



Linking sustainability to procedural law: procedural sustainability using Brazil as a paradigm¹

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ABSTRACT: This paper seeks to establish a new model of linking jurisdiction and sustainability, especially through the recognition of procedural sustainability, using the Brazilian legal system for this purpose. The objective is centred on identifying how a new form of guaranteeing environmental protection by jurisdiction can be achieved if procedural law is redefined based on the idea of sustainability. To achieve this aim, an analysis was developed on sustainability, its connection with jurisdiction and its applicability to the human experience, to then develop a concept of procedural sustainability and apply it in Brazilian law. It emerged that procedural sustainability is already an implicit concern of Brazilian procedural law, but its confirmation and conformation are imperative to further leverage the effectiveness of sustainability. The research carried out was qualitative, with exploratory objectives, based on bibliography and legislation, using the inductive method.

Keywords: Sustainability – jurisdiction – environmental protection – Brazilian procedural law.

¹ It should be noted that all quotations from works not originally written in English present in this article have been freely translated by the Authors.

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1. Introduction

The connection between the environmental protection and jurisdiction has been constantly debated over the years, especially after the necessary recognition of the importance of sustainability. As much as these debates have taken place, new research should always be conducted to ensure the enhancement of the sustainable ideal.

Another example of the link between the exercise of jurisdiction and the protection of the environment may be the main focus of this research, which is the analysis of procedural law through the lens of sustainability.

In order to establish the possibility of this new theory, a review of the foundations of important scientific areas under debate should be made. First, an understanding of sustainability and its characteristics must be reached. Then, the historical perception of the intertwining of sustainability and jurisdiction should be identified. Finally, it should be analysed how sustainability can be both a set of dimensions and a lens through which human actions can be viewed. Once all these primary goals have been achieved, it will be possible to develop a definition of procedural sustainability, and then analyse it within the Brazilian legal system.

This paper focuses mainly on the Brazilian legal system, as a way of narrowing its scope of analysis in favour of a more conceptualised effort to identify the sustainability of the procedure, as a more restricted outline for an in-depth study of the institute itself. However, once the present work reaches the desired conclusive notes, further research, especially focused on more complex systems such as that in Europe, is not only possible but also welcome. This paper involves the study of specialised bibliography and applicable legislation, in qualitative research, with an exploratory objective, using an inductive method.

2. The perception of sustainability and its current aspects and concepts

Lately, the notion of sustainability has taken a front seat in debates about human existence and its impact on surrounding beings and non-beings. Indeed, it is sustainability that guides people towards developing forms of existence that allow them to remain in the world without having such an impact as to jeopardise the existence of others. The result is that the scientific requirement for sustainability has become commonplace.

Another point of conversion must be the view through which the debate will be constructed. Despite being a current global debate, the perception of sustainability is different, at times, because of how its recognition happened. For this paper in specific, Brazil will be used as paradigm, both as a way to converge the discussion into one specific system, which prevents this research from being too broad or inaccurate due to its lack of considerations on the vicissitudes of varied legal systems, and because Brazil has recently been in the centre of discussions regarding legal protection of the environment, both as one of the biggest biomes in the planet and because of its still precarious international cooperation in environmental conservation and protection, which are being timidly resumed after the recent political changes in the country.

One of the most important initial considerations is the connection between sustainability and sustainable development, as both concepts are more often than not discussed together, as they are intrinsically linked, even if they have been separated for some time. In fact, before being established as a fundamental right, such as in Article

5, § 2, of the Brazilian Constitution, as described by Bodnar,² development did not have the ecological issue as one of its priorities, especially in the poorest countries.

The real recognition of sustainable development was only possible with the combination of the concern to develop countries in a state of lesser wealth with the growing environmental concern. Sustainable development, as conceived, has as a priority the satisfaction of the current population's general needs, without having to compromise the satisfaction of the needs of the populations which are yet to come.

Sustainability and development are therefore linked because meeting current needs may degrade the environment to such an extent that future generations will be rendered unviable. This means that development can only be real if it is sustainable. Also, as Bosselmann³ states, development is sustainable when it preserves the integrity and the maintenance of ecosystems, which means that the principle of sustainability is the duty to protect and restore the integrity of those systems.

Historically, sustainable development is seen as the need for the economic advancement of underdeveloped countries, including the use of new technologies, usually coming from developed countries, without exceeding the limits necessary to maintain the ecological balance. Since 2002, sustainability has been used as a substitute for the idea of sustainable development, since the notion was established that the elements of sustainability should not have hierarchy and must, on the contrary, be complementary and mutually dependent, with synergy.⁴

Five different perspectives on sustainable development have been identified. Those are the integration of conservation and development, the satisfaction of basic human needs, the promotion of equity and social justice, the provision of social self-determination and cultural diversity and the maintenance of ecological integration, all five of which stem from the Triple Bottom Line concept, according to which the sustainability of development depends simultaneously on meeting the imperatives of economic prosperity, environmental conservation, and social justice.⁵

Sustainability arises in the context of a legal order that is both transnational and complex, centred on contextualised development, making the protection of the environment, the economy and social development compatible with each other. Those factors must be combined, as the most unequal and rich societies are those that cause the highest ecological losses, produce more waste, consume more water and are responsible for more air travel measures in distance per capita.⁶

When analysed from the perspective of Law, sustainability could consolidate itself as the new paradigm inducing Law in post-modernity, as it currently works as a meta-principle that could be applied on a global scale. As it emerges in a world whose legal culture is in transition to a new transnational process, it has become insufficient to develop sophisticated legal theories in relation to themes

² Zenildo Bodnar, "A sustentabilidade por meio do direito e da jurisdição", *Revista Jurídica Cesumar*, v. 11, no. 01, (2011): 328, accessed June 10, 2021, <https://177.129.73.3/index.php/revjuridica/article/view/1885/1262>.

³ Klaus Bosselmann, *O princípio da sustentabilidade: transformando direito e governança* (São Paulo: Revista dos tribunais, 2015), 78.

