

AN INTRODUCTION TO BRAZILIAN ENVIRONMENTAL LAW

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Brazil plays a leading role in environmental issues. From Rio de Janeiro in 1992 to Bali in 2008, no major international discussion on the environment has occurred without Brazilian participation. Two decades ago, Brazil was on the defensive on this critical front. Since then, a number of structural changes—linked to redemocratization and the growing involvement of civil society in the policy debate—have led us to address environmental challenges in a proactive and transparent way, both domestically and abroad.

In the international arena, the fact that Brazil has actively helped to negotiate and adhered to all multilateral instruments designed to ensure sustainable development speaks volumes about my country's commitment to the responsible use of the environment. At home, a story we are proud of is that of the development and consolidation of a modern environmental legislation.

The initiative taken by the *George Washington International Law Review* to promote a focused exercise on the new directions in Latin American environmental law is a timely one. In the case of Brazil, there is much to be said. This brief essay, based on material put together by Brazilian legal experts, describes the building process and the general framework of Brazilian domestic legislation in this central area.

BACKGROUND

Three stages can be identified in the development of Brazilian attitudes to environmental issues from a legal perspective: a stage of unruly exploitation, a fragmentary stage, and a holistic stage.

The first stage, the stage of unruly exploitation, which lasted from the so-called discovery of Brazil in 1500 until the early 1950s, was characterized by few environmental concerns. There were only a few unrelated laws, rules, and regulations, and their primary goals were either to safeguard human health or to ensure the survival of valuable natural resources, such as the *pau-brasil* (brazil-

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wood). The Brazilian Forest Code and Waters Code date from that period, as does the law that establishes measures providing economic assistance to Brazilian natural rubber producers.

The second stage, the fragmentary stage, demonstrated lawmakers' concern with categories of natural resources, but not with the environment as a whole. In ethical terms, imposing controls on exploration and extraction activities was utilitarian in nature—legal protection was only granted when economic interest was at stake.

The third stage, the holistic stage, began with the National Environmental Policy Law,¹ which was the first Brazilian statute to include a legal definition of the environment, as follows: "the set of physical, chemical and/or biological conditions, laws, influences and interactions that facilitates, shelters and governs life in all of its forms."² That model was characterized by an attempt to protect the environment as a whole. The environment was no longer dealt with in terms of a waters law, a forest law, or a biodiversity law, but rather as a field of law that, while not disregarding the specificities of each topic, seeks to interconnect them as legal mechanisms providing for preservation and restoration. This new field of law also seeks to create a system for collecting information, monitoring adherence, and encouraging participation.

One can state that, during the third stage, environmental law increasingly became a "crosscutting" topic because it incorporated elements from almost every field of law into its framework. With the approval of the Environmental Crimes Law,³ the legal regulation of the environment became all encompassing, given that it was to be enforced through administrative, civil, and criminal law. In institutional terms, the National Environmental Policy Law created the National System for the Environment and the National Council on the Environment. In 1990, the Environmental Secretariat of the Office of the Brazilian President was created, which in 1992 was transformed into the Ministry of the Environment.

THE ENVIRONMENT AND THE BRAZILIAN CONSTITUTION

The stages mentioned are reflected in how the different Brazilian Constitutions have dealt with the environment over the years.

1. Lei No. 6.938, de 31 de agosto de 1981, D.O.U. de 02.09.1981. (Braz.), *available at* <http://www.planalto.gov.br/ccivil/Leis/L6938org.htm>.

2. *Id.* art. 3, § I.

3. Lei No. 9.605, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998. (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/LEIS/L9605.htm.

Brazil's 1988 Constitution was the first in which the environment was included as a separate concept, being specifically referred to as "the environment."⁴ Under prior constitutions, the legal basis for laws related to the environment was found in constitutional provisions regarding the protection of health and regulations governing production and consumption. A constitutional amendment dating from 1969 used the term "ecological," but only with regard to the proper use of land for the purpose of receiving government financial incentives.

