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**CRIMINAL LAW AND THE PROTECTION OF THE ENVIRONMENT IN BRAZIL**

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**SUMMARY**

The author reviews the development of criminal instruments in the protection of natural resources in Brazil and the growing importance of criminal sanctions in setting up compliance and enforcement programs. Special attention is given to the 1998 Crimes Against the Environment Act, a piece of legislation containing highly innovative provisions that could have a considerable impact on how the environment is protected in Brazil.

**1 THE WORLD SCENE**

Over the past few years, criminal law has expanded its involvement in environmental protection exponentially, both through enactment of new laws and more effective enforcement of existing provisions. This phenomenon, initially limited to a handful of countries like the United States, is now an international trend.

In this regard, a major development was the UN General Assembly Resolution 45/121 on "The Role of Criminal Law in the Protection of Nature and Environment," which endorsed a report of the same title adopted by the Eighth United Nations Congress on Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, in 1990.<sup>2</sup> The Resolution stated, *inter alia*, "that in addition to measures provided by administrative law and liability under civil law, measures should be taken, where appropriate, in the field of criminal law.: In addition, it called upon Member States to "recognize the need to modify or enact, where necessary, and to enforce national criminal laws designed to protect nature and the environment, as well as people, threatened by their deterioration."

In 1995, the topic was again discussed at length during the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cairo, from April 29 to May 8.

It was in this setting of renewed interest in criminal law as a powerful tool for the protection of human health and ecosystems that Brazil recently enacted Law no. 9605 of February 12, 1998.

## **2 OVERVIEW OF THE LEGAL PROTECTION OF THE ENVIRONMENT IN BRAZIL**

Brazil is a world power in terms of natural resources. At the same time, however, it ranks among the leaders also in pollution<sup>3</sup> and irreversible destruction of habitats,<sup>4</sup> a fact exhaustively stressed by scientists and lately acknowledged by the government.

In spite of such an alarming assessment, the situation might have been even worse if the country had not made dramatic changes in its legal system during recent years to improve its struggle against pollution and environmental degradation.

Since the mid-sixties, several laws were enacted with a view to regulate several issues and activities that interface with the environment: the 1965 Forest Code;<sup>5</sup> the Fauna Protection Act,<sup>6</sup> the Fishing Act<sup>7</sup> and the Mining Act,<sup>8</sup> all adopted in 1967; the 1977 Liability for Nuclear Damages Act;<sup>9</sup> the 1980 Industrial Zoning Law for Critical Pollution Areas;<sup>10</sup> and the 1989 Pesticides Act.<sup>11</sup>

But it was the National Environmental Policy Act of 1981<sup>12</sup> that really set in motion environmental protection as such in Brazil. The legislators went beyond the piecemeal approach so typical of the legislation enacted prior to that date. The Act did more than establish the principles, goals and instruments of a national policy for the environment. It brought into the Brazilian legal system the environmental impact statement. In addition, the Act provided a regime of strict liability for environmental damage and gave the Offices of the Attorneys General standing to sue on this matter.<sup>13</sup>

An important step toward this legal development was the promulgation of a new Federal Constitution in 1988, right after democracy had been fully restored in Brazil. Among other innovations, the new Charter embodies a whole chapter on the environment,<sup>14</sup> aside from providing a social-environmental obligation inherent in property rights.<sup>15</sup>

## **3 FLAWS IN THE PREVIOUS CRIMINAL LAW REGIME AND THE DRAFTING OF THE 1998 CRIMES AGAINST THE ENVIRONMENT ACT**

Even before the enactment of the Crimes Against the Environment Act and the efforts to give a more prominent role to criminal law in environmental policy, Brazil already had several legal provisions determining criminal sanctions for offenses in areas such as pollution control,<sup>16</sup> flora,<sup>17</sup> fauna,<sup>18</sup> fishing,<sup>19</sup> and pesticides.<sup>20</sup> The 1940 Criminal Code, still in force today, has a number of provisions that might (and can) be enforced to protect the environment.<sup>21</sup>

Such criminal offenses were open to criticism from several angles. First, because they had a double standard, treating wildlife and habitat differently. Behaviors harmful to fauna, for example, were defined as a felony and subject to heavy punishment (prohibition of bail, e.g.), while actions harmful to flora were classed only as misdemeanors, whether the offender had cleared one or 100,000 hectares of native forest. Second, because of several poorly worded provisions and a fragmented approach to the environment as such, it was easy for defendants to be acquitted. Third, nearly all criminal offenses would require intent. Plagued with so many flaws, it is no surprise that in describing the situation prevailing in the '80's, Roger W. Findley stated that "to date, criminal actions have been a negligible factor in the overall efforts to abate pollution in Brazil."<sup>22</sup>

My concern with the ineffective existing criminal laws and my conviction that they could be useful in affording adequate protection to the environment, I suggested to then-Minister of Justice Nelson de Azevedo Jobim in early 1996 that a Legal Experts Committee be appointed to draft a Crimes Against the Environment Act, to which I was appointed general rapporteur.

