

THE ESCAZÚ AGREEMENT AND BRAZILIAN ENVIRONMENTAL LAW: CONSIDERATIONS ON ACCESS TO JUSTICE AND INFORMATION IN THE PROTECTION OF THE ENVIRONMENT

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Abstract

This paper seeks to discuss the possible contributions that the ratification of the Escazú Agreement could bring to Brazilian environmental law, through the expansion of popular participation in the debate involving the collective environmental jurisdiction, and a greater dissemination of access to information that directly touches factors that directly affect the natural and anthropic environment. The main intention of the work is to show, based on the problems that Brazil currently faces in the environmental field, that the ratification of the Escazú Agreement can compel the country, under penalty of international accountability, to take affirmative action aimed at protecting the lives of vulnerable people, such as environmental activists and traditional peoples, who are under constant threat of being killed. And, at the same time, create mechanisms that do not allow deforestation, agri-business and mining to threaten the Brazilian human, fauna and flora lives. The method used is the hypothetical-deductive, through theoretical-bibliographic and documentary research to offer contributions on the construction of a new Brazilian ecological paradigm. It is an inclusive one that values a debate that actively involves the subjects who will be affected by decisions in the environmental sphere. The results obtained with the research indicate that access to justice in Brazilian environmental law is still very restricted, and that the implementation of the Escazú Agreement has the potential to help reverse this situation.

I Introduction

OVER THE previous few decades, Brazilian environmental law has been systematically dismantled. The Brazilian State's alliance with the radical right's neoliberal ambitions

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poses a huge threat not just to the environment, but also to traditional peoples and all those who struggle for the environment. The indiscriminate deforestation in the Legal Amazon and Cerrado's biome for agricultural and livestock purposes, combined with the widespread use of pesticides in plantations across the country, as well as the disregard for environmental laws in the mining industry, represent high-complexity threats that are aided by the Brazilian Government's passivity.

In opposition to the environmental dismantling fed by the Brazilian State, the elaboration of the Escazú Agreement is being drafted which innovates by seeking to ensure access to public information, popular participation, and access to environmental justice within Latin America. If Brazil ratifies the agreement, it may be able to help modify the country's current environmental policy, which is on the verge of collapsing in some parts, by forcing the government to adhere to some of the precepts already present in its legal system but not fully implemented. The primary objective of this paper is to show that the ratification of the Escazú Agreement has the potential to compel the Brazilian State, to take affirmative action aimed at protecting the lives of vulnerable people, such as environmental activists and traditional people who are under constant threat of being killed. At the same time, the ratification can also be instrumental in creating mechanisms that do not allow deforestation, agribusiness, and mining to threaten the Brazilian human, fauna and flora lives.

The work is divided into two parts. The first part seeks to demonstrate the innovations brought by the Escazú Agreement for the Latin American and Caribbean environmental field, together with the analysis of some of the main provisions of this treaty. The second part of the paper analyzes the geographical division of the Brazilian State, with the purpose of explaining that the country has a gigantic range of biomes and explores a vast number of economic activities that are related to the environment. It seeks to demonstrate that the Escazú Agreement can substantially help in the aspect of popular participation in the decision-making process to ensure greater implementation of environmental protection.

The hypothetical-deductive method is used seeking to highlight the role that the Escazú Agreement could have in helping the Brazilian State to promote the fundamental right to the ecologically balanced environment.

The methodology is based on documentary and theoretical-bibliographic research, through the reading and critical analysis of provisions of the Escazú Agreement, Brazilian laws, national and foreign scientific articles, and books, which are broadly concerned with the protection of the environment. The purpose of the research is to demonstrate that a country of continental proportions such as Brazil needs an environmental protection capable of addressing all kinds of threats faced by the Brazilian State in the establishment of an ecologically balanced environment.

II The innovations brought by the escazú agreement

The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, approved in Escazú, Costa Rica, on March 4, 2018 and signed on September 27 of the same year, consists of an international mechanism which is aimed at ensuring greater popular participation in environmental matters within Latin America and the Caribbean.

The strengthening of the protection of the environment at the international level, tied to the expansion of the protection of human rights related to it should be crucial in the new millennium. Along the lines of the Universal Declaration of Human Rights, 1948 (UDHR) the environment is a fundamental, human, and intergenerational right. As such, all states have responsibility to respect and protect the environment.¹

Following the same environmental protection tonic brought by the UDHR, the Aarhus Convention was adopted on June 25, 1998, in the Danish city of Aarhus, during the 4th Ministerial Conference “Environment for Europe”. The convention, which guarantees access to information, public participation in decision-making and access to environmental justice of the United Nations Economic Commission for Europe, came into force on October 30, 2001. It was ratified by 16 member countries of the United Nations Economic Commission for Europe (UNECE) and the European Union.²

In Latin America, the Declaration on the Application of Principle 10 of the Rio Declaration, drafted by Latin American and Caribbean countries at the United Nations Conference on Sustainable Development in Rio de Janeiro in 2012, reaffirmed the commitment to the rights to information, participation, and justice in environmental issues, as well as the need to make commitments for their full implementation. Drawing inspiration from the Aarhus Convention, the Declaration on the Application of Principle 10 of the Rio Declaration and other international environmental protection mechanisms, the Escazú Agreement,³ proposes the establishment of an environmental democracy in the Latin American region, to alleviate inequalities and ensure the right to a healthy and balanced environment, whose ownership belongs to all persons, indistinctly, as well as the right to sustainable development. Inequality, addressed here,

1 United Nations/ Universal Declaration of Human Rights. 1948, *available at*: <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=por>. (last visited on Jan. 30, 2022).

