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An Overview of Environmental Justice in Brazil

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ABSTRACT

This article discusses environmental conflict resolution in Brazil in both the administrative and judicial spheres, with the aim of analyzing the configuration of the bodies in charge of such adjudication, the procedural instruments at their disposal, and the main types, grounds and effects of environmental claims. An overview of the Brazilian system is evaluated based on the criteria of judicial and extrajudicial due process in order to point out certain dysfunctions of environmental adjudication that compromise its effectiveness, such as the inadequacy of the procedural legislation and the poor quality of the resulting decisions; ways of strengthening the rights and guarantees provided to litigants by the administrative and judicial authorities are also proposed as a means of improving the performance of environmental adjudication.

KEYWORDS

Administrative justice, Environmental claims, Due process, Administrative authorities. Safeguards

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I. Introduction

The increasing importance[3] attached to environmental issues on the international scene since the creation of the United Nations Environment Programme (UNEP) in 1972 and the successive conferences on the subject has tended to spread to the other UN member states and has influenced the creation of laws and regulations intended to regulate the protection of natural spaces and the use of resources, and to minimize harmful interference with the environment.

Since UNCED 1992 (the United Nations Conference on the Environment and Development, held in Rio de Janeiro in 1992) called up on nations to enact environmental protection legislation, more than 80 countries have amended their constitutions to include the right to a healthy environment, and more than 300 environmental treaties and multilateral agreements have been signed. As a result, environmental law has become more complex and many entities have become specialized in environmental affairs to ensure improved implementation. By 2010, there were around 360 judicial and non-judicial bodies (generally integrated into the Legislative or Executive structures, with the power to resolve disputes) specialized in environmental matters, spread over 42 countries.[4]

In Brazil, the incorporation of legislation into the discussions initiated in the international sphere coincided with the nation's creation of its own environmental law as a discipline, which dates back to 1981, with the enactment of the National Environmental Policy Law (Law 6.938/1981). This Law broke with the previous legal approach, which addressed the environment only sporadically, when instrumental to achieving other purposes, such as economic growth and public health protection, and began dealing with the environment as a legal asset worthy of autonomous protection.[5]

This process, which culminated in the enactment of the 1988 Federal Constitution, a pioneer in the constitutionalizing of environmental issues in Brazil, triggered the production of more and more sophisticated ordinances, creating a complex framework of environmental law. To illustrate this point, concerning environmental licenses alone, there are an estimated 30,000 ordinances issued at the federal, state, district and municipal levels that directly or indirectly regulate such licensing issues.[6]

The profusion of laws, however, has not been accompanied by the corresponding structuring of administrative agencies in charge of implementation and supervision, which is an obstacle to rendering the normative provisions fully effective. For instance, Ibama, the agency in charge of implementing the National Environmental

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3 The present article is derived from the lecture *Outline of Environmental Adjudication in Brazil* given by the author Ricardo Perlingeiro in the seminary *The Judiciary and Environmental Regulation*, which was held by the *Centre for American Legal Studies*, Birmingham City University, in partnership with the *United Kingdom Environmental Law Association*, on 17 November 2017, in London, the United Kingdom.

4 George Pring & Catherine Pring, *Increase in Environmental Courts and Tribunals Prompts New Global Institute*, 3 J. Court Innovation 11, 11-21 (2010).

5 Ingo Wolfgang Sarlet & Tiago Fensterseifer, Direito ambiental: introdução, fundamentos e teoria geral 178-183 (2014) (Braz.).

6 Rose Mirian Hofmann, Gargalos do licenciamento ambiental federal no Brasil 53 (2015) (Braz.).

Policy at the federal level, has held only four public competitions for the admission of civil servants since its creation in 1989.[7] After the completion of the selection process initiated in 2012,[8] the agency did not publish an announcement for a new competition for the hiring of civil servants until the end of 2021.[9] According to the agency's own estimates, it was understaffed by more than 50% during that period. This decreased the number of environmental license applications examined, delayed the collection of environmental fines, and increased deforestation due to the shortage of civil servants to monitor compliance with the relevant norms.[10]

The excessive workload assigned to an insufficient number of civil servants, who often lack the material infrastructure they need to perform their assignments, has an adverse impact on the timeliness and quality of procedures,[11] making it difficult to produce decisions worthy of deference in the eyes of the reviewing bodies and society. As a result, such disputes end up being transferred to other entities, put in charge of giving them a final solution.

However, the majority of the entities with authority to review such decisions are generalist courts without specific technical training in environmental matters.

The lack of specialization also affects the procedural legislation that regulates such conflicts in the judicial sphere: such laws do not provide for proceedings capable of responding to the class actions with the necessary legal certainty, which results in contradictory rulings being issued on claims originating from a given factual configuration.

Moreover, the resolution of structural problems depends on budget issues that are generally beyond the decision-makers' control. It is therefore necessary to find ways of optimizing the proceedings of the adjudicators, whether in administrative or judicial bodies, in order to increase the efficiency of environmental adjudication.

Thus, we initially need to identify the features underlying due process in both the judicial and extrajudicial spheres and to give an overview of the current situation of Brazilian environmental adjudication in order to find potential opportunities for improvement.

This Article begins with an analysis of what the Inter-American Court of Human Rights (IACHR) means by right to a fair hearing in or out of court apt to produce decisions worthy of deference.

We shall then examine the configuration of administrative justice in Brazil, with a special focus on its impact on environmental justice and on the basic principles, types and effects of environmental claims.

Finally, we shall address certain dysfunctions that compromise the effectiveness of environmental adjudication before judicial and administrative decision-making bodies.

The response to the questions raised will take into account the Brazilian and foreign legislation and doctrine relating to environmental law and administrative justice, in addition to the rulings of the IACHR and of the Brazilians higher courts

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7 Aline Borges do Carmo & Alessandro Soares da Silva, *Licenciamento Ambiental Federal no Brasil: Perspectiva Histórica, Poder e Tomada de Decisão em um Campo em Tensão,* Confins (19/2013) at 9 (Braz./Fr.).

8 IBAMA, Edital 1, de 25 de outubro de 2012 (Braz.).

9 IBAMA, Edital 1, de 29 de novembro de 2021 (Braz.).

10 Nota Técnica do IBAMA nº 16/2020/CODEP/CGGP/DIPLAN, item 4.11 (Braz.).

11 Nota Técnica do IBAMA nº 16/2020/CODEP/CGGP/DIPLAN, itens 8.20 and 8.21 (Braz.).

with subject-matter jurisdiction over environmental matters (the Superior Court of Justice and the Federal Supreme Court).

The analysis needs to cover Brazilian federal administrative procedure because it forms a system applicable throughout the national territory and generally replicated– although with certain adaptations– within each Federal State.

By doing, so, we hope to demonstrate the potential for increasing the effectiveness of environmental justice by implementing and strengthening the rights and guarantees established in national and international law in the proceedings of administrative and judicial authorities.

