuels, capable of guaranteeing a competitive differential in relation to these, especially in relation to contributions referred to in line "b" of item I and item IV of the caput of art. 195 and art.

> 239 and the tax referred to in item II of the head provision of art. 155 of this Constitution.
> § 2 Anyone who exploits mineral resources is obliged to recover the degraded environment, in accordance with the technical solution required by the competent public body, pursuant to the law.
> § 3 Conduct and activities considered harmful to the environment will subject violators, whether individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage caused.
> § 4 The Brazilian Amazon Forest, the Atlantic Forest, the Serra do Mar, the Pantanal Mato-Grossense and the Coastal Zone are national heritage, and their use will be made, in accordance with the law, within conditions that ensure the preservation environment, including the use of natural resources.
> § 5 Lands that are vacant or collected by the States, due to discriminatory actions, necessary for the protection of natural ecosystems, are unavailable.
> § 6 The plants that operate with a nuclear reactor must have their location defined by federal law, without which they cannot be installed.
> § 7 For the purposes of the final part of item VII of § 1 of this article, sports practices that use animals are not considered cruel, provided they are cultural manifestations, in accordance with § 1 of art. 215 of this Federal Constitution, registered as an intangible asset that is part of the Brazilian cultural heritage, and must be regulated by a specific law that ensures the welfare of the animals involved. (Brasil, 1988)

Item VIII of article 225 was recently introduced in the Constitution. The Constitution was modified by Amendment 123, in 2022. According to the novel norm, it is a task of the tax system to promote biofuels. Article 225 determines the protection of forests, waters, animals and establishes alternatives to fossil fuels. It means that the constitutional system supports alternatives like biomass (Kokke, 2022: p. 74) and considers climate change a relevant problem nowadays. The Constitution doesn't speak directly about climate change. However, it resolves to preserve the ecological balance, the normality in ecological processes in the environment. It also settles that it is necessary to control pollution and to maintain the ecological functions of flora and fauna. Brazilian scholars and Brazilian courts understand that these norms mean an unavoidable link with climate change regulation.

Furthermore, the Constitutional framework allows for international treaties and conventions to receive validity and effectiveness in Brazilian law. When Brazil signs an international treaty or convention linked to human rights (Mendes & Branco, 2015: p. 130), they are applied with a special force in the national system. And Brazilian Courts recognize environmental law as a human right (Brasil, 1995). From this point of view, the Act 12.187, on December 29, 2009, regulates the National Climate Change Polity (Brasil, 2009). The Act is linked to the United Nations Framework Convention on Climate Change (Wedy, 2018: p.

152). Regarding the goals of this study, it is important to show the commitments of the Brazilian environmental system in terms of climate change:

> Art. 5th The guidelines of the National Policy on Climate Change are:
> I - the commitments undertaken by Brazil in the United Nations Framework Convention on Climate Change, in the Kyoto Protocol and in other documents on climate change to which it becomes a signatory;
> II - actions to mitigate climate change in line with sustainable development, which are, whenever possible, measurable for their adequate quantification and subsequent verification;
> III - adaptation measures to reduce the adverse effects of climate change and the vulnerability of environmental, social, and economic systems;
> IV - integrated strategies for mitigating and adapting to climate change at the local, regional, and national levels;
> V - encouraging and supporting the participation of federal, state, district, and municipal governments, as well as the productive sector, academia and organized civil society, in the development and implementation of policies, plans, programs and actions related to change of the climate;
> VI - the promotion and development of scientific-technological research, and the dissemination of technologies, processes and practices aimed at:
> a) mitigating climate change by reducing anthropogenic emissions by sources and strengthening anthropogenic removals by sinks of greenhouse gases;
> b) reduce uncertainties in future national and regional projections of climate change;
> c) identify vulnerabilities and adopt appropriate adaptation measures;
> VII - the use of financial and economic instruments to promote mitigation and adaptation actions to climate change, observing the provisions of art. 6th;
> VIII - the identification, and its articulation with the Policy foreseen in this Law, of instruments of governmental action already established able to contribute to protect the climatic system;
> IX - support and promotion of activities that effectively reduce emissions or promote the removal of greenhouse gases by sinks;
> X - the promotion of international cooperation at the bilateral, regional, and multilateral level for financing, training, development, transfer and dissemination of technologies and processes for the implementation of mitigation and adaptation actions, including scientific research, observation systematic and exchange of information;
> XI - the improvement of the systematic and precise observation of the climate and its manifestations in the national territory and in the contiguous oceanic areas;
> XII - promoting the dissemination of information, education, training, and public awareness on climate change;

