

# Environment and Economics: the Ethics of Emergency in India and Brazil

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### ABSTRACT

The paper analyses the impact of the Covid-19 pandemic on environmental policies from the perspective of two BRICS countries, namely India and Brazil. The study of those legal systems becomes relevant in order to investigate the relationship between environment and economy in the post-modern era, especially evident in countries that in the past years have had an important growth of GDP. At the same time, the particular sensibility shown by them both at constitutional and international level for environmental values, consecrated in their charters of rights and in their commitments to cooperate for the sustainable development, makes clear the twisting of some principles of the neo-liberal scenario that is occurring during the health emergency. The concept of sustainability, as argued, probably needs to be reconsidered in light of recent events at a global scale, abandoning universalising tendencies.

### KEYWORDS

Covid-19 Pandemic – Environmental Law – BRICS countries – Transformative constitutionalism – Sustainable Development

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«Keep your eye glued to the telescope, Sagredo, my friend.  
What you're seeing is the fact that  
there is no difference between heaven and earth.  
Today is 10 January 1610.  
Today mankind can write in its diary: Got rid of Heaven.»  
B. Brecht, *Life of Galileo*, scene III

### 1. The advent of the pandemic and some 'ancient' concepts belonging to environmental law

The coming of the pandemic contingency silhouetted against a panorama of the environmental law mainly dominated by an ideal that emerged during the Nineties, i.e. the principle of sustainable development.

As well known, it was defined in *Our Common Future*, the Brundtland Commission Report published in 1987. It does not represent 'a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs'.<sup>1</sup>

This idea of development, which meets the needs of present generations without compromising those of the future ones, is connected with an inter-generational approach, while not neglecting the intra-generational perspective.<sup>2</sup>

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<sup>1</sup> The reference is to the *Report of the World Commission on Environment and Development: Our Common Future*, <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>> accessed 28 October 2020.

<sup>2</sup> The affirmation and the evolution of this concept are outlined by D. Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale* (Giappichelli 2017) 269 ff. The Author under-

The notion of sustainable development embodies in itself the construct of sustainability, but does not exhaust it, the latter being a constitutional key concept<sup>3</sup> that implies ‘the aspiration that a certain value, currently present (the environment or the wealth of a country, the budget balance or tourism) may still be there also in the future’.<sup>4</sup>

Sustainability, as emphasised by some authors, relates Man to Nature looking for possible convergences that do not give prevalence to one or the other, so that one element could attract the other and absorb it.<sup>5</sup>

Sustainable development, criticised for its excessive abstractness, appears to be problematic in its enforcement because, in the search for balance between economic growth and the environment, it seems to play the role of a mere policy guiding principle, devoid of perceptive scope, even though it is loaded with ethical significance.<sup>6</sup>

During the health emergency, in those countries that have experienced the lockdown regime, newspapers and social networks have been inundated with pictures of cities and waters where animals came forward for conquering spaces that humans had left empty. The ‘revolution’ of Nature, however, presents itself as a show fascinating to observe, but probably ontologically opposed to the paradigms that continue to orient the Anthropocene era.<sup>7</sup>

It is worthwhile wondering whether an equilibrium between environment and economy is still a sufficient purpose or a step forward is needed from (local and global) economies, in order to reconsider that relation between human and environmental spaces.

The Constitutions of India and Brazil, in spite of the evident differences in the protection of the environment at the constitutional level, both unveil a strong commitment of the State in ensuring the safeguard of a healthy environment, within the context of a broader guarantee to the protection of social and economic rights.

This undertaking to give relevance to the social dimension appears to respond, under the taxonomic profile, to the ‘transformative role’ that can be found in some postcolonial constitutions.<sup>8</sup>

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lines that the emphasis placed on equity has fostered interpretations oriented to solidarity, as a part of Italian doctrine has pointed out (ibid 271). On the topic see R. Bifulco, *Diritto e generazioni future: problemi giuridici della responsabilità intergenerazionale* (FrancoAngeli 2008) and R. Bifulco, A. D’Aloia (eds), *Un diritto per il futuro: teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Jovene 2008).

<sup>3</sup> T. Groppi, *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro* [2016] 1 DPCE 43, 44.

<sup>4</sup> M. Cartabia, A. Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo* (il Mulino 2010) 13, quoted by Groppi (n. 3) 45-46.

<sup>5</sup> As recalled by G. Cordini, *Diritto ambientale comparato*, in P. Dell’Anno, E. Picozza (eds), *Trattato di diritto dell’ambiente, Volume Primo. Principi generali* (Cedam 2012) 101-149, who harks back to the thought of Giorgio Lombardi.

<sup>6</sup> Porena (n. 2) 272.

<sup>7</sup> On the notion of Anthropocene see D. Amirante, *Del Estado de Derecho Ambiental al Estado del Antropoceno: una Mirada a la Historia del Constitucionalismo Medioambiental* [2020] 28 Revista General de Derecho Público Comparado 1.

<sup>8</sup> Cf. O. Vilhena, U. Baxi, F. Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (National Law University, Delhi Press 2014).

In the framework of this theoretical elaboration, one can appreciate the reasons that led, albeit in different ways (and through different paths, which will be outlined later on), to the recognition of a right to a healthy environment, but above all to its justiciability.

The pursuit of environmental protection not only with the recognition of a mere principle of state policy in this matter, but as a legal right, implying its enforceability, puts the legal scholar in front of the dilemma that afflicts every judge whenever he is called upon to decide on a social right. This conundrum has been cleverly synthesised in the binomial usurpation-abdication,<sup>9</sup> moving on the slippery slope made up of political priorities for managing public resources and implementation of rights.

In this context, what has the experience of Covid-19 brought along?