II. Administrative Due Process (Judicial and Extrajudicial) According to the Inter-American Court of Human Rights

The IACHR considers it a fundamental human right to have access to an administrative justice system that is endowed with a competent, independent and impartial tribunal. Although "*Garantias Judiciais*" (Judicial Guarantees) is the official Portuguese title of Article 8 of the American Convention on Human Rights (ACHR), the Court finds that the guarantees of due process constitute a human right applicable not only to judicial but to any proceedings whose rulings have an impact on rights, including in administrative matters.[12]

According to IACHR precedents, the State's duty to resolve administrative disputes and protect rights should be comprehensive and effective and involve a review of the content of administrative decisions,[13] i.e., a review of questions of fact, questions of law, extrajudicial technical questions, as well as a review of the exercise of discretionary administrative powers.

In this context, the Brazilian Federal Supreme Court has allowed the review of a discretionary administrative decision to ensure that it complies with the constitutional principles that govern administrative proceedings, especially the principle of legality.[14] Gustavo Binenbojm affirms that "the possibility of judicial review of discretionary administrative decisions is now beyond dispute; the only remaining debates concern the limits (intensity) and parameters (criteria) that should govern such review". He further argues that the dichotomy between discretionary administrative powers and law-bound administrative powers has been refined by recognizing "different degrees by which administrative decisions are bound by the constitutional interpretation of the principle of legality", so that "the administrative merits – the core of the administrative action– which were previously untouchable, have begun to be directly influenced by constitutional principles".[15]

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12 Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs, Judgment, Inter-Am. Ct H. R. (Series C) No. 72, § 127 (Feb. 2, 2001).

13 Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 234, § 204 (Oct. 13, 2011).

14 STF, RE 131661, Relator: Min. Marco Aurélio, 2ª T., j. 26 set. 1995; RMS 24699, Relator: Min. Eros Grau, 1ª T., j. 30 nov. 2004; ARE 740670 AgR, Relator: Min. Gilmar Mendes, 2ª T., j. 07 out. 2014 (Braz.).

15 Gustavo Binenbojm, Uma teoria do direito administrativo: direitos fundamentais, democracia e constitucionalização 213, 220, 221 (3 ed. 2014) (Braz.).

Within the meaning of the ACHR, an "adjudicator" may mean an authority, a judge, a court or tribunal or an administrative body.[16] What matters is not the particular branch of government (i.e. the Executive Branch via its administrative agencies or the Judiciary via the courts) which is assigned the duty to resolve administrative conflicts and to protect rights; what matters is that the chosen adjudicator must be competent, independent, impartial and has full powers to review administrative decisions. Thus, the more the adjudication of administrative conflicts characterized by due process is concentrated in administrative agencies, the less such administrative decisions will have to be submitted to judicial review and the greater the deference that will be shown by the Judiciary to such agencies. And vice-versa, the less aptitude is demonstrated by the administrative agencies to resolve a conflict effectively, the greater will be the required judicial "activism" and the less deference will be shown by the courts to the administrative agencies.

The IACHR holds that the principles inherent in a fair hearing are also applicable to front-line decisions (i.e., the implementing functions of administrative agencies) but only to the extent necessary to avoid an arbitrary decision. Front-line decisions are not subject to typical preliminary due process, since the decisions triggering the administrative process are necessarily followed by a phase of defense prior to the final solution. In that respect, the IACHR has already decided that the guarantees of due process of law are not applicable to rights-restricting administrative decisions, such as front-line decisions, with the same intensity with which such guarantees are required by judicial bodies, but rather only to the extent necessary to ensure that the administrative decision is not arbitrary.[17]

However, the more likely the front-line decisions are to comply with fundamental rights, the less the probability of conflicts, and the less judicial or extrajudicial adjudicators will be needed; thus, the more the citizens and adjudicators will display deference and confidence in such front-line decisions.

A. Front-line Decisions as Implementing Decisions

In this regard, Michael Asimow conceives of front-line decisions as the initial stage of administrative adjudication, defined as "the entire system for resolving individualized disputes between private parties and government administrative agencies". The *front-line decision* is the initial decision, "the first agency proceeding that allows the private party a formal opportunity to present its case and challenge the "front-line" determination of the agency staff", apt to become firm and final unless challenged at a higher hierarchical level.[18] The term "implementation" as it is commonly used by Peter Cane and Peter Strauss, for example, refers to the elaboration of the initial decisions in the administrative sphere, as distinct from "administrative adjudication", which designates the review procedure for such decisions.[19]

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16 Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 218, § 108 (Nov. 23, 2010).

17 Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 151, §§ 118 and 119 (Sept. 19, 2006).

18 Michael R. Asimow, *Five Models of Administrative Adjudication*. 63, Am. J. Comp. Law 3, 4-6 (2015).

19 Peter Cane, Administrative Tribunals and Adjudication (2009) [ebook].

B. Judicial Deference and Activism

"Judicial deference" has to do with the intensity of the judicial review of the administrative decision. According to Eduardo Jordão, it refers to "the courts adopting an attitude of self-restraint when reviewing administrative decisions".[20] The 1984 U.S. Supreme Court Judgement in the *Chevron* case serves as a paradigm when analyzing judicial deference to administrative interpretation.[21] Jordão points out that said case:

> has established an important two-step test that has become a guide to determining the appropriate intensity of [judicial] review of the agency's interpretation of the law. According to the *Chevron* test, the courts should, in the first step, identify whether the law offered a clear solution to the specific question that was submitted for decision and formed the subject matter of the administrative interpretation. If the law provided such a clear solution, the case is settled: it suffices for the courts to apply that solution, because it is the only conceivable solution to the particular case. […] The second step of the *Chevron* test is performed precisely in cases in which the legislators failed to clearly settle the specific question brought before the court. In other words: the judge of the specific case should proceed to the second step of the *Chevron* test in the event that the legislation was ambiguous about the question at hand. If so, it is not incumbent on the courts to directly interpret the legislative ambiguity by adopting the solution they find most suitable. On the contrary, they should merely judge whether the solution adopted by the administrative authority is permissible (reasonable).[22]

U.S. Supreme Court case law evolved with the *Mead* case of 2001,[23] which added a preliminary verification step (*step zero*), by stipulating that:

> the *Chevron* system and its two-step test should only be applied in cases in which it is possible to identify a delegation by the legislators to the administrative authorities of powers to make norms with the force of law.[24]

According to the *Chevron* doctrine, judicial deference is based on the idea of separation of powers, which enables various possibilities of institutional arrangements. With the rise of the administrative state, the arrangement now includes a delegation of authority by the Legislative to the Executive branch to

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20 Eduardo Jordão, Controle judicial de uma administração pública complexa: a experiência estrangeira na adaptação da intensidade do controle 50 (2016) (Braz.).