The bill moved along a somewhat thorny but fast course in the Legislature. Adopted with no major amendments by the Senate, the Legal Experts' draft lost several of its original provisions thanks to pressures from an extremely powerful lobby that rallied together industrialists, mining concerns, timber companies, and ranchers. The law was weakened even further subsequently by a number of presidential vetoes. President Fernando Henrique Cardoso turned a deaf ear to the pleas not to do so from legal scholars, environmental groups and the international community.<sup>23</sup>

Totaling 82 articles, Law no. 9605 is much more than a Crimes Against the Environment Act, as its title implies, but also deals with administrative sanctions.

#### **4 KEY INNOVATIONS IN THE CRIMES AGAINST THE ENVIRONMENT ACT**

Law no. 9605/98 brings several innovations, starting from the fact that Brazil has in a single piece of legislation the near totality<sup>24</sup> of criminal offenses against the environment.

It should be stressed also that the law has both provisions that are dependent on or accessory to administrative law, and others that are independent from environmental agencies, incriminating conduct that creates serious risk to human life or health or to the environment even when covered by a valid permit.

##### *4.1 Criminal Liability of Corporations*

One of the key innovations of Law no. 9605/98 was the introduction of corporate criminal liability in the Brazilian legal system. This idea subverts the Latin-American legal tradition, where only individual liability is contemplated.

Under the new system, both individuals (including corporate management) and legal persons are criminally liable, their liability limited solely to those cases where "the offense is committed by a decision of a legal or contractual representative or of its collegiate body in the interest or for the benefit of its organization."<sup>25</sup>

The criminal liability of corporation does not preclude "individual liability,"<sup>26</sup> and the same conduct may bring a verdict of guilty to the corporation, its management and other individuals involved.

##### *4.2 Pollution Control*

As explained above, the 1981 National Environmental Policy Act had a criminal provision added to its wording in 1989 dealing specifically with pollution. Law no. 9605/98 also embodies that offense, punishing with one to four years in jail and a fine anyone who "causes pollution of any nature at levels that result or may result in injury to human health or that cause animal death or significant destruction of flora" (art. 54, first part).

It is also a crime to "build, remodel, expand, install or operate, anywhere in the Brazilian territory, potentially polluting facilities, works or services without a permit or authorization by the proper environmental agencies or in breach of the applicable legal or regulatory standards" (art. 60).

#### 4.3 Crimes Against Flora and Fauna

Offenses against flora were classed as misdemeanors under the old Forest Act, which weakened deforestation control considerably.

The new law has a whole section devoted to the protection of flora, listing criminal offenses such as direct or indirect damage to protected areas,<sup>27</sup> destruction of or damage to specially protected native or planted forests, dune preserving or mangrove protecting vegetation,<sup>28</sup> or hindrance or obstacles to natural rehabilitation of plant life under protection.<sup>29</sup>

Restrictions on the use of fire was vetoed by the Brazilian President under pressure of some powerful landholders.<sup>30</sup>

As far as wildlife is concerned, the law copied the criminal offenses already included in the 1967 Fauna Protection Act and added a few more. For example, it is an offense punishable by six months to a year's incarceration and a fine for anyone to "kill, stalk, hunt, trap or use native or migratory wildlife specimens without the required permit, license or authorization from the proper authority or in breach of any such permit, license or authorization granted" (art. 29). If the offense occurs in the form of professional hunting — forbidden by the Fauna Protection Act anywhere in the country — the penalty may increase threefold (art. 29, paragraph 5).

It also constitutes an offense to "practice any type of abuse, mishandling, injury or mutilation of wild, domestic or tamed, native or exotic animals" under penalty of three months to a year's incarceration and a fine (art. 32, first part).

While in the case of flora the law is harsher than the criminal provisions in the Forest Code, on wildlife it moved backward in that applicable sanctions were considerably abated. Behavior that was punished by two to five years in jail under the Fauna Protection Act is subject to six months to a year's incarceration and a fine according to Law no. 9605/98. Not to mention that under the new law all such offenses are entitled to bail, which was not the case before. In other words, in the criminal protection of fauna we went from one extreme (too much) to the other (too little).