⁴ Bodnar, "A sustentabilidade," 329-330.

⁵ Thiago Caversan Antunes and Lorival José de Oliveira, "Sistemática de precedentes obrigatórios no Código de Processo Civil de 2015 e desenvolvimento sustentável sob a perspectiva da teoria neoinstitucional". *Revista Eletrônica de Direito Processual*, vol. 21, no. 3, (2020): 617, accessed May 15, 2021, doi: <https://doi.org/10.12957/redp.2020.48574>.

⁶ José Eli Veiga, *A desgovernança mundial da sustentabilidade* (São Paulo: Editora 34, 2013), 31-32.

and institutes that protect the complex phenomenon of human coexistence, considering the necessity of the emergence and consolidation of a new paradigm of Law, which should be more useful and efficient in meeting the demands of humanity in the current context.

Bosselmann,⁷ in turn, states that the ideal of a sustainable development ends up being jeopardised by this multiple perception, since its meaning for many is considered vague, thus affecting its legal effectiveness. It stands to reason, then, that, in order to make sustainable development operational and enforceable, its normative core must be recognised.

Likewise, Bodnar⁸ understands that, due to this multiplicity, the definition of sustainability should always be considered incomplete, as well as the concept of justice, since it will always be subject to the specifics of reality and context, meaning that sustainability, as a concept, is open, permeable, ideologised, subjective and relational, and what can be considered sustainable in one period may not be in another richer or poorer one, thus making more sense, in most cases, to identify whether something is unsustainable as opposed to sustainable.

This is why Antunes and Oliveira⁹ conclude that the protection of the environment would not be feasible if it were to be pursued without being combined with a realistic and economically viable system, otherwise its high price would be paid mainly by the poorest populations.

In any case, the multitude of perceptions regarding sustainability makes it necessary, as identified by Souza,¹⁰ for all debates involving it to similarly establish dialogues between the protection of the environment and other areas, not restricted to the circle of environmentalists or professionals specialising solely in environmental studies.

It is possible to understand, therefore, that the core of factual sustainability is related to the development of necessarily plural actions and plans, in most diverse spheres, seeking to improve conditions from different perspectives, such as economic, social, environmental, especially for fragile populations.

These concerns necessarily have to be related to the present and the future, because environmental, economic, and social issues, which are assumptions related to sustainability, are intrinsically linked, and their joint protection is more appropriate.¹¹

In Brazil specifically, Freitas¹² understands that the multifaceted perceptions of sustainability are constitutionally legitimised, stating that, in the Brazilian Constitution, sustainable development, going beyond its primary establishment in Article 225, encompasses shared progress for the greater good of all, balanced development planning, scientific and technological development, and welfare and technological autonomy, all of which are in Articles 3, 174, 218 and 219, respectively.

⁷ Bosselmann, "O princípio da sustentabilidade," 75-76.

⁸ Bodnar, "A sustentabilidade," 330-331.

⁹ Antunes and Oliveira, "Sistemática de precedentes," 621.

¹⁰ Maria Cláudia da Silva Antunes de Souza, "Sustentabilidade corporativa: uma iniciativa de cunho social transformando o meio ambiente", *Revista Jurídica Unicuritiba*, vol. 4, no. 45 (2016): 248, accessed May 08, 2021, <http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/1803>.

¹¹ Bodnar, "A sustentabilidade," 332.

¹² Juarez Freitas, "Sustentabilidade: novo prisma hermenêutico", *Novos Estudos Jurídicos*, vol. 23, no. 3 (2018): 943, accessed May 10, 2021, doi: <https://doi.org/10.14210/nej.v23n3.p940-963>.

Brazil is not particularly revolutionary in its norms establishing sustainability. European legal systems have also foreseen this kind of protection. Canotilho,¹³ for example, recognises instances in which the sustainability principle has been enshrined in the Portuguese Constitution: as a fundamental task, in Article 9, as a fundamental principle of economic organisation, in Article 80, d, as a priority duty of the State, in Article 81, a, m and n, as a fundamental right, in Article 66(1), as a fundamental legal duty of the State and citizens, in Article 66(2), and as a vector and integrating principle of public policies, in Article 66(2), c, d, e, f and g. Similarly, the Spanish Constitution also recognises the importance of sustainability and environmental protection, mainly in its Article 45.

The concern with sustainability and its multiple facets has become essential especially due to the circumstances of the so-called risk society, as identified by Beck,¹⁴ reflecting the uncertainty represented by how to keep development within acceptable parameters, despite the threats and risks which are inherent to the late process modernisation, in which people are currently inserted.

Bodnar¹⁵ sees as a result of this risk society, established by a production and consumption model based on profit and excessive development, a greater need for environmental justice, since the risks and harm of unsustainability occur unevenly, as previously pointed out.

The result is that today's society needs constant analysis and concern for sustainability, in its various dimensions, and in the various aspects of its existence. Thus, sustainability extends a step further: it requires environmental justice, or as it is currently perceived, ecological justice, which must be as multifaceted as sustainability, justice, and well-being.

3. Sustainability, environment and law: from environmental to ecological justice

The whole discussion in this paper has to do with the perception of legal systems on sustainability, the environment and its protection. For the development of a sustainable view of legal processes, an analysis of the connection between the law and the protection of the environment is required.

The first connection between sustainability at a jurisdictional level was the recognition of the possibility of environmental justice, which represents the possibility of a jurisdictional discussion of the environment. It encompasses the idea that damage to the environment inevitably affects other people, thus being subject to compensation.

Despite being a necessary development towards the legal protection of the environment, representing the possibility of the jurisdictional reinforcement of such laws, it has been criticised. This criticism is based on the fact that this view

¹³ José Joaquim Gomes Canotilho, "O Princípio da sustentabilidade como princípio estruturante do Direito Constitucional", *Polytechnical Studies Review*, vol. VIII, no. 13 (2010): 7, accessed July 6, 2023, <https://scielo.pt/pdf/tek/n13/n13a02.pdf>.

