BALANCING HUMAN RIGHTS IN SUSTAINABLE DEVELOPMENT – THE CASE OF THE SÃO FRANCISCO RIVER IN BRAZIL[1]

I. In Guise of Introduction

The *São Francisco* River is also known as the River of National Integration, because it flows through parts of the Southeast, Centre and Northeast Regions of Brazil. Born in the state of *Minas Gerais*[2], it is 2,700 kms in length and flows south to north through the states of Bahia and Pernambuco, then turning east (separating the states of *Alagoas* and *Sergipe*) to reach the Atlantic Ocean. Its Basin[3] amounts to 639,219km2 of drainage area (7.5% of the country), spreading through seven units of the Federation (besides the five aforementioned, the Federal District and the state of *Goiás*) and serving 504 municipalities (*circa* 9% of the total municipalities of Brazil)[4].

Eco-systems involved vary greatly – the Atlantic Rainforest, partly deforested for agricultural usage; the *cerrado* (bush) which covers about half of the area (*Minas* to the south and west of *Bahia*) and is very rich in biodiversity; the semi-desert *caatinga* that predominates in the northeast of *Bahia*. Part of the Basin Area is situated in the 'draught polygon', legally recognized as an area subject to critical periods of prolonged dry seasons[5]. The climate varies from humid to desert, average temperature between 18-27oC.

Local economy relies strongly on mineral exploitation[6], but in the High, Medium and Lower São Francisco, soil apt for irrigated agriculture is found. Approximately 13% of the total area of the Basin has been losing soil at about 10t/ha/year – the tolerance limit for most tropical soils[7]. The river also presents the largest biomass and diversity in fish in the region. The HDI (Human Development Index) varies between 0.823 in the High *São Francisco* (near *Belo Horizonte*) and 0.538 in the draught areas. Government estimates about 35.5ha could be used for agriculture[8]. Basic sanitation indicators, divided in 3 different groups, are: (i) for water piped into urban homes 94% in the High *São Francisco* and 80-94% in the other regions; (ii) for urban homes served by sewage, above 45% in the High *Sao Francisco*, 10-45 in the Medium and Sub-Medium *São*

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[2] In the mountains of the *Serra da Canastra* – some 300 sources identified.

[3] There are 168 tributary rivers on both margins. Given the eco-diversity of the area, 99 of them are permanent, and 69 temporary (dry during the dry seasons, torrential during the rainy ones.

[4] See map in www.saofrancisco.cbh.gov.br, {acess Oct.3,2009}. This area is unevenly distributed throughout the federated states – 48.2% in *Bahia*, 36.8% in *Minas Gerais*, 10.9% in *Pernambuco*, 2.2% in *Alagoas*, 1.2%in *Sergipe*, 0.5% in *Goiás* and 0.2% in the Federal District (*Brasilia*).

[5] This polygon presents different levels of desertification, and though located mainly in the Northeast Region, it reaches the north of the state of Minas Gerais. Fifty eight percent of the Sao Francisco Basin are within this polygon, as well as 270 of the 504 Municipalities.

[6] 100% to 20-40% of the national reserves of most minerals found in Brazil are therein located.

[7] A good part of this land producing foods and fibres.

[8] Mainly in the valleys and proximities of urban áreas. Growth has been observed in soybean and corn production, as well as cattle (mainly bovine and goat) breeding, fisheries and aquiculture, industry, agro-industry , mining, tourism and leisure activities.

Francisco, and below 20% in the Lower *São Francisco*; and (iii) volume of urban sewage treated varying, for the most part, between 3 and 40%[9].

The idea of this paper is to study, in the context of the human rights component of sustainable development and access to justice in a democratic constitutional State, the Brazilian Federal Programme for the Revitalisation of the *São Francisco* River, initiated in 2001 and continued in the present administration, which has been the object of manifestations by civil society (including two hunger strikes by a local Bishop[10]) and law suits in which the Public Ministry has played (and plays) an important role. The above mentioned diversity in climate, ecosystems, HDI and social and economic development conditions in the different states involved, plus the fact that Brazil is a Federation in which the interests of different federated states compete, make this an interesting case study to reflect on crucial values underlying the concept of sustainable development.

The question addressed is: can access to justice balance the different interests at stake, from the multiple uses of water to the human rights/environment/economy components of sustainable development?

II. A Constitutional Approach

Brazil prides itself in being a Democratic Constitutional State since 1988. The Constitution in force is very lengthy (250 articles plus 96 Transitory Dispositions) not only because of legal tradition but because its drafters really included representatives of all sectors of society who, bearing in mind the (then) recent experience of 21 years of military dictatorship, wanted to enshrine in it all possible guarantees[11]. Brazilians call it 'The Citizen Constitution'.