Perhaps the most important article of our Constitution regarding the environment is the main paragraph of Article 225, which states:

All have the right to an environment that is ecologically in equilibrium and that is available for shared use by the people, essential to a healthy quality of life, which imposes on both the government and society as a whole the duty of protecting it and preserving it for both the present and future generations.⁵

Aside from Article 225, there are other constitutional provisions that deal with the environment. First, Article 23 establishes the concurrent jurisdiction of the federal government, the states, the federal district, and local governments to:

- III Protect documents, works and other assets of historical, artistic and/or cultural value, monuments, noteworthy natural landscapes and/or archeological sites;
- VI Protect the environment and combat pollution in any of its forms;
- VII Preserve the forests, fauna and flora;
- XI Register, monitor and oversee the granting of rights (i.e. concessions) to conduct research, exploration or extraction of water or mineral resources in their territories . . .⁶

Article 24, in turn, provides the legal authority to legislate on the environment, establishing the concurrent jurisdiction of the federal government, the states, the federal district, and local governments.⁷ It is worth emphasizing that, although Article 23 refers to law enforcement, Article 24 establishes the power to adopt laws, decrees, resolutions, ministerial directives, etc.⁸ By establishing concurrent jurisdiction, the Constitution establishes that the preparation of broad, overarching statutes is a federal-government

4. Constituição Federal [C.F.] [Constitution] (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constitui%C3%A7ao.htm.

5. *Id.* art. 225.

6. *Id.* art. 23.

7. *Id.* art. 24.

8. *See id.* art. 24, ¶ 3.

responsibility, while it falls upon the states and the federal district to create specific statutes of particular interest to the state that creates it.⁹ If the federal government does not establish overarching statutes, the states and the federal district enjoy full constitutional authority to legislate until a federal law on the topic appears.¹⁰

These constitutional provisions set the limits within which lawmakers can set specific rules for each one of the various areas encompassed by environmental law, as indicated below.

SPECIFIC TOPICS

A. *Forests and Protected Areas*

According to Article 1 of the Brazilian Forest Code, “the existing forests in [Brazilian] national territory and other types of vegetation, which are recognized as useful for the lands they cover, are assets in which all inhabitants of the country have a common interest.”¹¹ In the same Article, the Forest Code defines the term “permanent conservation area” and “legal reserve”:

- II A permanent conservation area: an area protected under the provisions of Articles 2 and 3 of this Law, whether or not covered by native vegetation, which has the environmental role of preserving water resources, landscape, geological stability, biodiversity, the gene flow of fauna and flora, protecting the soil and ensuring the well-being of human populations;
- III Legal Reserve: an area located inside a rural property or landholding, except those for permanent conservation, which are necessary for the sustainable use of natural resources, conservation and recovery of ecological processes, conservation of biodiversity and shelter and protection for native fauna and flora . . .¹²

This law also lists the conservation areas, which may or may not be covered by native vegetation. According to Leme Machado,¹³ the vegetation, whether native or otherwise, and the land itself are subject to conservation not only for their own sake, but because they serve the purpose of protecting water resources, the soil,

9. *See id.* art. 24, ¶¶ 1-2.

10. *Id.* art. 24, ¶¶ 3-4.

11. Lei No. 4.771, art. 1, de 15 de setembro de 1965, D.O.U. de 19.09.1965. (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L4771.htm [hereinafter Brazilian Forest Code].

12. The two items were included in the Brazilian Forest Code in 2006. *See* Medida Provisória No. 2.166-67, de 24 de agosto de 2001, D.O.U. de 25.08.2001. (Braz.).

13. PAULO AFFONSO LEME MACHADO, DIREITO AMBIENTAL BRASILEIRO 698 (12th ed. 2004).

biodiversity (which encompasses the gene flow of fauna and flora), the landscape, and human well-being. Permanent conservation areas should not be seen as mere benefits provided for by the law, but rather a broader concept that demonstrates a commitment to social and environmental sustainability.

With regard to forests, the approval of the Public Forests Management Law deserves to be highlighted.¹⁴ Its main purpose is to protect and preserve forests that belong to the federal, state, or local governments, with environmental, economic, and social benefits. The three management models that are provided for include the following: creating Conservation Units (e.g., National Forests); allocating forest areas for community use free of charge (e.g., forest settlements); and signing forest-concession contracts.

This law also created the Brazilian Forest Service, which was approved within the regulatory framework of the Ministry of the Environment by Decree Number 5,776 of 2006.¹⁵ This is an autonomous agency, in both administrative and financial terms, which regulates the management of public forests in Brazil and runs the National Forest Development Fund, created as well by the Public Forest Management Law.