2 United Nations Economic Commission for Europe. Convention on Access to Information, Public Participation in Decisions-Making and Access to Justice in Environmental Matters, Aarhus, June 25, 1998, *available at*: <http://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>. (last visited on Jan. 20, 2022).

3 Economic Commission for Latin America and the Caribbean. Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean. 2018, *available at*: http://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf. (last visited on Jan. 30, 2022).

refers to people, who are also right holders, who are in a situation of vulnerability, and lack means of access to justice. The Escazú Agreement is therefore also intended, in addition to greater transparency, for the expansion of popular participation in the protection of the environment.

The importance of the right to information in the environmental sphere, as a fundamental human right, stems from the right to an ecologically balanced environment. Based on the Escazú Agreement (article 2(c)), environmental information is all “written, visual, audio, and electronic, or recorded in any other format, regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as to environmental protection and management”.⁴

Access to information, in the context of the Brazilian legal system, was initially included in the Constitution of the Brazilian Republic of 1988 (article 5, XXXIII⁵) and, later, in law no. 12,527/11 (law on access to information). It is noteworthy that the legislators predicted, at a previous time, specifically in environmental matters, “the dissemination of environmental data and information”, as well as the “formation of a public awareness about the need to preserve environmental quality and ecological balance” in law no. 6,938/81 - National Environment Policy⁶ (free translation). The aforementioned law also provided for the National System of Information on the environment (article 9, VII), as a way to expand access to environmental information in Brazil. Érica Bezerra Queiroz Ribeiro, and Bruno Amaral Machado⁷ mention about active and passive environmental transparency, brought by the Brazilian lawmaker at a time before law no. 12,527/11, both in law no. 6,938/81, and in law no. 7,804/89, providing for the

4 Economic Commission for Latin America and the Caribbean. Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean. 2018, *available at*: http://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf, (last visited on Jan. 30, 2022).

5 Art. 5, XXXIII - all persons are entitled to receive from public agencies information of their particular interest, or of collective or general interest, which will be provided within the period of the law, under penalty of liability, subject to those whose secrecy is essential to the security of society and the State (Free translation). BRAZIL. Constitution of the Federative Republic of Brazil of 1988. Enacted on Oct. 5, 1988. Published in the Official Gazette of the Union. Brasília, 05 October 1988, *available at*: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. (last visited on Feb. 10, 2022).

6 Brazil, Law n° 6.938/81, 31 August 1981. Provides for the National Environmental Policy, its purposes and mechanisms for formulation and application, and other measures. Published in the Official Gazette of the Union. *Available at*: http://www.planalto.gov.br/ccivil_03/leis/l6938.htm. Access on: 29 Mar. 2021.

7 Riberio, Érica Bezerra Queiroz; Machado, Bruno Amaral, “The Escazú Agreement and access to environmental information in Brazil”, *available at*: http://core.ac.uk/display/211947989?utm_source=pdf&utm_medium=banner&utm_campaign=pdf-decoration-v1. (last visited on Jan. 20, 2022).

obligation of the production, by the government, of non-existent information, and in law no. 10,650/03, which deals with public access to data and information existing in the organs and entities that are part of the National Environment System.

Although the access to environmental information in Brazil is expressed in law, it is emphasized that, in practice, the theory does not work the way it was elaborated. The citizen, even if in possession of environmental information, does not have active legitimacy to exercise his right of access to justice in the defense of the environment. Given this Brazilian context, the need for an international mechanism that requires the country to comply with the precepts already provided for in its legal system becomes unequivocal.

The Escazú Agreement, if ratified by the Brazilian State, will be able to compel the country, under penalty of international accountability, to review the way in which environmental protection is carried out in the current system.

Along the lines of article 1, the agreement aims to implement fully and effectively (not only formal, as occurs in Brazil) the rights of access to environmental information, to public participation in environmental decision-making processes, and access to justice in environmental issues.⁸ The development and strengthening of cooperation, to protect the right of each person, as well as of present and future generations, life in a healthy environment and sustainable development in the countries of Latin America and the Caribbean, is another point of concern addressed by the Escazú Agreement.

Articles 2 and 3, respectively, contain the definitions of access rights, competent authority, environmental information, persons or groups in vulnerable situations, as well as the principles of: a) equality and non-discrimination; (b) transparency and accountability; c) non-regression and progressive realization; d) good faith; (e) preventive action; f) precautionary action, g) intergenerational equity, h) maximum disclosure; i) the permanent sovereignty of States over their natural resources; (j) sovereign equality of states; k) *pro persona*.⁹

The general provisions of the agreement are dealt with in article 4. Article 5 specifically addresses access to environmental information, delivering data for accessibility and denial of access to environmental information, and on the conditions applicable to the provision of environmental information and independent review mechanisms.¹⁰

The principle of access to information, in the terms of the agreement, concerns maximum publicity, encompassing the rights: to request and receive information from the competent authorities, regardless of direct and specific interest, and to be informed

8 *Supra* note 4.