The Program to Revitalise the São Francisco River was established in June 2001, by a Presidential Decree. The idea was to increase the quantity and quality of water in the Basin. But what is to be understood by revitalization[12]? The concept is not defined in Brazilian legislation. As of its inception, the Programme met with doubt and legal questioning. What started as a revitalization project was later redirected towards transposing the flow of the river in semi-desert areas, namely in an attempt to address the chronic draught problem[13]. The merits of such decision are contested by state

[9] National average is 20.9%. Data collected from site mentioned in note 4.
[10] Dom Luiz Cappio is a Bishop in Bahia, recognized for his long-standing knowledge of and involvement with local issues and population. He abandoned the first strike when the President promised to consider his pleadings, and when this was not done, he started the second one, mobilizing the country, not to mention the international environmentalist community.
[11] The present Constitution came into force in October 1988. This work uses the Constitution published by Editora Saraiva (SP), 42nd. Ed., 2009, which include 54 Amendments, the last one dating of December 2008. See www.saraivajur.com.br for further information.
[12] See, on the subject of revitalization, A.T. Da Mata Machado, translated by Anthony Doyle, *The Construction of a Revitalization Program for the Sao Francisco River Watershed*, in *Estudos Avançados* 22 pp. 195 to 209, USP, 2008. Available at www.scielo.br/pdf/ea/v22n63/en_v22n63a13.pdf .
[13] Some prefer to call it the Draught Industry – which for centuries has maintained local populations at the mercy of local authorities or oligarchies, despite the vast amounts of money which have been spent namely to solve it.

governments and civil society, in fear that redirection will take the place of revitalization and might result in the death of the river in some places, without necessarily benefitting those who really suffer the effects of draught – threatening access to water and the right to life, human dignity, the right to a healthy environment and other possibly conflicting socio economic rights inscribed not only in the Constitution, but also in all the major International Human Rights instruments to which Brazil is a party[14].

Article 20 of the Brazilian Federal Constitution lists as assets of the Union the lakes, rivers, and whatever watercourses serving more than one federated state; hydropower potentials; mineral resources, sub-soil included. Competence rests with the Union, under Art. 21, to explore, directly or by authorization, concession or permission for services, facilities or potential use of electric or energy generation power, jointly with the states in which they be located[15] - and for water transportation services in rivers when more than one federated state is involved[16], as well as river ports[17] . The Union is also competent for (and charged with) elaborating and carrying out national and regional plans for the organisation of the territory and economic and social development[18] and establishing a national system for the management of water resources[19]. Art. 22 gives the Union exclusive legislative competence in terms of waters[20], watercourses navigation[21], minerals, mines and mining activities[22], indigenous peoples[23], general norms for bidding and contracting by public administration in general[24].

This should be seen in conjunction with Art.1 of the Constitution which states as fundamental principles 'the dignity of the human person' and 'the social values of work and free initiative'; with Art.2, which establishes as "harmonious and independent among themselves[25] the Legislative, Executive and Judiciary powers; with Art.3 which lists as fundamental objectives the building of a free, fair and solidary society, ensuring national development (no mention of sustainability), eradicating poverty and marginalisation, reducing social and regional inequalities, i.a.; with Art. 4 which states the principles to be followed in international relations, among which the prevalence of Human Rights[26]; with Art.5 which lists seventy eight individual and collective rights

[14] Brazil is a Party to the major Human Rights treaties, both International and Regional (Organisation of American States and Mercosul). The same applies to the so called Environmental Treaties. For more on the subject, please see www.mre.gov.br , the website for the Ministry for Foreign Affairs.
[15] Art. 21 XII b). Law n. 9,427 of 26 December 1996 created ANEEL – the National Agency for Electric Energy – and rules the concession of public services for electric power.
[16] Art. XIId). Law n. 9,432 of 8 January 1987 rules watercourse transports.
[17] Art. 21 f). Decree 1,265 of 11 October 1994 establishes the National Maritime Policy.
[18] Art. 21 IX of the Federal Constitution.
[19] Art. 21 XIX. Law 9,433 of 8 January 1997 established the National Plan for Water (Hydric) Resources and created the National System for Water Resources Management.
[20] Art. 22 IV
[21] Art. 22X. See Note 13 above.
[22] Art. 22XII.
[23] Art. 22XIV. See The Statute for Indigenous Peoples, Law 6,001 of 19 December 1973 and Art. 231 of the Constitution.
[24] Art. 22XXVII.See Laws 8,666 of 21 June 1993 and Law 10,520 of 17 July 2002.
[25] And this is reinforced in Art. 60 paragraph 4,III, which prohibits constitutional amendments which try to change this.
[26] Brazil is a party to the American Convention for Human Rights (Decree 678 of 6 November 1992), and recognizes mandatory competence of the Inter-American Court in matters relating thereto (Decree 4,463 of 8 November 2002).

which are considered 'stone clauses' of the Constitution and, in a much debated Paragraph, says that new rights deriving from new international treaties to which Brazil be or become a part shall be seen as part of this list; with Art.6 which lists social rights, i.a. the right to health; and with Art. 225, which states that 'all are entitled to an ecologically balanced environment, an asset which use is common to the people and essential to a healthy quality of life' and charges the public powers *and the collectivity* with the duty to defend it and preserve it for present and future generations.

