

AN ANALYSIS OF THE ROLE OF THE PUBLIC PROSECUTION IN PUBLIC ENVIRONMENTAL INTEREST PROTECTION: BASED ON THE BRAZILIAN MODEL

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ABSTRACT: Brazil is one of the world’s largest emerging economies, and its environmental protection mechanism is widely recognized. Considering the public interest on environmental litigation in Europe and the United States, the tradition of continental legal system and its national conditions, Brazil improved its protection mechanisms for public environmental interest. The function of the Brazilian public prosecution to protect public environmental interest improves the enforcement of environmental law. Meanwhile, the separation of the right of action between prosecutors and victims, and the “Conduct Adjustment Agreement” mechanism, give full play of the prosecutor role in public environmental interest protection and promotes the public and enterprise compliance with environmental regulations. Nevertheless, the current function of the Brazilian public prosecution for public environmental interest protection cause several problems, such as reduced efficiency of the judiciary and lack of coordination in law enforcement. Therefore, relevant mechanisms in Brazil require study and can be made a reference for other countries.

KEY-WORDS: Public Prosecution — public environmental interest protection — public civil action — Brazil

I. Development of public interest environmental litigation and the role of public prosecution

The protection mechanisms for public environmental interest develop with the emergence and development of public interest litigation. At present, collective and class actions have been recognized and regulated in most countries and regions worldwide, especially in common law countries. In theory, the necessity of protecting diffuse, collective, and homogeneous individual rights is widely recognized.¹ In practice, the right of relevant parties to initiate a lawsuit to protect public interest has been widely recognized and legislated.

In the United States, “citizen suit” has long been recognized. With the development of relevant theory of civil litigation, scholars in the United States suggested reducing plaintiff qualification requirements. Meanwhile, the “Private Attorney General” mechanism was the preliminary stage of public interest litigation. This mechanism grants citizens the right to become private attorney generals and protect the environment, which is an important supplement to public relief methods. According to relevant regulations, any citizen can bring a lawsuit against violators of environmental law or national environmental protection agencies

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¹ See Gidi, A. (2003). Class actions in Brazil, a model for civil law countries. *American Journal of Comparative Law*, 51(2), 311-408.

that fail to fulfill their responsibilities. The “private attorney generals” that win the case can, in addition to the claims, also ask the defendant to pay lawyer fees. This mechanism is a considerable improvement in public interest litigation in the United States. Since the adoption of the Clean Air Act of 1970, many environmental laws promulgated in the United States contain relevant “citizen suit” provisions.²

In addition, the law in the United States also authorize the prosecution to initiate public interest litigation against persons or organizations that cause environmental damage, and relevant fines or compensation are paid to governments for environmental protection. The rights and obligations of prosecuting agencies that initiate public interest litigations are similar to other plaintiffs in courts. Moreover, such cases do not influence the rights of victims to ask for compensation. This mechanism in the United States is a good attempt for the public prosecution function of protecting public environmental interest.

Public interest environmental litigation is also regulated in the European Union. According to article 9 (3) of the United Nations Economic Commission for Europe’s Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters³, members of the public can initiate legal action even in cases when they are not directly affected by the violation of the environmental law. According to this convention, environmental protection organizations in the European Union have initiated numerous successful cases. Moreover, the environmental protection authorities of the European Union member states can also employ lawyers as “prosecutors” to file public interest lawsuits against polluting factories. Similar to relevant regulations in the United States, the rights and obligations of these “prosecutors” that initiate public interest litigation are similar to other plaintiffs in courts.

Brazil is one of the world’s largest emerging economies, and its environmental protection mechanisms are widely recognized. Considering public interest environmental litigation mechanisms in Europe and the United States, the tradition of continental legal system and its national conditions, Brazil recently improved its protection mechanisms for public environmental interest. The function of the Brazilian public prosecution to protect public environmental interest improves the environmental law enforcement. Meanwhile, the separation of the right of action between prosecutors and victims, and the Conduct Adjustment Agreement⁴ mechanism, significantly promotes public and enterprise compliance with environmental regulations. The theoretical and practical attempts lay a good foundation for improving public interest environmental litigation in Brazil.

In Brazil, before the public prosecution began to play a role in public environmental interest protection, environmental law enforcement faced several problems. Although the relevant regulations are relatively comprehensive, specific provisions cannot be implemented completely. At that time, administrative agencies have the main responsibility to enforce environmental regulations. However, several problems relating to environmental law enforcement mechanism arose, such as the relatively low status, limited influence of administrative agencies, and insufficient technical personnel of law enforcement. In addition,

² Such as the Clean Air Act, Clean Water Act, Endangered Species Act, Toxic Substances Control Act, and Drinking Water Safety Act of the United States.