¹⁴ Ulrich Beck, *Sociedade de risco: rumo a uma outra modernidade*, trans. Sebastião Nascimento (São Paulo: Editora 34, 2011), 24.

¹⁵ Zenildo Bodnar, "Os novos caminhos da jurisdição para a sustentabilidade na atual sociedade de risco". *Veredas do Direito*, vol. 6, no. 12 (2009): 103-104, accessed June 10, 2021, <http://revista.domhelder.edu.br/index.php/veredas/article/view/19>.

of the environment as something to be justly distributed among people¹⁶ subjects nature to an anthropocentric view, that is, a human-centred debate, rather than to an eco-centred view of the legal debate, which, in accordance with Fensterseifer,¹⁷ should be preferred.

A similar debate is also brought up with the distinction between shallow and deep ecology. Shallow ecology is, according to Capra,¹⁸ humans' concern for the environment based on their own needs, that is, an anthropocentric view, while deep ecology would be ecocentrism.¹⁹ Flores and Terribile,²⁰ using this concept, developed what they call deep sustainability, in which the concern with the environment is not just its use now and in the future, but a real concern with the protection of the environment for and because of itself.

It is because of these criticisms that the ideal of environmental justice has been constantly regarded as insufficient. There would be no real justice if it focused not in the environment itself, but on human needs. This is why Bosselmann²¹ recommends that the debate on the interconnection between environmental protection and justice be orientated towards a relatively new system called ecological justice.

Ecological justice would be the jurisdiction applied to the protection of the environment that considers the non-human world, that is, a justice that considers ecological integrity, caring for human beings living both in the present and in the future, and the natural processes that sustain life.

When differentiating both kinds of justice, it is possible to identify the centre of the discussion as the diversion: "*Environmental Justice deals with human interests in relation to the environment. The Ecological Justice recognizes the nature as subject of rights. Therefore, Ecological Justice, which understands nature as a subject of rights independent of human interests, requires intense interspecies cooperation; demands to deepen the bonds that bring humanity closer to other living beings, to sensitize it to the affections of care for nature, thereby valuing what makes possible the existence of life on the planet, in such a way that, in feeling nature recognize human beings, cooperating for the preservation of humanity as such.*"²²

Bosselmann²³ identifies two ethical elements as demonstrators of ecological justice from the perspective of sustainable development, the first being the need for a concern for the poor, which would be the social dimension of ecological justice, called intragenerational justice, and the second being the concern for future generations, or intergenerational justice, which is fragilised by the fact that it is impossible to know what the needs of the future will be, thus requiring those who seek to ensure ecological justice and sustainability to at least preserve the integrity of the planetary ecosystem in the minimal condition as it was inherited by the current generation.

¹⁶ Bosselmann, "O princípio da sustentabilidade," 108.

¹⁷ Tiago Fensterseifer, *Direitos fundamentais e proteção do ambiente: A dimensão ecológica da dignidade humana no marco jurídico constitucional do Estado Democrático de Direito* (Porto Alegre: Livraria do Advogado, 2008), 52.

¹⁸ Fritjof Capra, *A teia da vida - uma nova compreensão científica dos sistemas vivos*, trans. Newton Roberval Eichenber (São Paulo: Cultrix, 2006), 14.

¹⁹ Nilton Cesar Flores and Daniele Regina Terribile. "Meio ambiente e trabalho: por uma ética ocupacional sustentável". *Novos Estudos Jurídicos*, vol. 21, no. 2 (2016): 701, accessed May 10, 2021, doi: <https://doi.org/10.14210/nej.v21n2.p691-717>.

²⁰ Flores and Terribile, "Meio ambiente e trabalho", 708.

²¹ Bosselmann, "O princípio da Sustentabilidade", 107-109.

²² Tônia Andrea Horbatiuk Dutra, "Thinking of ecological justice from a transdisciplinary perspective of cooperation", in *Innovations in the ecological rule of law*, ed. José Rubens Morato Leite, Melissa Ely Melo and Heidi Michalski Ribeiro (São Paulo: Instituto O direito por um Planeta Verde, 2018), 389.

²³ Bosselmann, "O princípio da sustentabilidade," 129.

Bosselmann²⁴ then develops the idea of interspecies justice, which means that justice could and should better accommodate the concern with the non-unanimous natural world, which is at the heart of environmental ethics, only possible by abandoning liberal anthropocentric justice and adopting an eco-centred model of justice.

Corroborating this perception: “*To sum up, it turns out that notwithstanding the sophisticated nature of the arguments or the guiding theoretical traditions, distinct approaches to a notion of ecological justice, based on identifying moral responsibilities towards nonhuman nature, suggest similar institutional arrangements. These include stewardship or guardianship structures and the expansion of standing rules for contesting decisions involving nonhuman welfare. This is also the solution addressed by proposals towards assigning rights to nature, although its relevance and practical implications to environmental law structures and institutions remains a cloudy issue.*”²⁵

Likewise, Borile and Calgaro²⁶ elaborate that the idea of ecological justice means the suppression of the anthropocentric ideals, directing the connection between the jurisdiction of the environment towards the concept of deep ecology as a means of establishing the conservation and welfare of other non-human beings.

Similar to the idea that there will only be development if it is effectively sustainable, those who defend an ecological approach to justice promote the notion that justice can only be real if there is ecological concern, justice between species, recognising the intrinsic value of the non-human natural world. In that regard, Bosselmann²⁷ understands that there must be a distinction between the intrinsic value of the environment, a value that comes because of itself and its importance, which is the core of the eco-centred model, and the old instrumental value of the environment, viewing the environment as a tool to be used by humans, which comes from the anthropocentric model.

Bosselmann²⁸ argues that, despite the anthropocentric tradition of justice, elements of ecological justice can already be observed in the law, demonstrating that this idea has already influenced the process of legislative evolution, both in the area of domestic and international environmental legislation. To this end, the author mentions the example of New Zealand legislation, which, despite its weaknesses, is particularly concerned with national intragenerational equity and between species. This has also been observed in European judicial systems, such as in Portugal, in its Climate Law, Law no. 98/2021, of 12/31. In any case, ecocentrism clearly defines ecological functions, helping to understand that environmental justice is essentially justice for those who cannot speak for themselves.