This same Art. 225 prescribes that in order to ensure the implementation of this right, the Public power shall preserve and restore the essential ecologic processes and provide for ecologic management of species and eco-systems; preserve diversity and integrity of the genetic patrimony of the country and control and verify entities dedicated to research and manipulation of genetic material[27]; define by law, in all units of the federation, territorial spaces and their components to be especially protected (which can only be altered or suppressed by equivalent law) and forbid whatever type of use that may compromise the integrity of the attributes which justify their protection; require mandatory and previous Environmental Impact Studies (which must be publicised), regulated by Law, to be carried out in order to install works or activities which might potentially cause significant degradation of the environment[28]; control the production, trade in, and employment of methods and substances which might imply risk to life, quality of life or the environment; promote environmental education at all levels of teaching as well as public conscience awareness concerning environmental preservation; to protect fauna and flora, issuing law that forbids practices which might jeopardise their ecological function, lead to extinction of species, or subject animals to cruelty – and since mining is important in the *São Francisco* area, it should be pointed out that Paragraph 2 established the mandatory recuperation of environment degraded in mining activities, according to technical solutions demanded by the competent public body, by law[29]. Other paragraphs of this article which touch on our subject are Par.4 which states, i.a., that the coastal area (mouth of the river) is a national asset and its use must take place, in the form of law, in a manner that ensures environmental protection, including the use of natural resources; and Par.5, which declares that land acquired by the State by devolution or by expropriation deemed necessary for the protection of environmental systems cannot be disposed of.

A most important tool for access to justice is provided in Art. 5, LXXIII, which guarantees the right of the individual person to sue the public powers: 'any citizen will be a legitimate part to propose a popular law suit aiming at annulling an act which harms the public patrimony or that of any entity in which the State participates, or administrative morality, or the environment and the natural patrimony, and the Author shall, except in the case of proven bad faith, be exempted from legal costs or payment of

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[27] Law n. 9,985 of 18 July 2000, which created the SNUC – National System for Nature Conservation Units – regulates this Article and its paragraphs, complemented by Provisional Measure 2,186-16 of 23 August 2001 and Law 11,105 of 24 March 2005. Decree 5,705 of 16 February 2006 promulgated the Cartagen Protocol on Bio-security of the Convention on Biological Diversity.

[28] See Law 11,105,IV.

[29] Ruled by Law 11,794 of 8 October 2008; Law 5,197 of 3 January 1967 (hunting); Decree-Law 221 of 28 February 1967 (fisheries); Law 4,771 of 15 September 1965 (Forestry Code); Law 9,605 of 12 February 1998 (Environmental Crimes); Decree-Law 227 of 28 February 1998 (Mining Code). The Public Ministry, resorting to Terms of Adjustment of Conduct or pecuniary fines when reconstitution proves impossible, has been very active on the subject, especially in the states of Minas Gerais and Sao Paulo.

the fees to the lawyer of other part in case the sentence is unfavourable. The existing law, though it dates of 1967[30], has been widely used and has established interesting tools, such as a Special Fund for the Protection of Diffuse Interests which receives compensation for damage caused to diffuse interests which us supervised by the Public Ministry[31], but should soon be replaced by a modern one, which incorporates the concepts of public participation and tutoring at all levels. This Law is being written by a team of the most renowned specialists in procedure law in Brazil, and has been the subject of public hearings in Universities and public bodies such as the Public Ministry, which represents the interests of Society and is entrusted by the Constitution as Guardian of the Environment. Presently under appreciation by the Chamber of Deputies, its *Rapporteur* at the Justice Commission of the House of Representatives presented his Report on the Project, with a substitute, in 15 September 2009. After this, the Commission discusses the project for five sessions, during which amendments may be presented; if approved, the Project will be sent to the Senate for appreciation[32].

This brings to light an important development in the legal status of the Public Ministry as a fundamental constitutional institution of the Democratic Constitutional State, within a neo-constitutionalist approach which sees the legal system as undergoing transformation from a closed to an open system, grounded on values – a transition from legalistic positivism to constitutionalism, which means interpreting the Constitution creatively and aiming at social efficacy[33] .