21 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

22 Jordão, *supra* note 20, at 202-03.

23 United States v. Mead Corporation, 533 US. 218 (2001).

24 Jordão, *supra* note 20, at 206.

interpret norms that it is responsible for enforcing, whether the delegation is express or implied. In this context, it is incumbent on the Judiciary to act in such a way as to foster the balance among the political powers.[25]

Another point that should be noted about the U.S. definition of judicial deference is that it finds its justification in the agency's technical capabilities. If the agency were not specialized in the subject matter of the interpreted norm or did not display technical expertise, there would be no reason to defer to the agency's interpretation.[26] Judicial deference therefore functions as a measure of the capacity of the administrative agency to resolve conflicts with the required technical expertise and guarantees of due process.[27]

In Brazil, Gustavo Binenbojm tried to systematize the parameters guiding the proper degree of judicial deference to administrative decisions as follows:

> I) the greater the degree of objectivity that can be derived from the administrative rules pertaining to the hypothesis under examination, the more intensive the degree of judicial review should be. […] II) the greater the degree of technicality of the subject matter decided upon by the experienced expert agencies, the less intensive the judicial review has to be. […] III) the greater the political nature of the subject matter decided upon by the duly elected agents (Chief of the Executive branch and Congressmen, for example), the less intensive the judicial review should be. […] IV) the greater the degree of effective social participation (whether direct or indirect) in the deliberation process that gave rise to the decision, the less intensive the judicial review should be. […] V) the more restrictions are imposed on fundamental rights […], the more intensive the degree of judicial review should be.[28]

Judicial activism may be thought of as the "exercise of the adjudicative function beyond the limits imposed by the legal system itself", by invading the areas of authority of another Branch. That characterization of judicial activism is directly related to the institutional role assigned to the Judiciary in every legal system. Generally speaking, in *civil law* systems, where case law is not considered to be a formal source of the law and adjudicative activity should be kept within the existing statutory framework, it is easier to identify judicial activism than in *common law* systems, where case law and precedents function as a creative source of the law.[29]

Judicial activism should not be confused with the judicialization of policy-making, which is a trend that:

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25 Anne Oakes, *Judicial Deference & the Administration: Are UK/US Parallels Feasible?,* 22 Revista Juris Poiesis 307, 307-311 (2019) (Braz.).

26 Ilaria Di-Gioia, *Administrative Deference in the United States: Kisor and the Consolidation of* Auer *Jurisprudence,* 22 Revista Juris Poiesis 328, 328-32 (2019) (Braz.).

27 Peter Cane, Controlling Administrative Power: An Historical Comparison 268 (2016).

28 Binenbojm, *supra* note 15, at 253-254.

29 Elival da Silva Ramos, Ativismo Judicial: Parâmetros Dogmáticos Capítulo I, Seção III (2 ed. 2015) (Braz.).

> [...] far from weakening the party system, [...] tends to strengthen it, insofar as it helps to create a bond (albeit mainly in the field of law and legal procedures) between representative democracy and participatory democracy, which is contributed to by "ações populares" (*actio popularis)* in which the citizenry has legal standing to sue authorities.[30]

Thus, the judicialization of policy-making would exercise a counter-majoritarian function in which the Judiciary would be responsible for revealing "the general will of the people implicit in positive law".[31] According to that line of thought, judicial activism may be considered to be a degeneration of the judicialization of politics.

III. Administrative Justice: Organization and Impacts on Environmental Justice

Peter Cane defines "administrative justice" as the system that "[...] encompasses substantive rules and norms, decision-making procedures, and institutions", referring to matters of an administrative or executive nature. The author also points out that the word "justice" has a descriptive function in the term "administrative justice".[32] What is meant by administrative justice in the United Kingdom is equivalent in Brazil to a set of administrative and judicial decisions, in the following sequence:

- *Front-line administrative decisions*, meaning decisions that grant or deny an environmental license application and decisions that initiate an environmental sanctioning process or an environmental license revocation process. Examples of front-line administrative decisions found in Brazilian environmental legislation are Article 70, §3º, of Law 9.605/1998, on the initiation of administrative proceedings to ascertain environmental violations; Article 10, Clause VIII, of CONAMA[33] Resolution No. 237/1997, on the granting or rejection of environmental license applications; the introductory paragraph of Article 50 of Law 9.433/1997, which authorizes administrative agencies to impose penalties for the violation of any statutory or regulatory provision regarding the use of water resources; and Article 22 of Law 9.985/2000, on the creation of nature conservation areas by decision of the public authorities.
- *Administrative adjudication*, such as decisions that resolve an

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30 Luiz Werneck Vianna et al., A Judicialização da Política e das Relações Sociais no Brasil 43 (2 ed. 2014) (Braz.).

31 *Id.* at 38.

32 Cane, *supra* note 19, at Chapter 6, item 6.1.

33 CONAMA stands for *Conselho Nacional do Meio Ambiente* (National Environmental Council), consultative and deliberative body created by the National Environmental Policy Law (Law 6.938/1981) with the objective of proposing guidelines for government policies for the environment and natural resources and deliberating, within its attributions, on norms and standards compatible with an ecologically balanced environment.

administrative appeal or that conclude a sanctioning procedure or an environmental license revocation procedure. Examples of decisions that resolve administrative disputes under Brazilian environmental law are provided by articles 70, §4º, and 71, II, both of Law 9.605/1998, regarding decisions that conclude an administrative procedure to ascertain an environmental infraction, ruling on the notice of infraction issued at the start of the procedure; Article 19 of CONAMA Resolution 237/1997, which provides for the suspension, cancellation or modification of the requirements for an environmental license by the appropriate environmental agency; and Article 50, § 3º, of Law 9.433/1997, which provides for an appeal against an administrative agency's decision that imposes a penalty for an infraction of any statutory or regulatory provision regarding the use of water resources.

- Finally, judicial review, meaning a judicial proceeding for the review of administrative decisions intended to resolve environmental disputes or to take the place of such decisions in case of omission. In addition to judicial review, strictly speaking, there is a possibility of a judicial action, such as a judicial proceeding on a question of private law (but one that is relevant to the public administrative authorities) that does not necessarily have a preliminary extrajudicial administrative phase, such as questions of the civil liability of the State. In numerous precedents, the Brazilian Superior Court of Justice has recognized the civil liability of the State in environmental matters, whether by reason of an administrative act causing damage to a third party – or to a community represented in court by the Public Prosecutor's Office (*Ministério Público*) in accordance with Article 127 of the Federal Constitution – which did not take part in producing the administrative decision[34], or else as a result of an administrative omission, in which case the government agency is considered an indirect originator of the damage that is jointly and severally liable with the direct polluter.[35]

To summarize, "administrative justice" in Brazil is organized as follows: on the one hand, the civil servants and administrative agencies responsible for the initial decision (*front-line decision*) and for the review of that decision (*administrative adjudication*), although endowed with specialized technical expertise, impartiality and full powers of review of the challenged decisions, may lack the necessary prerogatives for taking independent (quasi-judicial) action. On the other hand, the trial and appellate judges and courts act independently and impartially, and with full powers of review of the challenged decision, despite their generalist

[34] STJ, AgInt no REsp 1326903/DF, Relator: Min. Og Fernandes, 2ª T., j. 24 abr. 2018); REsp 1245149/MS, Relator: Min. Herman Benjamin, 2ª T., j. 09 Out. 2012 (Braz.).

[35] STJ, REsp 1666027/SP, Relator: Min. Herman Benjamin, 2ª T., j. 19 out. 2017; AgRg no REsp 1417023/PR, Relator: Min. Humberto Martins, 2ª T., j. 18 ago. 2015; REsp 1376199/SP, Relator: Min. Herman Benjamin, 2ª T., j. 19 ago. 2014; REsp 1071741/SP, Relator: Min. Herman Benjamin, 2ª T., j. 24 Mar. 2009 (Braz.).

jurisdiction (non-specialized in administrative law and lacking environmental technical expertise). It should also be noted that the decision-making bodies in the administrative sphere are subject to the rules of administrative procedure and the courts are subject to the general rules of civil procedure.

