

ENVIRONMENTAL LEGISLATION

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Brazilian environmental legislation can be broken down into two distinct phases: before and after 1981.

Prior to 1981, *pollution* generally stood for industrial emissions that did not conform to the standards established by law and technical guidelines. At that time, based on the assumption that every production activity caused an impact on the environment, pollutant emissions were fully tolerated, provided that they were kept within preset limits.

Viewed as a whole, this early system was rather coherent: (i) industrial zoning confined more polluting industries to areas that could absorb significant amounts of pollution; (ii) industries were licensed so as to locate them geographically in keeping with the industrial zoning; and (iii) guidelines for pollutant emissions were drawn up to ensure that industrial zones would not rapidly deplete their capacity to absorb and metabolize pollution.

The Brazilian Environmental Policy

Law No. 6938 of August 31, 1981, known as the Brazilian Environmental Policy, introduced an entirely different environmental concept. There is no longer any environmental damage that is released from proper remediation: strictly speaking, pollutant emissions are no longer tolerated. The bottomline of this new legislation is that even a polluting waste tolerated under the established standards may cause environmental damage, thus making the polluter liable for redress. This entails the concept of *strict liability*, by which an industry undertakes all risks inherent to its activity: damages are no longer to be shouldered jointly with the community.

The subtle difference lies in the fact that a company complying with maximum pollution standards may even so be held liable for any residual damage caused. To that end, it suffices to prove a causal relation (cause-and-effect chain) between the company's activity and a particular environmental damage. This is at the very heart of *strict liability*: in order to determine liability for an environmental damage, such damage need not have been produced as a result of an illegal act (noncompliance with acceptable tolerance, concentration or intensity limits for pollutant emissions) because strict liability does not require proof of fault. In short, it is sufficient that the production source has caused the damage, irrespective of compliance with pollutant emission standards.

In furtherance of this new environmental stewardship concept, Law 6938/81 authorized the Public Attorneys Office (the public prosecutors) to act in defense of the environment. As the environment is something that belongs to everyone but to no one alone, it is fitting to ascribe protection of this interest (known as a *diffuse interest*) to a body in charge of protecting the public interest. Law No. 7347 of July 24, 1985 extended this authorization to environmental entities (NGOs), and created a kind of litigation expressly intended to defend environmental interests in court: the civil public action (*ação civil pública*).

The Federal Constitution

Having established the guidelines for the new legal treatment afforded to environmental concerns, the October 1988 Federal Constitution devoted an entire chapter to stewardship of the environment (Chapter VI – The Environment; Title VIII – The Social Order), and in all contains 37 articles relating to environmental law and five concerning urban law.

The Constitution conferred a series of duties on the public authorities, including: (i) preservation and recovery of species and ecosystems; (ii) preservation of the variety and integrity of genetic heritage, and supervision of entities engaged in genetic research and manipulation; (iii) environmental education at all educational levels, and development of public awareness about the need to preserve the environment; (iv) definition of the territorial areas eligible for special protection; and (v) compulsory environmental impact assessment for the setup of any activities that may translate into significant ecologic degradation.

Another feature of the Constitution that came in for special attention was the legislative authority of the federal government, the states and municipalities over environmental matters. There is concurrent competence between the federal government and the states to legislate on environment protection issues; laying down general rules for the environment is incumbent on the federal government, whereas the states must issue the supplementary rules in this respect.

Criminal Sanctions

Law No. 9605, sanctioned with some vetoes by the President of the Republic on February 12, 1998, establishes the criminal penalties imputable to activities that are hazardous to the environment. With this underlying objective, Law 9605/98 is intended to replace all criminal sanctions scattered throughout various environmental protection laws such as the Forest Code, the Hunting Code, the Fishing Code, Law No. 6938 of August 31, 1981 (article 15), etc.

This law imputes criminal liability to whoever has polluted or degraded the environment, without derogating Law 6938/81, which regulates civil liability for environmental damage. Article 2 of Law 9605/98 clearly stipulates that criminal liability is to be commensurate with the extent of the agent's fault, thus ruling out the applicability of strict liability for criminal purposes as well. The same article ascribes criminal liability not only to the person directly liable for the damage but also to any agents

who were aware of the criminal conduct but took no action to avoid it, even when they could have done so. Joint liability extends to senior managers, officers, members of the board or committees, auditors, managers, legal representatives or proxies of a legal entity. Strictly speaking, this precept establishes that technical advisors, auditors and lawyers of companies may be held criminally liable for environmental damage when they were cognizant of this event, but manifestly did nothing to avoid it even though they could have done so.

Article 3 attributes criminal liability to the legal entity without excluding the possibility of penalizing individuals who may be considered the originator or co-originator of the same fact that is damaging to the environment. Article 4 embraces the tenets of the so-called *disregard doctrine*, piercing the corporate veil to the extent necessary for redress of damages caused to the environment. This disregard doctrine seeks to void any corporate scheme devised as a means of raising formal barriers to full redress of damage. The transfer of assets to a legal entity knowingly incapable of making reparation for environmental damage derived from such assets is one of the schemes that the law seeks to thwart.

