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Towards a critical and liberating legal-environmental analysis in Brazil

Para uma análise jurídico-ambiental crítica e libertadora no Brasil

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Abstract

The present article deals with the possible contributions arising from the critical analysis of Brazilian constitutional environmental law for the protection of vulnerable groups. The healthy environment is considered a fundamental human right to guarantee dignity and quality of life, and thus, the Federal Constitution of 1988 enshrined it in its article 225 as a right for all. However, it is observed that certain groups - historically constructed - bear disproportionately the environmental impacts and risks, and also have unequal access to environmental resources. In this sense, the specific objective of this study is to apply the idea of "Political claim to Justice", by the Argentine philosopher Enrique Dussel, as a tool for analyzing the Brazilian constitutional environmental protection, precisely because of the inequality of the aforementioned groups in accessing the right to a healthy environment. This is an article of a qualitative methodological approach, based on decoloniality and environmental justice with bibliographic and documentary research.

Keywords: Critical; Environmental Constitutional Law; Political claim to Justice; Liberation; Popular participation.

Resumo

O presente artigo cuida das possíveis contribuições advindas da análise crítica ao direito constitucional ambiental brasileiro para a proteção de grupos em situação de desigualdade ambiental. O ambiente sadio é considerado um direito humano fundamental à garantia de dignidade e qualidade de vida e, assim, a Constituição Federal de 1988 o consagrou em seu artigo 225 como um direito de todos. No entanto, observa-se que determinados grupos - historicamente construídos - suportam de forma desproporcional os impactos e riscos ambientais como também acessam de forma desigual os recursos ambientais. Nesse sentido, constitui objetivo específico deste estudo aplicar a ideia de “Pretensão Política de Justiça”, do filósofo argentino Enrique Dussel, como ferramenta de análise da proteção ambiental constitucional brasileira, tendo em vista justamente a desigualdade dos grupos supracitados em acessar o direito ao ambiente sadio. Trata-se de um artigo de abordagem metodológica qualitativa, fundamentada na decolonialidade e na justiça ambiental com pesquisa bibliográfica e documental.

Palavras-chave: Crítica; Direito Constitucional Ambiental; Pretensão Política de Justiça; Libertação; Participação popular.

Introduction

Once the intrinsic and necessary relationship between humans and nature was recognized, the understanding that a healthy environment is a human right was consolidated, since human dignity, the potential for full and integral development of human being and, as well, of its existential well-being depend on an environment with minimal environmental health and safety conditions[1]. In legal terms, this implies that the absence of a healthy environment also affects other rights such as the right to life, health, physical integrity and adequate food.

In this way and in line with a global trend of constitutionalization of environmental protection (SARLET and FERNSTERSEIFER, 2019), the Federal Constitution of 1988 built a legal framework and incorporated the concern with the environmental issue, enshrining in its article 225 the ecologically balanced environment as rights of all, including future generations. For this reason, from an internal perspective, the right to a healthy environment has reached the status of a fundamental right.

It is worth mentioning that the Federal Constitution of 1988 presents itself as one of the most advanced throughout the country's history in terms of guaranteeing rights, and for this reason, it is recognized as a Citizens' Constitution. In addition, according to Ayala e Rodrigues (2015), the Brazilian Constitution is part of the first cycle of constitutional reforms in the Latin American continent, highlighting a progressive disposition that is reflected in the protection of individual rights and guarantees and, also, in the constitutionalization of the protection of the environment - a theme that until then had been absent from the constitutional text.

Nevertheless, despite its progressive disposition in relation to previous Brazilian constitutions, it must be remembered that it was enacted with a society that still reverberates coloniality both in its social and legal structures. Mignolo (2007) and Quijano (2005) point out that the "conquest" of the Latin American continent changed its dynamics, installing a new way of life in the economic, social, political, subjective and epistemic sense,

[1] At the International level, the concern with ecological balance with the objective of guaranteeing quality of life for human beings became the agenda of debates in the 1970s. In addition, the Stockholm Declaration (1972) is the first document that embraces the environmental protection as a requirement to guarantee dignity and well-being for the human being. Since then, the debate has evolved and new international documents have addressed the issue. Currently, the Rio Declaration on Environment and Development (1992) is one of the most important documents in terms of recognizing environmental rights.

which, in turn, it did not end with the declarations of independence of the colonies in relation to the metropolises, but which remains until today.