³ Also known as the Aarhus Convention.

⁴ The “*termo de ajustamento de conduta (TAC)*” in Brazil.

relevant administrative agencies in charge of environmental law enforcement are not independent and are influenced by other governmental agencies, which results in the occasional corruption. In the 1980s, the debt crisis occurred in Latin American countries, and as management measures, the Brazilian government took several fiscal reforms, such as reducing expenditures. Correspondingly, environmental protection agencies began to face challenges such as wage drop, budget shortage, and insufficient professionals.⁵ The environmental law enforcement in Brazil worsened.

In this context, the Brazilian public prosecution, which played a role in protecting social and public interest, began to implement environmental laws and regulations on behalf of public environmental interest. According to the National Environmental Policy of 1981 and the Public Civil Action Act of 1985, the public prosecution is authorized to initiate or join civil litigations on behalf of environmental public interest protection. In 1988, the Constitution provided that the public prosecution is independent of other governmental agencies. According to the 1988 Constitution, public prosecution can institute a civil investigation and public civil suit to protect public and social property, the environment, and other diffuse and collective rights. In detail, the public prosecution can conduct civil investigations on environmental issues, reach a Conduct Adjustment Agreement with responsible parties, initiate public interest environmental litigations, and prosecute environmental crimes. Although according to the law, individuals as well as governmental and non-governmental organizations all have rights to initiate public interest environmental litigations, reports show that 97% of the cases are initiated by the public prosecution.⁶

Therefore, among considerable environmental protection legal mechanisms in Brazil, further study of the role of the public prosecution in protecting public environmental interest is significant, especially their public interest environmental litigations.

II. Legal basis of public prosecution function of public environmental interest protection

The Public Prosecution of the Union in Brazil comprises the Federal Prosecution, Labour Prosecution, Military Prosecution, and Prosecution of the Federal District and its territories. The Public Prosecution Service is not part of the Executive, Legislative, or Judicial branches and is independent of those agencies. The service cannot be terminated and its duties cannot be transferred to other government agencies. The independence of prosecutors is guaranteed by the 1988 Brazilian Constitution. Therefore, prosecutors are subordinated to an authority for administrative purposes only, but each member is free to act according to their conscience and convictions under the law. The federal prosecution acts on federal matters regulated by the Constitution and federal laws whenever public interest is involved. Among their responsibility is to ensure compliance with the laws in force, including international agreements. Furthermore, the federal prosecution acts as a guardian of democracy, ensuring respect for principles and rules that guarantee popular participation.⁷ At the same time, the theoretical study and

⁵ Juliano Assuncao, Clarissa Gandour. (2015). Strengthening Brazil's Forest Protection in a Changing Landscape, *Climate Policy Initiative*, available at <https://climatepolicyinitiative.org/publication/strengthening-brazils-forest-protection-in-a-changing-landscape/>, October 21, 2020.

⁶ McAllister, L. K. (2008). *Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, Stanford University Press, p.20.

⁷ See Brazilian Prosecution Service, Ministério Público Federal, available at <http://www.prrj.mpf.mp.br/english>, October 18, 2020.

development of relevant regulations provide legal basis for the function of public prosecution of environmental public interest protection.

A. Difference between right of action and substantive rights

In traditional civil procedure law, scholars hold that only holders of substantive rights and obligations in disputes can initiate civil litigations, and the subjects that are not directly involvement parties cannot make a lawsuit or be accused. Then, with the development of relevant theory of civil procedure law, the requirements of directly involvement parties are gradually abandoned, and the concept of parties in civil procedure law is widely recognized. In this context, the right of action and substantive rights are separated, and the scope of parties in civil procedure law is expanded. Organizations and individuals other than directly involved parties are authorized to initiate civil litigations in more countries. For instance, the Federal Rules of Civil Procedure of the United States provides that the governments can file lawsuits to protect citizen interests.⁸ Article 55 of the Civil Procedure Law of the People's Republic of China provides that "for conduct that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court". Similarly, Article 1 of the French Code of Civil Procedure, Article 45 of the Civil Procedure Code of the Russian Federation, and Articles 11–15 of the Spanish Civil Procedure Code also regulate collective actions and corresponding requirements for litigants. Moreover, as one of the largest emerging economies, India also reformed its public interest litigation mechanism; according to relevant regulations, individuals who are not directly involved can also initiate litigations to protect the public interest as much as possible.

