



THE GREENING OF JURISPRUDENCE: A STUDY CASE BETWEEN COSTA DOS CORAIS IN BRAZIL AND THE AUSTRALIAN GREAT BARRIER REEFS¹

O ESVERDEAMENTO DA JURISPRUDÊNCIA: UM ESTUDO ENTRE O CASO DA COSTA DOS CORAIS DO BRASIL E A GRANDE BARREIRA DE RECIFES DE CORAIS DA AUSTRÁLIA

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Abstract: The object of study addresses the greening of jurisprudence due to environmental protection and human rights by the Inter-American Court of Human Rights, covering its (in) applicability on the Costa dos Corais in Brazil and the Great Barrier Reef of Australia. The investigation was carried out by inductive and systematic methods through jurisprudential, normative and documentary analysis. The protection of the environment and human rights form the reflective pathway, from where emerges the greening of jurisprudence when justice goes beyond the peoples as a central point of support. In the Brazilian Area of Environmental Protection of Costa dos Corais, environmental protection was established aiming at the sustainable use of the area by humans in case of environmental damage, covering anthropocentrism. In the case of Australian Great Bareer Reefs, justice was for the protection of this area for the rights of nature, supporting ecocentrism, demonstrating the importance of Environmental Courts.

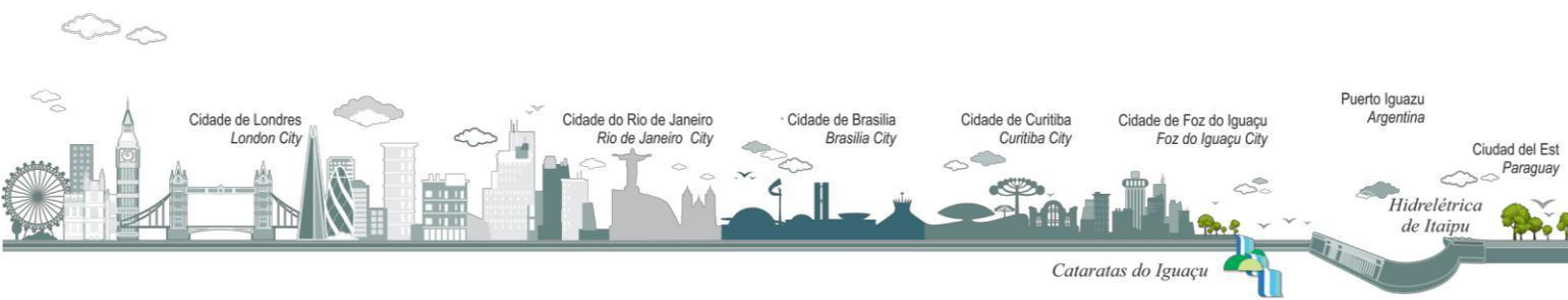
Keywords: Greening and Justice. Rights of Nature and Limits. Ecocentrism and Anthropocentrism.

Resumo: O objeto de estudo aborda esverdeamento da jurisprudência decorrente da proteção ambiental e dos direitos humanos pela Corte Interamericana de Direitos Humanos, percorrendo sua (in) aplicabilidade sobre a Costa dos Corais do Brasil e a Grande barreira de recifes de corais da Austrália. A investigação foi feita com os métodos indutivo e sistemático por meio de análise jurisprudencial, normativa e documental. A tutela do meio ambiente e dos direitos humanos formam a

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via reflexa, surgindo o esverdeamento da jurisprudência quando a justiça ultrapassa o ser humano como ponto central de respaldo. Na Área de Proteção Ambiental Costa dos Corais no Brasil houve a proteção ambiental voltada ao uso sustentável da área pelos humanos em caso de dano ambiental, abrangendo o antropocentrismo. No caso da Grande barreira de recifes de corais da Austrália a justiça se deu pela proteção dessa área em prol dos direitos da natureza, abarcando o ecocentrismo, demonstrando a importância de Tribunais Ambientais.

Palavras-chave: Esverdeamento e Justiça. Direitos da natureza e Limites. Ecocentrismo e Antropocentrismo.

INTRODUCTION

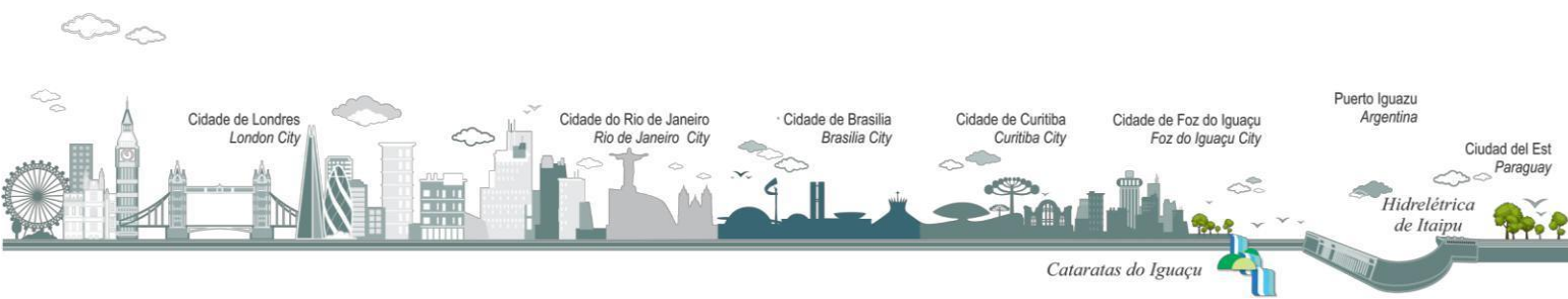
The current interactions of peoples within the environment have required greater attention regarding the strengthening of the mechanisms of protection for ecological justice, if they are compatible with the identification and solving of their causes and effects, through ecocentrism. Thus, this knowledge generated by the greening of jurisprudence helps with the understanding of this matter.