The perception that the future of the jurisdiction applied to the protection of the environment is necessarily eco-centred, translating to an ecological justice, is, as already mentioned, new and still cloudy in some parts, although this theory has been gaining attention in recent years. However, it is already possible to observe some

²⁴ Bosselmann, “O princípio da sustentabilidade,” 131.

²⁵ Larissa Verri Boratti, “Situating Justice: A notion of urban-environmental justice”, in *Innovations in the ecological rule of law*, ed. José Rubens Morato Leite, Melissa Ely Melo and Heidi Michalski Ribeiro (São Paulo: Instituto O direito por um Planeta Verde, 2018), 316.

²⁶ Giovanni Orso Borile and Cleide Calgaro, “Fundamentos da justiça ecológica”, *Revista Fundamento Jurídico*, vol. 14, no. 03 (2020): 273, accessed May 20, 2021, <https://fadisp.com.br/revista/ojs/index.php/pensamentojuridico/article/view/239>.

²⁷ Bosselmann, “O princípio da Sustentabilidade,” 132-133.

²⁸ Bosselmann, “O princípio da Sustentabilidade,” 134-135.

debates that move away from the notion of ecological justice. Boratti,²⁹ for instance, mentions the idea of urban-environmental justice.

The theory of procedural sustainability, while also going beyond the notion of the centrality of the environment in the judicial treatment of the protection of the nature, must not be considered an evolution or a step ahead in the same direction, but a parallel movement. It is not the next grade on the list that previously had environmental justice and ecological justice, for both these movements deal with the protection of nature as an object of jurisdiction.

The idea of procedural sustainability, on the other hand, means the protection of nature as a necessity for the exercise of jurisdiction. The result is that, even when following the ecological justice ideal, procedural sustainability should be respected. A last distinction must be made, however, before actually defining what procedural sustainability is, or what it is not.

4. Procedural sustainability: dimension or innovation?

One of the main discussions when it comes to sustainability is its aspects on a scientific level. Similar to the aforementioned concepts of justice and well-being, as stated by Freitas,³⁰ sustainability is also multidimensional, which has led sustainability scholars to create spheres of its observance, usually called dimensions of sustainability.

Nowadays, it is common to identify that sustainability must encompass several aspects of a project or human action for it to be truly sustainable, as, for it to be sustainable, it needs to observe several aspects, usually called dimensions, and not just the environmental one, which has been the historical perception of what sustainability is.

It is understood that the dimensions of sustainability need to be mutually debated and observed, without the prevalence or distance of one from the other. This is because, as Gomes and Oliveira³¹ point out as an example, the environment will never be properly preserved if it is at the expense of social balance, just as poverty will never be fully eradicated with environmental destruction.

In the same direction, Freitas³² identifies that the dimensions of sustainability establish an intertwining of each other, and similarly help constitute each other, in a necessary dialogue between all aspects of sustainability, which cannot be dismissed, lest it results in irremediable damage.

Any analysis of the dimensions of sustainability necessarily needs to recognise, as pointed out by Souza,³³ that there is no hierarchy between them, that is, they operate in a horizontal manner, so that none of them is negatively affected by the other.

Souza³⁴ notes that, historically, the tradition of the scientific debate on sustainability has been of identifying three core dimensions, which are the environmental, social and economic. Dimensions. On more recent studies,

²⁹ Boratti, "Situating justice", 330 et seq.

³⁰ Juarez Freitas. *Sustentabilidade: direito ao futuro* (Belo Horizonte: Fórum, 2016), 61.

³¹ Magno Federici Gomes and Leandro José Ferreira, "A dimensão jurídico-política da sustentabilidade e o direito fundamental à razoável duração do procedimento", *Revista do Direito*, vol. 2, no. 52 (2017): 95, accessed June 8, 2021, doi: <https://doi.org/10.17058/rdunisc.v2i52.8864>.

³² Freitas, "Sustentabilidade: direito ao futuro", 77.

³³ Souza, "Sustentabilidade corporativa", 256.

³⁴ Souza, "Sustentabilidade corporativa", 252.

however, other dimensions have been systematically brought up by those who study sustainability, so much so that it is difficult to single out every one of them. Sachs,³⁵ for example, recognises eight dimensions.

Nevertheless, this multitude of dimensions have found a few conversions. By way of example, in the Brazilian tradition, Freitas³⁶ and Antunes and Oliveira³⁷ recognise two other dimensions of sustainability which have been commonplace in current debates: the legal-political and the ethical dimensions. Bodnar,³⁸ on the other hand, defends the existence of technological sustainability, which has also found quite some space in recent analysis of sustainable framework.

Focusing on these main dimensions, a few conceptualisations should be made. The environmental dimension, the most classical one, encompasses the guarantee of the protection of the Earth and its environments, in order to maintain the conditions that make life on the planet possible.³⁹ Similarly, Gomes and Ferreira⁴⁰ argue that the environmental dimension is a non-negotiable premise, according to which a balanced environment with a healthy quality of life for present and future generations must be properly preserved and protected, otherwise natural resources will no longer be able to support life on Earth.

The social dimension, according to Souza,⁴¹ involves everything from culture to the exercise of human rights, seeking a more homogeneous and better governed society. For Bodnar,⁴² this is one of the most important dimensions, as it is exceptionally fragile and is more directly linked to the environment. Gomes and Ferreira⁴³ understand that this dimension emphasises the concern with human beings and their well-being, as the definitions of human quality of life and environmental quality should not be considered separately.

The economic dimension is based on the recognition that development can only be sustainable if there is concern about the financial effects of things, since the economic issue is the foundation of human relations and existence, and the greater goal of both social progression and environmental development. Souza⁴⁴ defines the economic dimension as the concern to balance environmental sustainability, the process of generating wealth and an equitable social situation.