According to these authors, independence only broke with colonialism, but not with coloniality. This means that the forms of domination instituted with the conquest of certain groups and spaces, henceforth under a new mechanism, continue to produce their effects and reverberate in social structures, including in Law, until there is a total rupture with this logic and it persists in a less evident way. The same authors emphasize that the change in the ways of life existing here was responsible for the invisibility or even the extermination of those who did not correspond to the standard established by the metropolis during the colonial period, or by the political elite, after the declaration of independence – which places such groups on the margins of the concrete totality, that is, outside that world system.

This perspective allows us to understand that certain social groups in a situation of environmental inequality are the historical result of a set of structures that date back to the colonial period that exclude them, if not distance them, economically, socially and legally. Applying this theoretical lens to the study of environmental inequality in the Brazilian reality deepens the elaboration of environmental justice insofar as it incorporates the aspect of coloniality, then not explicit, into the analysis.

In this sense, it is possible to argue that, although the Brazilian constitutional text of 1988 enshrines the fundamental right to an ecologically balanced environment as a right of all people, we observe that certain groups - since the colonization process - disproportionately bear environmental impacts and risks as well as unequally access environmental resources. The scarcity of natural resources, the adverse change in environmental quality promoted by polluting processes and the intensification of climate change denounce the fragility of this right in relation to certain groups that in practical reality suffer more than others from these effects.

By these means, how is it possible to understand environmental protection to guarantee the fundamental right in relation to groups in environmental inequality? As a fundamental question, there is the possibility of, by the Constitutional Environmental Law itself, breaking with the logic of marginalization and socio-environmental inequality briefly exposed. To answer these questions, we will seek contributions arising from the critical analysis of Brazilian environmental constitutional law for the protection of groups in

environmental inequality/vulnerable, anchored in decoloniality and in dialogue with environmental justice.

The "Political Claim of Justice" elaborated by Enrique Dussel is a tool of the Philosophy of Liberation for conducting social, institutional and legal actions, aimed at combating some form of exclusion, which in the case of this article turn to the situation of socio-environmental inequality in Brazil in contrast to what the Constitution provides. Therefore, it is expected that the Dusselian philosophy provides subsidies for the understanding of the fundamental right to a healthy environment in Brazil, transforming the structures of society and decolonizing it by its own subjects.

The article, through a qualitative methodological approach, will make a brief exposition about the process that led to the concealment of certain groups in the country, exposing them to situations of violation of the right to a healthy environment. Here, coloniality and environmental justice as a theoretical elaboration form the starting point for the reflections of this work. Then, these reflections meet the concepts and foundations of the Political Claim of Justice, for which they will be presented next. Finally, based on the provisions of the 1988 Constitution, we seek to identify aspects to be considered for the construction of critical and liberating environmental protection. The research procedures applied consist of bibliographic and documental research.

The proposal is to offer an understanding of constitutional environmental protection that challenges practical materiality and not only takes place within the limits of the Law itself, but brings to the focus of analysis the addressees and developers of these norms.

1. Coloniality, environmental justice and healthy environment

The environmental impacts and risks arising from the exploitation of natural resources and the degradation of nature do not affect equitably to all individuals, demonstrating that certain groups are more exposed to these situations in which the fundamental right to an ecologically balanced environment is weakened. Nor do they have the same direct and/or indirect access to the country's environmental resources. Environmental justice, as a theoretical current, traces this diagnosis, showing that there is no random character in the distribution of environmental problems. Acserald (2004) explains that there is an underlying

logic, closely related to the mode of production that directs environmental impacts to social groups that have fewer political and economic resources to resist or escape this dynamic. In this way, they end up being subjected to situations of environmental inequality in which the right to a healthy environment cannot be fully enjoyed, undermining basic living conditions that can be reflected in other rights.

The characteristics that identify groups in a situation of environmental inequality do not hide the fact that their construction is related to the idea of race. In the United States, where discussions on environmental justice began, it was found that "race was the most powerful variable in the prediction" of where hazardous waste landfills would be installed, to the point that the expression environmental racism was coined (BULLARD, 2004). In Brazil, this characteristic appears to be dimmed and environmental injustice - that is, the mechanism by which unequal societies allocate greater burden of environmental damage from development to marginalized and vulnerable populations (ACSERALD, HERCULANO and PADUA, 2004) - becomes identified with the issue class as a criterion in the distribution of environmental impacts and risks among the population (HERCULANO, 2002).