To this end, it will be shown how the greening takes place in a parallel between the international protection of human rights and the environment, pointing out whether there is the occurrence of greening between the decision of the Superior Court of Justice of Brazil – STJ on the Environmental Protection Area Costa dos Corais in Brazil and the understanding the International Court of Nature Rights on Australia's Great Barrier Reef, as it is an area recognized as a world heritage site and has inspired new movements against anthropocentrism.

This takes place in environmental justice and ecological justice to the greening between a common court and an environmental court, providing new support for the legal developments in question that need to be resignified.

REFLECTIVE VIA

In the multiple human dimensions, life is indispensable to thrive the interaction between living systems, that is, ecology. In these contexts, the Federative Republic Constitution of Brazil of 1988 – CRFB/88 provides and determines whether there is a right to life guaranteed to all unconditionally. Brazilian Law nº. 7,347 of 1985, in its article 1, item I,





provides for the Public Civil Action the protection of the right to the environment, and as a determining means. Also, the CRFB/88, states:

Art. 225. Everyone has the right to the ecologically balanced environment, good of common use of the people and essential to the healthy quality of life, imposing on the Public Power and the collectivity the duty to defend and preserve it for present and future generations (BRAZIL, 1988, our translation).

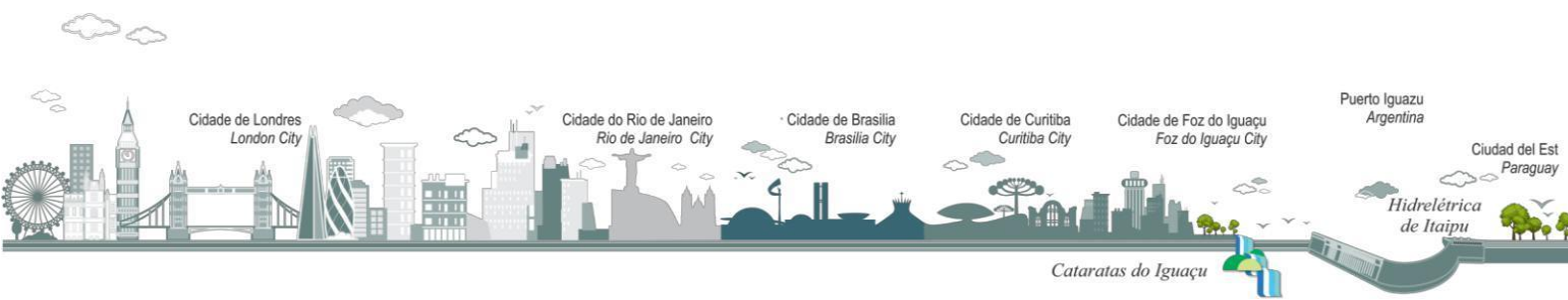
In this bias, "the right to access to the healthy environment is consolidated as an extension of the right to life" (TEIXEIRA, 2013, p. 08). On the other hand, all ecosystems begin to feel and respond to today's *modus operandi* and *modus vivendi*, making resilience a path to a better human coexistence within the environment (DIAS, 2002).

Beyond of this understanding, the crisis in the bond between nature and human beings has not been sufficiently identified, hindering the discernment of peoples on decision-making, regarding the rights of nature (OST, 1995) and it is important to reaffirm Principle 2 of the Earth Charter, which promotes humanity:

[...] 2. To care for the community of life with understanding, compassion, and love. To accept that, with the right to possess, **administer and use natural resources comes the duty to prevent the damage caused to the environment and to protect the rights of people.** (b) Assuming that increasing freedom, knowledge and power implies responsibility for **promoting the common good [...]** (EARTH CHARTER, 2018, p. 2, Our Griffin).

Emphasis added, it is necessary to comment that there are the individual and collective dimensions of the right to the environment to achieve the mechanisms for the protection of civil, political, social, and Cultural areas. Initially, the individual dimension is comprised by vertical and horizontal relationships, where the first includes individuals with legal instruments aimed at the protection of natural resources and the guarantee of civil and political, access to information and popular participation in an environmental asset management (TRINDADE, 1993).

In the horizontal sphere, *Drittwirkung* is the occurrence as the guarantee of the healthy environment in private relations, thus, greening also arises, focusing on the protection of human rights and the environment (TRINDADE, 1993).





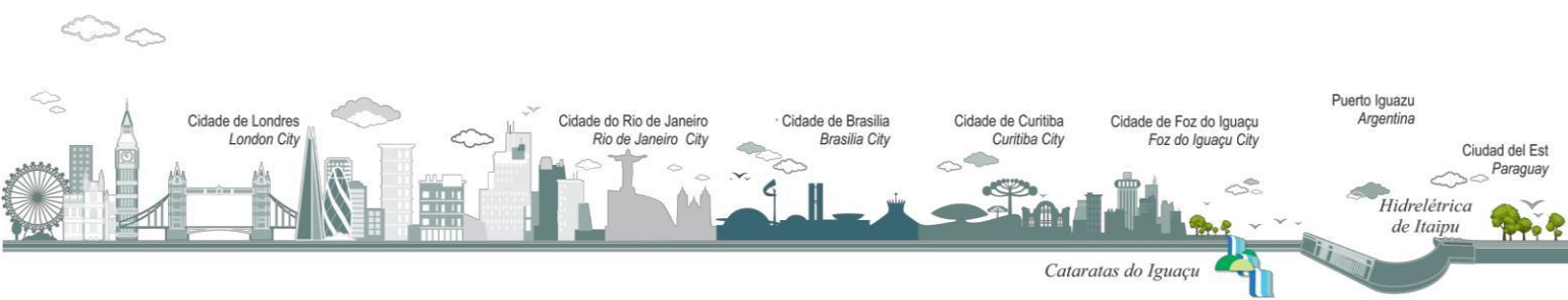
Collectively, the environment becomes a common good as a reflection of the greening of economic, social, and cultural rights. This dimension has implied the tendency to protect groups and collectivities in vulnerability resulting from environmental degradation (TEIXEIRA, 2013).