Under this context, considering the regulations and practices of other countries, Brazil also stipulates the right of individuals, organizations, and state agencies to initiate and participate in civil public interest litigations, which provides a legal basis for the public prosecution to perform its duties of public environmental interest protection.

B. Public prosecution acts on behalf of the state

As the representative of public power, the public prosecution has the responsibility to play a role in public interest protection. Currently, the state has the responsibility to protect the public interest. From the perspective of environmental protection, environmental pollution and damage can be regarded as the infringement of public interest, which the state also has the responsibility to protect. However, the state is an abstract subject that cannot act as the plaintiff and the defendant in litigation. Therefore, state agencies become representatives and the administrative proceedings are typical examples, and similarly, fulfill their responsibilities of protecting environmental and other public interests.

Generally, state agencies include executive, legislative, and judicial agencies. Executive agencies act on behalf of the state to organize and perform administrative duties, specifically of the implementation of state policies. Legislative agencies are mainly in charge of enacting, amending, and repealing laws, and also for deliberating on the bills. Judicial agencies enforce laws and resolve disputes. Generally, the executive or judicial agency acts on behalf of the state

⁸ See article 17 of the Federal Rules of Civil Procedure Rule in the United States.

and plays a role in public interest protection. In different countries, the public prosecution is a judicial or executive agency,⁹ which exercises the duties of criminal investigation, prosecution, and legal supervision. According to the regulations of different countries, public prosecution has different specific duties and legal status. Nevertheless, public prosecution is widely recognized to play a role in public interest protection. At present, the United States, Russia, and several Eastern European countries all authorize the public prosecution to independently initiate litigations for public interest protection. Meanwhile, other countries such as France adopt a joint party mechanism, which authorizes the public prosecution to initiate relevant litigations with other individuals and organizations. In conclusion, in many countries, the public prosecution acts on behalf of the state and plays a role in public interest protection.

C. Evolution of relevant Brazilian laws

Open democracy in Brazil began in the late 1970s. At that time, the people and the Parliament wanted to establish an agency within the existing political system and enhance its function of democracy and civil rights protection. Under this context, the public prosecution began to take the role of public interest protector.

Before the 1980s, the public prosecution was only responsible for criminal prosecution. In 1965, the Popular Action Act was enacted and provided regulations for collective actions. According to the Popular Action Act, any person with civil rights can bring a lawsuit against individuals and organizations that cause damage to public property and interest, and guarantee the proper use of public property and protect public interest.¹⁰ The 1981 National Environmental Policy provided that the public prosecution has the right to initiate public civil proceedings for environmental protection.

Then, Brazil promulgated the No. 7347 / 1985 Public Civil Action Act, which provided specific regulations of judicial remedies to protect the environment, consumer interests, and other diffuse rights. The public prosecution holds that its aim is to protect the public interest instead of government interest. During the legislation of the Public Civil Procedure Law, the public prosecution of Sao Paulo state also played an important role. In 1970, local scholars began to study the legal protection mechanisms of collective rights and interests. Several prosecutors of Sao Paulo state also put forward their opinions on the public prosecution function of protecting diffuse rights, suggesting that prosecutors should play a greater role. Under this context, the Public Civil Procedure Law finally provides that individuals, environmental protection organizations, public prosecution, and other governmental agencies can initiate public interest environmental litigations. More importantly, the law provides that Brazilian public prosecution can carry out a civil investigation and collect evidence for initiating civil public interest litigations. This is the law that clearly stipulates the role of Brazilian public prosecution in public civil litigation. The general consensus is that “the law represented, without doubt, a revolution in the Brazilian legal order, as the judicial process stopped being seen as an instrument merely for the defense of individual interests and became

⁹ Generally, prosecution agencies are executive agencies in Common law countries and judicial agencies in Civil law countries.