However, it should be noted that even though class is currently the variable that best explains the phenomenon of environmental inequality in Brazil, the construction of groups more subject to environmental impacts and risks in the country can also be described from the perspective of coloniality. Therefore, Brazilian environmental inequality has links with a historical process common to Latin America that has as its foundational landmark the conquest of this continent by Europeans during the maritime expansion, originally based on the idea of race.

As part of this process, Western Europe was built as the center of the world-system and reference of a new pattern of world power that exerts its influence until the present time (DUSSEL, 1993; MIGNOLO, 2007; QUIJANO, 2006). As part of this process, Western Europe was built as the center of the world-system and reference of a new pattern of world power that exerts its influence until the present time (DUSSEL, 1993; MIGNOLO, 2007; QUIJANO, 2006). At first, this process operated the use of physical force for the domination of colonized peoples (indigenous and African), determined in their subjectivity as inferior by a negative aspect, that is, by the absence of identity with Europeans. Later, and especially after the independence of the Latin American colonies, this process began to act through a logic of

domination that underlies imperial control and reverberates in social structures, adapting to new realities to continue producing its effects (MIGNOLO, 2007).

This refers to the coloniality that operates in relation to being, knowledge and power. In summary, in the first case, only the subjectivity that approaches that established by the white European standard is validated. In the second, Eurocentrism is established as a way of producing knowledge, discarding an episteme different from the European one, since modern European rationality would be the only valid means of producing knowledge and the foundation to legitimize all forms of acting in society, which explains the process of domination of nature. Finally, the coloniality of power is based on the idea of race, a basic social classification also spreading to gender, sexuality and class relations (RODRIGUES; CAVALCANTE; SOUZA, 2016).

It is in this way, then, that what Dussel (1993) calls "The Coverage of the Other" takes place, referring to the exclusion of the diversity of faces and historical subjects that are part of oppressed people. These faces belong to the indigenous people (the first protagonist in Latin American history who resisted European domination for centuries and had his life affected in every way); to the black (enslaved to serve the world market); to mestizos (who suffered cultural, political and economic dependence); to Creoles; to the workers (because the industrial revolution here was late and dependent) and to the peripheral (who make up a reserve workers' army) (DUSSEL, 1993). Here we also include those who suffer more than others from environmental problems, in a situation of “no right” to an ecologically balanced environment.

The further away from the European, white, heteronormative male pattern related to the elite, the more invisible these subjects are in our societies, perceiving different forms of marginalization and even the transfer of the environmental costs of production processes, without them also enjoying their burdens, or could access, directly or indirectly, the environmental assets in their entirety.

Cartesian modern rationality, characterized by scientific rigor and impartiality, objectified nature and dominated it by exploiting its resources to satisfy human needs and capital under the logic of “the more 'developed' a society is, the greater the control and influence of the human being in nature” (SANTAMARIA, 2017, p. 36). In this way and in summary, it is possible to understand that America, throughout its history, served as a source of precious metals to exhaustion, then of raw materials and, finally, of commodities, always

for the benefit of the metropolises or under the idea of development, making the effects on the groups that lived here and on their ways of life invisible:

> la destrucción de la base de recursos naturales, el desarraigo de la población de su entorno natural, la disolución de sus identidades colectivas, sus solidaridades sociales y sus prácticas tradicionales. Así, los proyectos del estado en América Latina para sacar a los pueblos de su "atraso" con la capitalización del campo y el proceso dependiente de industrialización no sólo produjeron fracasos económicos sino que desencadenaron procesos de destrucción ecológica y degradación ambiental (LEFF, 2004, p. 421-422).

What the author intends to highlight, in this case, is that the allocation of "development costs" to certain groups such as *quilombolas*, indigenous, landless or poor people does not refer to a random process or is determined by the class. In fact, according to the text, it finds related historical roots to the history of the reproduction of coloniality on the continent and towards the Latin American peoples. This story made them invisible and deprived them of certain rights.

Leff, when explaining environmental degradation, verifies important points:

> Hay un orden económico que ha transferido los costos ecológicos del crecimiento económico hacia los países del tercer mundo, y de políticas económicas que han expulsado a los pobres hacia las zonas ecológicamente más frágiles del planeta (LEFF, 2004, p. 422).