The 1988 Brazilian Constitution dedicated to the subject, under Chapter IV which is entitled *'Of the Functions Essential to Justice'*, four very extensive articles which declare the Public Ministry a permanent institution, essential to the jurisdictional function of the State, and charged with defending the legal order, the democratic regime and the undisposable social and individual rights (most especially the so called third generation, or diffuse, rights). Further Constitutional amendments endowed it with functional and administrative autonomy[34] and a large degree of financial independence, provided its budget respects the limits established by the law on budget directives[35]. Furthermore, there is a Union Public Ministry, which comprises the Federal Public Ministry, the Labour Public Ministry, the Military Public Ministry and the Public Ministry for the Federal District and Territories – and the co-existing Federated States Public Ministries. Access to the career, which demands full dedication, is by public

[30] Law 4,717 of 29 June 1967 (Law of Public Action).
[31] Art. 13 added to the Law in 1985. See on the subject A.Gidi, *Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales em Brasil – um modelo para países de derecho civil*, translated into Spanish by Lucio Cabrera Acevedo. Mexico, *Universidad Autonoma/Instituto de Investigaciones Jurídicas*, 2004, PP 31-43. ISBN 970-32-1365-0.
[32] See http://www.observatorioeco.com.br/index.php/parecer-nova-lei-de-acao-civil-publica/ {acess October 7 2009} for the Project, comments, substitute presented by the Raporteur, and academic articles. The Raporteur in this case is a Congressman who has had a career as a member of the Public Ministry, Antonio Carlos Biscaia. Although the website is in Portuguese, it does have a page in twitter - http://twitter.com/observatorioeco in which one will find comments in English.
[33] See on the subject ALMEIDA, Gregório Assagra de. *Direito Material Coletivo. Superação da Summa Divisio Direito Público e Direito Privado por uma nova Summa Divisio Constitucionalizada*. Belo Horizonte: Del Rey, 2008.
[34] Par. 2 to Art. 127, inserted by Constitutional Amendment 19 of 4 June 1998.
[35] Par. 3 to 6 to Art. 127, inserted by Constitutional Amendment 45 of 8 December 2004.

exams, and once past the probationary period its members enjoy the same guarantees as judges.[36]

III. The Human Rights Component of Sustainable Development

Human Rights is considered to be one of the three 'legs' of sustainable development, though some say it to have received much less attention than the environmental and economic ones[37], be it by commentators, international agreements or even their different national equivalents.

Nicholas Robinson, in 'Agenda 21: Earth´s Action Plan' says that 'if the basic human right is the right to life itself, then the environmental dimensions of human rights must become ever more explicit'[38]. He then proceeded to note that the right to environmental protection was then already guaranteed by several national constitutions[39], despite the fact that then current human rights treaties did not get to do so. He also mentioned several reports issued by the UN Human Rights Commission concerning human rights aspects of the UN International Covenants on Civil and Political Rights or Economic, Social and Cultural Rights, and especially the situation of indigenous peoples, whose cultures depend on maintaining nature[40]. He also noted that individuals increasingly demanded rights of notice, access to decision making rights of participation and transparency in environmental regulation and management.

In the introduction to 'Sustainable Development and Good Governance'[41] two of its editors, K. Ginthers and P. de Waart, devoted the very first chapter to the 'Human rights dimension of peace and development'; quoting art. 28 of the 1948 Universal Declaration of Human Rights, they mentioned their satisfaction for human rights (be them individual or collective) being considered an essential element when Regional (the European Union) or international (the UN) institutions assess good governance, important in the quest for turning 'everyone's entitlement to a social international order in which all universally recognized human rights can be fully realized' a reality. Stressing the importance of collective human rights leading to the question of the relationship between the individual and the community at national, regional and

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[36] On the role of the Public Ministry in protecting social and individual rights in the São Francisco Project see P.C.V. Lima, *O Ministério Público como Instituição Potencializadora do desenvolvimento sustentável: reflexões a partir de experiências na Bacia do Rio São Francisco-MG* (The Public Ministry as an Institution which potentialises sustainable development: reflexions from the starting point of experiences in the São Francisco Basin-MG, translation of tittle by the author) . *Universidade de Montes Claros,* MG, MS. Dissertation supervised by Prof. Dr. S. N. Lessa.

[37] Reports of the ILA International Committee on Legal Aspects of Sustainable Development have dealt with the subject, but none of the books it published, for instance, featured ' human rights' in its title – one was centred in 'International Law with a Human Face' and another on ' Good Governance and Sustainable Development'; it can, of course, be argued that Human Face, or Good Governance, indirectly reflect on human rights. Please note that frequent reference will be made to the work of ILA Committees in view of the fact that they represent widely varying views, from all continents and legal systems.

[38] N. Robinson, Ed..N.Y: Oceana Publications, 1993, ISBN: 0-379-21201-3 p. xxxiv.

[39] This was the case in Brazil, see point II above.

[40] In the next point the reader will see that this happens also in the São Francisco case.

[41] See K.Ginther, E. Denters and P. J.I.M. de Waart (eds), 'Good Governance and Sustainable Development'. Dordrecht: Martinus Nijhoff, 1995, ISBN0-7923-3341-1.Although the title does not refer to it, several chapters were written on HR aspects – those by Y. Matsui, A. Tolentino, P. Slinn, Ph. Sands and J. Werksman, C. Taylor, P. de Waart, K. Arts, W. Benedek, and P. Nherere.

international levels in the context of the right to development, they criticized the then Secretary-General of the United Nations *Agenda for Peace* for exposing poverty, disease, famine, oppression and despair only as sources and consequences of conflict that require the ceaseless attention and the highest priority of the United Nations, but not as violations of the right to development[42] .