The law imputes to individuals penalties restraining freedom – imprisonment or confinement – as well as penalties restricting rights, expressly permitting that the latter replace the former, provided that the provisions set out in article 7 are met. The first condition is that the offense is labeled as a culpable crime or whose penalty of imprisonment or confinement is less than four years. The second, which will remain at the discretion of the courts, is contingent on the subjective conditions of the agent and the characteristics of the damaging act, which may indicate that replacement of imprisonment or confinement by restriction of rights will suffice for conviction and prevention of the crime. Penalties restricting rights comprise: community services; temporary suspension of rights; partial or total suspension of activities; fine and house arrest.

The punishment specifically meted out to legal entities under article 21 is: fine; restriction of rights; and community services. For legal entities, the penalties restricting rights comprise full or partial suspension of activities; temporary interdiction of establishment, work or activity; and prohibition against executing contracts with or to obtain subsidies, subventions or donations from the public authorities. It is expressly set forth – and this will be of utmost importance for the defense of legal entities – that activities will be suspended when they do not comply with environmental laws or regulations, whereas the penalty of interdiction will apply when the establishment, work or activity has been operating without proper authorization (that is, without the preliminary installation and operation permits prescribed by environmental law), or when such businesses are not run in compliance with the existing permits or, furthermore, when these operations violate legal or regulatory provisions.

According to article 26, a criminal action is subject to the *ex-officio* initiative of the Public Attorneys Office, which means that it is filed irrespective of any initiative taken by the aggrieved party. With some changes, the law maintained the system set out under the Law of Special

Courts (Law No. 9099 of September 26, 1995), which permits that the offender enter a plea of *nolo contendere*, provided that certain conditions are met. In the case of crimes considered less serious¹ and processed by the state courts, punishable by up to one year's imprisonment or confinement (article 61 of Law 9099/95), and crimes processed by the federal courts, punishable by up to two years' imprisonment or confinement (article 2, sole paragraph of Law No. 10259 of July 12, 2001), a plea of *nolo contendere* may be entered into with the Public Attorneys Office upon immediate imposition of the penalty restricting rights, provided that the environmental damage has been previously remedied (article 27 of Law 9605/98).

As for crimes subject to a minimum penalty of up to one year's imprisonment or confinement, a conditional stay of criminal proceedings for two to four years is permissible; if during this period, the damage is remedied and the offender does not commit other irregularities, punishability for the crime is extinguished (article 89 of Law 9099/95). Moreover, the punishment meted out to the offender may be suspended when the penalty of imprisonment or confinement does not exceed three years (article 16 of Law 9605/98).

The new law consolidates the criminal sanctions set out in the Forest Code, the Hunting Code, and the Fishing Code (Sections I and II). The law is worded so as to cover the various forms of environmental degradation caused by pollution, including the damage caused by mining activities (Section III). Merely administrative irregularities (such as the lack of proper environmental licensing, for instance) and chronic problems regarding use of the urban land (water sources) are within the purview of the law. The law also provides for imposition of fines, ranging from R\$ 50 to R\$ 50 million.

Administrative Sanctions

Decree No. 3179 of September 21, 1999 regulated Law No. 9605 of February 12, 1998, updating the list of administrative sanctions applying to any activities and practices that are detrimental to the environment.

Under article 2 of such Decree, the following penalties are imposed on corporate offenders: warning; one-time or daily fine ranging between R\$ 50 and R\$ 50 million; product seizure, destruction, rendering unfit for use or suspension of sales; embargo, suspension or demolition of irregular works or activities; reparation of damage; and penalties restricting rights. The penalties restricting rights consist of suspension or cancellation of registration, licensing, permit or authorization granted to the corporate offender; forfeiture, restriction or suspension of tax benefits and incentives or credit facilities from official institutions; and prohibition against signing any contract with the government authorities for a period up to three years.

Although such Decree provides for reparation of damage as an administrative sanction, this procedure should not actually be labeled as an administrative penalty to be imposed by the

¹ *Some court decisions have also defined as less serious crimes those processed at the state courts, punishable by up to two years' imprisonment or confinement. These crimes would also be subject to a plea of nolo contendere.*

federal, state or municipal inspection agencies, as it happens with the other penalties prescribed in the Decree. The obligation to make proper reparation for the damage is, in actual fact, an offshoot of the civil liability set out in Law 6938/81.

Therefore, the administrative sanctions set forth in Decree 3179/99 can be imputed in furtherance to the Public Attorneys Office actions towards reparation of environmental damage and imposition of criminal liability on the offender, pursuant to Laws 6938/81 and 9605/98. It goes without saying that administrative offenses and criminal liability are subject to the rules applying to at-fault liability (*responsabilidade subjetiva*), which depends on evidence of malice or negligence on the part of the offender, whereas the obligation to redress the damage dispenses with evidence of fault (in that it is solely dependent upon the existence of a causal relation between the offender's action or omission, on one part, and the damage caused – the strict liability doctrine).

The Brazilian Environmental System

There is an entire system of federal agencies designed to enforce environmental legislation in Brazil. The Brazilian Environmental System (**SISNAMA**) comprises the Brazilian Environmental Council (**CONAMA**, the normative, consulting and decision-making agency); the Ministry of the Environment (the agency charged with coordination, supervision and control of the Brazilian Environmental Policy); and the Brazilian Institute for the Environment and Renewable Natural Resources (**IBAMA**, the executive agency).

SISNAMA also includes other federal government bodies, environment stewardship foundations, and entities of both state and municipal executive branches (state and municipal environmental offices; environmental agencies – CETESB/FEEMA/COPAM/IAP/CRA and others), in their respective jurisdictions.

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