In 2019, with a GDP that amounted respectively to 2,875,142,314,811.9 and to 1,839,758,040,765.6, India and Brazil recorded a GDP annual growth equal to 5.0 and 1.1 %.<sup>10</sup>

In *Doing Business 2020* Report, India ranks among the ten countries which – through the implementation of regulatory reforms, especially in starting a business, dealing with construction permits, trading across borders and resolving insolvency – made greater advances in terms of ease of doing business.<sup>11</sup> At the same time, Brazil made reforms that led to an improvement with regard to ‘Starting a business’ and ‘Registering property’ indicators.<sup>12</sup> As reported by the International Monetary Fund, these two countries have given important economic responses to the pandemic, in a context in which Indian GDP ‘contracted sharply in 2020Q2 (-23.9 percent year-on-year)’ and in Brazil ‘the exchange rate has depreciated by about 22 percent since mid-February and by 29 percent since end-2019’.<sup>13</sup>

In particular, beside the modification of the foreign direct investment policy, Indian government has introduced, *inter alia*, some fiscal business support measures, while the Brazilian Executive has announced various ‘fiscal measures adding up to 12 percent of GDP, whose the direct impact in the 2020 primary deficit is estimated at 8.4 percent of GDP’.<sup>14</sup> Under this perspective, it appears useful and fruitful to analyse some recent questions that have arisen in India and Brazil involving environmental issues and consider them in the framework of the aforementioned economic measures adopted in the last months and

<sup>9</sup> O. LM Ferraz, *Between usurpation and abdication? The right to health in the Courts of Brazil and South Africa*, in Vilhena, Baxi, Viljoen (n 8) 379, refers to F.J. Michelman, *The Constitution, social rights, and liberal political justification* [2003] 1 International Journal of Constitutional Law 13.

<sup>10</sup> The data, which refer to the indicators ‘GDP (current US\$)’ and ‘GDP growth (annual %)', are available at <<https://www.worldbank.org/>>.

<sup>11</sup> Cf. World Bank, *Doing Business 2020* (World Bank 2020), DOI: <10.1596/978-1-4648-1440-2> accessed 9 December 2020, 8.

<sup>12</sup> Ibid. 92.

<sup>13</sup> Cf. <<https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#I>> accessed 3 October 2020.

<sup>14</sup> Ibid.

of the commitments assumed by BRICS countries since the First Meeting of Environment Ministers held in Moscow in 2015.

## 2. The attempted new regulation of EIA in India and the vacuum in public consultation

Despite the absence of an express recognition of a right to environment, the Constitution of India deals with the environment in articles 48A and 51A(g), both introduced by the *Constitution Forty-second Amendment Act* of 1976.

The former, inserted in Part IV of the charter dedicated to *Directive principle of State policy*, provides for a commitment of the State, which has ‘to protect and improve the environment and to safeguard the forests and wild life of the country’. The latter, set out in Part IV-A of *Fundamental duties* states that every citizen must ‘protect and improve the natural environment including forests, lakes, rivers and wild life’ and ‘have compassion for living creatures’.

Those provisions – which are expressive of an objective approach to environmental protection or in any case are limited to a position of duty as regards the subjective profiles – are counterbalanced by the activity of the Supreme Court of India that has elevated the collective interest in a healthy environment to an individual fundamental right.

With a hermeneutical operation the apex court, with its case law already dating from the Eighties, has included environmental protection into article 21, which ensures the right to life, by giving an extended interpretation of the term ‘life’ so as to include the meaning of ‘quality of life’.<sup>15</sup>

One of the first steps towards this judicial construction – which occurred through the procedural remedy of public interest litigation, whose function in this matter was defined ‘transformative’<sup>16</sup> – was taken with the decision *Subhash Kumar v. State of Bihar* in 1991. On that occasion the Supreme Court affirmed that the ‘Right to live is a fundamental right under Art 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life’.<sup>17</sup>

However, already in the previous decision *Municipal Council Ratlam v. Shri Vardhichand*,<sup>18</sup> there emerges the connection existing between the protection of the environment and so-

<sup>15</sup> For an analysis of the link between the right to life and the right to healthy environment refer to J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004), in particular 94 ff., but also M.A.A. Baig, *Environmental Law and Justice* (Regency 1996) and G.N. Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017).

<sup>16</sup> Gill (n. 15) 42.

<sup>17</sup> Cf. Supreme Court of India, *Subhash Kumar v. State of Bihar and Ors.*, 1991 AIR 420.

<sup>18</sup> Cf. Supreme Court of India, *Municipal Council, Ratlam v. Shri Vardhichand and Ors.*, 1980 AIR 1622.

cial justice, which represents the conceptual background in which the above ‘extensive’ reading developed.

In fact, the ideal of social justice<sup>19</sup> – enunciated in the Preamble and reaffirmed in articles 38 and 39 – permeates Parts III and IV of the Constitution, but article 21 surely represents a keystone for opening the way to ‘restitutive Justice’.<sup>20</sup>

In *Vellore Citizens Welfare Forum v. Union of India* case, the Supreme Court definitively recognised that the constitutional and statutory provisions finalised to protect the environment have their source in ‘the inalienable common law right of clean environment’.<sup>21</sup>

In order to implement this constitutional right, in the light of a preventive approach, the Indian legal system has drawn up an authorization system connected to the starting or renewal of economic activities, which is regulated by the *Indian Environment Protection Act* of 1986, the *Environment Protection Rules* of 1986 and the *Environmental Impact Assessment Notification*, 2006, all as subsequently amended.<sup>22</sup> It was finalised to obtain clearance from the institution that is currently known as the Ministry of Environment, Forest and Climate Change (MoEFCC) by submitting the projects to a procedure of Environmental Impact assessment (EIA). This is an administrative process that yet in the past created tensions in the dialectic between the Ministry and the project authorities, the first criticised for the delay in the granting of the authorisation and the second for ‘failing to integrate ecological and economic considerations in decision-making’.<sup>23</sup>

On this ground, the existing relationship between economic conditions and the environment needs to be taken into due consideration, as it becomes more intense and unavoidable.

Indeed, the expression ‘environmental racism’ coined in the United States by the activist Benjamin Chavis,<sup>24</sup> in its being extreme, draws attention on a phenomenon that can characterise some geopolitical contexts where environmental problems mostly affect low-income areas.