The ILA Committee on Legal Aspects of Sustainable Development presented its First Report to the 66th Conference of the ILA in Buenos Aires (2004). It concentrated in the analysis of UNCED (92) and its legal products, as well as on the impact (upon sustainable development) of the creation of the WTO; but the human rights component was not absent - special attention was paid to the right to a healthy environment and to the right to development[43]; the report further analyzed the outcome of the 1993 Vienna UN Conference on Human Rights and its Declaration and, in point 2.1., stated the need to elaborate the Right to Development '*in the context of the other collective human rights and of all individual human rights'*, giving priority to the fight against absolute poverty and to attuning the right of self-determination of peoples to the promotion and protection of civil, cultural, economic, political and social rights[44].

In the book *International Economic Law with a Human Face*[45] P. de Waart addressed the issue of human rights in international trade (people at the centre of development), in the context of the 1995 World Summit for Social Development and the role of UN related human development agencies[46] and Asif Qureshi wrote about international trade and human rights from the perspective of the WTO[47]. This book reflected on the Second Report the ILA Committee on Legal Aspects of Sustainable Development presented to the 67th ILA Conference (Helsinki, 1996), which noted the Committee´s concern over an unbalanced development of international law in the field of sustainable development and the lack of a normative structure for international economic relations between developing and developed countries, particularly the absence of a *human face* in the International Economic Order[48]. The Committee decided on a work programme which envisaged three subcommittees – Subcommittee 2, chaired by Paul de Waart, charged with, *i.a., promoting a constructive tripartite dialogue between IGOs, NGOs and governments, on the development of standards of political and social freedoms, e.g. a human rights impact assessment as an integral part of projects and programmes touching upon sustainable development*[49]. As a result, the Committee Report to the 68th. Conference dedicated three pages specifically to human rights[50], and the work program foresaw a questionnaire as a means to explore the feasibility of drafting an ILA Declaration on Principles on International Sustainable Development Law.

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[42] Pp. 1-2.
[43] The Report did not consider the former as having been directly included by the Rio Declaration in Principle 1 - but did consider that the Rio Declaration gives recognition both to the principle of the right to development and to the concept of intergenerational equity (Principle 3).
[44] Report of the 66th Conference, pp. 103-136.
[45] F.Weiss, E.Denters and P.de Waart. The Hague:Kluwer Law, 1998, ISBN90-411-1001-1.
[46] Pp. 109-132.
[47] Pp. 159-174.
[48] Conference Report, p. 278 *in fine.*
[49] Report of the 66th. Conference, pp. 298-299.
[50] Pp. 701-703.

In 1999 Alan Boyle and David Freestone, in their Introduction to 'International Law and Sustainable Development'[51] , touched indirectly on the subject when they discussed the right to development and intergenerational equity, and stressed the need to integrate environmental protection into the development process - but the focus remained on environment/economy, even when they refered to the requirement (integration) permeating all the Rio Documents[52] and being one of the decisive elements of the *Gabcicovo-Nagymaros* case at the International Court of Justice. They also noted that Principle 3 of the Rio Declaration was the first occasion in which the international Community fully endorsed the previously controversial concept of a right to development.

The Fourth Report of the ILA Committee on Legal Aspects of Sustainable Development (London, 69th.Conference) pointed at the degree of controversy in assessing the positive and negative aspects of globalization, stressing that despite the fact that many developing countries were part and parcel of the world economy growth process, the number of people living in absolute poverty was increasing - 1.2 billion still living on less than 1 $ a day, more than a billion people lacking access to safe water and more than 2.4 billion lacking adequate sanitation[53], seriously impeding the path to sustainable development in peace and re-emphasizing the interdependent nature of peace and security, of economic and social progress, of respect for human rights and of environmental conservation. It also posed an unanswered question – is international law moving in the direction of more justice and equity in international relations and for more influence of people on public international decision making? Would that serve the cause of sustainable development?[54].

The Committee´s fifth (and final) report70th Conference, New Delhi) proposed the New Delhi Declaration on Principles of International Law Relating to Sustainable Development, adopted by the plenary of the Association as Resolution 3/2002, and later, presented by the Governments of Bangladesh and The Netherlands to the United Nations General Assembly, adopted by the General Assembly of the United Nations as document A/57/329 and circulated by the UN in the Johannesburg UN Summit on Sustainable Development as document A/CONF.199/8.