XIII - encouragement and support for the maintenance and promotion of:
a) low greenhouse gas emissions practices, activities and technologies;
b) sustainable patterns of production and consumption. (Brasil, 2009)

Recently, the Federal government adopted several standards to implement the constitutional and legal provisions pertaining to environmental protection and climate commitments. To support the normative provisions, the Federal Attorney's Office (*Advocacia-Geral da União*) adopted judicial practices to force those who illegally deforested to repair the damages. A strategic environmental group was created inside the Federal Attorney's Office to promote judicial actions in support of protecting rain forests and other Brazilians biomes, such as *Mata Atlântica* and *Pantanal*. The group was created by the Normative Ordinance 89, of March 22, 2023 (Brasil, 2023a).

The Federal Attorney's Office is part of the Executive branch, representing all the federal entities in the Brazilian system, including environmental agencies like *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis* – IBAMA (Brazilian Institute for the Environment and Renewable Natural Resources) and *Instituto Chico Mendes de Conservação da Biodiversidade* – ICMBio (Chico Mendes Institute for Biodiversity Conservation). Besides the Federal Attorney's Office there is the Federal Public Ministry. Its function is linked to environmental protection. However, the Federal Attorney's Office acts with sectorial and environmental cases and the Federal Public Ministry acts only with environmental cases, regarding the object of this study.

3. Water Regulation and Brazil's System

Article 20 of the Brazilian Constitution determines that water in the nation's rivers and lakes is a federal good. The case of rivers or lakes located in two or more states or between Brazil's border with another country is also considered a federal good. In other words, it is possible to say that it is federal property, but the water is also a good of the Brazilian people. It is a diffuse legal good. The water belongs to the Brazilian people. But for the task of water management, water was turned into a federal good. In article 26, I, the Constitution says that if a river or a lake is situated in a state's area, the water is property of that state only. In addition to that, subterranean water is the property of the state where it is located. There is no provision that cities or counties have water property. Additionally, rainwater has no owner. In other words, all individuals can collect rainwater and use it.

The consequence of this system is that from the point of view of property, Brazil's system has a double federative regulation. The regulation of water has federal rules and state regulations. Article 22, IV, establishes that the competence for legal regulation of the water system is a federal responsibility. In this way, the Federal Union makes rules, acts, and laws pertaining to water, treating water as an environmental resource. Even though water is an environmental resource under federal regulation, the States are responsible for applying federal regula-

tions in their territories. For instance, if a company wants to use a river's water for its business, the company must first check if it is a federal or state river. If it is a federal river, a federal government agency needs to authorize this use. On the other hand, if it is a state river, the attribution is a state government agency. But if it is a subterranean water the competence is just by state government agency.

Therefore, the law that regulates water as an environmental resource is a federal law, but both federal and state agencies apply federal rules. At the same time, each state has their rules about the agencies that will apply the federal rules in their territory. There are the regulatory rules of water and execution rules of water legal frameworks. Federal acts determine the rules. State rules say how to implement in each state the regulatory execution.

The most important act of water legal framework is Federal Act 9.433, published on January 8, 1997 (Brasil, 1997). This act establishes the National Water Resources Policy. Article 1st determines:

> Art. 1 The National Water Resources Policy is based on the following grounds:
> I - water is a public good;
> II - water is a limited natural resource, endowed with economic value;
> III - in situations of scarcity, the priority use of water resources is human consumption and the watering of animals;
> IV - the management of water resources must always provide for the multiple use of water;
> V - the hydrographic basin is the territorial unit for the implementation of the National Water Resources Policy and the performance of the National Water Resources Management System;
> VI - the management of water resources must be decentralized and rely on the participation of the Government, users, and communities. (Brasil, 1997)

Regarding water as an environmental resource, the act determines that who uses water must pay for it. The public payment is called "*outorga hídrica*" (Purvin, 2017: p. 38). The payment works as a tax based on the usage of water. So, if a company wants to use river water or subterranean water, it must pay the government for it. Article 11 says that "the purpose of granting rights to use water resources is to ensure quantitative and qualitative control of water use and the effective exercise access rights to water" (Brasil, 1997). It is important to say that insignificant use of water is free of charge. Therefore, small populations groups do not have to pay for their water needs. The Act states:

> Art. 11. The purpose of granting rights to use water resources is to ensure quantitative and qualitative control of water use and the effective exercise of rights of access to water.
> Art. 12. The rights of the following uses of water resources are subject to grant by the Government:

> I - derivation or capture of a portion of the water existing in a body of water for final consumption, including public supply, or input for the production process;
> II - extraction of water from an underground aquifer for final consumption or as input for the production process;
> III - discharge of sewage and other liquid or gaseous waste, whether treated or not, into bodies of water, for the purpose of dilution, transportation or final disposal;
> IV - use of hydroelectric potential;
> V - other uses that alter the regime, quantity or quality of water existing in a body of water.
> § 1 Independent of grant by the Government, as defined in regulation:
> I - the use of water resources to meet the needs of small population centers, distributed in rural areas;
> II - derivations, funding and releases considered insignificant;
> III - accumulations of water volumes considered insignificant.
> § 2 The granting and use of water resources for the purpose of generating electricity will be subject to the National Water Resources Plan, approved in accordance with the provisions of item VIII of art. 35 of this Law, obeying the discipline of the specific sectoral legislation. (Brasil, 1997)

Act 9.433 (Brasil, 1997) regulates water as environmental resource (Milaré, 2018: p. 945). On the other hand, Brazil's system regards water as an environmental good. In this situation, water is regarded as an important good, or even as the most important good, for the natural environment. Here, water is analyzed as an ecological good. The use of water entails effects on human life and on ecosystem relationships. From that point of view, Brazilian constitutional framework determines the regulation in article 24, VI. This article says that it is the competence of the Federal Union, States and counties or cities to regulate environmental protection together. Environmental defense and pollution control is also their competence.

As previously stated, the Brazilian system has federal, regional, and local rules according to its perception of water as an environmental good (Antunes, 2021: p. 823). Of course, the local rules must be in accordance with regional rules and both in accordance with federal rules. However, it is not so simple, that is why conflicts about the application of the adequate rule for each case are not uncommon. For instance, there are judicial conflicts concerning whether a local rule can forbid an activity or a certain water utilization. It is not always that a federal rule has a preponderance over a local rule. It depends on the kind of rule and their relationship with the environmental goods' protection. It is possible that the use of water is forbidden in a vulnerable place, and it is allowed in another place.

Act n. 6.938, enacted August 31, 1981 (Brasil, 1981), regulates water as an environmental good, it also establishes the National Environmental Policy. The act

created the National Environmental System. Hence, if a company wants to use water, it must have an environmental authorization and a sectorial authorization. The first is granted by regulatory agencies, regarding water as an environmental resource. The second considers water as an environmental good. It is possible that a company has sectorial license but does not have environmental license (Bechara, 2009: pp. 127-128). Considering that the local rules are not applicable in the case of use of water, as an environmental resource, after all the counties or cities are not owners of the water, their rules are important in the analysis of environmental license.

Brazil's system is remarkable for its diverse and numerous normative fields. Regarding Brazilian legal framework it is relevant to highlight that water is regulated according to each regulatory field. The federal agency of water is the *Agência Nacional de Águas e Saneamento Básico—ANA*, or "National Water and Basic Sanitation Agency". This agency must dialogue with the regional agencies, according to the rules of the National Water Resources Policy and its National Water Resources Management System.

In addition to that, the federal government's environmental agency is the *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis—IBAMA*, or "Brazilian Institute for the Environment and Renewable Natural Resources." This environmental agency must keep in contact with the state and local environmental agencies. It is necessary to have coherence in the federative legal framework system.

Sectorial regulations and environmental regulations must walk side by side. In fact, the judicial and normative system in Brazil recognized that there is a preponderance of water as environmental good. But it does not mean that economic needs are ignored. Indeed, it is not possible to think about environmental questions without considering society's needs. The key, and at the same time the problem, is how to make a complex system efficiently work. The problem doesn't have one correct answer. But in all cases the participation of federal, regional, and local spheres of government as well as the stakeholders is critical. It is not possible to solve environmental problems or economic problems pertaining to environmental resources without complex answers.