<sup>19</sup> The term has a double sense; on the one hand, it implies ‘the rectification of injustice in the personal relations of the people’ and, on the other, it is oriented ‘to remove the imbalances in the political, social and economic life of the people’, cf. M. Saxena, H. Chandra (eds), *Law and Changing Society* (Deep & Deep Publications 2007) 190.

<sup>20</sup> Cf. Saxena, Chandra (n. 19) 193. About the Judiciary as ‘an arm of the social revolution’ see G. Austin, *The Indian Constitution. Cornerstone of a Nation* (Oxford University Press 1999) 164 ff.

<sup>21</sup> Cf. Supreme Court of India, *Vellore Citizens Welfare Forum v. Union of India and Ors.*, (1996) 5 SCC 647.

<sup>22</sup> For the consultation of Environmental clearances’ regulation see <<http://moef.gov.in/rules-and-regulations/environment-protection/environmental-clearance-general/>> accessed 15 November 2020.

<sup>23</sup> Razzaque (n. 15) 168.

<sup>24</sup> Regarding environmental justice movements and Chavis’s remarks on U.S. environmental policies and their effects in the socio-political context, see R.J. Lazarus, *Environmental Racism! That’s What It Is* [2000] Vol. 2000 University of Illinois Law Review 255. The issue is again highly topical today in the United States, cf. M. Santiago Ali, *Environmental racism is killing Americans of color. Climate change will make it worse*, *The Guardian* (28 July 2020) <<https://www.theguardian.com/commentisfree/2020/jul/28/climate-change-environmental-racism-america>> accessed 15 November 2020.

Some scholars used this argument to explain the Supreme Court of India's activism in environmental matters, starting from the finding that 'the poor and disadvantaged sections of the society pay a heavy price because of environmental degradation and, therefore, that their rights need to be protected'; on the contrary, the 'greenness' of judicial decisions has been interpreted by others as 'an attempt to reconcile different claims on behalf of development, environmental protection and human rights', responding definitively to the sustainable development principle.<sup>25</sup>

The issues connected to environmental clearances have assumed greater relevance in the last few years, and even more in the constancy of the Covid-19 emergency. In fact, far from involving only technical aspects, regarding EIAs the battle is being waged between two different approaches to the economic and investment policies of the country.<sup>26</sup>

Recently, it has been pointed out that 'investment by foreign companies and industry, enthusiastically supported by government, into sectors including energy and mining has on occasions resulted in unsustainable development'.<sup>27</sup>

Moreover, during the lockdown regime the draft of *Environment Impact Assessment Notification, 2020* was published in the Gazette of India,<sup>28</sup> for the purpose of modifying the regulation of clearances. A fact that per se may not arouse particular interest in ordinary circumstances (unless among the experts), considering also the numerous amendments occurred since the first notification of 1994,<sup>29</sup> at the current time has led to criticisms among public opinion and to some legal disputes, for two main motives.

On the one hand, the draft implies a lowering of standards of environmental authorizations. On the other, this occurred in a period during which the process of public consultation cannot produce its wide effects, for reasons connected to the health emergency.

Finally, an open letter was addressed to the Ministry of Environment from academics and scientists to ask for the withdrawal of the draft notification and the submission of a new proposal.<sup>30</sup>

<sup>25</sup> G. Sahu, *Environmental Jurisprudence and the Supreme Court. Litigation, Interpretation, Implementation* (Orient Blackswan 2014) 7 ff. The Author accounts for the doctrinal debates with regard to the role of Judiciary in the protection of the environment in India, not failing to report the critical voices. On this topic, see also Gill (n. 15).

<sup>26</sup> For an overview on environmental clearances regulation in India, see N. Chowdhury, *Environmental Impact Assessment in India: Reviewing Two Decades of Jurisprudence* [2014] 5 IUCNAEL EJournal 28.

<sup>27</sup> Gill (n. 15) 3.

<sup>28</sup> It is necessary to note that the draft was issued on the 23rd of March 2020, a day after the declaration of the national Janta Curfew and a day before the institution of the lockdown regime, and it was published on the 11th of April 2020 in the Gazette of India.

<sup>29</sup> For the EIA regulation, cf. <<http://moef.gov.in/rules-and-regulations/environment-protection/environmental-clearance-general/>> accessed 15 November 2020.

<sup>30</sup> The Wire published this open letter at <<https://thewire.in/environment/students-researchers-environment-ministry-letter-revoke-draft-eia-2020>> accessed 15 November 2020.

Among the critical points of the procedure initiated for reviewing the mechanisms for issuing environmental authorizations, one has been identified in the scarce publicity given to it, with the result of a limited public debate.

Regarding its merits, seven points are emphasised in addressing criticism to the draft, observing that it would undermine ecological and environmental security in India.<sup>31</sup>

The most relevant critical remarks, as noted, can be found in:

- a) the provision of clause 26, which excludes from the regime of prior-EC or prior-EP the projects relative to a long list of activities, e.g. 'Solar Photo Voltaic (PV) Power projects, Solar Thermal Power Plants and development of Solar Parks' or 'Coal and non-coal mineral prospecting';
- b) the reclassification of a variety of activities or the exemption of some projects from certain burdens, which subjects them to a less stringent regulation, in particular with reference to public consultation
- c) the introduction of an *ex post facto* environmental clearance and the restriction, contemplated in clause 22, of the cognizance of violations to government authorities and to project proponents, providing for the payment of a late fee.

As underscored by some authors, apart from remarks that may be advanced in terms of compliance with the commitments deriving from international law, problematic issues from the point of view of domestic law can be identified in the violation of the principles of non-regression and 'polluter pays' as well as in that of intergenerational equity, and also in reducing the projects that require prior public consultation.<sup>32</sup>

In the face of the important changes that the Government intended to introduce through the draft in constancy of the pandemic, obvious problems connected to public consultation occurred. In fact, various judicial proceedings have been pursued in order to extend the deadline for the presentation of objections or suggestions to the MoEFCC fixed in sixty days.