The second paragraph of the New Delhi Declaration *consideranda* emphasizes that sustainable development " …should be integrated into all fields of policy in order to realize the goals of environmental protection, development and *respect for human rights*[55]…*";* the thirteenth EXPRESSES the view that the objective of sustainable development involves a comprehensive and integrated approach to economic, *social* and political processes " ...which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom…" ; the fourteenth IS OF THE OPINION that the realization of the international bill of human rights, comprising economic, social and cultural rights, civil and political rights and

[51] A. Boyle and D. Frestone (eds). Oxford: Oxford University Press, 199, ISBN 0-19-829807-2 pp. 8-15.
[52] The 1992 Biodiversity Convention, the 1992 Climate Change Convention, the Rio Declaration and Agenda 21.
[53] Pg. 656 – see text but also footnotes 1 and 2.
[54] Report to the 69th Conference, pp. 656-657. In the context of this paper, one could transpose this reasoning to inequality and needs of the people in the different states in Brazil…
[55] Report of the 70th. Conference - emphasis added by author.

peoples´ rights, is central to the pursuance of sustainable development". The words Human rights are also specifically employed in Principles 1 (the duty of states to ensure sustainable use of natural resources), 2 (the principle of equity and the eradication of poverty, 5 (the principle of public participation and access to information and justice) and 7 (The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives).

The Johannesburg UN Summit on Sustainable Development happened in a context very different from that of Rio 92. The Washington Consensus in economy following serious economic crises, strengthened by the terrible political events of 2001, had reshaped world relations. Cooperation goals for sustainable development had not been met, be it internationally or nationally. So the goals established were to reduce poverty and ensure access to water and sanitation – as we all know, the conference did not aim at new treaties, but rather at an implementation plan with much less wide objectives.

The First Report of the present ILA Committee on International Law on Sustainable Development[56] was presented to the 71st. ILA Conference (Berlin, 2004). The principle of integration (Principle 7 of the New Delhi Declaration) became a key focus for Committee work, and the relationship between human rights and sustainable development was once more emphasized[57], but it in fact permeates the whole report.

In 2007 Nico Schrijver, in his course at the Hague Academy, when evaluating the incorporation of the concept of sustainable development in international treaty law, called to attention that despite the fact that several human rights treaties *implicitly* incorporate elements of the concept of sustainable development, only the 2003 Protocol on Human and Peoples´ Rights on the Rights of Women in Africa *explicitly* does so – enhancing the role to be played by women in the building of a consciousness of sustainable development[58].

The third Report of the Committee on International Law on sustainable Development (Rio 2008) has a section on Development in international human rights law, which deals largely with the new UN Declaration on the Rights of Indigenous Peoples and especially their entitlement to their lands, territories and resources (indigenous peoples rights are also said to be at stake in the *São Francisco* Basin project, as will be seen below), but draws attention also to the fact that the period under review (2007-2008) saw controversy concerning the right to development raise its head once again, with the result that the UN General Assembly, upon a proposal of the Non-Aligned Movement, decided that the feasibility of a new legal standard of a binding nature on the right to development should be examined.

This prompted new debate as to the status of the right to development as a legal norm, comparison of the normative content of a treaty against the Declaration on the Right to Development, as well as with the experience with existing human rights treaty norms which relate to the right to development. The solution adopted by the UN High Level

[56] Chaired by Nico Schrijver and having as co-rappporteurs Duncan French and Ximena Fuentes, succeeded the peviousone on Legal aspects of sustainable Development..
[57] PP. 566-572. This Committee succeeded the previous one, on Legal Aspects of Sustainable Development.
[58] Now published in pocketbook form. N. Schrijver, The Evolution of Sustainable Development in International Law: Inception, Meaning and Status. Leiden:Martinus Nijhoff, 2008, p. 126.

Task Force on the Right to Development was to develop a set of criteria (pragmatic approach) to assess the implementation of the right to development and apply it to selected global partnerships in the context of Millennium Goal 8.

Despite the 15 years gone by, should one argue that the more it changes, the more it remains the same? Should the British Government´s suggestion that the UN Security Council consider the potential for international conflict concerning the limited quantity of water available for the multiple uses engaged in by an (ir)responsible international community, despite realistic and laudable, be seen as following the same basic idea of economy and environment as the 'main' if one could say so, legs in the process - as could, as we will see in point IV, the practice of CODEVASF in Brazil? Or not? And how can one ensure that the human rights content of initiatives aiming at sustainable development be effectively brought into the discussion/policies?

IV. The Legal Battle in the *São Francisco* Project – the central issue for sustainable development?

The *São Francisco* Programme, as said in the introduction, was established by a Presidential Decree of June 5th (the National Day for the Environment) in 2001. The official website of the company charged with coordinating its implementation defines revitalisation as 'the act of recuperating, conserving and preserving the environment by implementing actions which foster the sustainable use of natural resources, the improvement of *social*[59] and environmental conditions in the Basin, and the increase in the quantity and quality of water'. And complements by saying that revitalising suggests new life and the quest for alternatives which bring back what is no longer there – this being the spirit in which CODEVASF and partners operate the 'hundreds of projects and concrete actions' in course[60].

CODEVASF (Company for the Development of the Valleys of the São Francisco and Parnaiba), a public company linked to the Ministry for National Integration, is presently responsible for the programme. But the long story behind this programme started in 1997, when Brazil decided to create River Basin Committees, and the one for the São Francisco basin was drafted by its Committee (CBHSF), in conjunction with ANA (the National Agency for Waters), obeying the requisite for previous public hearings in each phase.