The observation mentioned above by Leff is also verified in Brazil and reminds us of the need to overcome this condition, which creates a situation of violation of the right to a healthy environment for certain groups that also end up suffering from the threat of violation of other interrelated rights. From here, we will reflect on the Political Claim of Justice and its application for critical analysis of constitutional environmental protection in Brazil, seeking, within the law, possible ways to transform reality.

2. The Political Claim of Justice as an analytical category

For Dussel, the totality represents an existing order where the reproduction of human life is manifested with its set of norms, institutions and structures. The author points out, however, that this totality never ends in itself, as it inevitably produces negative effects, which fall on certain individuals - excluded and oppressed from this sphere of totality - who, in turn,

constitute the exteriority towards a new, future and transforming order that frees them from the current situation (DUSSEL, 2009).

To make this possible, the movement must start from alterity, from the Other, from the bottom up, in search of fulfilling the claims and needs of these subjects. Therefore, the transformation invariably passes through those who are excluded. Analectics designates the process of passing from a given order that is questioned by exteriority, since reality is not summarized as a totality, to a future order, better than the current one, by the subjects that constitute exteriority (DUSSEL, 1996).

> Analectics starts from the interaction between Totality and Exteriority, generating the transformation of the current totality in all its various ontic fields, among which is also the legal field. Furthermore, as a theoretical method, analetics assumes a pre-originating ethical option, in favor of Exteriority, of the oppressed by the structure of the current world-system in force (DIEHL; LEONEL JÚNIOR, 2016, p. 173).

At this point, it is worth reflecting on the Political Claim of Justice as a tool for these subjects to move towards the construction of a new society. The Political Claim of Justice talks about "determination of the norm, of the act, of the microstructure or macrostructure, of the political institution or system that have honestly and seriously fulfilled the conditions (or universal principles)" (DUSSEL, 2015 p. 126).

According to the author, ethics studies the universal conditions that are conditions for the claim to goodness. These universal conditions are identified by three moments that are the material moment of reproduction of practical truth for the reproduction of life, the formal moment of consensual validity with demand for symmetrical participation of the interested party(s) and the moment of feasibility of instrumental reason, that informs and cares about the possible consequences of the act, the unintended negative effects and its victims (DUSSEL, 2015). From the fulfillment of these universal conditions comes the Political Claim of Justice.

These conditions of the constitution of the act, the norm, the microstructure or macrostructure, the institution or the political system operate on three levels of generality that Dussel identifies as A, B and C. Level A corresponds to political action at the strategic level that underlies the possibility of a concrete act having a claim to goodness, constitutive

of *potentia*[2], based on the conditions (or universal principles) of the Policy, namely: those of production and reproduction of life in a political community, those referring to normative procedures of consensual legitimacy and those of political feasibility in the realization of means and ends. This is Politics (with a capital p), as it refers to

> that of the statesman who fights in the long term for the survival of humanity and for the democratic symmetry of the interested parties (especially the victims), and not the "politics" with minuscule, that of M. Weber, of the mere professional for whom his victims give him. they are invisible, professional for profit, fame or the mere Schmittian strategic purpose of defeating the "enemy". (DUSSEL, 2015, p. 126)

Level B concerns the level of institutions or systemic mediations. It is the institutional political level, the *potestas*[3], which realizes universal conditions through three concrete systems. The first of these systems is the material, where the ecological, economic and cultural dimensions meet, with the ecological dimension being the last material instance, as it is directly related to life itself. The cultural dimension is the one that gives meaning to life and the economic dimension is responsible for producing goods and promoting well-being for all. The second system at the level of mediations is the formal one, which, in turn, involves the entire system of law and public opinion. (DUSSEL, 2015).

Specifically with regard to the system of law Dussel (2015) states that it should include rights in the material sphere that guarantee the condition of life, rights in the procedural spheres of autonomy and freedom that allow the individual to activate and exercise their rights, participating with equality of opportunity for consensus building processes and feasibility rights from which the duties for individuals emerge.

The third and final system that integrates level B is that of systemic-institutional feasibility, which articulates civil society and political society (State) in the political field, exercising the powers necessary for previous material and formal systems.

The last level of generality in which the conditions of goodness operate (level C) is that of the fundamental implicit principles, which are not articulated in the last instance, but are co-determined in the concrete action of political struggle in which the way of exercising power is discussed and uses coercion to enforce the rule of law. The fundamental implicit

[2] Dussel proposes that the notion of power must be identified in a positive way and having as its ultimate reference the *potentia*, that is, the individuals responsible for building from below the foundation of institutionalized power, the *potestas*. (DUSSEL, 2009).