#### 4.4 Crimes Committed by Environmental Officials

The change introduced by Law no. 9605/98 that has brought the heaviest and most immediate impact was the criminalization of certain types of behavior of environmental officials. It is now an offense — carrying one to three years; incarceration and a fine — for the "official to grant a permit, authorization or license in breach of environmental rules for activities, works or services that depend on authorization of a government agency" (article 67), whether the behavior is intentional or negligent (in the latter case, the penalty is three months to a year's incarceration and a fine).

Another new provision punishes "any official who makes false or misleading statements, omits the truth, or does not disclose technical and scientific information or data in applications for environmental permits or licensing," under penalty of one to three years' incarceration and a fine (art. 66).

#### 4.5 Sanctions

Individuals are liable to incarceration, fines and restriction of rights. Legal persons are liable to the last two penalties, in addition to providing community services (maintenance of public facilities, rehabilitation of degraded areas other than the directly damaged one).

According to the law, restriction of rights means, among other things that the offender may not sign contracts with the government, receive tax incentives or any other kind of benefit or take part in public bids; the guilty party is also liable to partial or full suspension of its activities (articles 8, 10 and 22).

Redress for environmental damage may suspend or mitigate criminal sanctions if certain requirements are met.

## **5 AN ASSESSMENT OF THE FIRST FEW MONTHS OF ENFORCEMENT OF THE NEW LAW AND FUTURE CHALLENGES**

In the State of Sao Paulo — the most affluent and industrial unit of the federation and a pioneer in pollution control — environment permits have been mandatory since 1976, when State Act no. 997 of 05.31.76 was enacted.

But it was only after the Crimes Against the Environment Act that CETESB — the State pollution control agency — and the State Secretariat of the Environment, concerned with the threat of criminal liability for its officials, decided to fully enforce Law 997/76.

So, a few days before Law no. 9605/98 came into force, CETESB issued over 7,000 notices to polluter companies demanding that they either apply for or renew their environmental permits. Those who could comply with the environmental standards had new permits issued, but major steel, petrochemical, mining and automobile companies that had been operating illegally for years while officials and their inspectors turned a blind eye, would have to be shut down because they needed more time to install new pollution control equipment.

Surprisingly, the Secretariat of the Environment<sup>31</sup> and CETESB went to President Cardoso and asked him to make use of his constitutional powers for emergency action (“Medida Provisoria”), withdrawing enforcement of Law no. 9605/98 and giving polluters more time to make the necessary adjustments. A deferral of up to ten years was granted, postponing full enforcement of the environmental law in Brazil until the year 2008<sup>32</sup>. The presidential order and the attitude of the Secretariat favoring polluters were severely criticized by environmentalists, by officials of environmental agencies, and even by the more broadminded business leaders. It was indeed astonishing to see a decision like this right in the middle of the political campaign for the coming presidential and gubernatorial elections. In response to public pressure, President Fernando Henrique Cardoso reissued the emergency measure cutting the deadline back from ten to up to six years. In spite of these hurdles, however, Law no. 9605/98 will improve environmental protection in Brazil. The big challenge now is to enforce the law. Without effective enforcement, the law will become another piece of paper with little or no benefit to the people.

## **REFERENCES**

- 1 Senior Assistant Attorney General, Head of the Environmental Protection Division of the Office of the Attorney General of the State of Sao Paulo, member of the United Nation’s Legal Experts Committee on Crimes Against the Environment, Rapporteur of the Legal Experts Committee of the Ministry of Justice in charge of drafting the Bill on Crimes Against the Environment, President of Lawyers for a Green Planet Institute, and visiting Professor of Environmental Law at the University of Texas School of Law at Austin (1995-present)