With the intention of promoting this change, the jurisprudence of the Inter-American Court of Human Rights – IHR Court has decided on cases related to the violation of individual rights and legal precepts in which, in the face of environmental damage, it has not been possible to apply the rights of nature directly, but through the defense of collective rights, configuring the greening of jurisprudence. This is about the procedural and technical linkage of environmental issues to the content of the IHR Court, covering legal guarantees, freedom of expression, property rights, world heritage, life, and justice, protecting the environment and thus improving the indivisibility, interrelationship, and interdependence of human rights (MAZZUOLI; TEIXEIRA, 2014). Faced with this flow of human action, the solution of the environmental crisis depends on the right choices and decisions made today by the population and by the rulers (CARVALHO, 2011).

However, it is advisable to obtain better results in view of the practices adopted so far, even those in force since the publication of the Universal Declaration of the Human Rights 1948. The extent of protection of human rights and the environment in societies currently in crisis becomes cogent due to threats among States to solve their international controversies, being possible to detect the weaknesses of the instruments for the protection of these rights (SOARES, 2001).

As a result of moral strength in the economic pathways, the missteps caused to the biosphere, and to the of life by the limits in the processes of development and civilization, where the awareness that peoples have accumulated powers, referring humans to a transgenerational crisis through inter-retroactions (PADUA, 2000, CARVALHO, 2011; MORIN, 2003).

Thus, only the development of solidarity strategies without understanding the human factors that come to impact the environment and rights, implies the emergence of a moral crisis between men and nations (BOBBIO, 2009). When peoples are aware that there is a provision of rights on the international platform, the globalization of the protection of human





rights and the environment extends to the relationship between world heritage, cultural and natural, which are not confused but unison, and comes to value the human dimension biodiversity and its existence (TRINDADE, 1993; SOARES, 2013).

For this, the protection of human rights and the environment helps to promote a better living condition for citizens and Nature. Therefore, the protection of individual and collective rights comes to meet the ecological environment balanced, going to anthropocentrism with a new destiny from of the threats that could stop the reflective via (SARLET, 2010).

Therefore, humanity would need to be able to lead the to the destination of the effectiveness of all rights in a *sine qua non* way, especially as to the rights of nature that need to be recognized and applied by Brazilian environmental justice system.

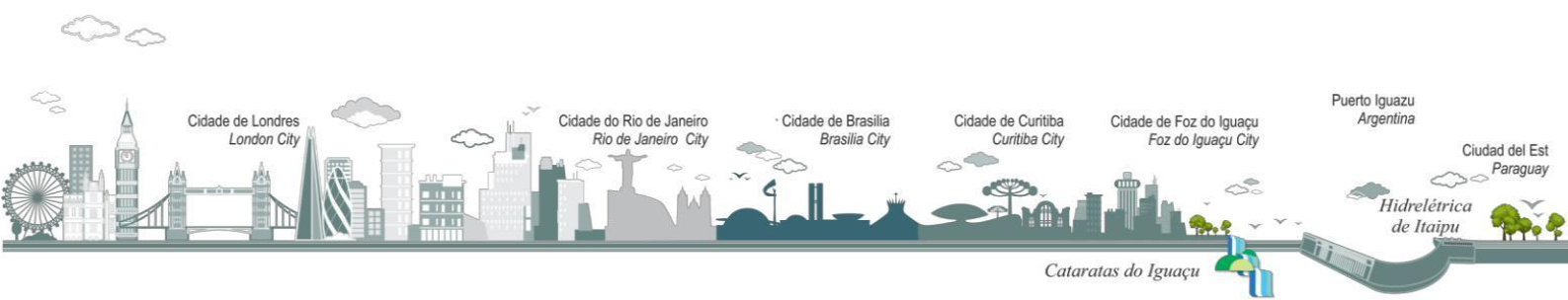
BRAZILIAN SUPERIOR COURT OF JUSTICE: A CASE OF COSTA DOS CORAIS

While it was possible to demonstrate notions about the fundamental right to the ecologically balanced environment, the crystallization of fundamental, social, individual, and collective rights in effectiveness by greening become a foundation for the protection of human rights and the environment in the case of the Coral Coast Environmental Preservation Area - APACC.

The APACC was delimited in 1997 because it has a high biodiversity not only of coral reefs, but also of crustaceans, fish, turtles, manatees, and whales. This space has 400,000ha, around 120 km of extension and covers part of the coast of Pernambuco and Alagoas, extending 30 km into the Atlantic Ocean (ICMBio, 1997), and it is important to highlight that:

The APAs, as defined in our legislation, are characterized as Sustainable Unit of Conservation, consisting of generally extensive areas, which can be constituted by public or private lands, with a certain degree of human occupation, endorsed with abiotic attributes, biotic, aesthetic or cultural aspects especially important for the quality of life and well-being of human populations, and which have as their basic objectives to protect biological diversity, to discipline the process of sustainability of the use of natural resources (PAPP, 2017, p. 64).