The legal-political dimension is related to fundamental rights and guarantees, which must be accessible and feasible not only for people nowadays, but also for those of future generations. In this way, Freitas⁴⁵ presents this dimension as the guarantee of the right to a future, with the protection of the freedom of each citizen, current or future, in an *“intersubjective of the intertemporal content of the fundamental rights and duties of present and future generations, whenever directly viable”*.

³⁵ Ignacy Sachs, *Caminhos para o desenvolvimento sustentável*, (Rio de Janeiro: Garamond, 2002), 85-86.

³⁶ Freitas, “Sustentabilidade: novo prisma hermenêutico”, 941.

³⁷ Antunes and Oliveira, “Sistemática de precedentes obrigatórios”, 618.

³⁸ Zenildo Bodnar, “A sustentabilidade por meio do direito e da jurisdição”, *Revista Jurídica Cesumar*, vol. 11, no. 1 (2011): 334, accessed June 10, 2021, <https://177.129.73.3/index.php/revjuridica/article/view/1885/1262>.

³⁹ Souza, “Sustentabilidade corporativa”, 253.

⁴⁰ Gomes and Ferreira, “A dimensão jurídico-política”, 95.

⁴¹ Souza, “Sustentabilidade corporativa”, 254.

⁴² Bodnar, “A sustentabilidade por meio”, 332.

⁴³ Gomes and Ferreira, “A dimensão jurídico-política”, 95.

⁴⁴ Souza, “Sustentabilidade corporativa”, 254.

⁴⁵ Freitas, “Sustentabilidade: direito ao futuro”, 72.

The ethical dimension, as stated by Gomes and Ferreira,⁴⁶ is related to the previous dimension, as it represents the mission of the present generation to guarantee the sustainability of the existence of future generations, through an environmental and social heritage that will be passed on to the future generations, in a plexus of solidarity and fraternity of acceptance of the human being as a person and the environment as nature, responsible for managing the life of all living beings.

Finally, the technological dimension, for Souza,⁴⁷ is the driving force behind the others, as it allows the creation, construction, and reinvention of a mechanism for the realisation of other traditional dimensions of sustainability, and the society of the future will be what science and technology – through social engineering – are able to build and what they allow or require.

The proper conclusion, when it comes to the perception of sustainability in dimensions, is that these dimensions are, if nothing else, necessary parts of what is sustainable. That is to say that if, for example, a project is sustainable, it will be environmentally safe, socially respectable, economically viable, legally and politically acceptable, ethical, and technologically feasible. It could be argued, then, that if one of these aspects is not inserted in a project, it should not be considered sustainable.

In that respect, procedural sustainability would not be one dimension, but it should include all of these dimensions. This is the distinction that is important to make: procedural sustainability is not an aspect of sustainability, but a human exercise which must be submitted to the lens of sustainability, so as to create a desired product that is the sustainable legal procedure system.

5. Defining procedural sustainability

The purpose of this paper, as mentioned before, is to establish the operational concept⁴⁸ of procedural sustainability, representing the evolution of the perception of sustainability in a legal context, as the next necessary link between the environment and justice.

It is the depiction of evolution because, as already mentioned, it arises following the anthropocentric view of environmental justice being succeeded by the eco-centred view of ecological justice. In this new perception of how the protection of the environment is connected to jurisdiction, the paradigm goes beyond what was historically perceived as the backbone of this link.

The point that should be made is: in the same way that there has been a shift from the legal protection of the environment as a good to be distributed among human beings, which was addressed as the anthropocentric view, to the environment as the real holder of the need for jurisdictional protection by and for itself, i.e. the ecological view, there may also be a process that can go further with the environmental protection of the jurisdiction.

In fact, the present proposal is a step further in the debate of the intersection between jurisdiction and environment, with a significant change in direction: there

⁴⁶ Gomes and Ferreira, “A dimensão jurídico-política”, 95.

⁴⁷ Souza, “Sustentabilidade corporativa”, 255.

⁴⁸ Cesar Luiz Pasold, *Metodologia da pesquisa jurídica: teoria e prática* (Florianópolis: Empório Modara, 2018), 10.

should not only be the analysis of how the environment might be submitted to the exercise of jurisdiction, but there also should be a preoccupation with how the exercise of jurisdiction should not be harmful to the environment.

In addition to distinguishing this proposed sustainable perspective from the models of justice mentioned above, it is necessary to separate procedural sustainability from the sustainability of the Judiciary, which is also essential, but is much more affected by the Judiciary as a body (almost in a procedural sustainability policy) than in a general sustainability policy.

There have been many discussions on how the Brazilian Courts should be more sustainable. To name a few of these studies, Souza⁴⁹ analysed how sustainability should be a mechanism for social participation and social and environmental management of the Judiciary Branch in Brazil. Similarly, Caldas et al.⁵⁰ studied how both governance and new technologies should represent a paradigm shift towards the sustainability of Brazilian Courts. Finally, in the same direction, Hülse et al.⁵¹ investigated how the resolution of conflicts in the Judiciary should be sustainable.

Barbosa⁵² notes that the fact that the Judiciary is not sustainably managed is not recent, nor is it a specific feature of the Brazilian legal system. However, belated but welcome attempts to change this reality can be observed. An example of this is the creation of the National Council of Labour Justice – CNJT called the Guide for Sustainable Employment of Labour Justice in Brazil,⁵³ in 2014, instituting guidelines for the acquisition of goods, contracting services, engineering works and services, and waste treatment.

Guaragni, Barros and Knoerr⁵⁴ recognise that the Judiciary branch necessarily needs to direct its culture and activities towards a sustainable structure, even as a means of influencing all its members to adopt sustainable daily practices, since there is a significant quantity of waste produced by jurisdictional courts and agents.