9 *Ibid.*

10 *Ibid.*

about the ownership of the information sought. The principle also addresses the right and means of challenge in the event of non-provision of the requested information.¹¹

The Escazú Agreement calls for access to information by vulnerable groups to be facilitated, with assistance procedures, especially for traditional peoples and ethnic groups. In the event of denial, as a result of a Legal Regime of Exception (*e.g.*, secrecy), the act must be substantiated by the reasons and legal provisions justifying the decision. In general, article 5 of the agreement provides in detail the conditions applicable to the provision of environmental information, based, mainly, on the principle of advertising, so that all data are widely disseminated, to ensure a healthy and balanced environment for present and future generations.¹²

Article 6 of the Escazú Agreement provides for the generation and dissemination of environmental information by states, through their competent authorities, also based on the principle of disclosure. It is emphasized that exposure should occur in a “systematic, proactive, timely, regular, accessible and comprehensible manner”, and be periodically updated to encourage the disaggregation and decentralization of environmental information at the sub-national and local levels”. The agreement provides that each state is responsible for organizing its environmental information systems, including the immediate dissemination of information in the event of an imminent threat to public health or the environment, through early warning systems that enable the reach of as many people as possible, including in more than one language and alternative formats.¹³ The provision in question imposes on states the obligation to issue, periodically, a national report on the environment, which must be drafted clearly, enabling the understanding of all. It is also tasked with the responsibility to carry out environmental performance assessments, with criteria established in national or international agreements, for the purpose of evaluating environmental policies. In the context of the consumption process, consumers and users are guaranteed the provision of information on the “environmental qualities of goods and services and their effects on health, favouring sustainable production and consumption patterns”. Finally, it requires the encouragement of “public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance”.¹⁴

Public participation in environmental decision-making processes, along the lines of article 7 of the Escazú Agreement, must be open and inclusive, based on internal and international normative frameworks. This essentially means that, anything that can

11 *Ibid.*

12 *Ibid.*

13 *Supra* note 4 at 20.

14 *Ibid.*

generate impact on the environment and somehow ricochet in the human being, should be the object of active popular participation. It is noteworthy that disclosure and transparency in environmental information are fundamental to ensure popular participation in decisions and other issues that concern nature, in addition to the other mechanisms that enable this access, as will be addressed in the next section. For effective popular participation, there must be an established procedure that allows, above all, the opportunity to submit observations, which should be considered by the authority when making any decision or opinion. Regarding the disclosure of the decisions taken, as well as their rationale and justification, the precepts regarding access to information are valid. As regards environmental negotiations, the agreement obligates states to promote public participation in “international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum”. The agreement also requires states to incentivise the establishment of spaces for consultation on environmental issues, dialogue, and interaction of different spectrums. Regarding the participation of vulnerable groups, the agreement emphasizes the need for each state “in order to engage them in an active, timely and effective manner in participation mechanisms”. An important provision of the agreement is to ensure the participation of the public which is affected by projects and activities with significant impact. Finally, regarding public participation in environmental matters, the agreement regulates in article 7, item 17, that the information must be made available free of charge.¹⁵

15 *Supra* note 4, art 7, item 17 reads: With respect to the environmental decision-making processes referred to in paragraph 2 of the present article, as a minimum, the following information shall be made public:

- (a) a description of the area of influence and physical and technical characteristics of the proposed project or activity;
- (b) a description of the main environmental impacts of the project or activity and, as appropriate, the cumulative environmental impact;
- (c) a description of the measures foreseen with respect to those impacts;
- (d) a summary of (a), (b) and (c) of the present paragraph in comprehensible, non-technical language;
- (e) the public reports and opinions of the involved entities addressed to the public authority related to the project or activity under consideration;
- (f) a description of the available technologies to be used and alternative locations for executing the project or activity subject to assessment, when the information is available; and Regional Agreement on Access to Information... 27
- (g) actions taken to monitor the implementation and results of environmental impact assessment measures. The aforementioned information shall be made available free of charge to the public in accordance with paragraph 17 of article 5 of the present Agreement.

available at: http://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf.
Access on: 02. Apr. 2021. at 26.

Access to justice in environmental matters, based on article 8 of the Escazú Agreement, requires that “each Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process”. Notwithstanding the above-mentioned obligation, the agreement establishes some parameters to guarantee its effectiveness, in access to both judicial and extrajudicial bodies, including ordinary and appeal forums, as well as in relation to the merits and procedures. To this end, each state must, in addition to providing specific environmental bodies and procedures, must also expand the active legitimation regarding the protection of the environment, develop measures to cease and compensate environmental harm, facilitate the production of evidence, and strengthen mechanisms for the enforcement of judicial decisions, and environmental damage remediation. In order to achieve this end the agreement provides for the debureaucratization of existing means of obtaining information; through the disclosure of administrative and judicial decisions. It also provides for translation into official languages, when necessary. The agreement stresses again, in the article 8, the importance of ensuring access to justice for vulnerable groups, guaranteeing them free technical and legal support and assistance. Finally, it obligates states to promote the solution of environmental conflicts through alternative means such as mediation and conciliation.¹⁶