[3] "The necessary institutionalization of the power of the community, of the people (...)" (DUSSEL, 2007, p. 32).

principles are the material principle of politics (fraternity), the democratic principle (equality) and the principle of strategic-political feasibility (freedom).

It follows, therefore, that at whatever levels it manifests itself, the act must comply with the aforementioned components in order to have a Political Claim of Justice and, in this way, to constitute a tool of liberation. Indeed, it should be noted that formality alone is not enough. Neither is mere feasibility, since his judgment cannot detach from what practical reality evidences.

Therefore, the application of the Political Claim of Justice to constitutional environmental protection in Brazil must take as a starting point the exteriority whose practices operate struggles that can lead to the transformation of the established order. In this case, taking exteriority as a starting point does not mean abandoning it throughout the process. It means the contrary: it matters in the necessary consideration of the oppressed in the practical mediation in a permanent way, which signals to a process in continuous movement and never finished since always subject to the contingency of the acts themselves and the impossibility of foreseeing all the effects.

Exteriority appears as the artificer of its own liberation, that is, of its overcoming of its exclusion, oppression, concealment, opening the gap for a new order until it takes place and moves away what is contrary to the previous order. The groups in a situation of environmental inequality, in addition to not being randomly determined, are related to the historical process of constitution of Brazilian society that placed them outside of concrete materiality, clouding access to the right to a healthy environment. In the light of the Political Claim of Justice, it fundamentally means that these groups, interacting with the totality, carry the possibility of carrying out analetics. Therefore, in addition to guaranteeing the right as a result of the constitutional provision, it is necessary to bring conditions for its exercise, including from non-hegemonic perspectives and more harmonious relationships with nature.

The inclusion of certain groups in the totality does not complete the Dusselian proposal, as it keeps activated the structure responsible for exclusion, always placing a group on the sidelines. Hence the importance of transforming reality and reformulating the relationship with the Other and with nature to transcend the utilitarian reason that guides the current extractive logic of appropriation of natural resources with which it directs environmental impacts and risks.

3. Proteção constitucional ambiental no Brasil: crítica e libertação?

Once the Dusselian proposal is understood, the work now moves on to the application of such formulations for the analysis of constitutional environmental protection in Brazil. The object of analysis, then, starts to be investigated in its capacity to guarantee access to the right to a healthy environment for those who, in a situation of environmental inequality, are situated in the exteriority. Are there ways within the law that allow the change in the current state of affairs to pass through these groups with reference to the constitutional text?

The law is inserted at the level of systemic mediations and concretely carries out the conditions of level A through norms that, fulfilling the universal conditions, will fulfill the Political Claim of Justice. In this way, law must be guided by the materiality of practical reality, that is, by what is manifested in the daily concreteness of our lives (truth claim) seeking to guarantee historically constructed rights. In this case, this will be supported by the norm itself when observing article 225 of the Federal Constitution.

As mentioned at the beginning, the ecologically balanced environment was enshrined in the constitutional text after the understanding of the essentiality of a healthy environment for human dignity was established, with the public power and the community responsible for ensuring it for the present and future generations. Certainly, the provision was not made positive by mere environmental awareness of the constituents or a disposition interested in the theme, but as a result of previous political struggles ranging from international influences in the preservation of forests and rivers to the concrete internal struggle, waged, for example, by Chico Mendes, when performing the "*empates*[4]" to keep the forest standing!

Environmental constitutional protection will comply with the achievement of discursive consensus (claim to legitimacy), providing interested parties with rules for exercising and claiming material rights. Thus, there is a need to create spaces for the participation of interested parties in a symmetrical relationship, bringing those who are on the margins of material law to participate with the ability to influence decision-making. This idea can be glimpsed when considering the democratic principle that is expressed as follows:

[4] The *empate* was a method of struggle, in which the people of the forest, especially the rubber tappers who lived by extracting the latex from the trees, organized themselves to prevent tractors from devastating the forest and felling the trees, putting themselves in front of the vehicles, preventing them from continuing the deforestation. The practice was very common in the state of Acre throughout the 1980s.