Among others, with a decision taken on the 30th of June 2020, the High Court of Delhi, on the application of Vikrant Tongad, considering the expiry term to be unclear after the publication of another notification on the 8th of May which further extended the notice period, stated that the term for the objections would expire on the 11th of August.<sup>33</sup>

The petitioner also required the Court to adopt a writ of mandamus or *similia* for the publication of the draft in all the languages provided by the Eighth Schedule of the Constitution and the implementation of the consultation with the involvement of stakeholders. On

<sup>31</sup> Ibid.

<sup>32</sup> S. Shendye, O. Malpani, *The Conundrum of Ecology V. Economy: Analysis of the Eia Draft 2020 (Law School Policy Review*, 9 July 2020) <<https://lawschoolpolicyreview.com/2020/07/09/the-conundrum-of-ecology-v-economy-analysis-of-the-eia-draft-2020/>> accessed 15 November 2020.

<sup>33</sup> The reference is to the order adopted by the High Court of Delhi on the 30th of June 2020, in *Vikrant Tongad v. Union Of India (MoEFCC)*, W.P.(C) 3747/2020.

this point, the bench constituted by the Chief Justice D.N. Patel and Judge P. Jalan adopted a direction addressed to the Government of India for the translation of the text and its publication on the institutional website of the States' Environment Ministries and Pollution Control Boards.<sup>34</sup>

The case of the draft of EIA Notification 2020 continued – as reported by the countless headlines dedicated to it by the press – involving other High Courts and the Supreme Court, albeit the latter not for reasons relating to the merit of the proposal.<sup>35</sup> Moreover, about 1.7 million comments have been sent to the MoEFCC, opening a political debate.<sup>36</sup> While the web is teeming with numerous campaigns for signing petitions,<sup>37</sup> under the OHCHR special procedures mechanism, with the Communication of the 31st of August addressed to the Government of India it was found that the provision of a *post-facto* clearance, in addition to being in contrast with the consolidated case law of the Supreme Court, is contrary to the principles of the environmental rule of law.<sup>38</sup>

### 3. Possible omissions of the Government with regard to the *Fundo Clima* and *Fundo Amazônia* in Brazil and the ADO 59 and 60 before the *Supremo Tribunal Federal*

Another environmental issue on which the Covid-19 pandemic has drawn attention is that of climate change, due to both the visible and the imperceptible effects that the lockdown regime has determined, for example, on air quality.<sup>39</sup>

Undoubtedly, although in 2018 Brazil was the country that produced fewer MtCO<sub>2</sub> emissions among the BRICS and was ranked fourteenth on a world scale, between South Africa

<sup>34</sup> Ibid.

<sup>35</sup> *Ex plurimis*, in the online press, see <<https://www.downtoearth.org.in/news/environment/eia-notification-2020-delayed-till-september-7-72673>> and <<https://www.indialegallive.com/top-news-of-the-day/top-story/draft-eia-in-hindi-and-english-only-sc-stays-delhi-hc-contempt-proceedings-against-moef/>> accessed 15 November 2020.

<sup>36</sup> Cf. <<https://www.hindustantimes.com/india-news/environment-ministry-says-17-lakh-comments-on-draft-eia-notification/story-hIZhPzTM185fplOCeAAjGI.html>> accessed 15 November 2020.

<sup>37</sup> See, e.g. the campaign launched on Change.org 'Withdraw EIA Notification 2020'.

<sup>38</sup> Cf. the Communication IND 13/2020 'Information received concerning the draft notification "Environment Impact Assessment Notification, 2020", issued by the Ministry of Environment, Forests and Climate Change, which, if published, will supersede the Environment Impact Assessment notification dated the 14th September, 2006 and its subsequent amendments' as part of mandates of Special Rapporteurs of the United Nations High Commissioner for Human Rights (OHCHR), available at <<https://spcommreports.ohchr.org/>>.

<sup>39</sup> On the topic of air quality, its causes and consequences, also with reference to Covid-19 see Health Effects Institute, *State of Global Air 2020. Special Report* (Health Effects Institute 2020). More generally, on the issue of climate change, see the report by World Meteorological Organization (WMO), *United in Science 2020. A multi-organization high-level compilation of the latest climate science information*, available at <[public.wmo.int/en/resources/united\\_in\\_science](http://public.wmo.int/en/resources/united_in_science)> accessed 6 December 2020.

and Turkey,<sup>40</sup> the problem of air quality is currently strongly felt due to the phenomenon of deforestation resulting from fires in the Amazon.

In a recent report by Human Rights Watch, IPAM and IEPS, it was observed that ‘Amazon is an exceptional bulwark against climate change in this regard, storing approximately 100 billion tons of carbon [...] and removing about 600 million tons per year from the atmosphere’.<sup>41</sup> Actually, in past years the Brazilian government was a forerunner in perceiving the importance of climate issues and inquiring into the climatic changes that took place in its territory and more generally in South America during the twentieth century.<sup>42</sup> In this respect, it is necessary to consider the pioneering approach of the Brazilian Constitution of 1988 concerning the right to a healthy environment.<sup>43</sup>

In fact, article 225 states ‘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’.<sup>44</sup>

Among Brazilian scholars, the right to an ecologically balanced environment is definitely qualified as a fundamental right, in a frame in which the catalogue of fundamental rights, in accordance with article 5 § 2, is to be considered open.<sup>45</sup>

If the provision is the expression of an ‘*antropocentrismo alargado*’ – as argued by some scholars – which combines anthropocentric, ecocentric and biocentric visions and the environment is considered as an intangible asset, it is clear that this right has also a collective dimension, so the solidaristic perspective becomes relevant.<sup>46</sup>

This seems to be confirmed also by the placement of article 225 in Title VIII, dedicated to ‘The Social Order’ and where social rights are recognised.

<sup>40</sup> Cf. J. Kirton, *BRICS Climate Governance in 2020*, paper presented at *BRICS at Ten: Challenges, Achievements and Prospects*, Gaidar Forum, Ranepa – Moscow, January 15, 2020 available at < [http://www.brics.utoronto.ca/biblio/Kirton\\_BRICS\\_Climate\\_Governance\\_2020.pdf](http://www.brics.utoronto.ca/biblio/Kirton_BRICS_Climate_Governance_2020.pdf) > accessed 6 December 2020, which refers to the data available at <<http://www.globalcarbonatlas.org/en/CO2-emissions>>.