¹⁰ Humberto Dalla Bernardina de Pinho. (2005). Class Actions in Brazilian Law: General Aspects, Evolution and Some Controversies. *Connecticut Journal of International Law*, 186.

seen as an effective mechanism for the participation of society in those conflicts that involve supra-individual interests”.¹¹

In 1988, the Brazilian Federal Constitution was amended and stipulated the institutional independence of Brazilian public prosecution. In detail, Article 127 of the 1988 Constitution provides that the public prosecution is “a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests”. Article 128 of the Constitution stipulates the appointment of the Attorney General of the public prosecution, the life tenure of prosecutors, and the agency independent status. Article 129 of the Constitution further provides that the institutional functions of the public prosecution include criminal prosecution; ensuring effective respect by the Public Authorities and by the services of public relevance for the rights guaranteed in this Constitution; instituting civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective rights; defending judicially the rights and interests of the Indian populations; and requesting investigatory procedures and the institution of the police investigation, indicating the legal grounds of its procedural acts.¹² Then, Brazilian public prosecution is relatively independent of other executive, legislative, and judicial agencies, and thus becomes the independent “fourth branch”. The 1988 Constitution stipulates that the Brazilian public prosecution has administrative, political, and financial and budget independence, which provides a legal foundation for public prosecution to perform the function of public interest protection.

Therefore, after the 1988 Constitution clarified its independence as an agency and its function of protecting diffuse and collective interests, the Brazilian public prosecution and its role in environmental civil interest protection began to be recognized.

III. Function of Brazilian public prosecution in protecting public environmental interest

Article 225 of the 1988 Brazilian Constitution provides that “all have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.”

In civil proceedings, Brazilian public prosecution mainly aims to protect diffuse, collective, and homogeneous individual rights. The 1988 Brazilian Constitution stipulates that Brazilian public prosecution can submit proposals, initiate public interest litigation, and organize class action towards companies, individuals and governments, to protect the interests of minorities, consumers, environment and other public aspects. Therefore, in case of any infringement of the above rights and interests, Brazilian public prosecution take measures such as consultation and civil investigation to first collect evidence, and then decide whether to initiate civil public interest or administrative litigations and organize class action. In addition, Brazilian public prosecution also has the function of environmental criminal prosecution.

¹¹ Édís Milaré. (2001). *Direito do Ambiente*, 510.

¹² See Articles 127–129 of the Constitution of the Federative Republic of Brazil, 1988.

A. Making Civil investigation

Upon receiving citizen complaints or discovering any clues about environmental damage, the Brazilian public prosecution can carry out a civil investigation for environmental protection. In detail, public prosecution can require any individuals and legal persons to provide relevant information and documents, and then decide whether to initiate litigations based on the collected materials. In general, relevant individuals and legal persons are inclined to cooperate with the public prosecution to provide required information and documents, due to the regulation that those who fail to do so may be sentenced to up to three years of imprisonment, and the public prosecution can decide whether to further initiate criminal prosecution. In general, the civil investigation carried out by the public prosecution is terminated with insufficient evidence collected, or be completed with the initiation of the public interest litigations based on the collected information. The civil investigations can be terminated before and during the public interest environmental litigations, only if the public prosecution reaches a Conduct Adjustment Agreement with the investigated individuals and legal persons. Each year, the public prosecution carries out numerous civil investigations for environmental protection, such as approximately 6,000 in 2005.¹³

B. Negotiating the Conduct Adjustment Agreement

The public prosecution mainly takes pre-litigation negotiations and public interest litigations to protect public environmental interest.

In Brazil, most civil investigations for environmental protection initiated by the public prosecution are completed by reaching the Conduct Adjustment Agreement. The power owned by the public prosecution improves their reach of Conduct Adjustment Agreement with the person responsible for relevant environmental damage. Through negotiations, the environmental remediation methods to be taken by the liable party and the sanctions to be imposed in violation of relevant agreements are regulated in the Conduct Adjustment Agreement. The subjects under investigations are inclined to reach the Conduct Adjustment Agreement with the public prosecution, to avoid the possible public interest litigations or criminal prosecution. If the subjects refuse to perform or violate the agreements, the public prosecution requires the subjects to perform the agreements, or initiate civil litigations or criminal prosecution such that the subject takes responsibilities for the environmental damage they caused. In 2005, of the nearly 6,000 environmental civil investigations initiated by the public prosecution, many ended with a commitment of the subject to repair the environment and pay compensation.¹⁴ Typical cases relating to the Conduct Adjustment Agreement are introduced as follows.

On November 07, 2011, a submersible platform team owned by Transocean identified the occurrence of an oil kick in a well that was being drilled in Campo de Frade by the concessionaire Chevron Brazil Upstream Frade Ltda. Safety equipment was triggered to close the well, which was not completely achieved due to Chevron's inefficiency. On November 09, 2011, Chevron officially reported the accident at Campo de Frade and submitted the beginning of procedures provided for in the Individual Emergency Plan. The National Petroleum Agency

¹³ McAlliser, L. K. (2011). Environmental advocacy litigation in Brazil and the United States. *Journal of Comparative Law*, 6(2), 203–219, p. 209.