The Escazú Agreement, in addition to the modernization brought in relation to popular participation, access to information and environmental justice, innovates brilliantly regarding human rights defenders in environmental issues, guaranteeing them protection in a safe environment, absent from threats and restrictions. The agreement obligates the States to take steps “to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement”.¹⁷

It is unequivocal the conclusion of how valuable the ratification of the Agreement by the Brazilian State would be to modify the current way of using the natural resources of Brazilian lands.¹⁸ The agreement, in addition to the real implementation of environmental policies, stands out for innovations related to popular participation and access to justice in environmental matters. This is an issue that urgently needs to be developed in Brazil. International human rights protection mechanisms can act as guarantors for the implementation of environmental policies, which, although provided in the Brazilian legal system, have been ineffective uptil now.

16 *Id.* at 29.

17 *Ibid.*

18 Resende, Flávia *et al.*, “The importance of ratification of the Escazú Agreement for the implementation of the Paris Agreement. 2020”, available at: http://www.ethos.org.br/wp-content/uploads/2020/08/Paris_Escazu_2020-Copia.pdf (last visited on Dec. 12, 2021).

It is important to mention at this juncture that, for the Escazú Agreement to enter into force, it was necessary at least 11 of the 24 signatory countries ratify it. Even without Brazil's ratification, in November 2020, Mexico became the 11th country to ratify the agreement, thus reaching the minimum requirement for it to enter into force. This essentially means that, very soon there will be a positive impact on Brazil, even if it still has not ratified the agreement.¹⁹

However, even though the agreement was ready to enter into force, 90 days after ratification by Mexico (in November 2020) and the corona virus pandemic erupted as a hindrance in the process of its implementation.

It is necessary to disinternalize from collective thought the fallacy that economic development and environmental protection are antagonists to each other.²⁰ Not least because if environmental degradation reaches an irreversible level, humanity will gradually say goodbye to the planet. If current habits do not change, this day is not far from reaching. Bringing the population to the participation of decisions concerning environmental law is the first step to modify the current thought, unsustainable, human.

III Geography of the Brazilian state

The Brazilian state is the most territorially extensive in Latin America. Brazil is geographically divided into five regions, *i.e.*, North, Northeast, Midwest, Southeast and South. Division is not only for a territorial issue, but also involves the aspect of biomes, nature, and other socioeconomic aspects.

The Northern Region is composed mostly of the Legal Amazon and has extremely low population density. Paradoxically, the largest region in territorial extension in Brazil is the least inhabited and one of the least developed in the aspect of the Human Development Index (HDI). The Northeast is the driest region and one of the poorest in the country. The North-eastern biome differs greatly from the other regions, moreover the aridity contributes a lot to the poverty of the population of that region. The Midwest is one of the richest regions of the country due to agriculture that moves billions of BRL (R\$) every year with the export of grains and cattle produced there. The Southeast is the richest and most industrialized region of the country, which concentrates the highest demographic density of the Brazilian State. Although not being the capital of Brazil, the State of São Paulo is where most of the distribution of

19 Gutierrez C., Ángela. "Thanks to Mexico, the Escazú Agreement will enter into force in 2021". *Revista Bioika*, available at: <http://revistabioika.org/pt/econoticias/post?id=98> (last visited on Dec. 12, 2021).

20 Resende, Flávia *et al.*, "The importance of ratification of the Escazú Agreement for the implementation of the Paris Agreement. 2020", available at: http://www.ethos.org.br/wp-content/uploads/2020/08/Paris_Escazu_2020-Copia.pdf. (last visited on Dec. 3, 2021).

wealth takes place in the country. Notwithstanding the fact that it is far from being one of the largest states in territorial extension, it is the richest and most populous.²¹ The South is a region that somewhat resembles the Southeast, despite having a climate not as tropical as the one found in the northernmost areas of the country.²² Despite not being the richest region in the country, it is the socioeconomically more homogeneous and the one with the lowest rates of social inequality.

After the introductory analyses surrounding the geographical and socioeconomic division of the Brazilian State, it becomes easier to ponder about better environmental protection to ensure greater effectiveness of Brazilian jurisdiction in defense of the environment and native biomes of the country.

The low population density of the Northern Region of Brazil, when compared to the Southeast, justifies the smaller number of members of the Brazilian Judiciary, in the areas closest to the Amazon Forest. The fact that the crime rate is higher, in absolute numbers, in large centers, means that a larger number of ostentatious policing is needed in the demographically denser areas of the country. The problem is that some parts of the country are sparsely populated, creating a false impression that it does not require a lot of supervision. This essentially ends up being an invitation for those who profit from criminal exploitation of the environment. Environmental damage, unlike organized crimes, such as drug trafficking, does not necessarily depend on ordered actions, and can be committed by only one person. The act of a single individual has the potential for devastation capable of affecting tens, hundreds, and thousands of others, so that the situation of environmental protection lacks a better analysis by the Brazilian judiciary.