> Operemos siempre de tal manera que toda norma o máxima de toda acción, de toda organización o de las estructuras de una institución (micro o macro) en el nivel material o en del sistema formal del derecho (como el dictado de una ley) o en su aplicación judicial, es decir, del ejercicio del poder comunicativo, sea fruto de un proceso de acuerdo por consenso en el que puedan de la manera más plena participar los afectados (de los que se tenga conciencia). Dicho entendimiento debe llevarse a cabo a partir de razones (sin violencia) con el mayor grado de simetría posible, de manera pública y según la institucionalidad acordad de antemano. La decisión así elegida se impone como un deber político que normativamente o con exigencia practica (que subsume como político al principio moral formal) obliga legítimamente al ciudadano. (DUSSEL, 2009, p. 405)

It is about giving the exteriority – affected and threatened by environmental impacts and risks – space within the totality for the elaboration by itself of ways to overcome this situation. In this aspect, it is worth reflecting on the ways in which this exteriority participates in environmental matters and also considering new legal proposals for the protection of nature.

According to article 225, *caput*[5], of the Brazilian Federal Constitution, the healthy environment is a fundamental right of present and future generations, and its defense is the responsibility of the Public Power, but also of the community. The final part of the constitutional text, by including the collectivity in environmental defense, signals the recognition that such a task depends on a joint accomplishment and, therefore, on the participation of all. In its first paragraph, item IV, the provision already mentions the duty to publicize environmental impact studies of polluting activities as a mechanism of information to potentially affected populations, necessary for the eventual participation in environmental matters. However, under a systemic view, it is possible to extract other norms that reinforce the issue of participation in the protection of the environment and that, as well, must reach groups in environmental inequality if based on an ethical commitment to performing analetics.

[5] Article 225. 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. Paragraph 1. In order to ensure the effectiveness of this right, it is incumbent upon the Government to: I – preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems; II – preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in research and manipulation of genetic material; III – define, in all units of the Federation, territorial spaces and their components which are to receive special protection, any alterations and suppressions being allowed only by means of law, and any use which may harm the integrity of the attributes which justify their protection being forbidden; IV – demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public; (…).

José Rubens Morato Leite (1999) identifies three forms of direct participation in environmental matters in the Constitution: participation in the creation of environmental law, participation in the formulation and execution of environmental policies and participation via access to the Judiciary. In the first case, the author identifies the popular initiative law (art. 14, III) as a manifestation of one of the mechanisms of popular participation, however, he himself emphasizes that it is a participation of difficult concreteness, which ends up, therefore, reducing the materialization of what the order provides as a duty to protect the collectivity with the Public Power.

Regarding participation in the formulation of public policies, in addition to infra-constitutional norms such as those that establish the obligation to hold public hearings, the author lists the plebiscite (article 14, item I) as a tool available for popular participation. Beside it, we can also mention the referendum (article 14, item II) as an instance of consultation with the population for approval, or not, of a certain public policy. Finally, regarding access to the Judiciary, in addition to the enshrined fundamental right of article 5, which guarantees the inescapability of the jurisdictional power, we highlight the citizen suit (article 5, item LXXIII, of the Federal Constitution, regulated by Law No. 4,717/65). In fact, such action serves to annul an act harmful to the environment (among other cases), leaving the author, unless proven bad faith, exempt from legal costs and the burden of loss of suit. Nevertheless, it is about the resolution of an environmental conflict within the scope of the judiciary which, in order to be instrumentalized, requires time and knowledge that those subjects who make up the concrete exteriority often do not have In addition, this instrument transfers the solution of the issue of these subjects to the judiciary.

Esses mecanismos, como bem observa Morato Leite (1999), são significativos nos sentidos de sinalizarem para a identificação do ordenamento jurídico brasileiro com a questão da importância da participação em matéria ambiental.

Still with regard to the formal moment of the legal system, it is worth mentioning the international treaties and conventions, where the ILO convention 169 on indigenous and tribal peoples ratified by Brazil stands out. Still with regard to the formal moment of the legal system, it is worth mentioning the international treaties and conventions, where the ILO convention 169 on indigenous and tribal peoples ratified by Brazil stands out. Although it did not enter the legal system with the status of a constitutional amendment, but a supra-legal norm, it serves to guide the interpretation of infra-constitutional norms and, therefore,

deserves to be highlighted[6]. This convention establishes the duty of prior consultation of indigenous and tribal peoples whenever "legislative or administrative measures capable of directly affecting them are foreseen" (article 6, item 1, ILO convention 169). The norm complements the Constitution, but because of its specific recipients – indigenous and traditional peoples – it does not grant this right to all exteriority, but it is a positive provision that deserves to be extended.