According to this, the APA as a Sustainable Unit of Conservation is legally regulamented:





1. Authorization for the Use of Public Good; 2. Permission to Use public good; 3. Granting the Use of Public Good; 4. Common concession (public/public interest services); 5. Public-Private Partnerships (Sponsored Concession and Administrative Concession); 6. Partnership Agreement with civil society organization of public interest - OSCIP; 7. Term of Collaboration/Development Agreement/Cooperation Agreement with Civil Society Organization - CSOs. 8. Interactions between the Municipalities and ICMBio (PAPP, 2017, p. 83).

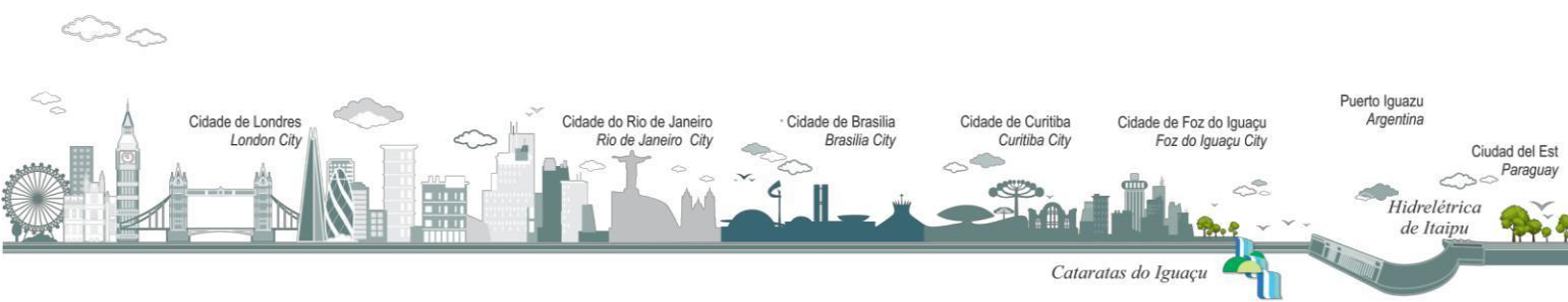
In addition, there is a project on touristic, economic, and financial viability. Currently, the touristic space is saturated because of the unfeasibility of the inclusion of new this kind of activities, with only Maragogi City holding the capacity to develop the Sustainable Unit of Conservation, due to the existence of a fee for the maintenance of these activities (PAPP, 2017).

It happens because these operations occurred "without transferring resources from Chico Mendes Institute - ICMBio to the private partnership" (PAPP, 2017, p. 100), but through the "Cooperation Agreement, supported by characteristics and requirements provided in Laws N^o. 13,019/2014 and N^o. 13,204/15" (PAPP, 2017, p.101). The regulation of this area on the prohibition of the construction and urbanization undertaking in the ecological balance:

Art. 5^o - Are prohibited or restricted, as provided by IBAMA ordinance, the following activities in the APA Costa dos Corals: II - **implementation of urbanization projects**, realization of earthworks, opening of roads and canals and the practice of agricultural activities, **when these initiatives import in changing local ecological conditions**, especially wildlife areas; III - **exercise of activities capable of causing erosion or silting** of water collections; VII - **removal of sand and rocky material in the marine and increased terrain, which implies changes in local ecological conditions** (BRAZIL, 1977). (Our emphasis).

In this legal view, a Public Civil Action was proposed by the Federal Public Prosecutor's Office, in which it was intended to compel the holder/owner of a project to regularize the construction of illegal wall with risk to the Coral Coast Conservation Sustainable Unit of Conservation in Pernambuco.

Justice determined the immediate demolition of the clandestine enterprise due to the environmental damage and impacts to the natural environment. Dissatisfied, the defendant appealed to the Federal Regional Court of the 5th Region which receives legal process from the Northeast, where the matter was not envisaged for technical reasons and legal. It was because the property would have been carried out within the legal parameters, being





unnecessary its demolition, justified that the extraordinary advance of the sea came to collide with which could not cause any damage or environmental impact (STJ, 2018).

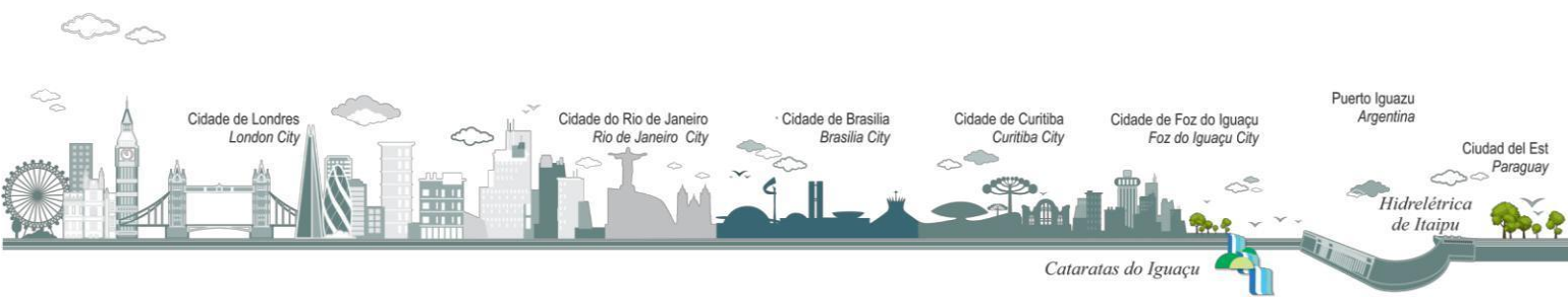
If for these provisions, the current law prohibits the occupation and use of these areas carried out illegally, the legal regime of the Permanent Preservation Area becomes applicable, as there was no adequate environmental inspection by Brazilian Institute for Environment and Renewable Resources - IBAMA, nor the release of the necessary licenses. Thus, the Public Prosecutor's Office filed a Special Appeal, alleging that the undertaking was irregular as it brought significant harm damage to the environment, which in turn did not analyze the evidence that could serve as grounds for the conviction of the Defendant (BRAZIL, 2012; IBAMA, 1990; STJ, 2018).