The reality is that both the sustainable functioning of the Judiciary and the jurisdictional protection of the environment mean active jurisdiction, not passive, as an instrument that deals with increasingly rapid and serious environmental degradation issues, as reported by Moreira.⁵⁵

⁴⁹ Marcelo Volpato de Souza, “O paradigma da sustentabilidade como mecanismo de participação social e de gestão socioambiental no Poder Judiciário” (Masters diss., Universidade do Vale do Itajaí/Universidade de Alicante, 2017), 10.

⁵⁰ Roberto Correia da Silva Gomes Caldas, Jamile Bergamaschine Mata Diz and Antonio Donizete Ferreira da Silva, “Governança e as novas tecnologias: a sustentabilidade na gestão administrativa do poder judiciário”. *Revista Jurídica*, vol. 1, no. 54 (2019): 364. Accessed May 14, 2021, <http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/3314>.

⁵¹ Levi Hülse, Fabiano Colusso Riberio, Joel Haroldo Baade and Adécio Machado dos Santos, “As práticas do poder judiciário em prol da sustentabilidade na resolução de conflitos”. *Contribuciones a las ciencias sociales*, v. 1, (2018), Accessed June 15, 2021, <https://www.eumed.net/rev/cccss/2018/07/praticas-poder-judiciario.html>.

⁵² Claudia Maria Barbosa, “Reflexões para um judiciário socioambientalmente responsável”, *Revista da Faculdade de Direito UFPR*, no. 48 (2008): 115-116, accessed May 15, 2021, doi: <http://dx.doi.org/10.5380/rfdufpr.v48i0.15744>.

⁵³ Conselho Superior da Justiça do Trabalho, *Guia de contratações sustentáveis da justiça do trabalho/Brasil*, (Brasília: Conselho Superior da Justiça do Trabalho, 2014), 01.

⁵⁴ Fabio Andre Guaragni, Ellen Galliano Barros and Fernando Gustavo Knoerr, “Poder judiciário e meio ambiente: uma gestão judiciária sustentável”, *Revista da Faculdade de Direito da FMP*, vol. 14, no. 1 (2019): 86, accessed June 10, 2021, <https://revistas.fmp.edu.br/index.php/FMP-Revista/article/view/120>.

⁵⁵ Luciana Maria Reis Moreira, “A informatização do processo judicial sob a ótica do desenvolvimento

These are important and necessary dialogues, but they fail to address the connection that can be made, which is not limited to the sustainability of the Judiciary as an organ, or sustainability in the jurisdictional protection of the environment, but to sustainability as a lens through which procedural rules must be systematised, that is, a look at procedural law with the necessary concern with its sustainability.

The proposition under discussion is still a connection between sustainability and the Judiciary Branch, but with a new twist: instead of analysing how the environment should be subjected to jurisdiction, or how courts, as an entrepreneurial model, can be managed in a sustainable way, it should be understood how procedural law, as the ritualistic system through which jurisdiction happens, can be observed under the necessary view of environmental preservation.

In the latest research on this topic, it is proposed to name this paradigm as procedural sustainability. Far beyond discussing the environment for human beings (as in environmental justice) or beyond human beings (as in ecological justice), procedural sustainability is not limited to the legal protection of the environment, or the sustainability of courts as physical locations where jurisdiction happens, which, as described, are also essential, but rather is the understanding that the exercise of jurisdiction in itself should not be harmful to the environment.

The first appropriate warning is that the aim of this proposed concept is not to establish a new dimension of sustainability, but to establish an analysis of procedural law through the lens of sustainability, as one does with several other institutes of human life.

A good example, perhaps the most well-known, of a human institute similarly reviewed through the lens of sustainability is the idea of corporate sustainability, defined by Souza⁵⁶ as a business model in which managers use plans and actions aimed at sustainable management, not limited to the economic-financial dimension, but reaching the other dimensions of sustainability as well. It is, therefore, the concern with the future of the company itself, of other people and companies, and of society as a whole.

Another analysis that is already being carried out through the lens of sustainability is the sustainability of migration, which Piffer⁵⁷ reports as responsible migrations, in an orderly, safe, regular manner, as well as how to translate them into competent, systematic and not-emergency dependent national policies.

Similarly, Flores and Terribile⁵⁸ discuss another social aspect that must be observed through the lens of sustainability, which they call sustainable occupational ethics, stating that, when considering environmental risks, in the sense of environmental agents resulting from decisions in the process of production, the right to health in the work environment needs to be viewed from the perspective of sustainability. It makes it necessary to establish a set of actions aimed at identifying risks, which should be recognised and eliminated through prevention and precaution.

sustentável”, *Revista Direito Ambiental e Sociedade*, vol. 2, no. 1 (2012): 288, accessed June 08, 2021, <http://www.uces.br/etc/revistas/index.php/direitoambiental/article/view/3707>.

⁵⁶ Souza, “Sustentabilidade corporativa”, 257-258.

⁵⁷ Carla Piffer, “Direitos humanos e migrações sustentáveis na Agenda 2030 da ONU”, in *Desafios da sustentabilidade na era tecnológica: a proteção dos direitos humanos*, ed. Liton Lanes Pilau Sobrinho (Itajaí: UNIVALI/UPF, 2018), 65.

⁵⁸ Flores and Terribile, “Meio ambiente e trabalho”, 708.

Freitas⁵⁹ also develops another reality that needs to be observed from the perspective of sustainability, which he calls sustainable hermeneutics, identified, in a short explanation, as “*in semiotic and final terms, the sustainable interpretation endorses reasoned, consistent and far-reaching, fiscally responsible and lucid intervention to encourage innovation without the myth of technological neutrality, as well as eco-efficiency, long-term savings and the end of pollution that sickens and kills legions of creatures*” in the process of interpretation.

What is sought to be reinforced through this paper is something similar. Procedural sustainability, in this direction, would be the submission of procedural law to the imperative conformation of sustainability, in its most diverse dimensions, but especially those exposed: environmental, social, economic, technological, ethical, and legal-political.

The interest on procedural sustainability would be centred on ensuring, at the same time, that jurisdiction does not have an unfeasible or harmful impact on society, which could be identified as the outcome feature of procedural sustainability, and that the functionality of jurisdiction, as in the possibility of obtaining effective jurisdictional protection through lawsuits, will be maintained as far as it is possible in the future, which would be the structural feature of procedural sustainability.