Only the form is not enough for the materialization of rights, above all, because they must be questioned in their limits as viable means for groups located in the exterior to be able to overcome the condition in which they find themselves in terms of access to the right to a healthy environment.

In relation to the claim of feasibility in the legal system, this refers to the exercise of administrative power that includes the law of public institutions and that create duties for individuals, such as the regulation of potentially polluting activities, creating for individuals the obligation to carry out impact studies, recovery and compensation for damages.

The materialization of legal perspectives emerges in a curious way in Brazil. A case that has become notable recently is the consideration and judicial reception of Rio Doce as a subject of law in Brazil. This was due to the socio-environmental crime committed by the mining company Samarco, controlled by Vale, at the end of 2017, when it neglected its inspection and allowed the Fundão tailings dam in the Rio Doce basin to burst. Because of this episode, Rio Doce itself, represented by Associação Pachamama, filed a lawsuit (proceeding No. 1009247-73.2017.4.01.3800) before the Brazilian Federal Court, against the State of Minas Gerais, demanding its accountability. The proceeding was not limited to asking for the recognition of the Rio Doce as a subject of law, but to legitimize all people to defend the basin's right to a healthy existence, in addition to accountability for omission by the government. Until then, no Brazilian river would have been considered legitimate to file a lawsuit recognizing its character as a subject of rights. As Carlos Frederico Marés reminds us, this non-recognition is not by chance, because in the hegemonic line of capitalist

[6] Article 5, Paragraph 3, of the Federal Constitution, provides that international treaties and conventions approved in each house of the National Congress, in two rounds, by 3/5 of the votes of the respective members and that deal with human rights, enter with the status of constitutional amendment. The other human rights treaties that are not approved with a qualified quorum are situated between the Federal Constitution and the ordinary laws with supra-legality status, interrupting the effectiveness of infra-constitutional norms conflicting with them, according to an understanding signed by the Federal Supreme Court in the special appeal ("RE") No. 466.343-1, STF/2008.

development, nature was expelled from modernity (MARÉS, 2017). For Germana Moraes, criticism of this claim came as follows:

> The lack of legal provision for rivers to be subjects of law and the accusation of romanticism and lyricism stand out, without facing the argument according to which the interpretation similar to that of the Constitutional Court of Colombia would be legally sustainable in Brazilian Environmental Law. (MORAES, 2018, p. 118).

Even with the criticism, the recognition of the river as a subject of law not only materializes a real possibility of claiming a diffuse right, but also combines environmental protagonism with the people affected by the tailings, since the individualization of reparation is insufficient in the face of community collapse. It is worth mentioning on the subject that the authors Ingo Sarlet and Tiago Fensterseifer (2019) defend the interpretation of the scope of art. 225 in a comprehensive way to include in the word everyone that begins the normative text also as a subject of rights to nature, expanding the sphere of constitutional protection and, above all, breaking with the current anthropocentrist paradigm.

The environmental protagonism can also be identified among the already mentioned rubber tappers in their struggle for the standing forest, who conceive the preservation of the natural wealth of the forest as a condition for economic and social human development. Consequently, as a condition for their own survival, as they identify an intrinsic and necessary association between their social practices and their ecological context. In a similar way, the babassu coconut breakers[7], identified as guardians of the forest, have a territorial relationship through existential connections as part of the construction of their identity through the special bond they have with nature.

Furthermore, in addition to active participation through mechanisms of direct participation in decision-making, the recognition by the legal field of ways of life different from the modern paradigm, including the conception of natural resources as subjects of law, mitigates the anthropocentric perspective of environmental protection and favors the struggle of groups that find themselves with a systemic exteriority insofar as the invisibility that covers them fades.

[7] The breakers are rural workers who survive from the extraction of babassu - a palm tree from which all parts are used - and fight for their territory against farmers, ranchers and agricultural companies that have fenced off the land and prevented access to the babassu groves since these workers do not have property titles.