The case reached the Superior Court of Justice - STJ through Special Appeal No. 1593369-PE-2016/0076870-7. The STJ understood that the advance of mangroves and related ecosystems does not have the power to oblige owners and possessors to demolish projects, since they would already be in a regular situation.

Although the appeal was received, the matter did not make it to the plenary due to the understandings of the STJ in the sense that in that Court the analysis of facts and evidence is no longer carried out, but only cases related to the interpretation of federal law or treaty international law that has been accepted by domestic law. The justification was that the property was built without the respective compliance with the licenses and authorizations of the competent environmental agency and, even so, despite being provoked, the Court of origin did not consider the issue of merit. Because of this, the decision was reversed to annul the judgment of TRF5, returning the case to this court for a new manifestation (STJ, 2016).

The STJ's goal in annulling the judgment of the TRF5 was to standardize and pacify the possible conflicting decisions on the subject, since both the CRFB/88 and the Civil Procedure Code of 2015 – CPC/15 provide for the use of these mechanisms in similar cases (MARINONI; ARNEHART; MITIDIERO, 2015).

One of the precedents of individual cases in environmental matters regarding the use, enjoyment, and disposition of properties with Permanent Preservation Areas may reflect such an understanding regarding the Costa dos Corals Environmental Protection Area, which





aimed to apply greening through oblique ways: the right procedural, not material (SARLET; FENSTERSEIFER, 2017).

In the meantime, it is identified that this interpretative standardization of the federal norm, its consequent application to the concrete case of the Coral Reefs of Pernambuco as a basis for stability, integrity, and coherence of the signed understanding, may reflect the subsequent judicial decisions of similar content as an attribute in ensure biodiversity for the common good, not the opposite.

It can be seen, then, that the defense for the legality of the illegal enterprise did not prevail over the application of the rights of nature, which made it difficult to resolve judicial conflicts that were prolonged, since environmental justice prevailed, but limited to issues merely to anthropocentric and procedural.

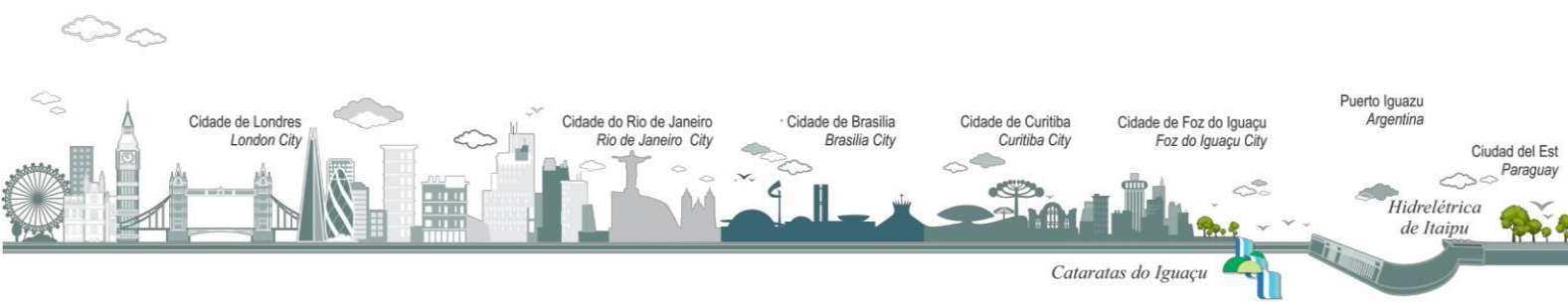
In this way, expanding the perception of the impact of environmental damage and the structuring axis of decisions with holistic to anthropocentric content comes to contribute and act on behalf of the environment, since human beings are an integral part of it.

RIGHTS OF NATURE INTERNATIONAL COURT: AUSTRALIAN GREAT BARRIER OF CORAL REEFS

The assimilation between the case of the Coral Coast in Pernambuco and the Great Barrier Reef of Australia is due to the similarity of biomes and sociobiodiversity between Brazil and Australia, since these countries have environmental problems of dimensions that matter in offering assertiveness in their treatment (SACHS, 2015).

The great barrier corals reef is in northeastern Australia and is composed of 2.900 reefs, 600 continental islands, around 400 types of corals, 1.500 species of fish and 4.000 kinds of mollusks, among other species, some of which are vulnerable and threatened with extinction. It's so extensive that it can be seen from space (UNESCO, 1981).

The biodiversity in the region is such that it was listed as a UNESCO World Heritage Site in 1981, and since then it has been protected by both the country itself and the entire world community, thus validating the reflex path between peoples and Nature (HUGHES, KERRY; BAIRD *et al.*, 2018).





With the scope of preserving the natural life of the region for the present and future generations, coral bleaching was the object of study at the Conference of the Parties – COP, in the COP Rio + 20, COP 20 editions in Lima and COP 21 in Paris. As a result, it can be understood that bleaching resulted in the disappearance of the natural color action of corals in the 1990's, caused by the heating of seawater and acidity due to a greater presence of carbon dioxide in the atmosphere (MALONEY, 2016; HISSA, 2009).

