

Brazilian Jurisprudence in a Risk Society: The non-patrimonial or Moral environmental damage issue

José Rubens Morato Leite*
Marina Demaria Venâncio**

Introduction

Environmental law in Post Industrial Society faces new challenges imposed by Risk Society. In this way, it is possible to say that Brazilian Jurisprudence has presented many evolutions, in particular concerning civil liability and non-patrimonial environmental damage.

Therefore, this paper aims to discuss judicial decision-making concerning new approaches about environmental damage. The first part will examine issues related to the Risk Society, Brazilian courts decisions and civil liability, which is seen as an instrument of risk management. The second part will discuss recent decisions concerning non-patrimonial environmental damage, such as damage caused to immaterial collective rights, including the right to life and to environmental quality.

* Associate Professor of Environmental Law in Universidade Federal de Santa Catarina, Researcher of CNPq and leader of Group of Research Environmental Law in Risk Society, GPDA/UFSC.

** Researcher of CNPq and of Group of Research Environmental Law in Risk Society, GPDA/UFSC.

Risk Society and Brazilian Jurisprudence

The transition from an Industrial Society to what Ulrich Beck¹ described as a *Risk Society* is an important underlying issue in new approaches to judicial decision-making in environmental law concerning *civil liability for environmental damage* and ecological risk. In Beck's view, the transition from Industrial to Post Industrial Society (first modernity to reflexive modernization) brings new characteristics to social relations and structures.

The *Industrial Society*, which is stratified in social classes, is based on a kind of wealth distribution logic². At this perspective, risk distribution adheres to the class pattern and wealth accumulates at the top while risks at the bottom³. Those Risks can be qualified as hierarchical⁴, personal⁵ and calculable⁶.

On the other hand, *Risk Society* is based on a risk distribution logic caused by its own technological development⁷. These "new risks"⁸ happens to be *invisible*⁹ (for scientific descriptions and human senses), *global*¹⁰ (with no class-specified barriers¹¹ or territorial boundaries) and have a

¹ Beck, Ulrich, *Risk Society: toward a new modernity*, London, Sage, 1992.

² *Ibid.*

³ *Ibid.* p. 35.

⁴ *Ibid.* p. 36.

⁵ *Ibid.* p. 21.

⁶ *Ibid.* p. 22.

⁷ Beck, *Risk Society*. p. 19-50.

⁸ Beck, Ulrich, "De la sociedad industrial a la sociedad del riesgo: cuestiones de supervivencia, estructura social e ilustración ecológica." *Revista Occidente*. n.º 150, 1993. p. 19.

⁹ Beck, Ulrich, "The anthropological shock: Chernobyl and the contours of the risk society." *Berkeley Journal of Sociology*, n. 32, 1987; Ulrich Beck, *Risk Society*. p. 27-28, 45, 60.

¹⁰ Beck, Ulrich, *World Risk Society*. Malden: Polity Press, 1999; Beck, *Risk Society*. p. 37

¹¹ Beck, *Risk Society*. p. 47.

catastrophic *potential*¹² (irreversible consequences, for example).

Thus, while Industrial Society's main features are class based structures and the distribution of wealth¹³, Risk or Post-Industrial Society is characterized by the distribution of risks¹⁴.

In Industrial Society the law responds to damage and concrete or perceptible risks, in Post-Industrial Society however invisible and globally distributed risks predominate, without legal restriction¹⁵. The appearance of new demands as a result of the rise of a Risk Society and the invisible and global risks that it produces requires institutionalization of the risk communication in law structures.

In this way, *ecological risks* may be considered as a particularly good example of post-industrial risks, once they are invisible and their impacts are global

These considerations, altogether with the irreversibility of ecological damage, and its catastrophic consequences, arguably justify an environmental law focus on civil liability to manage ecological risks. The Post-Industrial social structures dislocate the aim of the legal system from the past/present damages to the future damages and their control, by setting up a *risk communication*¹⁶.

In this sense, legal system and its instruments must be used not only after the occurrence of an environmental damage but preventively. In other words, legal instruments in environmental law must deal with the future uncertainty by managing ecological risks using the probable/improbable code¹⁷.