The Northern Region of Brazil still faces great challenges in relation to the protection not only of the environment, but of the lives of those who fight for the defense of nature also. Environmentalist Chico Mendes, who died in 1988, is one of the main persons fighting for environmental protection who had their lives lacerated in Brazil. The reports of the NGO Global Witness indicate that Brazil is the third in the ranking of those who kill most environmentalists and defenders of Human Rights, with the death of at least 24 activists being recorded, only in the year 2019.²³ More than 30

21 Casali, Giovana F. Rossi; Silva Orlando Monteiro da *et. al.*, “Regional innovation system: study of Brazilian regions” 14(3) *Rev. Econ. Contemp.* Rio de Janeiro, 515-550 (Dec. 2010), *available at*: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1415-98482010000300004&lng=en&nrm=iso.(last visited on Dec. 20. 2021).

22 Coutinho, Leopoldo Magno. “The Biome Concept” 20(1) *Acta Bot. Bras.* São Paulo, 13-23 (Mar. 2006), *available at*: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-33062006000100002&lng=en&nrm=iso.(last visited on Dec. 20. 2021).

23 Global Witness, “Defending Tomorrow”. 2020, *available at*: <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/> (last visited on Dec. 12, 2021).

years have passed since Chico Mendes' death, and people fighting for an ecologically balanced environment, as advocated by article 225 of the Brazilian Constitution, continue having their lives dilapidated in the name of the incessant profit sponsored by neoliberal capitalism. This is even more so in light of the fact that the Ministry of the Environment and the Presidency of the Brazilian Republic watch with resounding passivity.

Not by chance, crime grows in the absence of state interference. The murders of the leaders of environmental movements are clear statements of the incompetence – or collusion – of those who occupy or occupied the most important positions within the federal, member states and municipal executive powers in the country in recent years. Despite the praiseworthy attitudes of environmental defenders, it should not be their task to fight alone for the protection of the environment. The main obligation to protect nature comes from the government, not from citizens. Individuals were only supposed to play the role of supervising and collaborating with the State. It is perceived in Brazil that environmental defenders, however, have been fighting alone and requesting, in vain, the help of the Brazilian State in the war against illegal deforestation and criminal exploitation of the environment.

The illegal dismantling of the Amazon Rainforest does not concern a singular economic activity. There is the figure of fires to turn the forest into pasture, for agricultural and livestock purposes. One of the main problems arising here is the fact that fires, when they are out of control, directly affect the life of fauna and flora.²⁴ Moreover, the felling of trees for the production of furniture, and charcoal cannot be neglected. . The Amazon Rainforest is undeniably an inexhaustible resource. However, at the same time, it requires greater protection from the authorities so that it does not reach an irreversible degree of deterioration. The same goes for rubber tappers and other traditional people who depend directly on the Forest for their survival and are having their lives taken either by homicides,²⁵ or by illegal mining, which contaminate rivers and directly affect the lives of indigenous peoples.²⁶

24 Copertino, Margareth *et al.*, “Deforestation, fire and climate are intimately connected in the Amazon” 71(4) *Science Cult* São Paulo 4-5(Oct. 2019), available at: http://cienciaecultura.bvs.br/scielo.php?script=sci_arttext&pid=S0009-67252019000400002&lng=en&nrm=iso (last visited on Dec. 12, 2021).

25 Almeida, Mauro W. Barbosa de, “Forest rights and environmentalism: rubber tappers and their struggles” 19 (55)*Rev.Bras. Cien. Soc.* São Paulo, 33-52 (June 2004), available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-69092004000200003&lng=en&nrm=iso (last visited on Dec. 12, 2021).

26 ABI-EÇAB, Pedro Colaneri “Main threats to the environment in indigenous lands”, 3 *Planeta Amazônia: Revista Internacional de Direito Ambiental e Políticas Públicas Macapá* 1-17 (2017), available at: <http://periodicos.unifap.br/index.php/planeta/article/view/551/EcabN3.pdf>. (last visited on Jan. 20, 2022).

Brazilian environmental problems are far from being summed up only to violations that occur in the Legal Amazon Region. Deforestation for agricultural and livestock purposes practiced by companies that are monetizing the exploitation of the Brazilian environment on the stock exchange is another aspect of concern and that has become increasingly common in virtually all regions of Brazil, especially the Midwest. The planting of grains, such as soybeans, for example, has largely modified the Cerrado's biome,²⁷ making it the second most threatened biome in Brazil, behind only the Atlantic forest. The situation of deforestation, which is already too serious, ends up getting even worse with the indiscriminate use of pesticides in the Midwest and Southeast Regions.

Brazil uses the most amount of pesticides in the world. It is appalling that 22 of the 50 most used pesticides in the country are banned in Europe. The risk that these products pose to the Brazilian population is undeniable. It has been scientifically proven that there exists a possibility of pollination by the air of pesticides, as well as their presence in the rain, and consequently in the flood that brings toxic water to rivers.²⁸ As pesticides are placed on plantations with the purpose of ensuring greater productivity in cultivation, nothing prevents food from being contaminated as well, making the population more likely to develop diseases such as cancer.²⁹

The contours involving pesticides end up not being restricted to Brazilian territory. Brazil is one of the countries that export food, of all genera, from soybeans and corn to the protein of poultry, cattle, and pigs. Because Brazil is a country that has a less valued currency than the dollar and the euro, some of the more developed countries prefer to import Brazilian products than produce products on their territory to avoid exposing their population to pesticides. It turns out, however, that if the products from Brazil are contaminated by pesticides, the population of the most developed country will also suffer the effects of such damage, configuring what Ulrich Beck³⁰ calls the boomerang effect.