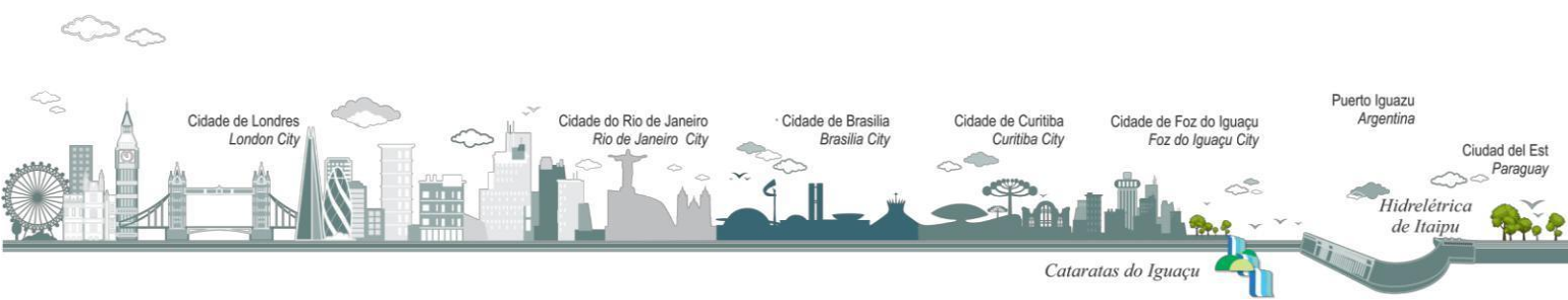
As a result, in 1996 Australia participated in the Protocol to the Convention for the Prevention of Maritime Pollution by Allegation of Waste and Other Matters, which had occurred in 1972, although it ratified only in 2000. With this, the confrontation of environmental issues in international legislation comes to be of paramount importance for the preservation of biodiversity but has been facing some barriers in exercising a legal understanding of the complexity of the protection of sensitive areas, such as the Great Barrier Reef of Australia (UN, 1996; PRIEUR, 2019).

The first obstacle to be broken would be the formulation of public policies and environmental governance based on anthropocentrism, because the preservation of the environment and species is influenced by the interests of industrial, economic, cultural, religious societies and the laws themselves, threatening the Nature and, consequently, peoples (KORMONDY; BROWN, 2002).

As an example, the government of Ecuador stimulated the exploration and extraction of native oil with the aim of fostering the economy, promoting growth and job creation in Yasuni Park. Subsequently, it was concluded that the investment in this practice was lower than expected, and the financial return was not enough for the country's economy, and the park was devastated (The Guardian, 2016).

This is because the economic aspects directly affect the management of the community and it is based on them that public policies are formulated, the exception of what occurred in Ecuador when there was a failure in the protection of the Yasuni National Park (The Guardian, 2016).

The second barrier to be faced is in the change of thought and relocation of peoples in Nature. Thus, it is suggested that the laws express the principles of the jurisprudence of the Earth, derived from the laws of nature (*wild laws*) and centralized in the rights of the Earth (BERRY, 2002).





In addition to the case of Ecuador, other interferences in nature were the object of study in hearings held by the International Court of Nature Rights, including British oil pollution in the Gulf of Mexico, the Chevron/Texaco case in Ecuador, the Great Barrier Reef in Australia, the genetically modified organisms and, finally, the punishment and persecution of defenders of the Earth by the government of Ecuador in the local courts (MALONEY, 2016).

The participants of these hearings are lawyers, activists, civil society organizations and association of people focused on the preservation of the Rights of the Earth. These subjects meet voluntarily to discuss and guide countries about environmental damage and the preservation of local nature, promote laws, judgments and recommendations to the countries and people (MALONEY, 2016).

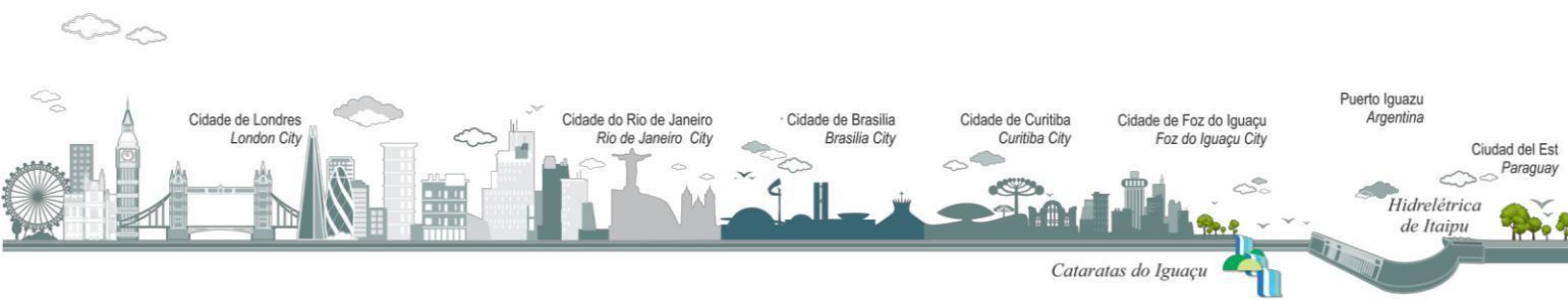
As a result, the International Court of Nature Rights has drawn up legal guidelines for environmental protection, and the main document is the Universal Declaration of the Rights of Mother Earth prepared at the World Conference on Climate Change and Mother Earth Rights, in 2010, Cochabamba, Bolivia (GARN, 2010).

The conclusions reached after these hearings were presented in Paris, 2015, at COP21, and at each meeting new cases would need to be admitted for further consideration, analysis, and decision-making in order, at the end, to have recommendations made about them at the initial hearings. Some regional environmental chambers were set up in the United States and Australia, with share the new rules established by the International Court to forward and present these new discoveries of violation of the rights of nature that remain outside large-scale government regulations and laws (MALONEY, 2016).