In Brazil, the Judiciary has a monopoly on independent and impartial exercise of the adjudicative function.[36] According to the 1988 Constitution of the Federative Republic of Brazil, there are branches of justice specialized in trying cases of labor law (articles 111 to 116), electoral law (articles 118 to 121) and military law (articles 122 to 124). Any subject areas not mentioned above, such as environmental law, are referred to the common state courts (articles 125 and 126) and federal courts, whose jurisdiction generally depends on the presence of the federal agency or the involvement of the federal interest in the dispute (articles 106 to 110). There may be specialized bodies within the common state or federal justice systems, if so determined by laws or judicial norms. For example, the Federal Regional Court of the 4th Circuit created specialized trial courts in Curitiba, Porto Alegre and Florianopolis, by Resolutions 39, 54 and 55, respectively, of the President's Office of the Federal Regional Court of the 4th Circuit, all of them adopted in 2005, to try and judge all cases related to environmental and agricultural law, both in civil and criminal matters. Nevertheless, delimitation of jurisdiction is ad hoc rather than permanent, which is intended to minimize the problem of the lack of specialization of the adjudicators.

In this context, independent and impartial adjudication in Brazil is a function performed exclusively by the courts, which are almost always generalist courts having full powers of review of the agencies' decisions, both those that implement the laws (*front-line decisions*) and those that adjudicate disputes (*administrative adjudication*). In Brazil courts are subject to the principles of civil procedural law. Thus, it is not hard to see how much the courts and tribunals play the leading role in Brazilian environmental law.

IV. Legal Grounds of Environmental Claims

A. Environment and Development

According to the systematic analysis proposed by the authors, most of the conflicts that give rise to environmental claims before the courts are based on one of the grounds discussed below.

This primarily concerns issues that are inherent in the collision of fundamental rights and involve an agency's exercise of its discretionary powers in making difficult choices between favoring the environment, on the one hand, or economic development, on the other.

The Federal Supreme Court has already been called upon to settle various situations of conflict, where the Court gave priority to one principle or the other depending on the circumstances of the specific case. In the case ADI 3540 MC/

[36] In the case of *Piersack v. Belgium*, the European Court of Human Rights distinguished the subjective approach from the objective approach of impartiality. The former relates to the person of the judge, while the latter concerns the trust that the court inspires in the public (Piersack v. Belgium. Eur. Ct. H.R. (Oct. 1, 1982)).

DF,[37] considered the leading precedent on the subject, the Court upheld the constitutionality of a provision that granted the environmental agency the authority, via an administrative proceeding, to authorize the partial removal of vegetation in a permanent nature conservation area in order to facilitate economic activity in such areas. The reporting Justice stated as follows in his opinion:

> the principle of sustainable development [...] is one factor contributing to a fair balance between economic and ecological demands; nevertheless, invoking that principle in a situation of conflict between relevant constitutional values is conditional on one indispensable requirement, compliance with which neither compromises nor nullifies the essential content of one of the most significant fundamental rights: the right to preservation of the environment, which is an asset to be used in common by the general population and to be safeguarded on behalf of the present and future generations.

In another emblematic case, the Supreme Court recognized the constitutionality of decisions prohibiting the importation of used tires, giving priority to environmental protection to the detriment of the free exercise of such economic activity, which is considered harmful to health and to the environment due to the toxicity of the raw material and increase in the accumulation of solid waste.[38] The Supreme Court once again adopted an interpretation that favors the environment by recognizing that the statutory provision permitting commercial exploitation of chrysotile asbestos, a substance that is agreed to be toxic by the majority of medical researchers, fails to provide sufficient protection to health and environmental values.[39] More recently, when analyzing the constitutionality of various provisions of the Forestry Code (Law 12.651/2012), the Supreme Court acknowledged that mankind is an integral part of the environment, so that it is unacceptable to make economic progress at the cost of human survival. On the other hand, it is not feasible to achieve a total absence of environmental impact, since the Constitution also protects values such as social development, protection of the labor market and the satisfaction of the population's basic consumer needs, since democratically formulated public policies are the ideal *locus* in which to weigh such conflicting interests.[40]

The Supreme Court case law noticeably oscillates back and forth when it comes to determining the sustainability model that is supposed to reconcile environmental protection with economic development. Although such an assessment involves assigning different weights to each of the conflicting interests according to the circumstances of the specific case, the decision-making process underlying the solution adopted is often insufficiently explained. This prevents assessing the weights assigned to each of the conflicting interests which, in turn, makes it

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37 Relator: Min. Celso de Mello, Tribunal Pleno, j. 01 Set. 2005 (Braz.).

38 STF, ADPF 101/DF, Relatora: Min. Cármen Lúcia, Tribunal Pleno, j. 24 Jun. 2009 (Braz.).

39 STF, ADI 4066/DF, Relatora: Min. Rosa Weber, Tribunal Pleno, j. 24 Ago. 2017 (Braz.).

40 STF, ADC 42, ADI's 4901, 4902, 4903 and 4937, Relator: Min. Luiz Fux, Tribunal Pleno, j. 28 Fev. 2018 (Braz.).

difficult to elaborate objective parameters applicable in subsequent decisions, to the detriment of legal certainty.[41]

B. Environment and Legitimate Expectations

The other category of conflicts involves a collision of fundamental rights: environmental protection versus legitimate expectations.

Legitimate expectations can generally be defined as the subjective aspect of legal certainty, which is intended to protect the confidence placed by individuals in the continuation of a certain type of behavior by the State, as defined by Almiro do Couto e Silva in his article "O Princípio da Segurança Jurídica" (The Principle of Legal Certainty).[42]

In practice, situations commonly occur in which the government, through municipal and non-specialized agencies, allows individuals to occupy areas that are protected by reason of their environmental characteristics, promoting the collection of taxes and providing essential services such as supplying water, electrical power and garbage collection. This raises expectations in the individual occupants that they will be allowed to continue occupying such areas on a regular basis, which conflicts with the actions, generally assigned to specialized federal and state environmental agencies, to enforce the regulations that prohibit such occupancy.

Although the case law of the Brazilian higher courts contains no precedents specifically involving the conflict between legitimate expectations and environmental protection, the latter (environmental protection) is generally given priority when it conflicts with other principles related to legitimate expectations. For example, according to Statement 613 of the Summary of Case Law of the Superior Court of Justice, "the theory of *fait accompli* cannot be applied to matters of Environmental Law". The same Court has also held that no right can be acquired to the continuation of a situation that causes damage to the environment.[43] The Federal Supreme Court, for its part, when analyzing the tension between the legal certainty that justifies setting statutes of limitation, on the one hand, and the constitutional principles of environmental protection, on the other, ruled in favor of environmental protection by holding that no claims limitation period is applicable to environmental damage claims under civil law, considering 1) the inalienability of the fundamental right to an ecologically balanced environment and 2) the difficulty of assessing and measuring environmental damage in the short and medium term.[44]

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41 Luísa Silva Schmidt, A Aplicabilidade da Economia Ecológica na Definição Jurídica do Desenvolvimento Sustentável especially items 2.1.1 & 2.2 (2020) (Braz.).