<sup>41</sup> Cf. Human Rights Watch – Instituto de Pesquisa Ambiental da Amazônia – Instituto de Estudos para Políticas de Saúde, ‘*The Air is Unbearable*’. *Health Impacts of Deforestation-Related Fires in the Brazilian Amazon*, August 2020, <<https://ipam.org.br/bibliotecas/the-air-is-unbearable-health-impacts-of-deforestation-related-fires-in-the-brazilian-amazon/>> accessed 6 December 2020, 14.

<sup>42</sup> J.A. Marengo, *Mudanças climáticas globais e seus efeitos sobre a biodiversidade: caracterização do clima atual e definição das alterações climáticas para o território brasileiro ao longo do século XXI* (2nd edn, Ministério do Meio Ambiente 2007). For updated projections on climate change in Brazil it is possible to consult the PCBp platform by INPE – *Instituto Nacional de Pesquisas Espaciais* of Brazilian *Ministério da Ciência, Tecnologia e Inovações*, available at <<http://pclima.inpe.br/>>.

<sup>43</sup> With regard to the trends of environmental constitutionalism in Latin America, see D. Amirante, *L'ambiente preso sul serio. Il percorso accidentato del costituzionalismo ambientale* [2019] Fascicolo Speciale DPCE 1, 22 ff.

<sup>44</sup> As laid down in article 225 *caput* of the Constitution of the Federative Republic of Brazil. The text in English is available at <<http://www2.senado.leg.br/bdsf/handle/id/243334>>.

<sup>45</sup> Cf. A.J. Krell, *Comentário ao artigo 225, caput*, in J.J. Gomes Canotilho, G.F. Mendes, *et al.* (eds), *Comentários à Constituição do Brasil 2078-2085* (Saraiva/Almedina 2013).

<sup>46</sup> *Ibid.*

Seen through the lens of its objective connotation, the right to a healthy environment implies a duty of preservation for the public powers, the content of which is explained in § 1 of the provision.

In fact the latter imposes, in the interests of effectiveness, *'diferentes instrumentos de defesa ecológica'*,<sup>47</sup> e.g. the creation of protected areas or the undertaking of environmental impact assessment that respond to the theory of the *Constituição ecológica*.<sup>48</sup>

Before the spread of the pandemic, the *Supremo Tribunal Federal* of Brazil (hereafter referred to as the STF) had the occasion to offer a thorough reading of article 225, in particular of the sustainable development principle contained in it with the mention of present and future generations.

Among others, in the decision made in the *ação declaratória de constitucionalidade* (ADC) 42,<sup>49</sup> starting from the consideration that *'a Carta de 1988 consistiu em marco que elevou a proteção integral e sistematizada do meio ambiente ao status de valor central da nação'* to the point that the Brazilian Constitution is known as *Constituição Verde*, the apex Court has given a broader interpretation of sustainability in the context of the theoretical premises that led to the scrutiny of the rules of the new Forest Code.

The STF – refusing any antagonism between economic development and environmental protection and referring to the thought of R. L. Revesz and R. N. Stavins, which combines intergenerational equity with dynamic efficiency<sup>50</sup> – addresses the complex issues connected to the theory of the *'vedação do retrocesso'* in environmental matters. In the Brazilian panorama, indeed, the *princípio da proibição de retrocesso ambiental*<sup>51</sup> only partially finds its correspondence in the well-known principle of non-regression, because it expresses a *"vedação ao legislador de suprimir, pura e simplesmente, a concretização da norma", constitucional ou não, "que trate do núcleo essencial de um direito fundamental" e, ao fazê-lo, impedir, dificultar ou inviabilizar "a sua fruição, sem que sejam criados mecanismos equivalentes ou compensatórios"*.<sup>52</sup>

<sup>47</sup> A.J. Krell, *Comentário ao artigo 225 § 1º*, in J.J. Gomes Canotilho, G.F. Mendes, *et al.* (eds), *Comentários à Constituição do Brasil* (Saraiva/Almedina 2013) 2086.

<sup>48</sup> On this topic see L. de Faria Rodrigues, *A Concretização da Constituição Ecológica. A Norma Ambiental e as Ciências Naturais* (Lumen Juris 2015).

<sup>49</sup> Cf. Supremo Tribunal Federal, ADC 42, rel. min. Luiz Fux, P, j. 28-2-2018, DJE 175 de 13-8-2019. See also the *ação direta de inconstitucionalidade* (ADI) 3.540 MC, rel. min. Celso de Mello, P, j. 10-9-2005, DJ de 3-2-2006.

<sup>50</sup> Ibid. The STF quotes R.L. Revesz, R.N. Stavins, *Environmental Law*, in A.M. Polinsky, S. Shavell (eds), *Handbook of Law and Economics*, Vol. 1 (Elsevier 2007) 507.

<sup>51</sup> On this topic see VV.AA., *Princípio da Proibição de Retrocesso Ambiental* (Brasil, Congresso Nacional, Senado Federal – Comissão De Meio Ambiente, Defesa do Consumidor e Fiscalização e Controle 2011), available at <<http://www2.senado.leg.br/bdsf/handle/id/242559>> accessed 8 December 2020.

<sup>52</sup> A. Herman Benjamin, *Princípio da Proibição de Retrocesso Ambiental*, in VV.AA. (n. 51) 57-58, who refers to F. Derbli, *O Princípio da Proibição de Retrocesso Social na Constituição de 1988* (Renovar 2007) 298.

Thus the Constitution of 1988, as noted by Carducci, in the fundamental right to diversity, to healthy environment and to ecological balance would summarise a *Nomos-Ethnos* nexus that is reflected in the elaboration of litigation remedies by the legal system.<sup>1</sup>

On close examination, in June 2020, a group of political parties goes to *Supremo Tribunal Federal* to complain about possible omissions of the Union with regard to the *Fundo Amazônia* and the *Fundo Nacional sobre Mudança do Clima* (also known as *Fundo Clima*).