27 Queiroz, Fábio Albergaria de, "Impacts of export soybeans on savannah (Cerrado) biodiversity" 21(2) *Soc. nat.* (Online), Uberlândia, 193-209 (Aug. 2009), available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1982-45132009000200013&lng=en&nrm=iso. (last visited on Dec. 12, 2021).

28 Bortoncello, Luís Gustavo Patuzzi; BRASIL, "Deilton Ribeiro. Agro is not pop, it's not tech, it's not everything: the Bill 6.299/2002 on poison and environmental setback" XI *Revista Catalana de Dret Ambiental* 1-25(2020).

29 Ferreira, Rafael Clementino Veríssimo; BRASIL, Deilton Ribeiro, "Environmental Harm: Negative Externality Arising from the Relationship Between the Environment and Risk Society" 10(30) *Revista Humus* 87-101(2020).

30 BECK, Ulrich, *Risk Society: Towards Another Modernity* 384 (São Paulo: Editora 34, 2011).

The transfer of risk industries to Brazil in the second half of the 20th Century is another aspect of environmental damage that cannot be overlooked. The unhealthy enterprises that were established in the country throughout the 20th Century helped to represent another dark chapter within the regime of exception that the dictatorship period represented for the Brazilian State. Basically, it was perceived during this period that people in extreme poverty were forced to work in enterprises that, in addition to harming their health, also degraded the environment.³¹ The same that happened with pesticides occurred with the risk industries, both were sold to Brazilians as necessary evils to fight hunger and misery, in a suicidal choice that simply modifies the way of facing death.

Tailings dams have been another major problem for the Brazilian State to solve.³² The dam rupture in the city of Mariana, located just over 100 kilometers from the city of Belo Horizonte, capital of the State of Minas Gerais, the third richest in the country, located in the Southeast region, caused the avalanche of toxic mud and fatally victimized 19 people, leaving 1,200 families displaced, in addition to directly affecting 35 municipalities and sweeping two villages, Bento Rodrigues and Paracatu, off the map. The figures indicate that 60 million cubic meters of toxic mud ended up falling into the Doce River, and the watercourse led the mudslide to the Gualaxo do Norte and Carmo Rivers, directly affecting a stretch of 660 kilometers.³³ Four years later, another tragedy occurred, this time in the city of Brumadinho, also about 100 kilometers from Belo Horizonte. The tragedy in Brumadinho resulted in 270 deaths, and there are still 11 people missing – in figures updated until March 2021.³⁴ As for the toxic mud, it is believed that it extends for about 300km along the Paraopeba River.³⁵

31 *Ibid.*

32 The tailings can be understood as remains, that is, the leftover resulting from the process of extraction and processing of some metal, in the case of Brumadinho and Mariana was iron ore. When the desired metals are separate, the other unwanted components need to be discarded. As it would be an environmental crime to dispose of these toxic components in rivers, lakes, or in the environment itself, the tailings dam is created to ensure that nature is not harmed. The problem is that if a dam disrupts, the mud avalanche has the potential to cause damaging events that can culminate in a real ecocide. Werneck, Márcio de Souza. What is a tailings dam and what is it for? 2019. Available at: <http://proec.ufabc.edu.br/ufabcdivulgaciencia/2019/02/01/o-que-e-e-para-que-serve-uma-barragem-de-rejeitos-v-2-n-1-p-5-2018/> (last visited on Dec. 12, 2021).

33 Laschefski, Klemens Augustinus, “Disruption of dams in Mariana and Brumadinho (MG)”. 2(1) *Revista Ambientas* 98-143 (2020), available at: <http://e-revista.unioeste.br/index.php/ambientes/article/view/23299> (last visited on Dec. 12, 2021).

34 Santos, Júlio César, “Firefighters suspend searches for victims of Brumadinho because of the purple wave in Minas Gerais” 2021, available at: <http://g1.globo.com/mg/minas-gerais/noticia/2021/03/16/bombeiros-suspendem-buscas-por-vitimas-de-brumadinho-por-causa-da-onda-roxa-em-minas-gerais.ghtml> (last visited on Dec. 12, 2021).

35 *Supra* note 33.

Environmental protection needs to be done responsibly, because it is an intergenerational right that directly affects the existence of subjects of all ages and social classes. The fact that environmental damage is socialized brings light to the state's obligation to create mechanisms to protect individuals in a position of socio-environmental vulnerability.³⁶ The ratification of the Escazú Agreement may represent an important first step for Brazil to promote a rearrangement in the way that environmental damage is protected in its territory.

The contribution to Brazilian law that the ratification of the Escazú Agreement could bring

The understanding of how the Escazú Agreement has the potential to bring immeasurable contributions to Brazilian law depended on a better explanation of the geography of the country, which has completely different continental dimensions and biomes that require an individualized analysis for its better protection. Environmental protection in Brazil, as a rule, is due to the laws of the Brazilian collective procedural system. The Public Civil Action Law and the Popular Action Law stand out in the judicial protection of the environment. The main differences between these two legislations are in the access to justice and in its object. The Popular Action Act entered into force in 1965 and is intended to annul acts or omissions of the public administration that are harmful to public property. The Popular Action Law is destined for the citizens. In order to act as petitioner, the applicant merely has to demonstrate his legal status as a voter.³⁷ Another important diploma on environmental protection is the Public Civil Action Act, which came into force from 1985, and aims at civil accountability of those who commit environmental damage. Unlike popular action, public civil action does not allow the voter to act as a plaintiff. Based on the law 7,347 of 1985, are legitimized to act as plaintiff in the public civil action the public prosecutor's office, the public

36 *Supra* note 30 .