Then, the rights of nature go beyond the self-satisfaction of the peoples to:

Empower that human community that is eager to restore balance when they meet themselves in conflict with powers and authorities that prefer to consider only nature as a resource that can be exploited for human purposes (MALONEY, 2016, p.06).

In the case of reefs, we considered the participation of groups, organizations and more than 150 observatories serving the Court. It was a rare opportunity for activists, lawyers, indigenous representatives, and scientists to celebrate Australia's natural world, whose development recommendations follow due caution for law reform and better prospects for environmental governance (MALONEY, 2016).



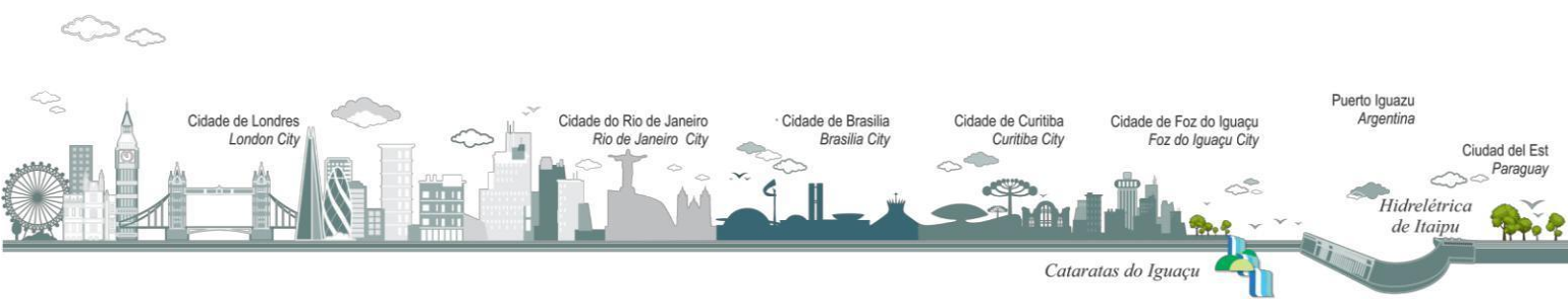


The Members of the Court also issue instructions for restoration and actions necessary to ensure the future protection of the precious Australian ecosystem and the expansion of the Earth Community. In 2016, there was the formation of the Australian Earth Laws Alliance - AELA, an alliance on the laws of The Earth of Australia with the aim of promoting an Australian forum to talk about the "non-human" world, challenging the flawed system of current laws, government agencies and created corporations that have sought to destroy Earth Community (MALONEY, 2016).

Therefore, the main characteristic of the International Court of Nature Rights is the purpose of agglomerating people and entities seeking discuss, protect, and guide governments, politicians, lawyers, and activists on the issues brought in their hearings and proposes regulation. Although the Court shouldn't impose sanctions on countries that fail to comply with its recommendations, under penalty of hurting the sovereignty and domestic law of the country, this Court has offered people the opportunity to be heard by experts and people who care about the preservation of local biodiversity. On the other hand, the International Court of Nature Rights may complement some initiatives and responsibilities of states due to their process and qualitative content, enabling giving voice to the voiceless – give a voice to the voiceless (MALONEY, 2016).

The Court's jurisprudence offers a clearer path to the Earth Community, whose injustices were considered legal and moral, since they were endorsed by the anthropocentric culture among global actors. It happens because "protecting and restoring the integrity of the Earth's ecological systems, with special importance for biological diversity and the natural processes that sustain life" (EARTH CHARTER, 2018, p. 03) are basic reasons for peoples to find environmental ethics.

Another favorable point is the possibility of criticizing the current legal system and redrawing attention to the devastation that the anthropocentric system has been causing. The questioning of the current legal principles, practices and discoveries makes the difference in wild Law, generating the transformation of paradigms in the realization of ecological justice in the face of contemporary legislative and judicial systems (HUGHES, KERRY; BAIRD *et. al*, 2018; MALONEY, 2016).





FINAL CONSIDERATIONS

This paper exposes the legal understandings on the greening by reflective via, which comes from the jurisprudence of the Inter-American Court of Human Rights and extends these aspects to the Superior Court of Justice of Brazil on the APA Costa dos Corais in Brazil and the International Court of Nature Rights on the Great Barrier Reef of Australia, for empowerment and resignification of Brazilian environmental knowledge.

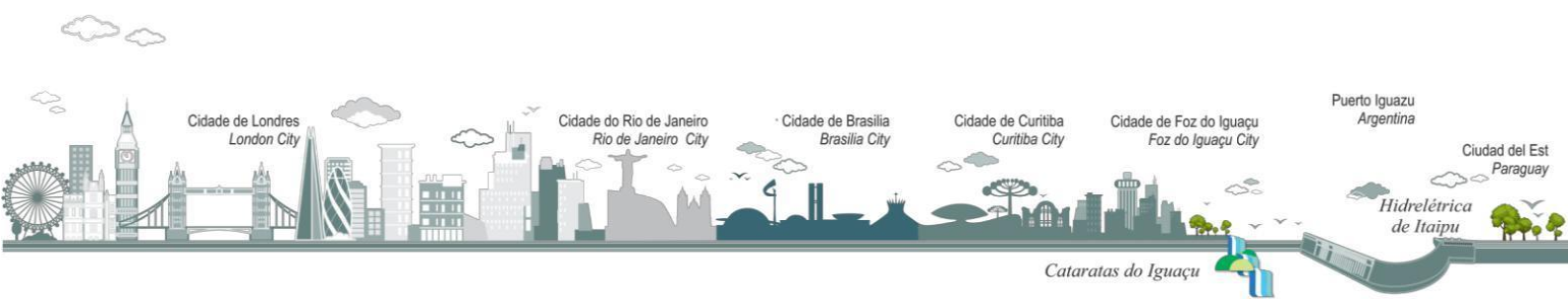
Natural, cultural, and historical heritage are part of the environment, by the way, the reflective via of protection of human rights and the environment is validated when the rights of nature prevail in the face of human practices related to environmental harm and aggression.