42 Almiro do Couto e Silva, *O Princípio da Segurança Jurídica (Proteção à Confiança) no Direito Público Brasileiro e o Direito da Administração Pública de Anular seus Próprios Atos Administrativos: O Prazo Decadencial do Art. 54 da Lei do Processo Administrativo da União (Lei 9.784/99),* 237 Revista de Direito Administrativo 271, 272-274 (2004) (Braz.).

43 STJ, AgInt no REsp 1545177/PR, Relator: Min. Og Fernandes, 2ª T., j. 13 nov. 2018; REsp 1755077/PA, Relator: Min. Herman Benjamin, 2ª T., j. 17 out. 2018; AgInt no AgInt no AgInt no AREsp 747515/SC, Relatora: Min. Regina Helena Costa, 1ª T., j. 09 out. 2018 (Braz.).

44 STF, RE 654833/AC, Relator: Min. Alexandre de Moraes, Tribunal Pleno, j. 20 Abr. 2020 (Braz.).

C. Environment and Technical Evidence

Disagreements about the scientific-technical evidence, on which the authorities base the exercise of their discretionary powers, also occur very frequently in environmental claims.

In a situation in which there was no scientific consensus on toxicity, the Supreme Court gave greater weight to free economic initiative by holding that it was not feasible to force electrical utilities to reduce the electromagnetic field of transmission lines below the minimum height required by law.[45]

V. Types of Environmental Claims

We may therefore observe that environmental claims always gravitate around by administrative acts or omissions; this is especially noticeable in the cases related to the powers of agencies to grant licenses or impose penalties. The types of claims vary in this context, but they are usually of the types discussed below.

A. Claims Challenging the Granting of Licenses

These are claims that challenge the granting or the refusal to grant an environmental license, or the absence of monitoring of licensing necessary to carry out a project or activity.

The environmental license is the administrative instrument that results from the licensing procedure and establishes the terms and conditions and compensatory measures that should be adopted to set up, operate and expand potentially polluting undertakings and activities (Art. 1º, I and II, of CONAMA Resolution 237/1997).

The licensing procedure generally encompasses three stages, namely, obtaining the preliminary license, the installation license, and the operating license. The preliminary license certifies approval of the project site and environmental feasibility; changes and measures may be required in subsequent stages. The installation license authorizes the entrepreneur to set up the undertaking or activity in accordance with the approved plan and the proposed changes, where applicable. Finally, the operating license authorizes the undertaking to go into operation once compliance with the conditions imposed in the previous stages has been verified (Art. 19, Decree 99.724/1990).

However, the environmental agencies often lack the operational capacity to complete the licensing procedure within a reasonable time and to monitor compliance with the conditions imposed. This situation ends up compromising their efficiency as a mechanism of environmental protection,[46] which may give rise to judicial review.

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45 STF, RE 627.189/SP, Relator: Min. Dias Toffoli, Tribunal Pleno, j. 08 Jun. 2016 (Braz.).

46 World Bank, Baseline Assessment of Proposals to Revise Federal Environmental Licensing in Brazil 9 (2016).

B. Claims Challenging Disciplinary Proceedings

These claims challenge decisions to take disciplinary action against private individuals or civil servants for failure to comply with environmental legislation.

Disciplinary prosecution of a civil servant may be implemented either extrajudicially (when the administrative agency initiates disciplinary proceedings for dismissal and the civil servant in question challenges the decision to commence the proceedings) or judicially (when the administrative agency initiates a judicial improbity action (*ação de improbidade)*, requesting removal from office, and the civil servant's challenge takes on the form of his defense).

An improbity action is a judicial instrument for protection against administrative misconduct. According to the express provision of §4º of Article 37 of the Federal Constitution, it is a non-criminal action aimed at imposing political penalties (suspension of political rights) and civil penalties (freezing of assets, compensation for damages and removal from public office) on those responsible for performing an act of misconduct. Law 8.429/1992 provides for three basic types of acts of misconduct, depending on whether the misconduct entails unjust enrichment (Art. 9º), causes losses to the public treasury (Art. 10) or violates the principles of public administration (Art. 11).

C. Claims Challenging the Revocation of Licenses

These are claims challenging a decision to revoke a license granted previously. According to Maurer, there are exceptions to the rule of the stability of administrative decisions because, unlike judicial bodies, which adjudicate disputes of third parties as a neutral forum, administrative agencies act as parties involved in their own cases, which means that administrative decisions do not provide the same guarantees of due process as judicial decisions. Besides that, the administrative decisions cannot offer the same resistance to change as judicial decisions because they have to adjust to the changing circumstances that gave rise to their enactment. The possibility granted to the administrative body to review its own decisions, and to revise them *ex officio* (when they were originally unlawful) or by reversing them (when, despite being originally lawful, changes in factual and/or legal circumstances would make it inappropriate to uphold its decision if certain circumstances provided for by law are ascertained), forms part of its administrative autonomy.[47]

In Brazil, the possibility of the agency annulling its own unlawful decisions *ex officio* was initially dealt with in Statement 473 of the Supreme Court Case Law Summary, published in 1969, according to which:

> the administrative agencies may annul their own decisions if vitiated by defects that make them unlawful, because no rights can be derived from them; or else revoke them, for reasons of convenience or expediency, providing that any acquired rights are respected, and subject to judicial review in any case.

[47] Hartmut Maurer & Christian Waldhoff, Allgemeines Verwaltungsrecht (20 ed. 2020) (Ger.).

Articles 53 and 54 of Law 9.784/1999 adopted the jurisprudential orientation and set a 5-year limitation period in which to annul administrative decisions favorable to the addressees; the right of the administrative agencies to review such decisions lapses upon expiration of that period. The limitation period does not apply to administrative decisions that are unfavorable or restrictive vis-à-vis the interested parties, nor does it apply to favorable administrative decisions if the beneficiaries acted in bad faith, in which case the decisions may be annulled at any time, in principle.

D. Claims to Recover Damages

Finally, there are civil liability claims for environmental negligence and failure to meet the requirements of an environmental license.

The compensation for environmental damage is characterized by various particularities in relation to the general theory of civil liability, by reason of the specific nature of the environmental asset for which compensation is payable. Such specificities include the absence of a limitation period on civil claims for compensation for environmental damage,[48] the reversal of the burden of proof in actions related to environmental pollution[49] and adoption of the "integral risk theory", which allows the agent to be held liable on a no-fault basis regardless of any factors that may generally exclude civil liability;[50] in other words, in order to establish an obligation to pay damages, it suffices to demonstrate the existence of a causal nexus capable of linking the harmful outcome ascertained (the pollution) with the act or omission attributable to the presumed causal agent (the polluter).[51]

Such particularities provide for a broader range of options to demonstrate civil liability in environmental matters than in other subject areas. Thanks to the adoption of the integral risk theory, it is even possible to sue the contractor for civil liability for damage arising from an activity carried out in accordance with the terms of an environmental license, even if the license was granted by mistake.[52]

E. Individual and General Effects of the Environmental Claims

All these claims essentially have general effect, in view of the widespread nature of the right to a healthy environment. The intensity of the external effects produced by the decision generally has a scope conditional on the type of claim. Therefore, in terms of the effects, environmental claims are generally classified into claims of indirect general effect and claims of direct general effect.