The original idea of revitalising and recuperating surface water and groundwater in order to secure multiple use supply of the waters to local municipalities evolved to redirecting water from the *São Francisco* to arid regions in the northeast[61] - which would involve allocating water to *Ceará* and *Rio Grande do Norte* i.a. [62]. As may be

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[59] Emphasis added by the author.

[60] http://www.codevasf.gov.br/programas_acoes/revitalizacao-1 {access on 08 August 2009}. *Codevasf* was created by Law 6,088 of 16 July 1974; its main goal is to develop the region, using water resources and irrigation as the driving engine. In 2000 its scope of action was enlarged and it is now in charge of yet another river basin in the northeast – that of the *Parnaiba* river, in the states of *Piauí* and *Maranhão*, an area of 330,000km2.

[61] Access to water being essential to the realization of the right to life and dignity of these local populations.

[62] On figures and data, see pp. 198-200 of paper cited in Note 12 above. And note that this enlarges the area to 709.771,3 km^2 because it involves 92 municipalities which are only partly in the river basin area.

imagined, this has met with heated concern and opposition on the part of civil society and governments of states and cities that feared losses in quality and quantity of the water in their areas, or even the death of the river on the long run – and argued that the project would end up benefitting only the big planters in the Northeast, to the loss of the individual persons and small planters traditionally living in the area.

To further complicate matters, there were also indigenous populations that might be affected – in May 2007 , when receiving in Germany the Kant Prize as Citizen of the World, Bishop Luiz Cappio launched the campaign 'Indigenous Peoples against the transposition of the São Francisco River' [63] The result was a series of all sorts of manifestations- which included two hunger strikes by Bishop Cappio, involvement in public debate by the President of the country in 2007, legal suits of all sorts and at all levels.

The programme has involved international cooperation – CODEVASF receives technical and financial cooperation from different sources, among which it points out the FAO (Food and Agriculture Organization of the UN), UNDP, USAID, BUREC (The US Bureau of Reclamation), the World Bank, the Inter-American Bank (IBD/BID), the Japanese Bank for International Cooperation (JBIC), and AGRBER/AGROINVEST (Hungary).

CODEVASF argues that a policy aiming at the sustainable development of the valley should contemplate the multiplicity of eco-systems and conflict, actual or potential, among the different sectors (economy, social, cultural, scientific, conservationist – human rights implied i.a.). It approaches the multiple uses of water from the presupposition that water resources, although renewable, are finite and scarce, and sees growing potential for conflict between energy generation and irrigation; urban effluents and waste consequences upon the watercourses; obstacles to navigation and to the circulation of fish deriving from the building of dams for energy generation; tourism x fishing; loss in quantity and quality[64]. This is not to mention other possibilities – the over-use of a given resource which harms the actual activity at stake, be it in cattle raising, fisheries or indiscriminate deforestation; the advance of agriculture and mining in areas of archeological and speleological interest; or predatory tourism[65]. The problem is not new, nor exclusive to the area or Brazil.

A big problem in the *Sao Francisco* Basin has apparently been the lack of coordination/understanding among the different areas of the executive branch involved. The Ministry for the Environment was supposed to co-ordinate the project, and there is a Managing Council which rings together other Ministries and should further coordinate its actions with local authorities and institutions. This group does not seem, however, to be able to communicate with other stakeholders, and not much better within itself. Most of the money is in the hands of the Ministry for Integration; the Ministry for the Environment lacks structure to evaluate promptly projects presented; officers of these

[63] See www.salveaselva.org/protestaktion.php?id=408 for details. 33 indigenous groups would allegedly have their livelihood threatened, directly or indirectly.

[64] For instance, 15,000m3 of water Will supply 100 persons and 450 cattle over a period of 3 years; OR 100 rural families over 4 years; OR 100 urban families over 3 years; OR 100 guests in a luxury hotel during 55 days; and with the water dispersed by a pivot for 90ha, a city with 100,000 inhabitants.

[65] Its Programme for Sustainable Development and Multiple Resources may be seen – albeit in Portuguese – at www.codevasf.gov.br/osvales/vale-do-sao-francisco/programa-de-desenvolvimento-sustentavel-da-bacia-do-rio-sao-francisco-e-do-semi-arido-nordestino {access 8 October 2009}.

Ministries have had public disagreements. This slows down the project, which is probably not all bad if one thinks in precautionary principle terms, and is certainly not new to people involved with projects the size of this.

But things happen – according to MACHADO[66], between 2004-2006 64 million US$ were invested in environmental sanitation, collection and treatment of solid waste, control of erosive processes in micro-basins, shoring of riverbanks and reforestation of ciliary (riverbank) woodland. And up to 2010 circa 700 million US$ should be budgeted by the Federal Government for sanitation projects in 80% of the municipalities. If this is implemented, the human rights component should be significant.