37 Presidency of the Republic Civil House Brazil, Law n° 4.717, June 29, 1965, Regulates Popular Action, Published in the Official Gazette of the Union, *available at*: http://www.planalto.gov.br/civil_03/leis/14717.htm (last visited on Dec. 12, 2021).

defender's office, associations,³⁸ nation, member states, the federal district and municipalities, semi-public corporations and public corporations.³⁹

The main laws of the Brazilian collective procedural system came into force in the second half of the 20th Century. This situation is explained by the transition from individual to collective protection systems. The overcoming of individualism that marked the liberal state, and the transition from the social state to the democratic rule of law marked the establishment of collective and diffuse rights within the scope of Brazilian Law. The classic doctrine of Mauro Cappelletti and Bryant Garth⁴⁰ helped bring several constructions about access to justice, especially in cases involving collective and diffuse rights. The Public Civil Action Law was the first law to drink from the fountain that encourages the participation of organs, such as associations, which were not linked to the public administration as legitimized to act as plaintiffs in the defense of collective and diffuse rights.

The theory seemed to be perfect. The law of popular action gave voters the active legitimacy to charge public entities for affirmative actions that would remedy their actions and omissions,⁴¹ while the public civil action law acted directly for the protection of diffuse and collective rights, and in the reparation arising from civil wrongdoings.⁴² The practice, however, was not as successful as the theory. After about 35 years that the Law of Public Civil Action has been in force, what is perceived is a virtually exclusive action of the public prosecutor's office as a plaintiff in this type of case under the Act.⁴³

38 In the case of associations, it is necessary for them to have been constituted for at least one year under civil law, in addition to having the purpose of defending the good protected by the Law of Public Civil Action, such as the protection of public and social property, the environment, the consumer, the economic order, free competition, the rights of racial, ethnic or religious groups or the artistic, aesthetic, historical, tourist and landscape heritage. Associations, however, are restricted to proposing public civil actions only on matters that are directly related to their purpose. Brazil Law n° 7.347, July 24, 1985. Disciplines the public civil action for liability for damages caused to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, touristic and landscape value (VETOED) and makes other provisions. Published in the Official Gazette of the Union, *available at*: http://www.planalto.gov.br/ccivil_03/leis/L7347Compilada.htm (last visited on Dec. 12, 2021).

39 Presidency of the Republic Civil House Brazil, Law n° 7.347, July, 24 1985. Disciplines the public civil action for liability for damages caused to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, touristic and landscape value (VETOED) and makes other provisions. Published in the Official Gazette of the Union, *available at*: http://www.planalto.gov.br/ccivil_03/leis/L7347Compilada.htm. (last visited on Dec. 12, 2021).

40 Cappelletti, Mauro; Garth, Bryant, *Access to Justice* Trans. Ellen Gracie Northfleet 168 (Porto Alegre, Fabris Ed, 1988).

41 *Supra* note 39.

42 *Ibid.*

43 Sarlet, Ingo Wolfgang; Fensterseifer, Tiago *Environmental Law Course* (Rio de Janeiro: Forense, 2020).

The Escazú Agreement has the potential to bring new life to the discussion that permeates access to justice and popular participation in the demands of the Brazilian collective procedural system.⁴⁴ The ratification of the agreement could make the Brazilian State rethink the forms of access to justice dispensed in collective actions and, consequently, seek ways to revisit the ideals of participatory democracy. This would provide for greater dialogue between stakeholders and a greater effectiveness of the Brazilian collective law.

The concept of access to justice, however, must be examined last. Before the examination, it is necessary to consider the access to environmental information which is the first step so that collective and diffuse stakeholders can know the extent of the facts with which they are dealing.⁴⁵ The hypothesis of a company presents the government with an environmental impact statement, that clearly shows the irreversible character of the violation to the environment that the company could cause. If the information is public, citizens would be able to seek judicial protection to prevent the installation of the enterprise. The central point is that preventing damage is more effective than fighting for repair.

Public participation in decisions that concern environmental law is the second step, and one of the most effective ways for the state to promote socio-environmental justice.⁴⁶ The individual who breathes the air and drinks the water must not only have the right to know the environmental impacts that the companies located there cause to their health, but also have the power to decide, together with their peers, on the issues that involve the interests of the population of that particular region.

Not allowing public participation in environmental demands is an immeasurable nonsense. It is unreasonable to think of the possibility that a collective or diffuse stakeholder take the demand to the assessment of the competent bodies, and thereafter no longer be able to participate in the judicial and extrajudicial acts that permeate the process.⁴⁷ Presupposing a court decision that the interested party disagrees, if this person cannot appeal, her access to justice is automatically constrained. The same goes for the conclusion of a deal that he could not participate in and disagrees with what was decided. Considering the agreement, it is a double destitute of access to justice, first because he was not authorized to express his opinion, and later by the fact that he is not considered a legitimate plaintiff to appeal to what was extrajudicially decided.