Those two funds are intended to finance projects aimed *latu sensu* to environmental protection. The first is designed to collect donations for investments in projects directed to prevent, monitor and combat deforestation and to promote the conservation of *Amazônia Legal*, while the second aims to guarantee resources to finance projects for the mitigation of climate change.<sup>2</sup>

With two *ações diretas de inconstitucionalidade por omissão* connected to one another,<sup>3</sup> the *Partido Socialista Brasileiro* (PSB), the *Partido Socialismo e Liberdade* (PSOL), the *Partido dos Trabalhadores* (PT) and the *Rede Sustentabilidade* complained, in one case, about the failure of the Union to adopt administrative measures in order to avoid the paralysis of the Amazon fund and, in the second case, about actions and omissions that would have compromised the functioning of the Climate fund.

Regarding the ADO 59, the petitioner stressed, in the light of the management of the fund and the approval of new projects, the non-compliance of the duty of environmental protection laid down in article 225, in the framework of joint administrative competence of article 23 VI and VII.<sup>4</sup>

<sup>1</sup> Cf. M. Carducci, *Nomos, Ethnos e Kthonos nel processo: verso il tramonto del bilanciamento? Spunti dal dibattito latinoamericano* [2014] 1 *Federalismi.it* 1, 7. The Author, in a comparison with the approaches of the Andean *nuevo constitucionalismo*, also gives an account of the doctrinal debates with regard to the interpretation of the notion of ecological balance contained in article 225 (*ibid.* 14 ff.). With regard to the litigation remedies for the environmental protection the *ação popular* provided by article 5 LXXIII of the Constitution is certainly the best known. Article 5 LXXIII states '*qualquer cidadão é parte legítima para propor ação popular que vise a anular ato lesivo ao patrimônio público ou de entidade de que o Estado participe, à moralidade administrativa, ao meio ambiente e ao patrimônio histórico e cultural, ficando o autor, salvo comprovada má-fé, isento de custas judiciais e do ônus da sucumbência*'.

<sup>2</sup> The *Fundo Amazônia* was instituted by the Decree No. 6.527 of August 1, 2008 and the management is entrusted to the *Banco Nacional de Desenvolvimento Econômico e Social – BNDES*; instead the *Fundo Nacional sobre Mudança do Clima*, created by the Law No. 12.114 of December 9, 2009, is bound to the Ministry of the Environment. For further study see the publication by Supremo Tribunal Federal – Secretaria de Altos Estudos, Pesquisas e Gestão da Informação Coordenadoria de Biblioteca, *Funcionamento do Fundo Nacional sobre Mudança do Clima (Fundo Clima) e do Fundo Amazônia. Bibliografia, Legislação e Jurisprudência Temática* (Supremo Tribunal Federal 2020), available at <[http://www.stf.jus.br/arquivo/cms/bibliotecaConsultaProdutoBiblioteca/anexo/FundoClimaeAmazonia\\_out\\_2020.pdf](http://www.stf.jus.br/arquivo/cms/bibliotecaConsultaProdutoBiblioteca/anexo/FundoClimaeAmazonia_out_2020.pdf)> accessed 8 December 2020.

<sup>3</sup> For an overview on the *ação direta de inconstitucionalidade por omissão* (hereafter referred to as ADO), a constitutional legal action contemplated by article 103 § 2 of the Constitution, see L.L. Streck, *Jurisdição constitucional* (6th edn, Editora Forense 2019) 513 ff. In this case the reference is to ADO 59 e ADO 60 pending before the Federal Supreme Court.

<sup>4</sup> Cf. Supremo Tribunal Federal, ADO 59, rel. min. Rosa Weber, decisão monocrática de 31-8-2020, DJE n° 219 de 01/09/2020.

The circumstance that the Court was called to judge on one of the most relevant legal issues of contemporaneity, with a humanitarian, cultural and economic impact on the social and constitutional fabric represents one of the premises that led the Judge-Rapporteur to schedule a public hearing for the acquisition of more information, also of a scientific nature.<sup>5</sup> Along with this – as stated in the decision – if an inadequate or insufficient environmental protection is challenged, a proportionality test of the measures to be taken is requested with respect to the *de facto* situation, from the perspective of the principles of prevention and precaution.

Also in relation to the ADO 60,<sup>6</sup> later admitted as *arguição de descumprimento de preceito fundamental*,<sup>7</sup> a public hearing was held on the 21st and the 22nd of September 2020.<sup>8</sup> The latter, in the opinion of the Judge-Rapporteur, would be necessary in the broader context of the informative role that Constitutional Courts in general have, but most of all because in the petition the Union's actions and omissions alleged could supply such a picture of regression and lack in environmental protection since 2019 as to constitute an *estado de coisas inconstitucional*.<sup>9</sup>

Surely the problems connected to the deforestation of Amazon and thus those of climate change – as highlighted in the judgement – were exacerbated by the advent of Coronavirus, mainly due to attenuation of controls.

The two cases here reported are still pending before the *Supremo Tribunal Federal* of Brazil, but are we sure that the pandemic has exclusively produced a catalytic effect on environmental concerns or hasn't it had the merit of making visible something that otherwise would have been taken into consideration with too much delay?

<sup>5</sup> The public hearing was held on the 23rd and the 26th of September 2020 and the Judge-Rapporteur Rosa Weber underlined the importance that this step has for the decision that will be taken by the Federal Supreme Court, cf. <<http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=454103&ori=1>> accessed 8 December 2020.

<sup>6</sup> Cf. Supremo Tribunal Federal, ADO 60, rel. min. Roberto Barroso, decisão monocrática de 28-6-2020, DJE nº 165 de 30/06/2020.

<sup>7</sup> Cf. Supremo Tribunal Federal, *arguição de descumprimento de preceito fundamental* (ADPF) 708, rel. min. Roberto Barroso. For an overview on the constitutional legal action contemplated by article 102 § 1 of the Constitution see L.L. Streck (n. 55) 525 ff.