The Public Ministry, as an institution and guardian of the environment as a diffuse interest[67], is deeply involved and plays different roles, no longer remaining in the somewhat comfortable position of prosecuting, but adopting a pro-active approach. For one, it should be noted that the institution enjoys credibility and trust in Brazil, according to reliable opinion polls[68]. Second, the federated states Public Ministries are responsible for supervising projects in their states – be it preventing, redressing noxious effects, ordering pecuniary compensation or simply giving voice to the interest of peoples.

In the state of *Minas Gerais* this has taken an interesting form. There is a co-ordination of all the Public Ministry Prosecutors involved (and there is one in every city, in the least developed region of the state of *Minas Gerais*), and the Prosecutor in charge has written his Ms. Dissertation on the role of the institution specifically in this programme[69]. His work not only evaluates the role of the Public Ministry, but the result of its actions in the implementation of projects in the area. Only one will be mentioned here, for obvious space reasons. Very interesting, starting from the title: 'Planting Water', and which led to the mobilization and motivation of the local population.

What the Public Ministry did was to identify locally successful experiences which could be replicated, and then intermediate a joint effort with the governmental Agency EMATER (which helps small planters), the local judge and other public agencies in the area as well as the population and, using money collected from pecuniary penalties and the donation of assets withheld by the local judge, proceeding to revitalize a tributary river, the *Pajeú*. The group established the first Agenda 21 in the region, diagnosing local environmental problems and establishing targets and goals to solve them. The result was that approximately 44,000 (forty four thousand) water trucks were 'planted', a sub-basin was revitalized, natural capital was recovered, and this led to the building of social capital because local subjects felt capacitated.

The role of the Judiciary has also been crucial, cooperating with all the institutions involved and resorting to expert witnesses to deal with very complex scientific subjects. Access to justice has been granted to all; from 2004 to 2007 transposition

[66] See Note 11 above for reference – pp.204-205.
[67] Please refer to the last paragraph of point II. Above.
[68] See www.conamp.org.br/04_arquivos/pesquisa/ibope.pdf
[69] Reference given in note 33 above. Please note that *Minas Gerais* is approximately the size of France, and although very developed in some areas, specifically the area in which most projects are located is the poorest and with the worst HDI.

works were virtually paralyzed by precautionary measures awarded by first and second instance judges[70].

All 14 legal suits brought against the transposition of the river shall now be tried directly by the Supreme Court[71], which, as Guardian of the Constitution, will have to decide, i.a., on the constitutionality of the programme and actions of its officers and government officials; on the balance of interests and rights of the different states and their populations; on the existence or inexistence of environmental threats. Some of these suits have been on trial for over 6 years and involve very complicated scientific and technical issues, with which the Justices are not familiar. Popular repercussion of the delay led the *Democrata* political party to ask (May 2009) the President of the Court to set a date for the judgment or, alternatively, to carry out a Public Hearing, inviting environmentalists and other expert opinions to assist the Court in its deliberations[72]; another political party, PSOL[73], had already filed ADIN 4113 (a direct suit for non-constitutionality)[74].

From the above, it seems possible to conclude that, if things are far from perfect, this case has involved and motivated Brazilian society at all levels and sectors, even in states which local populations, because of lack of all sorts of conditions, have been traditionally silent. The democratic instruments the new Constitution endowed Brazilian citizens and institutions with, to protect individual, collective and diffuse rights, are being put to use – and the role of local institutions has been strengthened, as foreseen in Chapter 3 of Agenda 21. The unfolding legal battle should be seen as a process which one hopes will result in sustainable development for one of the poorest regions of the country. The observer is left with one comforting thought (or hope!) – that of living in a State that struggles to effectively become a Democratic Constitutional State, in which people may truly participate in the building of a more sustainable – because less unequal – society.

[70] Almost all precautionary measures were not maintained at the Supreme Court – including one demanded by the Head of the Federal Public Ministry which argued IBAMA (the National Institute for the Environment) had granted environmental licences without performing the requisite previous environmental impact assessment studies. In 2006 the then President of the Supreme Court (since then retired, became Minister for Defense) ordered that all 14 legal suits against the project be reunited and brought directly to the Supreme Court in an effort to expedite matters or deal with conflicting jurisprudence. See www.agenciabrasil.gov.br/noticias/2007/12/12/materia.2007-12-12.6434384605/view

[71] In 2007 the then President of the Court decided to call to its jurisdiction all suits, in view of confusion caused by different decisions, given in different states and levels of judgement.

[72] See http://ultimainstancia.uol.com.br/noticia/DEM+PEDE+QUE+SUPREMO+AGILIZE+JULGAMENTO+DE+ACOES+SOBRE+TRANSPOSICAO_64240.shtml

[73] A new 'left' party, dissident from PT, the ruling party.

[74] Information on all the suits can be obtained in www.stf.gov.br , the website of the Brazilian Supreme Court. Judgements are televised in real time.