4. Brazil's Forests and Legal Framework

The Brazilian Constitutional system determines protection to special environmental places in addition to general protection. So, there is a set of general regulations to protect environmental goods and another set of special regulations to protect and regulate special places, regarding their ecological value. For instance, a green urban square has a different legal framework than a special landscape localized in a rural area. Regarding special environmental places, it is important to note the Federal Forest Code and Conservation Units National System as relevant norms.

The Federal Forest Code, Act 12.651, by May 25, 2012 (Brasil, 2012), regulates two special areas with ecological relevance. They are "Legal Forest Reserve" and

"Environmental Preservation Area." The Legal Forest Reserve exists only in rural properties. According to law, each rural property must conserve native vegetation in a determined percentage of its area. In Amazonia, this percentage can reach 80% and in other regions of country it reaches 20%. The Act defines a Legal Forest Reserve as the area located inside a rural property or possession with the function of ensuring sustainable economic use of the natural resources of the rural property, assisting the conservation and rehabilitation of ecological processes, and promoting the conservation of biodiversity, as well as shelter and protection of wild fauna and native flora.

On the other hand, there is the Environmental Preservation Area. In this case, the special environmental area can be localized in rural or in urban areas. The most important part of a Preservation Area is its ecological function. The rule explains the ecological functions existing into Preservation Area. Yes. Unlike Legal Forest Reserve, the Environmental Preservation Area is note registered in the government records (Avzaradel, 2019: p. 247). These areas exist on the banks of rivers or in the heights of hills, for instance. The Act defines an Environmental Preservation Area as a protected area, covered or not by native vegetation, with the environmental function of preserving water resources, the landscape, geological stability, promoting biodiversity, facilitating the gene flow of flora and fauna, protecting the soil, and ensuring the well-being of human populations.

The designation of Legal Forest Reserve or Environmental Preservation Area doesn't mean it is forbidden to use the areas or that deforestation is banned. The Act settles when and how it is possible, regarding restrictive situations. In these cases, the company must compensate the ecological loss. The Forest Code regulates the protection framework and delineates the categories of liabilities.

The Brazilian model of environmental liability has special determinations. There are three kinds of liability. They are criminal liability, administrative liability, and civil liability (Steigleder, 2017: p. 108). The same fact, the same violation, induces the three liabilities at the same time. Act 9.605, enacted February 12, 1998 (Brasil, 1998), regulates criminal and administrative liabilities (Kokke & Rezende, 2019: pp. 48-49). For instance, if someone causes environmental damage with illegal deforestation, this person will be prosecuted in judicial courts. It will be a criminal process. Legal entities can also be charged in a criminal process. Therefore, it is possible that a company is charged in a criminal process. Of course, in this case, the penalty is not arrest or imprisonment. The penalty can be fines or interdiction of activities, for example. Moreover, the government environmental entities can apply administrative penalties, such as suspension of activity, fines, or restrictions on economic rights. Administrative penalties are cumulated with criminal penalties. The Brazilian Supreme Court decided:

> EXTRAORDINARY APPEAL. CRIMINAL LAW. ENVIRONMENTAL CRIME. CRIMINAL LIABILITY OF THE LEGAL ENTITY. CONDITIONING OF THE CRIMINAL ACTION TO THE IDENTIFICATION AND CONCOMITANT PROSECUTION OF THE

> INDIVIDUAL WHO DOES NOT FIND SUPPORT IN THE CONSTITUTION OF THE REPUBLIC. 1. Article 225, § 3, of the Federal Constitution does not condition the criminal liability of the legal entity for environmental crimes to the simultaneous criminal prosecution of the individual responsible in thesis within the scope of the company. The constitutional norm does not impose the necessary double imputation. 2. Today's complex corporate organizations are characterized by the decentralization and distribution of attributions and responsibilities, being inherent, to this reality, the difficulties to impute the illicit fact to a concrete person. 3. Condition the application of art. 225, §3, of the Political Charter, to a concrete impunity also the natural person implies undue restriction of the constitutional norm, expresses the intention of the original constituent not only to extend the reach of the criminal sanctions, but also to avoid impunity for the environmental crimes against the immense difficulties in individualizing those responsible internally to corporations, in addition to reinforcing the protection of the environmental legal good. 4. The identification of sectors and internal agents of the company that determined the production of the unlawful act is relevant and must be sought in the concrete case as a way of clarifying whether these individuals or bodies acted or deliberated in the regular exercise of their internal attributions to society, and even to verify whether the action was in the interest or benefit of the corporate body. Such clarification, relevant for the purposes of imputing a certain offense to the legal entity, is not, however, to be confused with subordinating the liability of the legal entity to the joint and cumulative liability of the individuals involved. On not infrequent occasions, the internal responsibilities for the fact will be diluted or partialized in such a way that they will not allow the attribution of individual criminal responsibility. 5. Extraordinary Appeal partially known and, in part known, granted.
> (RE 548181, Rapporteur: ROSA WEBER, First Panel, judged on 08/06/2013, ELECTRONIC JUDGMENT DJe-213 RELEASED 10-29-2014 PUBLIC 10-30-2014 RTJ VOL-00230-01 PP-00464) (Brasil, 2013)