<sup>8</sup> For a comment on the decision to schedule a public hearing, see M.A. Tigre, A. Goodman, *ADPF708 / Climate Fund. What to expect from Brazil's first public hearing on climate policy?* (Gnbre, 22 September 2020) <<https://gnhre.org/2020/09/22/adpf708-climate-fund-what-to-expect-from-brazils-first-public-hearing-on-climate-policy/>> accessed 8 December 2020.

<sup>9</sup> On the debated theoretical construct of the *estado de coisas inconstitucional*, see C.A. de Azevedo Campos, *Estado De Coisas Inconstitucional* (Editora JusPodivm, 2ª edição, 2019).

#### 4. Rethinking (not only in BRICS countries) the relationship between environment and economy

The Covid-19 disease placed us before the limits of a development idea, which indeed even in a regime of ordinariness would probably require to be rethought.

Primarily, the reason that imposes a reconsideration of this paradigm is the climate emergency occurred in the last decade, announced by someone as an impending ‘catastrophe’,<sup>10</sup> but ignored by most.<sup>11</sup> The issue of climate change has shown the existing tension between the needs of our economies and those of environmental protection, intensifying it. Basically it represents, however, only one of the many pieces of coloured glass that the kaleidoscope of the environmental concern discloses.<sup>12</sup>

In hindsight, the spread of Covid-19 has had even shorter-term consequences on the environment.<sup>13</sup>

Already towards the end of the Eighties, U. Beck warned that in the age of advanced modernity, which can be identified in post-modernity, the social production of wealth systematically goes hand in hand with the social production of risk, thus distributive problems are flanked by those connected to the analysis of risks.<sup>14</sup>

Environmental risks arise from modernisation and now take on a global reach because every economic activity brings with it a risk that grows proportionally with the increasing of technical-scientific innovation.<sup>15</sup> Arguably, it is no longer enough to avoid the risk, or rather, the legal instruments elaborated to face it no longer seem able to cope with environmental problems, which in the last years have shown an exponential trend compared to technological progress.

<sup>10</sup> D. Amirante, *Aspettando la catastrofe. L'emergenza climatica fra storia della scienza e filosofia*, in G. Limone (ed.), *Il pudore delle cose, la responsabilità delle azioni*, L'era di Antigone. Quaderno di Scienze filosofiche, sociali e politiche (FrancoAngeli 2019) 143-151.

<sup>11</sup> During the pandemic the countries here analysed have faced, in different ways, the question of climate change. Regarding India, the Central Pollution Control Board of Ministry of Environment, Forest and Climate Change published on the 31st of March 2020 the report *Impact of Janta Curfew & Lockdown On Air Quality*, available at <<https://www.cpcb.nic.in/air/NCR/jantacurfew.pdf>> accessed 15 November 2020, while in Brazil they discussed the existing connection between deforestation of Amazonia, climate change and Covid-19, cf. P. Moutinho, A. Alencar, L. Rattis, V. Arruda, I. Castro, P. Artaxo, *The Amazon in Flames. Deforestation and Fire during the Covid-19 Pandemic*, Technical Note n° 4, June 2020, Instituto de Pesquisa Ambiental da Amazônia, available at <<https://ipam.org.br/bibliotecas/the-amazon-in-flames-deforestation-and-fire-in-the-amazon-during-the-covid-19-pandemic/>> accessed 15 November 2020.

<sup>12</sup> See, on this point, D. Amirante, *“Tangled Up in Green”: The Tight Connection between Covid-19 and the Environment*, in AA.VV., *Law on The State of Emergency*, International Conference Proceedings 16-17 June 2020 (NHÀ XU T B N H NG Đ C 2020) 405-416 and D. Amirante, *Il Covid-19 fra sicurezza sanitaria e sicurezza ambientale* [2020] 2 *Democrazia e Sicurezza* 3.

<sup>13</sup> L. Leiroz, *Coronavirus brings serious environmental impact* (Info Brics, 21 July 2020) <<https://infobrics.org/post/31410>> accessed 8 December 2020.

<sup>14</sup> U. Beck, *Risk Society: Towards a New Modernity* (Sage 1992), it. transl., *La società del rischio. Verso una seconda modernità* (Carocci 2013) 25.

<sup>15</sup> Ibid. 28.

In a crescendo, in the development of the principles of environmental management, there has been a shift from a curative model to one founded on the precautionary approach.<sup>16</sup> Although, from a legal standpoint, an attempt has been made to offer an answer even to those uncertain risks, we must probably start from the teaching of the anthropologist Mary Douglas, who drew attention on the circumstance that the risk represents the product of a given social construction.<sup>17</sup>

The pandemic has set humankind before the weight of scientific uncertainty, which has not been taken into adequate consideration up to now, in so far as the Law has responded to our society's need for security with neopositivist approaches.<sup>18</sup>

In that same positivism, we can find indeed the root of the term sustainability.<sup>19</sup> The sociological paradigm of anthropocentrism, with its idea of a hierarchical scale, was consecrated in the era that follows the discovery of America and culminated between the 17th and 18th centuries, though it can even be dated back to Aristotle and Thomas Aquinas.<sup>20</sup> On close examination, it should be pointed out that mechanicism and rational thought have led the western legal tradition towards a departure from possible ecocentric visions. In a recent discussion between a physicist and a jurist, the theoretical foundation of the economic paradigm that characterizes our society – the ethics of consumerism of Bauman's liquid society – can be traced back to the mechanistic worldview of the 16th century, because the prevailing idea of development is still mainly quantitative.<sup>21</sup>

On the contrary, the chthonic legal tradition (whose peoples live in harmony with Nature), from which all the other traditions derive, is 'genuinely environmentalist' and in a way that current Western ecologism fails to grasp in its wholeness.<sup>22</sup>

The process of constitutionalisation of sustainability was defined as a global trend, but the experience of the Andean *nuevo constitucionalismo* is in this sense undoubtedly the most representative.<sup>23</sup> In fact, through the recognition of a complex of rights connected to *buen*

<sup>16</sup> On the history of development and evolution of the triad of the principles of environmental management in a comparative perspective, see D. Amirante, *Diritto ambientale italiano e comparato. Principi* (Jovene 2003) 23 ff.