¹⁴ *Ibid.*

appointed a team to investigate the occurrence and first contacted the Navy to define the response procedures. On November 21, 2011, the Brazilian Institute for Environment and Renewable Resources (IBAMA) assessed the company Chevron to pay the administrative fine of R\$ 50 million, based on Articles 70 and 72, item II, of the Federal Law No. 9,605 / 1998, Article 17 of the Federal Law No. 9,966 / 2000, and Article 36 of Federal Decree No. 4,136 / 2002. In 2013, Chevron signed a Conduct Adjustment Agreement with the public prosecution and Federal Government Agencies, and pledged to compensate for the damages.¹⁵

In 2018, IBAMA fined the mining company, Anglo American Minério de Ferro Brasil S/A, R\$ 72.6 million for the two leaks that occurred in its Minas-Rio pipeline that polluted the Santo Antônio do Gramma region in Minas Gerais. The Minas Gerais Department of the Environment fined the company R\$ 125.5 million due to the first breach of its pipeline. The fines were mainly for pollution that can cause damage to human health, to the river that necessitated the interruption of the abstraction and water supply for the surrounding population, and the release of ore in violation of the legislation. Then, the Public Prosecution of Minas Gerais filed a Public Civil Action against Anglo American Minério de Ferro Brasil S/A on March 13, 2018, requesting the company to take emergency measures and pay compensation. On May 10, 2018, a Conduct Adjustment Agreement was reached by the Public Prosecution of Minas Gerais and the company, which promised to repair the affected environment and pay compensation to victims.¹⁶

On February 17, 2018, the residents of Barcarena reported to the State Public Prosecution of the possible leakage of waste from the Norwegian company, alumina producer Hydro Alunorte. The waste reaches several points in the municipality of Barcarena after two days of heavy rain. The Attorney General's Office of the State of Pará filed a public civil action with an injunction against Hydro Alunorte company for heavy metal contamination. In the lawsuit, the Attorney General's Office requested the payment of R\$ 250 million as compensation for damages caused by the release of rainwater not treated by the refinery. On September 05, 2018, those responsible for the Hydro Alunorte alumina refinery signed a Conduct Adjustment Agreement with the Federal Public Prosecution, State of Pará Public Prosecution, State of Pará, and the Secretariat of State of Environment and Sustainability. The purpose of the agreement is to ensure the immediate implementation of actions for impact assessment, emergency service to communities, safety of solid waste deposits, improvement of the production, and improvement and execution of the plan of emergency actions of the company.¹⁷

¹⁵ Judgment on Instrument of Appeal issued by the Federal Regional Court of the 2nd Region regarding Process No. 2012.02.01.0040752, available at <http://www1.tjrj.jus.br/gedcacheweb/default.aspx?UZIP=1&GEDID=0004B3C38C16C70A525834F89E638136106BC50707030D2C>;

Judgment from the 1st Federal Court of the Judicial Section of Rio de Janeiro – Process No. 0040420-58.2012.4.02.5101, available at <https://jurisprudencia.trf2.jus.br/sm/download?name=apolo-sentencas-rj&id=64123937;2012-08-16%2015:24:00>, December 14, 2019.

¹⁶ Decision that approved the Terms for Commitment to Adjustment of Conduct, available at https://www4.tjmg.jus.br/juridico/sf/proc_peca_movimentacao.jsp?id=29586562&hash=96b182942e799f24a2b536a82351f4b4;

Decision on the Preliminary Injunction by the Public Prosecution of Minas Gerais, available at https://www4.tjmg.jus.br/juridico/sf/proc_peca_movimentacao.jsp?id=26807106&hash=b23a71cb1c12d3a98546c96b4099b03a, December 27, 2019.

¹⁷Decision of Process No. 1001173-84.2018.4.01.3900 in relation to the revocation of the preliminary measure of seizure of the area of deposit DRS2, available at http://www.mpf.mp.br/pa/sala-de-imprensa/documentos/2019/1001173-84-2018-4-01-3900_71604587.pdf;

C. Initiating public interest environmental litigations

In addition to civil investigation and pre-litigation negotiation, initiating public interest environmental litigations is another important function of the public prosecution. In general, if the Conduct Adjustment Agreement cannot be reached during the civil investigation, then the public prosecution files public interest environmental litigations against those responsible for relevant environmental damage, and asks the court to order the responsible party to repair the environment and pay compensation. Moreover, before the court makes a judgment, the public prosecution can ask for an injunction to forbid the responsible party to take certain acts or force them to take certain measures to prevent further environmental deterioration.