An environmental administrative decision may be challenged because the license applicant disagrees with the version of the facts or evidence that the environmental agency associates with his license application. In such cases,

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48 Ver *supra* note 43.

49 Statement 618 of the Superior Court of Justice Case Law Summary.

50 STJ, REsp 1374284/MG (Tema Repetitivo 707), Relator: Min. Luis Felipe Salmão, 2ª Seção, j. 27 Ago. 2014 (Braz.).

51 STJ, REsp 1602106/PR (Tema Repetitivo 957), Relator: Min. Ricardo Villas Bôas Cueva, 2ª Seção, j. 25 Out. 2017 (Braz.).

52 STJ, REsp 1612887/PR, Relatora: Min. Nancy Andrighi, 3ª T., j. 28 Abr. 2020 (Braz.).

the claim is limited to the applicant and the trend is for only the applicant to be interested in the question, which is therefore considered to be a claim of indirect general effect.

In contrast, a claim may be based on grounds related to the legality of an environmental regulation or with the constitutionality of an environmental law. In such cases, the individual claim naturally takes on broader contours, extrapolates the usual limits of a conflict that is typically individual, and also tends to be of direct interest to the whole community.

VI. Certain Dysfunctions of Environmental Justice

Having analyzed judicial and extrajudicial due process of law in the view of the Inter-American Court of Human Rights, the configuration of administrative justice in Brazil and the fundamental principles, types and effects of environmental claims, we shall now take a look at dysfunctions that impair the effectiveness of environmental justice before the courts.

A. Inadequacy of Procedural Laws

The first dysfunction is related to the failure of the drafters of the laws of civil procedure to consider the specificities of environmental claims. Environmental claims are collective administrative actions, which becomes especially obvious in connection with claims of direct general effect based on environmental norms (administrative regulations or laws) rather than on facts that only have to do with the applicant.

In Brazil, there is no general law on judicial review proceedings in matters of administrative law or on collective proceedings. In an effort to systematize the subject matter, the Ibero-American Institute of Procedural Law, coordinated by professors Roberto Berizonce (Argentina), Ada Pellegrini Grinover (Brazil) and Angel Landoni Sosa (Uruguay), published the "Model Code of Collective Proceedings for Ibero-America" in 2004.[53]

In the field of administrative proceedings, the same Ibero-American Institute of Procedural Law, via a special committee coordinated by Brazilian professors Ada Pellegrini Grinover, as Chairwoman, and Ricardo Perlingeiro, as Secretary-General, prepared the "Model Code of Judicial and Extrajudicial Administrative Procedures for Ibero-America"[54] in 2012. In order to consider the justice systems of Continental Europe, too, the "Euro-American Model Code of Administrative Justice" was prepared.[55]

A procedural instrument is therefore needed allowing courts to issue decisions effective *erga omnes,* providing that, in a given claim, its grounds include

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[53] Ada Pellegrini Grinover et. al., Código Modelo de Processos Coletivos para Ibero-América (2004) (Braz.).

[54] Ada Pellegrini Grinover et. al., Código Modelo de Processos Administrativos: Judicial e Extrajudicial – para Ibero-América. Instituto Ibero-Americano de Direito Processual (2012) (Braz.).

[55] Euro-American Model Code of Administrative Jurisdiction (Ricardo Perlingeiro & Karl-Peter Sommermann org., 2014).

administrative decisions of direct general effect. On a previous occasion, it was observed that:

> [...] allowing diffuse and abstract review of a legal norm, granting several different courts the power of constitutional review of a law, would be something that could generate intolerable legal uncertainty, with decisions that are binding *erga omnes*, producing judgments that are *res judicata* and often inconsistent. With the same degree of legal uncertainty, the diffuse and abstract review of general and impersonal administrative acts, by allowing distinct and contradictory judicial decisions with respect to that category of administrative acts, would be capable of producing even more serious consequences, such as rendering unfeasible or contributing to the collapse of administrative activities and of the provision of public services that are essential to the community.[56]

In fact, one solution capable of reconciling legal certainty with the guarantees of due process of law in the resolution of collective disputes would consist in:

> [...] granting standing to sue and be sued to effectively independent public agencies and concentrating jurisdiction in a single court, thereby avoiding a multiplicity of lawsuits and conflicting decisions.[57]

Such a measure would prevent the atomization of individual lawsuits concerning issues that could be resolved collectively in the administrative sphere.

One example of the pernicious effects of the lack of a competent judicial body to centralize the resolution of environmental actions may be seen in the environmental disaster of Mariana, caused by the collapse of the mining tailings dam of Fundão in Minas Gerais, managed by the Samarco mining company, on November 5, 2015, causing 19 deaths, and dumping 62 million cubic meters of mining tailings into the environment, thereby damaging the Doce River ecosystem. This environmental disaster gave rise to several class actions, brought at both the state and federal level, by the State, Federal and Labor Public Prosecution Offices, representatives of the states concerned and the Federal Government, and civil society associations. The issues in dispute included compensation for damage to the natural and artificial environment (reconstruction of communities destroyed by the dam tailings), compensation for affected workers and fishermen whose livelihoods were impaired by water pollution, and the execution of preventive measures. In addition to the class actions, several individual actions have been proposed. The Court of Justice of Minas Gerais estimated that it has received approximately 50,000 individual actions questioning the water quality of Rio Doce.[58] The lack of

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56 Ricardo Perlingeiro, *A Impugnação Judicial de Atos Administrativos na Defesa de Interesses Difuso, Coletivo e Individuais Homogêneos*, 7 Revista de Direito do Estado 255, 263 (2007) (Braz.).

57 *Id*. at 270.

58 Cíntia Paes, *Processos e Acordos Marcam 30 Meses do Desastre da Barragem de Mariana",* G1 MG (05 Maio 2018) (Braz.).

uniformity in handling the question gave rise to procedural incidents due to conflicts of jurisdiction and contradictory decisions, so that, the case remained unresolved years afterwards, and the disaster ended up repeating itself on 25 January 2019, with the collapse of the Mina Feijão dam in Brumadinho, Minas-Gerais, which left 259 dead and 11 missing[59], in addition to the environmental damage still unmeasured.

In fact, in Brazil, "*ações populares*" ("*actio popularis*" or class actions in which standing to sue is universal) and actions concerning the standing to sue of the Public Prosecutor's Office are likely to result in court judgments that are effective *erga omnes*; nevertheless, such lawsuits are regulated by special procedural laws and based solely upon an issue of general interest, and neither prevent nor suppress the initiatives of individuals having a direct interest in the environmental issue. The absence of a stay of proceedings (*lis pendens*) between individual actions and collective actions may give rise to contradictory decisions and can lead to legal uncertainty.