¹² *Ibid.*, p. 29.

¹³ *Ibid.*, p. 20

¹⁴ *Ibid.*, p. 19-50.

¹⁵ *Ibid.*, p. 51-70.

¹⁶ Luhmann, Niklas. *Risk: a sociological theory*. Edison: Aldine Transaction, 2005; Beck, *Risk Society*, p.

¹⁷ Luhmann, *Risk.*; Carvalho. *Dano ambiental futuro*.

Thus, civil liability for environmental damage can play an important role not only in respect of reparation of damage, but also in its preventive effect on ecological risk circumstances.

However, the courts in most cases demand the presence of present and proven environmental damage with clearly established causal links between the prejudicial action and the damage in question before imposing legal obligations as a result. Civil liability, in its traditional form, is a post facto petition, dealing with damage that has already occurred. Risk however poses rather different problems for judicial decision making, in particular concerning risk management, since the legal system has neither a clear theory nor perception of risk (including prevention/precaution for unsuitable risks¹⁸); and it may be difficult to scientifically demonstrate causative links between risks, actions and ecological damage¹⁹.

As a result, in many cases ecological risks are described as "hypothetical" thus avoiding the imposition of preventive obligations²⁰. To fully address ecological damage and risk, the traditional concept of civil liability would need to change in a number of ways, including re-examining: causation, the nature and actionability of damage and the exclusion of liability.

Nonetheless, it is possible to say that despite current limitations in judicial perceptions of ecological risk and its

¹⁸ For us, future environmental damages are ecological risks which were declared unsuitable by legal system because of its probability and magnitude to harm the environmental interests of the future generations. (Carvalho, *Dano ambiental futuro*.)

¹⁹ Beck, *Risk Society*. p. 62-64; Leite, José Rubens Morato; Carvalho, Délton Winter de, "O nexo de causalidade na responsabilidade civil por danos ambientais." *Revista de Direito Ambiental*. v. 47, july-september, Revista dos Tribunais, 2007.

²⁰ Carvalho, *Dano ambiental futuro*. In this sense, Rocha, Leonel Severo, "Direito, Complexidade e Risco", *Seqüência*, nº 28, 1994. p. 11, demonstrates that the risk distribution is a new problem faced by democracy in our time.

management, some decisions of the Brazilian courts do engage with and control unsuitable ecological risks.

One example is the new judicial approach on *civil liability for non-patrimonial environmental damage*, which represents a significant Jurisprudence evolution.

Non Patrimonial Environmental Damage

Civil liability for non-patrimonial environmental damage can be described as harm to immaterial collective rights, such as the right to life and to environmental quality that justifies the imposition of damages for reparation.

However, it is not any damages that could result in civil liability, but rather a significant damage or what is socially *unacceptable*. The non-patrimonial damage is quite important for the Risk Society, because it is dealing with future or intrinsic value of the own nature and the loss of quality of life for human being.

In this sense, case law demonstrates that the Brazilian courts have been recognizing the existence of such liability as a response to the main characteristics of the Risk Society and the legal system's need to address environmental protection

This way, three recent decisions illustrate the development of a sensitive environmental hermeneutics in Brazil's Superior Court of Justice (STJ), which will be matter of the following explanations:

(1) Recently, in 2011, the Brazil's Superior Court of Justice (STJ) decided in special appeal number 1.145.083 from Minas Gerais for the full reparation of environmental damages, including non-patrimonial damages, caused by a deforestation in rural property. This decision also stated that is possible to cumulate the *obrigação de fazer*, *obrigação de não fazer* and indemnification²¹.

²¹ Recurso Especial n. 1.145.083, *Ministério Público do Estado de Minas Gerais vs. José Ilário* [2011].

This is an important leading case in Brazilian environmental law because in this decision Court takes into consideration for the judicial decision several aspects of environmental damages, and the fact that the irreversibility of them harm collective non patrimonial values justifying a monetary compensation.

(2) Brazil's Superior Court of Justice decided in the special appeal number 1.198.727 from Minas Gerais for the possibility of accumulation of civil obligation to restrain, civil obligation to do and restitution facing the deforestation of Cerrado's native vegetation²².