B. *Water Resources*

In 1997, Brazil enacted Law Number 9,433, establishing the National Water Resources Policy and creating the National Water Resources Management System.¹⁶ Subsequently, this system was expanded with the creation of the National Water Agency, through Law Number 9,984, of July 17, 2000.¹⁷

The National Water Resources Policy enshrines principles for water use and management that are internationally accepted, the adoption of which reflected significant conceptual changes with regard to practices in Brazil. The design of the National Water Resources Policy was guided by the principle of using hydrographic basins (i.e., watersheds) as planning units. Nine large watersheds were identified, each of which is the subject of a specific “national

14. Lei No. 11.284, de 3 de março de 2006, D.O.U. de 03.03.2006. (Braz.).

15. Decreto No. 5.776, de 12 de maio de 2006, D.O.U. de 15.05.2006. (Braz.).

16. Política Nacional de Recursos Hídricos, Lei No. 9.433, de 8 de janeiro de 1997, D.O.U. de 09.01.1997. (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/LEIS/19433.htm.

17. Lei No. 9.984, de 17 de julho de 2000, D.O.U. de 18.07.2000. (Braz.).

plan,” with national and regional significance.¹⁸ In addition, the plan provides for the implementation of five “special projects,” three of which are of interest from a foreign policy perspective: “recognizing the value of water resources in the environmental context of the Amazon,” “preserving water resources in the Pantanal ecosystem,” and “joint use of water resources in trans-boundary basins” aimed at enhancing the integration process underway within the framework of Mercosul.¹⁹ It is worth noting that the principle of basing planning on watersheds facilitates an integrated approach to water resources.

Equitable Access to Water and Sanitation

Brazil has an advanced legislative framework regarding equitable access to water and sanitation. Under Item IX of Article 23 of the 1988 Constitution, federal, state, and local governments can and should promote programs to improve basic sanitation services.²⁰ Article 23 of the Constitution grants the federal government the option of cooperating with state governments that are responsible for these services.²¹ This may involve financial cooperation, covering budgetary and other related funding issues. Thus, the federal government may make access to federal funds, appropriated for sanitation services, to state and local governments conditional upon compliance with criteria that involve regulation of such services, inducing state governments to act in environmentally responsible ways.

Law Number 11,455 of January 5, 2007, one of the most recent statutes on the subject, establishes the national guidelines for basic sanitation, which is understood as the entire range of services, infrastructure, and operational facilities for supplying clean water, sanitary sewage, urban-cleaning services, solid-waste management, drainage, and management of urban rainwater and storm sewers, joint-management arrangements (voluntary associations between state governments), universal access (progressively expanding access to basic sanitation to cover all occupied residences), social control (a set of mechanisms and procedures to ensure that Brazilian citizens have access to information, technical representation,

18. Política Nacional de Recursos Hídricos, Lei No. 9.433, de 8 de janeiro de 1997, D.O.U. de 09.01.1997. (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/LEIS/19433.htm.

19. *Id.*

20. Constituição Federal [C.F.] [Constitution] art. 23 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Constituicao/Constitui%C3%A7ao.htm.

21. *Id.*

and means of participation in policymaking, planning, and assessment of basic public-sanitation services), regional provision of services, and serving areas with small populations.²²

This law establishes as a principle the goal of achieving universal access to basic-sanitation services. As a result, it provides access to these services according to local needs, while maximizing their effectiveness in an integrated way.

It also establishes that water supply, sanitary sewage, urban cleaning, and solid-waste management must be carried out in ways that are consistent with public health and the protection of the environment. It establishes as an essential requirement the availability in all urban areas of rainwater storm sewers and drainage services that are adequate for public health, personal safety, and protecting public and private property. The law also requires that state and local governments adopt methods, techniques, and procedures to meet these requirements that take into account local and regional conditions.

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This brief presentation should be seen as an introduction to Brazilian environmental law to legal experts and others interested in approaching the subject through the good offices of the *George Washington International Law Review*.

In a spirit of dialogue, I look forward to participating in a collective effort toward furthering the understanding of this critical issue's various dimensions and enriching a debate, fostered by the works by *GWILR*-selected contributors on environmental law in Brazil and other Latin American countries, that will only acquire greater importance with time.

22. Lei No. 11.455, de 8 de março de 2007, D.O.U. de 09.03.2007. (Braz.), available at https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/111455.htm.