44 *Ibid.*

45 *Supra* note 4.

46 ECLAC. Economic Commission for Latin America and the Caribbean. Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean. 2018, *available at*: http://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf. (last visited on Feb. 10, 2022).

47 *Supra* note 4.

The concept of access to justice must be viewed from the broadest possible perspective. Judicial protection is the last resort that exists in the quest to have a satisfied right, and the trend observed in Brazilian law in past few years is to strengthen the figure of out-of-court agreements. As such it is of paramount importance that individuals and groups of individuals affected by an event harmful to the environment participate in the negotiations.⁴⁸

The agreement between the mining company responsible for the tailings dam that disrupted in Brumadinho, the Public Prosecutor's Office and the Public Defender's Office of the State of Minas Gerais is one of the examples that can be used to demonstrate the risk that the actual absence of those affected by environmental damage may represent for the effectiveness of judicial and extrajudicial decisions. The agreement, which was approved by the Justice of Minas Gerais in the amount of R\$ 37.69 billion, drew several criticisms from members of the Movement of Those Affected by Dams. According to the members of the movement, the amount necessary for satisfactory repair would be around R\$ 54 billion.⁴⁹ The agreement, however, was carried out without any affected person having an active voice to participate in the negotiations, which, as advocated by the Escazú Agreement, would be a violation of the fundamental right of access to justice.

The ratification of the Escazú Agreement, if accompanied by relevant developments in Brazilian domestic laws, has the potential to support environmental defenders and people affected by environmental disasters, to seek ways not to allow them to be ignored and even killed for defending the ecologically balanced environment.⁵⁰ At the same time, strengthening of popular participation in decision-making involving the environment, which is an intergenerational right of diffuse ownership needs to be protected to ensure not only the survival of the human species on the planet, but also the living of it.

Brazil cannot tolerate environmental defenders being marginalized, and that access to justice within the Brazilian system of defense of diffuse and collective interests being extremely limited, so as not to provide opportunities for all who have rights to bring their demands to the evaluation of the competent bodies. One cannot fail to keep in mind that fighting for the ecologically balanced environment is running against time. With every passing day, it becomes more difficult to guarantee future generations the chance to live in a healthy environment and not have their survival threatened by a cataclysm financed by unhealthy human behaviour.

48 *Supra* note 43.

49 February 4, 2021 "Protest leader criticizes agreement by Brumadinho: 'Vale wins'", *available at*: <http://noticias.uol.com.br/cotidiano/ultimas-noticias/2021/02/04/lider-de-protesto-critica-acordo-por-brumadinho-quem-ganha-e-a-vale.htm> (last visited on Jan. 22, 2022).

50 *Ibid.*

IV Concluding remarks

Violations of the environment and the fundamental rights of those who fight for the environmental cause in Brazil cannot go unpunished. It is not admissible for deforestation and burning to be covered by a neoliberal agenda that places agribusiness profit above the right to survival of animals and traditional peoples native to the Amazon Forest and the Brazilian Cerrado. It is also unacceptable for pesticides to be used in the country in an uncontrollable way, bringing risk to the existence of people living and working close to crops and, consequently, to those who eat these fruits, vegetables and grains, in Brazil and abroad. Environmental risks arising from economic mining activities should also be better analyzed by the Brazilian State. The two dam ruptures that occurred in Minas Gerais demonstrate that these types of accidents simply make it impossible for damage repair to be effective. The same goes for heavy metals used in mining, which greatly mistreat rivers. It is also unacceptable for people to be killed fighting for the protection of a common good of diffuse ownership and that it is the obligation of the state to protect.

The work sought to demonstrate that environmental dismantling takes place in Brazil mainly in four areas, which are: a) deforestation; b) the indiscriminate use of pesticides on plantations; c) the dumping of toxic products into rivers, lakes, seas, and air because of mining; and, finally, d) in the brutal murders of environmental activists. The Brazilian Government is undoubtedly responsible for the level at which environmental degradation has reached.

The Escazú Agreement calls for the protection of the environment to take hold in three key aspects: i) access to environmental information; ii) public participation in decision-making; and, finally, iii) access to environmental justice. The three elements have been shown to be a possible solution to the procedural problems of the legal system that prevents the individual from actively participating in the decision-making process in the environmental sphere and isolates the population from the Brazilian Judiciary.

The possibility of accountability of the Brazilian State for misconceptions and omissions in the way of dealing with the protection of the environment, has the potential to represent a turn in the way that environmental law is seen in the country. Government actions have shown that current environmental repair mechanisms have not been efficient or capable of bringing legal certainty to the population.

The Brazilian state should race against time to ensure that it is possible to avoid the damages that are to come and, thus, be able to reverse a situation that was already serious at the beginning of the third millennium and is about to assume the position of unsustainable. Actions must be taken now, otherwise the next generations will not have the opportunities that present ones have.

Fighting for the protection of the environment is, above all, an attitude of love. It is a way of demonstrating that this generation cares not only about themselves, but about the future ones and the way they will receive the world.