Through this simple legal-environmental analysis of the Brazilian constitutional law system, it is possible to observe that the universal conditions that will confer truth claims, legitimacy and feasibility are more or less present in the legal system, and still need to be improved. Within the scope of the proposal of this article, that is dedicated to those most exposed and affected by environmental damage and their possibilities of participation to overcome their condition, it is worth mentioning that the way it is placed, the constitutional environmental protection in Brazil ends up contributing to the perpetuation of the inequality, maintaining excluded groups and reverberating coloniality in their structures. This is because there is a lack of spaces for feasibility and materialization of environmental demands due to the lack of a democratic and popular project committed to a liberating process and guided by an environmental transversality. As Professor Marés points out, the protagonism of this agenda, at some point, will require a break with capitalism, which will emerge from a revolution or a catastrophe, from a still timid advance of revolutionary socio-environmental consciousness (2017, p.39). The socio-environmental issue assumes non-capitalist alternatives, and it is also possible to understand the current ecological crises of capitalism with a Marxist lens (FOSTER, 2005).

Law, whose maximum symbol in a nation is the Constitution, was built on the basis of the modern notion of power that is identified with domination, so it is not surprising that this occurs in the present case. However, it is worth having in perspective the realization of universal conditions by law, because acting in this way,

> the normativity of the struggle for recognition as liberation would have anticipated legitimacy, and the process of delegitimization of what must be derogated loses its distressing appearance and becomes an already anticipated moment also in the necessary impossibility of perfect legality or perfect legitimacy, a required impossibility by the human condition. (DUSSEL, 2015, p. 135-136).

As interesting examples, in this sense, we can mention the Constitutions of Bolivia and Ecuador, which privilege channels of participation by civil society and forms of direct democracy, which makes it possible for society to manifest demands, which is both a fiscal and a subject of implementation of rights (BELLO, 2016; LIONEL JUNIOR, 2018). It is not by chance that the Constitution of Montecristi (of Ecuador) is the first constitutional charter to affirm the rights of *Pachamama* or what is considered to be the rights of Nature, which places it as a leading player in the approach to Environmental Law and makes it a reference for

everyone. This is an important and unique issue, since the treatment given to nature as a living organism elevates it as a subject of law and removes its character of object.

An example of the recognition of nature as a subject of law is the case of Rio Blanco. The city of Tabacundo – State of Pichincha – granted authorization, without environmental licensing, for local landowners to carry out 53 artisanal mining activities. This exploitation caused the sliding of the materials used in the Granobles River (Rio Blanco), affecting it. Rio Blanco, considered a subject of law, then judges "Acción de Protección" in January 2013, alleging violation of the rights of the river and the right to water.

The court decision determined the temporary suspension of mining activities until obtaining the environmental license and a study of the river water in order to remedy the possible damages. The second instance confirmed this sentence.

For a constitutional environmental protection with a critical and liberating approach through the application of the Political Claim of Justice, the actions are not exhausted in addressing the issue of disproportionate distribution of environmental impacts and risks, but must contribute to thinking, identifying gaps and proposing paths to be improved for the construction of a more socially and environmentally just society.

4. Conclusion

In the understanding adopted here, indigenous people, affected by dams, rubber tappers, *quilombolas*, *faxinalenses*, babassu coconut breakers and many others who are on the margins of the totality are in a situation of environmental inequality. They are not subjects created by chance, but the result of a historical process of domination that still reverberates in social structures and is responsible for their exclusion, to whom environmental impacts and risks are systematically directed as products of modern rationality that also dominated and became appropriated from nature.

Reflections on coloniality were brought to environmental justice as a theoretical current, which deepened the relationship between environmental impacts and risks and the process of domination that contributed to the formation of groups more exposed to these scenarios. Thus, it was possible to describe this phenomenon and to characterize some

groups in a situation of environmental inequality as part of the exteriority thought by Dussel, since they do not enjoy, like the totality, the right to a healthy environment.

The formulations that deal with the claim to goodness and the Political Claim of Justice served us to seek in the Law the conditions for a constitutional environmental protection that does not disregard those who find themselves in this situation, but takes them as a basis in the construction of a more just reality. Active participation is a fundamental part along with materiality and feasibility, without which the claim to justice cannot be realized.

What is assessed is that the participation of exteriority in the environmental issue must be seriously taken into account, and even consider the recognition of elements of nature as subjects of rights.

A society whose individuals and the community can enjoy, including being recognized as subjects, and not mere objects, of their rights in harmony and in a healthy environment, is a permanent project, which will continue to conflict with the way of producing the life in capitalism.

Translation

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