One more time, Brazilian Court demonstrates its sensitivity to irreversible environmental harms, proportioning the full reparation of damages.

(3) Brazil's Superior Court of Justice further in 2013 decided in the special appeal number 1.367.923 from Rio de Janeiro. At this case, the Court has taken into consideration the fact that environmental degradation possibilities the perspective of civil liability for non-patrimonial damages.

The degradation was caused by an enterprise called Brasilit which used to produce and stock products made of amianto.

Furthermore, this sentence stated that environmental legislation should be interpreted having in mind its social finalities and the *hermeneutical principle of in dubio pro natura*.

This can be considered s another leading case in Brazil which reflects sensitive evolutions in Jurisprudence.

Conclusion

The main characteristic of Risk Society is the distribution of global, unpredictable and invisible risks, where

²² Recurso Especial n. 1.198.727, *Ministério Público do Estado de Minas Gerais vs. Pedro Paulo* [2013].

ecological risk is a typical example of such post-industrial risk as it is often imperceptible to the human senses. The irreversibility of most of environmental damage requires the use of civil liability not only as an instrument of reparation but also as an important risk management instrument.

In this sense, Brazilian court decisions relating to civil liability for the environment deal with multiple. The cases discussed above demonstrate a willingness on the part of the Brazilian courts to view environmental harm as covering not only property injuries but also non patrimonial consequences, such as interference with the right to life and to environmental quality.

In many cases, environmental damage also results in damage to life and environmental quality and this justifies redress. Since present and future generations have the right to an ecologically balanced environment (as defined in article 225 of the Brazilian Constitution), any damage caused to collective values justify compensation through civil liability as is broadly understood by the Brazilian courts.

Finally, it is known that the transition to a system more adequate to the 21st century is a slow process. Nevertheless, this new jurisprudence represents a new positive perspective about the decision-making concerning non-patrimonial damage.

Hence, the most important thing at this moment, marked by the environmental crisis, is the continuous research and improvement of decision-making mechanisms for a better juridical system.

Bibliography

Beck, Ulrich. *De la sociedad industrial a la sociedad del riesgo: cuestiones de supervivencia, estructura social e ilustración ecológica.* Revista Occidente. n° 150, 1993.

Beck, Ulrich. *Risk Society: toward a new modernity.* London: Sage, 1992.

Beck, Ulrich. *The Anthropological Shock: Chernobyl and the Contours of the Risk Society.* Berkeley Journal of Sociology, 32, 1987.

Beck, Ulrich. *World Risk Society*. Malden: Polity Press, 1999.

Carvalho, Délton Winter de. *Dano Ambiental Futuro: a responsabilização civil pelo risco ambiental*. Rio de Janeiro: Forense Universitária, 2008.

Leite, José Rubens Morato; Carvalho, Délton Winter de, *O nexo de causalidade na responsabilidade civil por danos ambientais*. *Revista de Direito Ambiental*. v. 47, July-september, *Revista dos Tribunais*, 2007.

Luhmann, Niklas. *Risk: a Sociological Theory*. Edison: Aldine Transaction, 2005.

Jurisprudence

Recurso Especial n. 1.198.727, *Ministério Público do Estado de Minas Gerais vs. Pedro Paulo* [2013].

Recurso Especial n. 1.367.923, *Brasilit Indústria e Comércio LTDA vs. Ministério Público do Estado do Rio de Janeiro* [2013].

Recurso Especial n. 1.145.083, *Ministério Público do Estado de Minas Gerais vs. José Ilário* [2011].

Abstract

Environmental law in Post Industrial Society faces new challenges imposed by Risk Society. In this following, this paper aims to discuss how civil liability and non-patrimonial environmental damage are involved in new approaches for Brazilian judicial decision-making and concerning about environmental damage. In this study, the methodology used is descriptive in a bibliographic research. By this, it happens to comprehend the Brazilian Jurisprudence new views, in relation to risk society and civil liability. It is important to reflect about it, because the present is marked by the environmental crisis, and an improvement of decision-making mechanisms for a better juridical system are needed.

Keywords: Risk society; environmental; civil liability; Brazilian Jurisprudence.