The first aspect, the outcome feature of procedural sustainability, would be a mission of magistrates, lawyers, prosecutors, and parties, who must seek to ensure that the procedural acts are practiced, and decisions are made, considering their impacts on the sustainability dimensions, that is, social, environmental, economic, amongst others.

This debate already occurs occasionally when, for example, the social function of punishment is discussed. Obviously, despite the importance of this aspect, it should never be sought with the bias of modifying reality or true justice, as there will never be factual jurisdiction if the result is not fully fair. That is, procedural sustainability cannot be used to judge an action, mainly for the purpose of seeking “sustainability”, in a way that means that the result is different from what has been effectively proven, according to what happened or what the law states. Furthermore, it cannot be used as a basis to perform procedural acts contrary to or prohibited by law, in the name of environmental, social, economic protection. In any case, any practice in this sense would not be sustainable from an ethical point of view, nor from a legal-political perspective.

What the proposed outcome feature of procedural sustainability requires is that, with procedural or decision-making options for a specific case, the choice should be the one that best meets the dimensions of sustainability. As stated before, this concern already somewhat exists.

Bodnar⁶⁰ echoes this existing concern by stating that, in making decisions, judges must realise that it is the choices of the present that will define the quality of all future forms of life. The decision needs to establish consistent links with the future in the constant and persistent construction of sustainability.

The structural feature of procedural sustainability has to do with the need to establish procedural acts and procedural rules that provide an effective response to conflicts but are also sustainable. It is, therefore, much more linked to those actors responsible for the sources of procedural law, that is, legislators, the courts, in the

⁵⁹ Freitas, “Sustentabilidade: novo prisma hermenêutico”, 951.

⁶⁰ Bodnar, “Os novos caminhos”, 106.

creation of internal regulations or jurisprudence in procedural matters, or even procedural doctrines.

Moreira criticises⁶¹ the current model of procedural law creation on the basis that the traditional way of entering the Judiciary causes many other obstacles to the emergence of a fully effective Judiciary branch, that is, one that is concerned with the environment, with its procedural aspects.

In this sense, Bodnar⁶² explains that, when deciding on an action, judges have an interpretational challenge represented by the fact that their exercise is not a simple subsumption of the fact to the norm anymore, but an intense activity of pondering and building, that is both participative and dialectic, transdisciplinary and preoccupied with its effects and consequences for the future. He concludes by saying that “*new models of management, governance and regulation for the construction of sustainability, with more social inclusion, environmental prudence and respect for fundamental rights, including those of future generations*” are needed, and, for that, a qualified and effective jurisdiction is a condition.

Similarly, Fensterseifer⁶³ warns that the importance of procedural law is fundamental to a system of realisation of rights, because, for instance, it is civil procedural law that must create techniques which are able to guarantee adequate and effective protection of rights, especially those endowed with fundamental legality, but without ever losing sight of its nature as an instrument and the primacy of material law.

Regardless of a previous nomenclature or specific study, the advancement of procedural law in Brazil has, at least implicitly, recognised the necessity of procedural sustainability, or rather, at times, the lack of its existence is notorious, as it will be analysed next.

6. Procedural sustainability in action: perceptions using Brazilian procedure law as inspiration

In Brazilian procedural law, it is possible to establish an initial discourse on procedural sustainability, albeit theoretical.

The 2015 Code of Civil Procedure already includes in its structure of principles the concrete duty of sustainability in the participation of parties in the action, by determining cooperation in Article 6,⁶⁴ good faith in Article 5⁶⁵ and the obligation of the magistrate to conduct the process in a sustainable manner in Article 8.⁶⁶

Therefore, at least in the civil procedure, the outcome feature of procedural sustainability is already somewhat prevalent in the current legislation, even as a result of a constitutional conformation of the process, given the guideline of sustainable development, a fundamental guarantee which combines economic

⁶¹ Moreira, “A informatização do processo”, 285.

⁶² Bodnar, “Os novos caminhos”, 106.

⁶³ Fensterseifer, “Direitos fundamentais”, 245.

⁶⁴ Our translation of Article 6 of Brazilian CPC/15: “All subjects of the process must cooperate with each other to obtain, within a reasonable time, a fair and effective decision on the merits”.

⁶⁵ Our translation of Article 5 of Brazilian CPC/15: “Anyone who participates in the process in any way must behave in good faith.”

⁶⁶ Our translation of Article 8 of Brazilian CPC/15: “When applying the legal system, the judge will meet the social purposes and requirements of the common good, safeguarding and promoting the dignity of the human person and observing proportionality, reasonableness, legality, publicity and efficiency.”

feasibility, environmental responsibility, social justice, legal-political coherence and ethical adequacy for undertakings and public policies, according to Oliveira and Antunes.⁶⁷

The apparent constitutional interest in procedural sustainability was further reinforced by the Constitutional Amendment No. 45/2004, which added to Article 5, item LXXVIII, establishing the reasonable duration of the process, reinforced by Article 4 of CPC/15. Gomes and Ferreira⁶⁸ argue that the aforementioned principle combats the existence of a slow Judiciary, whose occurrence is sadly still observable. For sustainability to exist, the exercise of jurisdiction needs a legal response to its conflict, in a timely manner to produce its effects, so that the interest in dispute is still available and has not deteriorated over time, otherwise the jurisdictional protection would not be adequate nor effective, necessarily meaning there is no sustainability. Also, Gomes and Ferreira⁶⁹ believe the reasonable duration of the process should be read as the legal-political dimension of sustainability, since, without it, there would be no effectiveness of the legal-political dimension and, without this dimension, there is no sustainability.