The public prosecution filed 40 public interest environmental lawsuits in 1984,¹⁸ a number that increased to more than 400 in 2004. Although the law stipulates that social organizations and other governmental agencies also have the right to initiate public interest environmental litigations in accordance with the provisions of the 1985 Public Civil Action Act, over 90% of such litigations are initiated by the public prosecution.¹⁹ Therefore, in Brazil, most public interest environmental litigations are initiated by the public prosecution, and its function of public environmental interest protection is publicly recognized.

A dam leakage in Cataguases is one of the typical cases. In 2003, industrial tailings spilled 900,000 cubic meters of black liquor that consisted primarily of lignin and sodium in the Paraíba do Sul Watershed. The Cataguases accident resulted in fish deaths, interruption of water supply in several municipalities of the states of Minas Gerais and Rio de Janeiro for about 10 days, and damage to small farms located on the banks of Ribeirão do Cágado to the extent of approximately 106 hectares.²⁰ In 2005, the Federal Prosecutors filed a public interest environmental litigation at the 2nd Court of the Federal Court of Campos (RJ), requesting several private legal entities that caused the joint damage to pay compensation.²¹ In 2015, the court upheld this request and ruled that the defendants should jointly bear the environmental and moral damages in the amount of R \$140 million.

In another case, the Federal Public Prosecution of Alagoas filed a public interest environmental litigation with an injunction in May 2019 against Braskem, a petrochemical company, to repair social and environmental damage of at least R\$ 20.5 billion caused by salt exploration activities. The court ruled that Braskem should present to the court and close the mines that already have the sonar study performed within 15 days.²²

Interlocutory decision of Environmental Public Civil Action No. 0003828-86.2018.8.14.0008, available at <https://consultas.tjpa.jus.br/consultaprocessportal/consulta/baixarDocumento.action?cdDocumento=20180138983987&cdProcesso=00038288620188140008&cdInstancia=1>, January 04, 2020.

¹⁸ McAllister, L. K. (2008). *Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, Stanford University Press, p. 99.

¹⁹ McAllister, L. K. (2008). Revisiting promising institution: Public law litigation in the civil law world. *Georgia State University Law Review*, 24(3), 693–734, p. 703.

²⁰ GONÇALVES, Juliana Bosi, DE ALMEIDA, Josimar Ribeiro, LINS, Gustavo Aveiro. (2007). Uma Análise Crítica do Acidente em Cataguases (MG) (2003). *Revista Ciências do Ambiente On-Line*, Agosto, Volume 3, Número 2, available at <http://sistemas.ib.unicamp.br/be310/nova/index.php/be310/article/download/88/63>, December 15, 2019.

²¹ Judgment of Civil Appeal/Necessary Reexamination – Specialized Court III – Administrative and Civil No. CNJ : 0001143-73.2005.4.02.5103 (2005.51.03.001143-3), available at https://jurisprudencia.trf2.jus.br/sm/download?name=apoloementa&id=2018,08,10,00011437320054025103_383808.pdf, December 15, 2019.

²² Judgment No. 583/2019/SJVM/JFT/4ªVARA/AL - TIPO 'A', of Proceeding No. 0803662-52.2019.4.05.8000, available at http://www.mpf.mp.br/al/arquivos/2019/setenca_pinheiro.pdf, January 10, 2020.

D. Prosecuting environmental crimes

Similar to prosecuting agencies in other countries, the Brazilian public prosecution also has the duty of criminal prosecution. The public prosecution can initiate criminal proceedings against parties in violation of regulations protecting the property and rights of the state, state agencies, and state-owned enterprises.

Prosecution of environmental crimes is one of the important duties of the public prosecution to protect the public environmental interest. In 1998, Brazil promulgated No. 9605/98 Environmental Crimes Law, which systematized the environmental criminal provisions in previous separate regulations. Apart from stringent requirements and strict punishment regulations, the provisions of Environmental Crimes Law also have other features. Similar to the Environmental Crimes Law in Japan, those in Brazil regulate crimes relating to environmental damage and corresponding punishment methods, and provides relevant criminal procedures relating to environmental crimes. Administrative regulations and relevant punishment methods of environmental damage are also stipulated in this law. Therefore, the Environmental Crimes Law in Brazil provides the substantive and procedural provisions of environmental crimes, and hence simultaneously deals with the conviction and procedural issues. Meanwhile, its regulations of environmental crimes are relatively comprehensive and systematic, including the crimes of environmental pollution, endangering animals and plants, and the crimes in violation of city management and cultural heritage regulations. In addition, this law includes the regulations of dereliction of duty of public officials and the omission of other personnel. Stringent environmental crime regulations are established with the focus on behavior rather than consequential crimes. Hence, the convictions of most crimes regulated in this law depend on the practical behavior of offenders. The parties should be punished only if they take criminal acts, and the actual environmental damage consequence is regarded as the conditions of aggravating punishment.