Civil liability expresses the obligation of repairing the damages. That responsibility happens both in the administrative and judicial process. There is a specific regulation in the Code. The obligation is *propter rem*. The law takes into account present and future generations. In terms of environmental justice, it is what Laura Westra treats as the rights of unborn and future generations (Westra, 2008: pp. 135-136). What does this mean? The obligation is linked to the ecological area. Then, the obligation of repairing the damage is transferred via buy and sell or via heritage. In other words, if company A sells a farm to company B and there is environmental damage in its area, both company A and company B have civil liability. Both must repair the environmental damage. The question was decided by the Superior Court of Justice, the penultimate court in the Brazilian judicial hierarchy:

> CIVIL PROCEDURE. CIVIL. ADMINISTRATIVE AND CONSTITUTIONAL. ENVIRONMENTAL DAMAGE. PUBLIC CIVIL ACTION. DEMOLITION. APPLICATION OF THE PRINCIPLE OF DISPROPORTIONALITY. ADOPTION OF OTHER MEASURES. DISMISSAL OF INTERNAL APPEAL. MAINTAINING THE APPEALED DECISION.
>
> (…)
>
> VII - However, the STJ has settled case law that, "if there is irregular construction in a Permanent Preservation Area, the responsibility for environmental restoration is objective and propter rem, reaching the owner of the property, regardless of whether he was the cause of the damage." (AgInt no REsp n. 1.856.089/MG, rapporteur Minister Sérgio Kukina, First Panel, judged on 6/22/2020, DJe 6/25/2020).
>
> VIII - This understanding was consolidated in statement n. 623 of the STJ Precedent, according to which "Environmental obligations have a propter rem nature, being admissible to collect them from the owner or current possessor and/or from the previous ones, at the choice of the creditor."
>
> Specifically, regarding the hypothesis in the case file, the STJ has already decided that the intention to keep buildings used as a leisure area denotes that the degradation of the APP will be perpetuated if the illicitly erected buildings are not demolished. By the way: Rep n. 1.983.214/SP, rapporteur Minister Og Fernandes, Second Panel, judged on 6/14/2022, DJe of 6/24/2022.
>
> IX - Improper internal grievance.
>
> (AgInt in REsp n. 1.882.947/SP, rapporteur Minister Francisco Falcão, Second Panel, judged on 3/20/2023, DJe of 3/23/2023) (Brasil, 2023b)

Brazil's system also regulates other kinds of ecological protection areas in what is called the Conservation Units National System. The system is inspired by the International Union for Conservation of Nature. There are subtle differences among Legal Forest Reserve, Environmental Preservation Area, and a Conservation Unit. A conservation unit is a territorial space and its environmental resources, including jurisdictional waters, with relevant natural characteristics, are legally established by the Government, with conservation objectives and defined limits, under a special administrative regime, to which adequate guarantees of protection apply. There is a normative act enacted by federal, regional, or local government that determines a specific area and its own regulation norms. The most important characteristic of a conservation unit is its geographic demarcation. Everything inside the demarcation submits to the special normative framework. For instance, the national parks are conservation units.

The Nature Conservation Unities National System is regulated by Act 9.985, enacted July 18, 2000 (Brasil, 2000). The Act establishes two groups of conservation units. They are the integral protection units and sustainable use units. The basic objective of the Integral Protection Units is to preserve nature, with only

the indirect use of its natural resources being allowed. Hence, the basic objective of the Sustainable Use Unit is to reconcile the conservation of nature with the sustainable use of part of its natural resources. Each group has its categories of conservation unit according to the characteristics of environmental goods existing inside the conservation unit.