The "*ação popular*" (*actio popularis)*, whose origins date back to Roman law, is characterized by the citizens being granted standing to sue in their own name to defend interests that belong to them not individually but collectively, as members of the community. It is recognized by the constitutions of various countries, such as Portugal (Art. 52), Spain (Art. 125) and Italy (Art. 113).[60] In Brazil, it is contemplated in Article 5º, LXXIII, of the 1988 Constitution, as a constitutional action intended to protect the historical and cultural public heritage, and administrative and environmental integrity, by annulling decisions that have proven harmful to them. Any citizen has standing to file a popular action subject to proving his eligibility by attaching a voter's card or equivalent document to his initial petition (Art. 1º, §3º, of Law 4.717/1965). The respondents (or parties with standing to be sued) should be composed of the legal entity responsible for issuing the allegedly harmful decision, the civil servants who contributed to the occurrence of the damage, and the direct beneficiaries of the harmful decision. It should be noted that the legal entity has the right not to challenge the claim or to act on the side of the claimant if doing so serves the public interest (Art. 6, introductory para. and §3 of Law 4.717/1965). The resulting judgment is effective *erga omnes*, except in cases dismissed for lack of evidence, in which case the judgement is only effective against the parties (Art. 18 of Law 4.717/1965). The problem is that jurisdiction to try the case is assigned to the court of first instance since no forum is provided for the administrative agent-respondent based on its privileges of office (Art. 5º, Law 4.717/1965). Consequently, the limitation of the effects of the decision to the territorial jurisdiction of the body that issued it may lead to contradictory decisions by different bodies.

Among the actions in which standing as a party is granted to the Public Prosecutor's Office, which is the body constitutionally responsible for defending the public and social heritage, the environment, and other diffuse and collective interests (Art. 129, III, of the 1988 Federal Constitution), the "*ação civil pública*" (civil public action) stands out as a procedural instrument for collective protection regulated in

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59 Luiza Franco, *"'Estamos Presos Naquele Dia': 1 Ano após Rompimento de Barragem de Brumadinho, os impactos duradouros da tragédia",* BBC News Brazil (25 Jan. 2020) (Braz.).

60 Paulo Hamilton Siqueira Jr., Direito Processual Constitucional 359-360 (6 ed. 2012) (Braz.).

Law 7.347/1985 and in Title III of Law 8.078/1990 (Consumer Defense Code). The subject matter of the civil public action is broad and includes any mass interest (diffuse, collective or homogeneous individual claims), even if not included within the scope illustrated by examples in Article 1º of Law 7.347/1985,[61] as well as the standing to file such an action, which is granted not only to the Public Prosecutor's Office but also to other entities representing collective interests in the broad sense of the term, such as the Public Defender's Office, the political entities, associations of civil society, political parties and labor unions (Art. 5º of Law 7.347/1985 and Art. 82 of Law 8.078/1990). Jurisdiction is assigned to the forum of the place where the damage occurred or is expected to occur.[62] In cases of nationwide or regional damage, jurisdiction is assigned to the forum of the State Capital or of the Federal District, respectively (Art. 2º of Law 7.347/1985 and Art. 93 of Law 8.078/1990); the forum by privilege of office is not applicable otherwise.[63] The effects produced by the decision depend on the outcome and the nature of the protected interest, in the manner regulated by Article 103 of Law 8.078/1990, and the filing of the collective action will not result in *lis pendens* (a stay of proceedings) with respect to individual actions (Art. 104 of Law 8.078/1990), which may generate a multiplicity of contradictory decisions.

B. Quality of Environmental Judicial Decisions

The above-mentioned inadequacy of the civil procedural law for implementation of environmental justice also leads to another dysfunction that compromises the quality of judicial decisions. In this respect, it should be recalled that judges who are members of the courts are not specialists in administrative law or environmental law, and that the courts have broad powers of review of environmental administrative decisions. The combination of generalist courts and the lack of specialized legislation exacerbates the poor quality of such judicial decisions.

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61 Art. 1st. The provisions of this Law shall govern, without prejudice to the "ações populares" (*actio popularis)*, liability actions for moral and material damages caused:
I – to the environment;
II – to the consumer;
III – to rights and assets pertaining to artistic, esthetic, historical, tourism or landscaping matters;
IV – any other diffuse or collective interests;
V – through the violation of economic laws and regulations;
VI – to the urban planning system;
VII – to the honor and dignity of racial, ethnic or religious groups.
VIII – to social welfare and public assets.
Single paragraph. The scope shall not include civil actions under public law to assert claims involving taxes, pension contributions, the Employee Severance Indemnity Fund (FGTS) or other institutional funds whose beneficiaries may be determined individually.

62 Brazilian law allows the filing of preventive actions, before environmental damage occurs, pursuant to Article 4 of Law 7.347/1985: "Precautionary actions may be filed for the purposes of this Law, including with the objective of preventing damage to public and social assets, to the environment, to the consumer, to the honor and dignity of racial, ethnic or religious groups, to the urban planning system or to rights and assets of artistic, aesthetic, historical, tourism and landscaping value".

63 The Brazilian Federal Supreme Court adopted this decision, among others, in the following cases: ARE 874283 AgR, Relator: Min. Gilmar Mendes, 2ª T., j. 04 Fev. 2019; Pet 3240 AgR, Relator: p/ Acórdão Min. Roberto Barroso, Tribunal Pleno, j. 10 Maio 2018 (Braz.).

According to the IACHR, the guarantees of due process instituted by the ACHR are closely related to the concept of justice, so that due process of law should be addressed not only from a purely formal perspective but also from a substantive point view that includes the quality of the judicial decision. Thus, the guarantees of due process should ensure that fair trial will be obtained, in which the decision adopted to resolve the dispute ensures the highest possible level of legal correctness.[64]

The "quality of a decision" is a vague concept that is difficult to measure. Nevertheless, the minimum required contents can be identified, including legality, effectiveness, efficiency and legitimacy. Legality refers to the jurisdiction of the decision-making authority, to an accurate evaluation of the relevant facts and to the convergence of the decision with the legal norms in force on the subject matter. Effectiveness means the extent to which the decision contributed to achieve the proposed purpose, whereas efficiency requires that purpose to be achieved at the least possible expense. Finally, legitimacy has to do with the subjective perception of the public affected by the decision and is influenced, for example, by the level of participation that is ensured to the public concerned, and by the quality of the arguments used to justify the decision. Moreover, legitimacy influences the acceptance and observance of the decision by the addressees.[65]

In this context, the judges put in charge of judicial review in environmental matters are often unaware of the specific environmental laws and regulations. Instead, they tend to apply principles of private law, focusing on the two-party nature of the dispute to the detriment of the underlying public interest.[66] Consequently, they fail to give due consideration to the conflict between the fundamental rights involved in the specific case, such as the rights to environmental protection versus economic development, or a healthy environment versus legitimate expectations.

C. Quality of Environmental Administrative Decisions

The third dysfunction of the environmental justice system is likewise related to quality, but the quality not just of judicial decisions but of administrative decisions, as well.

In Brazil, the administrative decisions subject to judicial review are based on technical reports prepared by the same individuals who are interested in obtaining a license, and the civil servants in charge of decision-making are not always properly qualified to check the validity of such technical evidence.

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64 Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14, Inter-Am. Ct H. R. (Series A) No.21, § 109 (Aug. 19, 2014); Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 303, § 151 (Oct. 5, 2015).