<sup>17</sup> For an analysis of the cultural theory of risk elaborated by M. Douglas in the framework of environmental sociology, see F. Beato, *I quadri teorici della sociologia dell'ambiente tra costruzionismo sociale e oggettivismo strutturale* [1998] 16 Quaderni di Sociologia Online 41, DOI: <<https://doi.org/10.4000/qds.1520>> accessed 31 October 2020.

<sup>18</sup> Amirante (n. 68) 47.

<sup>19</sup> The origins of the term sustainability were traced back to the Age of the Enlightenment by K. Bosselmann, *The Principle of Sustainability: Transforming law and governance* (2nd edn, Routledge 2017) 15.

<sup>20</sup> See V. Baricalla, *Natura e cultura occidentale. Tra mondo antico ed età moderna* (Oasi Alberto Perdisa 2002).

<sup>21</sup> F. Capra, U. Mattei, *Ecologia del diritto. Scienza, politica, beni comuni* (Aboca 2017) 34-35.

<sup>22</sup> As highlighted by H.P. Glenn, *Legal Traditions of the World: Sustainable diversity in law* (4th edn, OUP 2010), it. transl., *Tradizioni giuridiche del mondo. La sostenibilità della differenza* (il Mulino 2011) 115 ff. The Author emphasises the ecological footprint of the chthonic legal tradition pointing out that 'it is not just green: it is deep green' (ibid. 141).

<sup>23</sup> See Groppi (n. 3) 58.

*vivir*, a constitutional status has been given to the indigenous worldview, although even in those legal systems the anthropocentric vision has not been completely abandoned.<sup>24</sup> However, the western legal tradition panorama was already permeated with legal and economic narratives nurtured with ‘systemic blindness’ and characterised by ‘ingenuous equations between human balances and ecological balances’.<sup>25</sup>

As emphasised by some authors, definitively, ‘the idea of a healthy environment can be an “elusive” concept, one for which there cannot “always be a universal standard”’.<sup>26</sup>

BRICS countries over the years have shown concern for the environmental crisis, developing forms of cooperation in a constant dialogue with the United Nations.<sup>27</sup>

At the 5th BRICS Environment Ministers Meeting held in Sao Paulo in 2019,<sup>28</sup> reiterating the intention to strengthen the cooperation mechanisms, reference was made to the 10th BRICS Summit Johannesburg Declaration.<sup>29</sup> The latter was characterised by a reaffirmation of the commitment to the implementation of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals, understanding this principle in a triple dimension, namely the economic, social and environmental ones (paragraph 20). Furthermore, the commitment to cooperation in the energy sector was confirmed, in order to reach the transition towards more sustainable energy systems (paragraph 22), also in the sector of circular economy (paragraph 26).<sup>30</sup>

It is possible to state that the relationship between economies and environment is the theoretical locus in which the twisting of some concepts that characterise the neo-liberal scenario has taken place.<sup>31</sup>

BRICS countries represent a privileged place to observe this new backdrop of the globalised era, as the processes of change aimed at promoting more investments or intervening in environmental policies here discussed demonstrate.

<sup>24</sup> See S. Baldin, *I diritti della natura: i risvolti giuridici dell’etica ambiental exigente in America Latina*, in S. Baldin, M. Zago (eds), *Le sfide della sostenibilità. Il buen vivir andino dalla prospettiva europea* (Filodiritto 2014) 155-183.

<sup>25</sup> Cf. M. Carducci, *Natura (Diritti della)*, in R. Sacco (dir.), R. Bifulco, A. Celotto, M. Olivetti (eds), *Digesto delle Discipline Pubblicistiche*, Aggiornamento (Utet giuridica 2017) 486-521, 507 ff.

<sup>26</sup> The reference is to M. Kidd, *Transformative constitutionalism and the interface between environmental justice, human rights and sustainable development*, in United Nations Environment Programme, *New Frontiers in Environmental Constitutionalism* (UN Environment 2017) 120 that quotes L. Feris, *Constitutional environmental rights: An underutilised resource* [2008] 24 SAJHR 29, 35.

<sup>27</sup> Cf. Kirton (n. 40).

<sup>28</sup> The *Joint Statement for the 5th BRICS Ministers of Environment Meeting: Contribution of Urban Environmental Management to Improving the Quality of Life in Cities* held in Sao Paulo on August 15, 2019 is available on the website of BRICS Information Centre at <<http://www.brics.utoronto.ca/>>.

<sup>29</sup> The text of the *10th BRICS Summit Johannesburg Declaration* is available at <[https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th\\_BRICS\\_Summit\\_Johannesburg\\_Declaration](https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration)> accessed 3 October 2020.

<sup>30</sup> Ibid.

<sup>31</sup> With regard to the consequences of Covid-19 on the neo-liberal paradigm see the indepth reflections made by R. Venkatesan, *Neoliberalism After Covid-19: Some Caution And Counter Arguments* (*Law School Policy Review*, 14 October 2020) <<https://lawschoolpolicyreview.com/2020/10/14/neoliberalism-after-covid-19-some-caution-and-counter-arguments/>> accessed 15 November 2020.

If environmental law represents a symbolic post-modern law, for being regulated by principles,<sup>32</sup> probably recent events require reviewing those principles that have dominated our world so far, in light of a new paradigm that has become the main character of our present time, namely diversity.

The health emergency has put 'old' ideas in crisis, undermining their own premises. Who knows if this experience has not shown that the ideal of sustainable development can no longer be itself, in the end, a victim of universalizing pressures, leaving room for post-pandemic sustainability more respectful of the local dimension.

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<sup>32</sup> Cf. D. Amirante, *Post-Modern Constitutionalism in Asia: Perspectives from the Indian Experience* [2013] Vol. 6, No. 2 NUJS Law Review 213.