The Public Civil Action in line with the CRFB/88, by itself, did not generate stability in the crisis in the bond between human beings and nature, and in laws, norms, guaranteed rights and development projects, the protection of the environment did not go through its individual dimension, because there was malpractice by IBAMA which didn't supervise the construction of a wall of risk that took place without environmental licenses, which broke the intrinsic character of greening from the perspective of the reflective pathway.

Still, collectively, greening was also not present, because the decisions unfolded by the STJ did not reach the dimension of nature rights as common goods and didn't protect the rights of the APA Corals Coast as a subject of rights which was in a situation of vulnerability due to degradation committed by the Defendant.

Thus, there was no protection of the rights of the APA Costa dos Corais because the Brazilian judicial bodies merely allowed the by the defendant and subsequently carried out the mere regularization of their ordinary accepting the illegality committed by the defendant.

As a result, only the social function of the legal instruments of environmental justice was achieved, which excluded the rights of nature seeded by the Earth Charter, Jurisprudence of the Earth, and universal Declaration of the Rights of Mother Earth, not sized by the jurisprudence of the Supreme Court for the case studied, continuing the misrepresentation of sociobiodiversity, life and common respect.





With the intention of valuing the efforts of the International Court of Nature Rights, Australia promoted a great step and the opportunity for discussion by the bias of nature's rights, which did not only advocate the protection and legal provision of institutes capable of defending it, but also nature was taken as a subject law.

In this sense, the Australian case got the greening in all its forms because the reflection of environmental protection went beyond the legal forecasts of institutes or entities that protect Mother Earth, having reached the protection of the environment itself, fauna, flora, oceans, seas, lakes, coasts, reefs, and other biotas in a reciprocal way to the human species.

In the Australian case, the case took place in favor of respect for the survival of corals and the human being, where ecocentrism figured through ecological justice in the construction of an ecologically sustainable and organized community, reflecting the strengthening of institutions so as not to harm the structures of nature in sustaining life but by protecting delicate living systems from the effects of human action.

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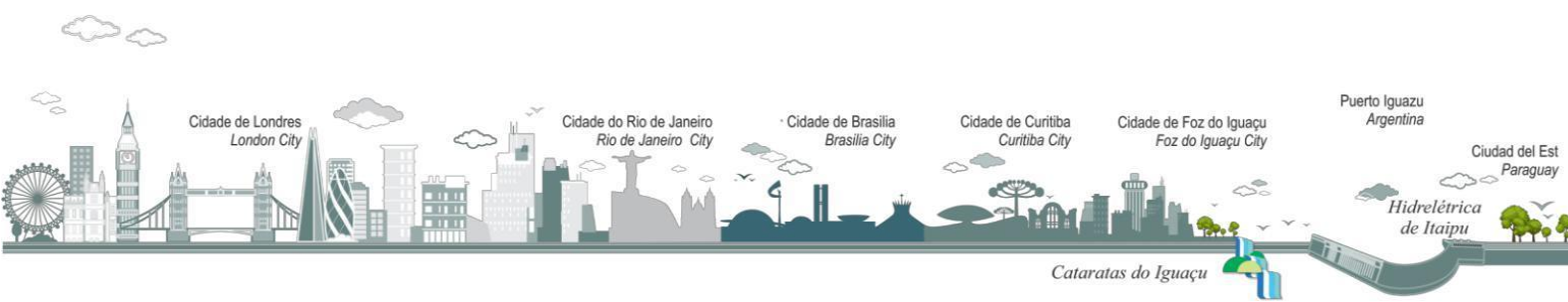
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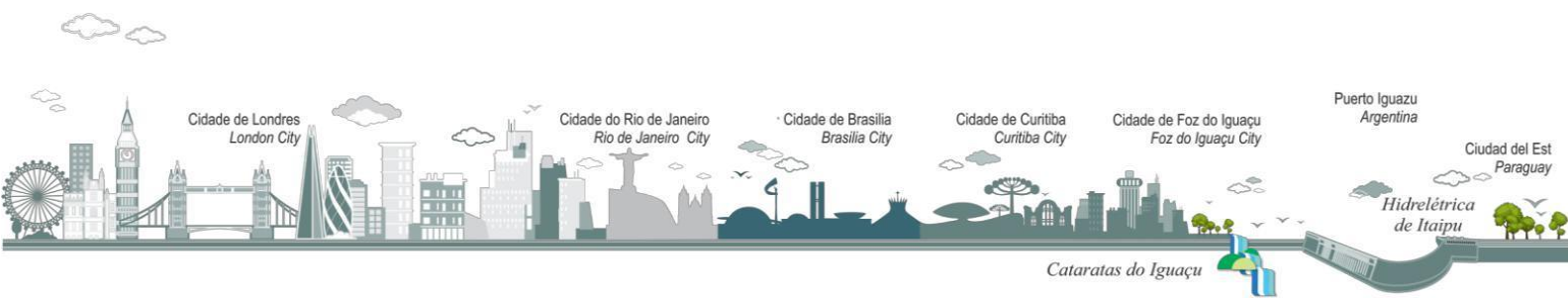
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