For instance, in 2013, the Public Prosecution of the State of Pará filed a complaint against *Salvação Empreendimentos Imobiliários Ltda.* and its administrators, who were accused of the offense provided in Article 60 of the No. 9,605/98 Environmental Crimes Law. In brief, the defendants were accused of deforesting, without an environmental license, an area of over 186.24 hectares to construct a residential subdivision. According to the Pará State Court of Justice, the defendants were sentenced to fines, community service, and detention. In detail, the magistrate sentenced the administrators to 4 months and 12 days of detention, plus a 132-day fine for each administrator. Finally, considering that the defendants fulfilled the requirements of Article 44 of the No. 9,605/98 Environmental Crimes Law, the judge replaced the penalty of detention for pecuniary benefit.²³ Notwithstanding, this remains a typical case in which the public prosecution performed its function of prosecuting environmental crimes.

In April 2013, a spill originated at the pier at Terminal Almirante Barroso (Tebar), operated by Transpetro, a Petrobras subsidiary. The incident caused serious environmental damage on the northern coast of São Paulo, with the contamination of over 10 beaches and the suspension of economic activities in the region. Transpetro was initially convicted in the civil sphere for damages resulting from the oil spill in the São Sebastião canal. Then, the company was

²³ Judgment on the Opposition by Objection on Process No. 00021369320138140051, available at <https://consultas.tjpa.jus.br/consultaprocessportal/consulta/visualizacaoCompleta.action?cdProcesso=0002136-93.2013.8.14.0051&cdInstancia=3&cdDocumento=>, December 31, 2019.

denounced by the Federal Public Prosecution in 2014, in public criminal action, for causing pollution that result in damage human health, animal death, and flora destruction, as well as preventing the public use of beaches, according to Article 54 of No. 9,605/98 Environmental Crimes Law. The penalty for the crime is 1–5 years in prison. Later, the public civil action filed by the Public Prosecutor of the State of São Paulo in 2016 required the company, together with Petrobras, to pay R\$ 16 million to repair collective material and moral damages, as well as indemnify cooperatives of fishers and agriculturists of the region.²⁴

E. Legal supervision

Brazilian public prosecution also has the duty of legal supervision on issues related to protecting public environmental interest. Specifically, the public prosecution can supervise the work of administrative agencies of environmental protection and provide its opinions on environmental protection issues, even those without their direct involvement.

IV. Analysis of the function of Brazilian public prosecution in protecting public environmental interest

A. Separation of the right of action between the public prosecution and relevant victims

In theory, scholars argue whether the victims of environmental damage can file a lawsuit against the same responsible party to ask for compensation after the public prosecution has initiated public interest environmental litigation. In other words, does the public interest environmental litigation initiated by public prosecution influence the right of action of relevant victims?

To answer this question, Brazil implemented the separation mechanism of the right of action between the public prosecution and relevant victims. Specifically, the mechanism stipulates no influence on victims to file lawsuits to ask for compensation after the public prosecution has initiated public interest environmental litigations. In general, the public prosecution function of protecting public environmental interest aims to stop environmental damage activities, restore the environment, and protect public interest, which do not influence relevant victims to ask for compensation from the same defendant for the same environmental damage activity. According to the law, Brazil set up the system of civil *res judicata*. The judgment of public interest environmental litigation is binding on all Brazilians. However, the individual rights relating to the same environmental damage would not be influenced, and the individuals still have the right to initiate civil litigations and protect their interests.²⁵ Therefore, the victims of the same environmental damage accident can still ask for compensation from the responsible party.

Thus, based on regulations and practices in Brazil, the rights of action of the public prosecution and relevant victims do not influence each other. The public prosecution

²⁴ Judgment of Public Civil Action No. 0000884-4420144036135, dated May 09, 2019, available at <https://www.jusbrasil.com.br/diarios/documentos/706159091/andamento-do-processo-n-0000884-4420144036135-09-05-2019-do-trf-3>;

Judgment of Criminal Public Action No. 0000019-21.2014.403.6135, dated May 24, 2019, available at <https://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2019/05/2019-05-28petrobras.pdf>, December 28, 2019.