It is important to note Klaus Bosselmann's observation about private property and public commons to understand the context of the problems between them. These problems will have consequences in the regulation of Brazil's environmentally relevant areas. From the author:

> The right to possession and ownership is perceived as fundamental to individual freedom. Ecological sustainability, on the other hand, reflects public morality without direct bearing on the content of individual rights. The sustainability agenda has not yet substantially altered the content of property rights or the context within which they are exercised. (Bosselmann, 2023: p. 1)

On average, a conservation unit is a public good. Therefore, the Union, State or County must expropriate the ownership area. Of course, the owner will receive the price of property when the expropriation occurs. However, in some situations it is possible to conciliate the public goals and the private uses, according to the category of the conservation unit. When this happens, it is not necessary to make an expropriation. The owner can keep the property if he follows the normative uses of the area. Sometimes it is a good deal for the owner. For example, if there is a special landscape on a farm, the government can create a conservation unit called a natural monument on that farm. The owner can open a restaurant in the area or place an ecological tourist structure. In other words, the owner will profit from natural monument protection.

5. National Environmental Policy and Governmental Framework

Almost ten years after the 1972 Stockholm Conference, Brazil edited its Act n. 6.938, published August 31, 1981 (Brasil, 1981). This Act regulates the Environmental National Policy and Governance. The United Nations Conference on the Human Environment in Stockholm elevated environmental protection as a global issue. A lot of its principles and ideas are present in the Brazilian Act. If we can say that the Conference placed environmental issues at the forefront of international concerns and discussions, surely Act n. 6.938 has produced similar results in Brazil. The text contains definitions relevant to Brazilian environmental law. Let's analyse some of them.

Pollution is defined as a type of environmental degradation. In the international scenario environmental degradation is "the deterioration of the environment through depletion of resources such as air, water and soil, the destruction of ecosystems and the extinction of wildlife. It is defined as any change or disturbance to the environment perceived to be deleterious or undesirable" (United

Nations, 2023). The Brazilian act defines environmental degradation as the adverse alteration of the characteristics of the environment. Environmental degradation can provoke specific consequences. If environmental degradation results in specific damages, directly or indirectly, it is considered pollution. The Act defines:

> Article 3 - For the purposes provided for in this Law, it is understood by:
> II - degradation of the environmental quality, the adverse alteration of the characteristics of the environment;
> III - pollution, degradation of environmental quality resulting from activities that directly or indirectly:
> a) harm the health, safety, and well-being of the population;
> b) create adverse conditions for social and economic activities;
> c) adversely affect the biota;
> d) affect the aesthetic or sanitary conditions of the environment;
> e) release materials or energy in violation of established environmental standards. (Brasil, 1981)

Moreover, there are the definitions of polluter. Obviously, a polluter is the one who produces the pollution or who makes polluting actions. However, the Act defines two types of polluters. The direct polluter is who engages in the activity that provokes environmental degradation. But there is also the indirect polluter. The indirect polluter is who consciously allows, supports, or funds the degrading activity. This concept is important in the Brazilian system. Direct and indirect polluters are both responsible for environmental damages. Brazilian Courts have decided that even the Government can be an indirect polluter. The Superior Tribunal de Justiça (Superior Court of Justice) decided that when the Government doesn't prevent environmental damage, it can become an indirect polluter in particular situations:

> CIVIL, ADMINISTRATIVE AND ENVIRONMENTAL PROCEDURE. PUBLIC CIVIL ACTION. IRREGULAR ALLOTMENT. SPRINGS AREA. STATE SUPERVISION DUTY. OMISSION. OBJECTIVE AND JOINT LIABILITY OF DIRECT AND INDIRECT POLLUTERS. REVIEW OF THE FILES' COGNITION ELEMENTS. DISCLAIMER. SUMMARY 7/STJ. JURISPRUDENTIAL DIVERGENCE. IMPROVED EXAMINATION. ALLOTMENT. REGULARIZATION. ART. 40 OF LAW 6.766/1979. CITY STATUTE. MUNICIPAL DUTY. LIMITATION ON ESSENTIAL WORKS.
> (…)
> 6. The Superior Court of Justice established the understanding that the federal entity has the duty to inspect and preserve the environment and combat pollution (Federal Constitution, art. 23, VI, and art. 3 of Law 6.938/1981), its omission may be interpreted as an indirect cause of damage (indirect polluter), which entails its strict liability. Precedents: AgRg in REsp 1.286.142/SC, Rel. Minister Mauro Campbell Marques, Second Panel, DJe 2/28/2013;

(…)

AgRg no Ag 822.764/MG, Rel. Minister José Delgado, First Panel, DJ 8/2/2007; REsp 604.725/PR, Rel. Minister Castro Meira, Second Panel, DJ 8/22/2005.

