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Governance Stream - Governance and the Law

'Globalisation and decentralisation: the role of legal frameworks'

The Brazilian Experience

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Brazil and globalisation

Brazil has an ambivalent position towards globalisation. On one hand, as a major exporter of goods and commodities, it favours and benefits from globalisation. On the other hand, it sees globalisation as a threat to its industries and to its cherished sovereignty.

It is also relevant to point out that both in some sectors of the media and in parts of the country with major environmental conflicts (the Amazon region, for example), globalisation is seen as synonymous to internationalisation. In other words, a threat to local or regional vested interests.

In the Amazon region, the protection of the forest and wildlife – and the establishment of large protected areas - is often portrayed as a result of international pressure.

"Good *legal* globalisation" and the evolution of the Brazilian system of nature protection

Throughout its development, Brazilian "green" environmental law has benefited enormously from the experiences of other countries and from international instruments, even those which are considered soft law (The 1972 Stockholm Declaration, for example).

Among many others, two examples could be mentioned here. The first protected areas created in the country followed closely the American system and the model proposed by the *1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*. At a different level, the 1988 Brazilian Constitution included several provisions and instruments that it borrowed from other common and civil legal systems.

Thus, one could speak of a sort of "*legal globalisation*" in the field of Environmental Law which predates globalisation as an economic and geo-political phenomenon.

"Bad *legal* globalisation" and the Brazilian system of nature protection

One could also identify instances of what I will call "bad *legal* globalisation". By that I mean a process in which a national system of protection of the environment is weakened by treaty making or by the establishment of regional common markets.

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In the past few years, Brazil has suffered a number of legal challenges and setbacks within the *Mercosur* framework. As a consequence of those legal cases, which were taken to arbitration, the country had to lower the requirements of its environmental law system, under the argument that some of its provisions represented trade barriers.

Another example of "bad legal globalisation" has happened in the area of "regulatory takings". Here, the foreign influence does not appear directly in the enactment of laws and regulations, but in judicial interpretation, where judges start to follow the radical pro-private property approach that is now the rule in the American model, based on recent Supreme Court decisions. The impact of this in the creation of protected areas and environmental planning cannot be exaggerated.

Decentralisation and Brazilian federalism

Only at the end of the 19th century, with the establishment of the Republic, did Brazil become a federal state. In the 1891 Constitution, it was the central or Federal government that granted new powers to the recently created States, and not the other way around, as was the case in the United States. This is relevant to understand the interesting aspects and shortcomings of the present model of federalism.

The 1988 Constitution states that all three levels of government – federal, state and municipal – have the power (and the duty) to protect the environment. This creates real and potential conflicts.

First, problems at the legislative level, since all three levels of government can enact legislation for the protection of the environment.

Second, conflicts also arise in enforcement procedures, since again all three levels can take action against violators.

Tensions – and litigation – have often appeared when states or municipalities try to use their legislative powers granted by the Federal Constitution for weakening the protection of the environment provided by federal law. This has become a recurrent issue, especially in the forest sector.

The dream and risks of decentralisation

In large countries like Brazil, decentralisation has benefits and risks.

Some will say that decentralisation benefits the protection of the environment because only those who are close to the issues can reach an optimum decision. Furthermore, national governments tend to be wasteful and bureaucratic.

However, it is also at the local level that the economic and political pressure of vested interests is most felt. Besides, the "optimum decision" will not be achieved, when the locals will not speak up for the environment, because either there are no locals (remote regions) or they are not organised. Or, even worse, because they are just too afraid to state their views or have been captured.

Finally, some environmental issues – even more in the "green" sector – cannot be dealt with in a fragmented way. In those situations, a radical partition of powers among the different levels of government will put the ecological effectiveness of the legal and enforcement measures taken by public authorities at risk.

In other words, decentralisation, although highly recommended in a number of fields, has to be addressed carefully in situations in which the "devolution process" is in fact an indirect guarantee of less protection for the environment.

In systems in which environmental decentralisation is not mandated by the Constitution, but rather, is a political decision, it should not be put in practice without a comprehensive analysis of its consequences on the effectiveness of the protection of nature.

Decentralisation should be granted only when a lower level of government can better and more cost-effectively reach the environmental goals set up in the constitutional and legal framework.

An example of "controlled" decentralisation

In Brazil, under the 1988 Constitution, permitting is mainly the responsibility of the States, although IBAMA (the federal environmental agency) and local agencies play a role as well.

A regulation issued by the National Environmental Council (Resolution CONAMA n. 237/97) attempted, for the first time in the country, to set threshold requirements for decentralisation of permitting powers from the federal government to the states and from these to local governments. First, states and city governments will not be recipients of decentralised permitting powers if they do not show that they have operating Environmental Councils, with decision-making powers and public participation, and have qualified professionals in the permitting agency (art. 20). In addition, city governments will be allowed permitting responsibilities when the activity has only "local environmental impact".

The future ahead

Environmental protection cannot avoid the tension between international and national legal regimes, and among national, state and local powers.

There are areas in which the environment cannot be effectively protected but at the national level. Take for example the major rivers of the Amazon basin, which cross several States and come from neighbouring countries. That's also the case of migratory species or wildlife in general – they move and do not respect the administrative borders of cities and states. One could argue that this is also the situation of certain biomes, such as the Amazon and Atlantic Forests.

But the federal government cannot be everywhere and do everything. Some sort of decentralisation is, therefore, inevitable. The question is how to decentralise without weakening the protection of nature.

What is – and will – be necessary is the development of a set of criteria for deciding when an environmental issue should be better dealt at the national, state or local level.