²⁵ Gidi, A. (2003). Class actions in Brazil, a model for civil law countries. *American Journal of Comparative Law*, 51(2), 311-408.

participates in activities of protecting public environmental interest and preventing the deterioration of environmental damage. Therefore, the public prosecution can perform its duty of protecting the public environmental interest and initiate a civil investigation and public interest environmental litigation. At the same time, the public prosecution can also carry out its duty of supervision and monitor relevant administrative agencies to perform their environmental protection duties, and in cases of failure, can initiate relevant procedures of public environmental interest protection. Such procedures include conducting a civil investigation and filing a lawsuit to protect public environmental interest. The public prosecution can initiate public interest environmental litigation as an independent plaintiff, or participate in public interest environmental litigation with other parties. These acts do not influence the right of action of relevant victims.

B. Conciliation during the public interest environmental litigation

Conciliation is generally acceptable in civil proceedings. Both parties can negotiate and reach an agreement before and during the civil litigation to solve their disputes and terminate the civil proceedings. Then, can the public prosecution negotiate and reach an agreement with the defendant through conciliation to terminate the public interest environmental litigation?

In this regard, the public prosecution is authorized to reach a Conduct Adjustment Agreement with the responsible party, and terminate its public interest environmental litigation. On the one hand, Brazilian law stipulates that the public interest litigation initiated by the public prosecution does not influence the right of action of relevant victims to initiate civil litigation against the same party and ask for compensation. Hence, the Conduct Adjustment Agreement reached between the public prosecution and the responsible party also does not influence the victims' civil rights and interests. On the other hand, the agreement with the responsible party helps to stop environmental damage, protect the ecosystem, and develop relevant companies and industries that the public prosecution is authorized to enact. In practice, the responsible enterprise is motivated to carry out negotiations and reach the Conduct Adjustment Agreement with the public prosecution, which can initiate the proceedings of civil prosecution and criminal prosecution. Therefore, authorizing the public prosecution to negotiate and reach an agreement with the responsible party is reasonable and beneficial, both in theory and practice.

The Conduct Adjustment Agreement helps to solve environmental problems more efficiently and enhance environmental protection that the public prosecution is authorized to negotiate and reach relevant agreements with the responsible party. Therefore, this successful experience in Brazil that encourages information exchange between the public prosecution and the other party, develops alternative dispute resolution mechanisms, and then balances economic development and environmental protection can be learned by other countries.

C. Existing problems

Several problems remain in relation to the function of protecting public environmental interest by the Brazilian public prosecution. On the one hand, several factors influence the independence of the public prosecution. For instance, when performing the duty of protecting public environmental interest, the public prosecution needs to cooperate with judicial and administrative agencies. At present, Brazilian courts show resistance to the public prosecution function of protecting public environmental interest. Meanwhile, the public prosecution

function of legal supervision may cause tension with administrative agencies. These factors influence and does not guarantee the independence of Brazilian public prosecution.

On the other hand, Brazilian governments have long been influenced by corruption scandals. Due to its special status, the public prosecution has relatively large power and may influence court judgments and relevant public policies by initiating public interest environmental litigations. Therefore, the problem of power imbalance between the public prosecution and other agencies needs to be solved. The possible solution is that in public interest environmental litigation, the rights owned by the public prosecution should be the same as those owned by ordinary plaintiffs in other civil proceedings, to avoid possible corruption in judicial processes and ensure the independence of the judiciary.

V. Conclusion

Brazil is one of the world's largest emerging economies, and its environmental protection mechanism is widely recognized. Considering public interest environmental litigation in Europe and the United States, the tradition of continental legal system and its national conditions, Brazil recently improved its public environmental interest protection mechanisms. The function of public environmental interest protection performed by the public prosecution improves the environmental law enforcement in Brazil. Meanwhile, the separation of the right of action between prosecutors and victims, and the "Conduct Adjustment Agreement" mechanism give full play of the prosecutor role in public environmental interest protection, and promotes public and enterprise compliance with environmental regulations. However, several problems remain in relation to the current public environmental interest protection function of Brazilian public prosecution, such as reduced efficiency of the judiciary and a lack of coordination in law enforcement. In addition, the special status and lack of supervision of Brazilian public prosecution may cause the problem of abuse of power, which needs to be solved. Nevertheless, this mechanism helps enhance the enforcement of environmental law, and require study and can be made a reference for other countries.

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