65 M. Herweijer, *Inquiries into the Quality of Administrative Decision-Making, in:* Quality of Decision-Making in Public Law 11, 11-27 (K. J. De Graaf; J. H. Jans; A. T. Marseille & J. De Ridder eds., 2007).

66 Ricardo Perlingeiro, *Administrative Functions of Implementation, Control of Administrative Decisions and Rights Protection*, 10 Br. J. Am. Leg. Studies 1, 5-6 (2021).

The Federal Constitution (Art. 225, §1º, IV) requires performing a preliminary environmental impact assessment during the licensing procedure whenever the planned activity is capable of causing what is considered to be a significant amount of environmental damage.

Before that, Law 6.938/1981 already listed the environmental impact assessment as one of the instruments of the National Environmental Policy (Art. 9, III), and it was up to CONAMA (the National Environmental Council), as an advisory and decision-making body attached to the Ministry of the Environment, to order, as necessary, studies of possible alternatives and the environmental consequences of public and private projects, as well as the respective reports (Art. 8, II).

To establish the general guidelines for the Environmental Impact Assessments, CONAMA issued Resolution 1/1986, in which it stipulated that the minimum required content of the Environmental Impact Assessments (EIA) must include the environmental diagnosis of the area impacted by the project and an analysis of the project's environmental impacts and the alternatives; the specification of measures to mitigate the negative impacts, and the preparation of a follow-up and monitoring program (Art. 6). The Environmental Impact Report (EIR) must state the conclusions of the EIA's and contain at least the objectives and justifications of the project, as well as description of it and of alternative technologies and sites; the summary of the results of the environmental diagnosis studies of the project's area of influence; the description of the probable environmental impacts resulting from the performance and operation of the planned activity; a characterization of the future environmental quality of the area of influence; the description of the expected effects of the mitigating measures on the negative impacts, including those that are unavoidable; the program for the following up and monitoring of the results; and recommendations as to the most favorable alternative (Art. 9º).

Article 3 of CONAMA Resolution 237/1997 has already established that the Environmental Impact Assessment (EIA) and the corresponding Environmental Impact Report (EIR) must be conducted by legally qualified professionals, at the entrepreneur's expense. According to Article 11, the entrepreneur and the professionals who sign the assessment are liable for the information provided. Thus, a professional hired and paid by the license applicant prepares the EIA/EIR.

On the other hand, the agency employees in charge of assessing the accuracy of the EIA/EIR do not necessarily have to be a trained expert in environmental engineering. According to Law 10.410/2002 on the careers of Environment Analysts, the position of Environmental Analyst is associated with environmental licensing and auditing activities, among others (Article 4º), and such analysts are required to hold a university degree or legally equivalent qualifications. If specialized training is required, that fact will be mentioned in the announcement of the entrance exam (Art. 11, §§2, I, and 3). In any case, the latest announcement of the public competition for Environmental Analyst positions at IBAMA stated that candidates need only be university graduates, without requiring any specific training.[67] Environmental Technicians who are in charge of providing specialized technical support and assistance to the Environmental Analysts (Art. 66 of Law 10.40/2002) are only required to have a high school diploma or the equivalent

[67] IBAMA, Edital 1, de 29 de Novembro de 2021, item 2.1 (Braz.).

(Art. 11, §2, III). As a result, the environmental agencies are forced to rely on individual training of their employees, since no policies have been planned to attract employees with the level of training required to perform some of the tasks involved in the licensing procedure.[68]

Thus, in such cases, administrative decisions lack legitimacy and objective impartiality, and undermine the credibility of the front-line decision-makers in the eyes of the administrative adjudication authorities, the courts and society, even at the international level, which is problematic in light of the need to structure the administrative agencies in such a way as to honor Brazil's environmental commitments.[69] Naturally, that increases the number of disputes.

Moreover, the courts are noticeably ill at ease when ruling on environmental cases involving highly technical issues, because the judges and administrative adjudicative bodies rarely have qualifications that are equal to or greater than those of the front-line decision-makers in environmental matters. In general, the courts and such adjudicative bodies lack specialized technical support and the specific training required to review the technical evidence. This is a widespread problem in procedural law, but it is intensified in environmental law, since a large part of such disputes can only be resolved by means of technical evidence.

By the way, in England and Wales, degrees in engineering, architecture or planning are generally held by the members of *Planning Inspectorates*, which perform a function similar to that of an administrative environmental *tribunal*, hearing appeals against the rejection of applications for environmental licenses or permits or appeals against additional requirements added to such licenses or permits.[70]

In this context, in Brazil, inadequate technical evidence (in administrative and judicial proceedings) may create a considerable lacuna in environmental adjudication, since there are no authorities authorized to make up for the absence of such evidence.

VII. Final Considerations

Increasingly, agencies have a duty to be guided by fundamental rights, not just for administrative adjudicative decisions but primarily for initial administrative decisions (*front-line decisions)*. Contemporary administrative law and environmental law require making decisions that are effective transnationally, which means, in turn, that the environmental authorities must be capable of gaining trust internationally.

In recent years, the Judiciary has been creating specialized environmental courts, which has now become a global trend, as we saw in the introduction. By the start of early 2010, 42 countries had already instituted around 360 judicial and

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68 Hofmann, *supra* note 6, at 69.

69 For example, one may mention here the obligations arising from the ratification of the Paris Agreement under the United Nations Framework Convention on Climate Change (implemented nationally in Brazil by Decree 9.073/2017), requiring the signatories, among other things, to develop objectives for the reduction of greenhouse gas emissions.

70 Richard Macrory, *Environmental Courts and Tribunals in England and Wales – A Tentative New Dawn*, 3 J. Court Innovation 61, 63 (2010).

non-judicial adjudicative bodies specialized in environmental disputes. In Brazil, as pointed out in item 3, three adjudicative units specialized in environmental matters were created by the Federal Regional Court of the 4th Circuit.

However, assigning a specialization of environmental law to the courts of a Judiciary that has a tradition of generalist jurisdiction and is subject to a Code of Civil Procedure is only a palliative measure so long as there is no effective (or partially effective) adjudication in the administrative sphere.

These findings, as well as the conclusions derived from them, are not new to the authors[71], nor are they limited to environmental issues. Nevertheless, such issues offer a striking example of the relevance of the debate due to the increasing importance that is being attached to environmental questions.

In reality, the only way that environmental justice can be transformed is through a reform of the environmental agencies, in compliance with the following:

1. setting up quasi-independent administrative agencies with an environmental adjudication function, as a way to guarantee a high level of specialization and to promote judicial deference in favor of such agencies; and
2. setting up prerogatives of independence and impartiality for the environmental agencies in charge of *front-line decisions*, so as to prevent conflicts, with a view to increasing the credibility of such agencies in the eyes of society, vis-à-vis the agencies' own environmental adjudication bodies, and vis-à-vis the Judiciary.

[71] Ricardo Perlingeiro, *Judicial Deference & Right to a Fair Trial: A Feasible Conciliation in Latin America?* 22 Revista Juris Poiesis 333, 333-337 (2019). ISSN 2448-0517 (Braz.); Perlingeiro, *supra* note 66.