- 2 A/CONF.144/L4
- 3 The case of the petrochemical complex of Cubatao, a city of over 100,000 people on the coast of Sao Paulo State, made international headlines due to its staggering population levels in the eighties. Cf. Hoge, *New Menace in Brazil's 'Valley of Death' Strikes at Unborn*, NY Times, Sept. 23, 1980, at 2, col. 1.
- 4 "Brazil is the biggest deforester (in terms of area and speed), accounting for about three-quarters of total world rainforest clearance," Chris C. Park, *Tropical Rainforests*, London and New York: Routledge, 39 (1992). To illustrate the extent of the problem, take the state of Sao Paulo: when it was originally settled "88.8% of its lands were covered with forests. By the early 90's, it was estimated that the remaining forest cover barely reached 1.7 million hectares, or just 7.16% of the primitive area," Sao Paulo State Secretariat of the Environment, *Do Rio as Ruas: a Insercao da Agenda 21 no Cotidiano Paulista*, Sao Paulo: SMA (1997), 78.
- 5 Law no. 4771 of 09.15.65. Despite its title, this statute does not rule only on "forests" but extends to "other forms of plant cover" (article 1, first part).
- 6 Law no. 5197 of 01.03.67, also known as the "Hunting Code" until it was amended by Law no. 7653 of 02.12.88, when the word "hunting" was replaced by "fauna protection."
- 7 Law-decree no. 221 of 02.28.67
- 8 Law-decree no. 221 of 02.28.67
- 9 Law no. 6453 of 10.17.77
- 10 Law no. 6803 of 07.02.80.
- 11 Law no. 7802 of 07.11.89.
- 12 Law no. 6938 of 08.31.81.
- 13 This standing to sue was subsequently amplified by Law no. 7347/85, whereby other parties, including environmental associations, are entitled to institute a public civil suit demanding restoration of the damaged areas or pecuniary compensation for the damages done.
- 14 Article 225
- 15 Articles 170, VI, and 186, II.
- 16 In 1989, a new provision (art. 15) was added to the National Environmental Policy Act (Law no. 6938/81) whereby criminal sanctions would be brought against "a polluter who exposes human, animal, or plant life to hazards or who increases any existing hazardous condition."
- 17 Forest Code, article 26.
- 18 Fauna Protection Act, article 27. Law no. 7653 of 02.12.88 that rechristened the existing "Hunting Code" changed all of its criminal offenses, which had been mere misdemeanors, into felonies, with much heavier penalties.
- 19 Fishing Code, articles 61 and 64.

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- 20 Law no. 7802/89, articles 15 and 16.
- 21 The Criminal Code has several provisions that punish as felonies certain actions having indirect impact on the environment. Article 271, for example, which forbids pollution of potable water as a crime against public health, or Article 132 that broadly makes it a crime “to expose the life of health of another to direct and imminent danger.” On the issue of forest protection, Article 250 imposes sanctions to anyone who causes “a fire, exposing the life, health or property of others.” In softer terms, the 1941 Misdemeanor Act punishes as a misdemeanor whoever “causes excessive production of smoke, steam or gas emissions that may hurt or cause discomfort to others” (article 38).
- 22 Roger W. Findley, *Pollution Control in Brazil*, 15 *Ecology Law Quarterly* 51 (1988).
- 23 Expressing the concern of both the international community and Brazilian environmentalists, the *New York Times* printed an editorial stating that the President “now has on his desk new legislation that finally gives the county’s environmental agency a modicum of power to enforce environmental laws,” concluding that “Mr. Cardoso must refrain from further weakening an already weak bill” (*Half-Measures to Protect the Amazon*, *NY Times*, Feb. 2, 1998, A24 (Editorials)).
- 24 When it was first submitted to Congress, the last provision of the bill listed expressly all criminal offenses that would be revoked. But in view of the firing power of the opposing members of the House of Representatives and the clear intent of the President of vetoing several other provisions, the Legal Experts Committee felt it would be wiser to simply end the text with “all other provisions to the contrary are hereby revoked.” Through this artifact, preexisting criminal offenses not modified by Law no. 9605/98 would remain in force. Such is the case, among others, of the criminal offense status given to whaling where the penalty involves 2 to 5 years in jail plus a fine (Law no. 7643 of 12.18.87).
- 25 Article 3, first part.
- 26 Article 3, second part.
- 27 Article 40, first part.
- 28 Article 50.
- 29 Article 49.
- 30 The provision vetoed had already been considerably watered down by the powerful ranchers’ lobby, and merely criminalized setting fire to forests and other plant life “without due precaution to prevent its spread” (article 43, first part).
- 31 To justify the generous deadline granted for polluters to make the necessary adjustments, the Sao Paulo State Secretary for the Environment, Stela Goldenstein, the main advocate of the highly controversial measure, said that it is not in the best interest of Brazil to suddenly shut down “such a sizable part of the Brazilian industry.” See *A SMA e a Medida Provisoria 1710*, 12 *SMA Esclarece* 2 (August 1998).
- 32 “Medida Provisoria” no. 1710 of 08.07.98