(AREsp n. 1.678.232/SP, rapporteur Minister Herman Benjamin, Second Panel, judged on 4/6/2021, DJe of 8/16/2021.) (Brasil, 2021)

Civil liability, the liability to repair the damages, is determined by the Act as absolute responsibility. It is not relevant if the polluter is or is not guilty. If the individual or the company causes the environmental damage, there is an obligation to make reparation. Then, the civil liability, the obligation to make reparation, is different from administrative or criminal liabilities. Moreover, there is no prescription period to require the reparation. In other words, it does not matter how long ago the damage happened. Who caused the damage has an obligation to repair.

The Act argues in favour of a concordance between economic issues and environmental issues. It is not possible to view economic and environmental goods in opposing places. In this way, the Act aims for the compatibilization of social and economic development with ecological balance. The federal entities form the National Environment System (*Sistema Nacional do Meio Ambiente*). So, regarding the competences of each federal entity, the Act organizes the relationships between federal, state, and local environmental agencies.

There is also a superior council named *Conselho Nacional do Meio Ambiente—CONAMA* (National Environmental Council). As part of its functions, it is tasked with establishing regulations and criteria for environmental licences. On this point, Act 6.938 is linked to the Complementary Act 140, 2011 (Brasil, 2011). The polluter's activities or enterprises must get an environmental licence. Act 6.938 and the National Environmental Council determine what levels of pollution, current or potential, justify an environmental licence. Act 140 determines which is the competent federal entity to analyse the environmental licence (Cirne & Fernandes, 2022: pp. 258-259).

Therefore, if an activity doesn't provoke significant levels of environmental risks, it doesn't need to obtain an environmental licence. However, the environmental licence doesn't mean free actions or that the company has no environmental responsibility for damages. If there is an environmental damage, it does not matter whether the company has a license or not. There is always environmental liability. The licence means a regular performance but not without consequences.

Act 6.938 also stipulates economic instruments (Trennepohl & Trennepohl, 2021: p. 130) side by side with the normative control. In this point of view, there are the green tax and the financial credits to companies who undertake environmental compromises. The regulation assumes the polluter pay principal side by side with the environmental protector principal. According to the legislation, this principal must be distributed to organizations and individuals who promote environmental health. The accomplishing of normative goals comes with an en-

vironmentalist culture. It is necessarily to think of legal, economic, social, and cultural issues together.

6. Conclusion

The Brazilian environmental legal framework is complex. The set of normative rules is linked to federalism. The Constitution has prescriptions for environmental standards and prescriptions about federative competences. It is necessary to always connect the federal, regional, and local norms. Moreover, it is necessary to identify when the Act covers natural resources as a sectorial legal field and when the Act discusses the protection of an environmental good. Although judicial conflicts are not rare, the system works well in terms of legal configuration.

In terms of environmental responsibility, the system has a strong structure. Here, the problem is not the law, nor the Act. Sometimes, companies or activities engage in enterprises outside the law. An outdated way of thinking persists that treats environmental issues as enemies of economic ones. The effectiveness of this legal system depends on environmentalist culture, and on a combination of legal, social, and economic matters.

The focus of subject must be expanded. At the same time, it is necessary to understand that Brazil is a heterogeneous country. Yes, Portuguese is the sole language of the country, but there is heterogeneity in another sense. There are parts of the country as rich as Western European capitals. But in other parts of the country there is poverty equal to the less developed countries of the world. Moreover, there are so many different cultures and populations inside the country, distributed in numerous states and counties. And, as was explained above, each of them can establish its own environmental regulation.

The effectiveness of environmental protection depends on economic programs in order to promote sustainable development. Deforestation, environmental pollution, and flora and fauna damage sometimes happen when the local people can't see alternatives in face of resource shortages. To understand Brazilian environmental problems, it is necessary to understand both the legal framework and the economic and heterogeneous social problems.

Conflicts of Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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