Likewise, for Freitas,⁷⁰ the reasonable duration of the process is an element of sustainability as it means a “*timely outcome and the best cooperative definition of competences, in a truly dialogical and preferably conciliatory posture, given the limitations of the traditional method of command and control.*”

The current Brazilian civil procedural law also demonstrates concern with procedural sustainability in the system of precedents, with the approximation to common law from the previous sole civil law in Brazil,⁷¹ as this system enables courts to generate interpretation guidelines with some stability, reducing processing time and number of actions, removing the risk of “*legal adventures*” in view of the positions of the courts, especially the supreme courts, already established, according to Antunes and Oliveira.⁷²

Another relevant aspect is the use of technology in procedural law, since, as Boucinhas Filho⁷³ adds, it is a process that brings many benefits to the functioning of processes, as it reduces the use of paper and reduces the contact of civil servants with harmful substances resulting from the archiving of paper, such as mould, and optimises the physical space of jurisdictional units and offices, in addition to reducing public spending on material, personnel and physical spaces for archives, essentially meaning an approximation to the goal of sustainability.

Unfortunately, it is possible to notice, within Brazilian law, that not all procedural branches are as aligned with this sustainability mission. This weakness is especially observable in procedural labour law.

⁶⁷ Antunes and Oliveira, “Sistemática de precedentes”, 619.

⁶⁸ Gomes and Ferreira, “A dimensão jurídico-política”, 102.

⁶⁹ Gomes and Ferreira, “A dimensão jurídico-política”, 106.

⁷⁰ Freitas, “Sustentabilidade: direito ao futuro”, 75.

⁷¹ Magno Federici Gomes and Letícia Alves de Oliveira, “Precedentes no Código de Processo Civil de 2015: obstáculos para seu uso adequado e sustentável”, *Revista Jurídica Cesumar*, vol. 18, no. 2 (2018): 505-506, accessed May 11, 2021, <https://177.129.73.3/index.php/revjuridica/article/view/6438/3262>.

⁷² Antunes and Oliveira, “Sistemática de Precedentes”, 633.

⁷³ Jorge Cavalcanti Boucinhas Filho, “Processo em meio eletrônico e a qualidade de vida de seus usuários”, in *Princípio do processo em meio reticular-eletrônico: fenomenologia, normatividade e aplicação prática*, ed. Cláudio Brandão, coord. Fabiano Coelho de Souza and Maximiliano Pereira de Carvalho (São Paulo: LTr, 2017), 164.

Brazilian procedural labour law is, except for a few and almost inexpressive occurrences, constituted in the Consolidation of Labour Laws, which is a law from 1943. A few changes, similarly, without strong amplitude, occurred in the changing of the years, such as the 2017 Labour Reform, but the marrow and the essence of the labour procedural law remains the same.⁷⁴ Its advanced age undeniably represents a series of weaknesses from the point of view of sustainability.

Clear examples of this weakness are the inexistence of a structure that systematises the rules applicable to the labour process in the specific case⁷⁵ and the main model of access to Labour Justice idealised in the CLT by the principle of *jus postulandi* of the parties provided for in Article 791,⁷⁶ which allows the parties to participate in labour claims without a lawyer.

Schiavi⁷⁷ points out that, even though the tenet system of labour procedural law has adopted principles in an attempt to reduce bureaucracy and simplify labour procedural law, the many changes in Brazilian law make this model of access to the Labour Court unsustainable. Postulatory capacity of the parties is an example of weakness, but many others can be seen, as addressed by Alves.⁷⁸

Another example of structural unsustainability of the labour procedural law comes from the risk of filing labour lawsuits against workers, which, as mentioned by Barros,⁷⁹ makes most labour lawsuits post-dismissal, making the Labour Court eminently indemnifying, which also results, according to Alemão,⁸⁰ in dialogues about the extinction of the Labour Court, the ultimate outcome of a procedural model that most likely does not meet the proposed procedural sustainability standard.

7. Final considerations

This paper aims to analyse the possibility of establishing a new perception of procedural law in line with sustainability, as an innovative paradigm for the connection between jurisdiction and environmental protection, especially in the Brazilian legal system.

To meet this end, a theoretical approach was taken. Firstly, a study was carried out on sustainability, as it is scientifically understood today. Then, the connection between jurisdiction and sustainability was analysed.

⁷⁴ Danilo Scramin Alves, *A teoria geral do direito processual do trabalho: uma análise a partir do acesso à Justiça do Trabalho*, (Rio de Janeiro: Lúmen Juris, 2020), 107-108.

⁷⁵ Rodrigo Cândido Rodrigues, “A decisão judicial como mecanismo de solução de conflitos trabalhistas”, in *Mecanismos de solução de controvérsias trabalhistas nas dimensões nacional e internacional*, ed. Adriana Goulart de Sena Orsini, Flávia de Ávila, Karine Monteiro de Castro Fantini and Nathane Fernandes da Silva (São Paulo: LTr, 2015), 30-31.

⁷⁶ Our translation of Article 791 of Brazilian CLT: “Employees and employers will be able to complain personally to the Labour Court and follow up their complaints until the end.”

⁷⁷ Mauro Schiavi, “Nova leitura dos princípios do direito processual do trabalho” (PhD diss., Pontifícia Universidade Católica de São Paulo, 2012), 107.

⁷⁸ The matter of the parties’ postulatory capacity is an example of fragility, but many others can be perceived. For a more in-depth study of the issue, see Danilo Scramin Alves, *A teoria geral do direito processual do trabalho: uma análise a partir do acesso à Justiça do Trabalho* (Rio de Janeiro: Lúmen Juris, 2020).

⁷⁹ Francisco Henrique Otoni de Barros, “Solução de controvérsias trabalhistas e o MTE”, in *Mecanismos de solução de controvérsias trabalhistas nas dimensões nacional e internacional*, ed. Adriana Goulart de Sena Orsini, Flávia de Ávila, Karine Monteiro de Castro Fantini and Nathane Fernandes da Silva (São Paulo: LTr, 2015), 106.

⁸⁰ Ivan da Costa Alemão, *Justiça do Trabalho: análises críticas* (São Paulo: LTr, 2017), 51.

Next, it was important to separate the idea that was being constructed from the concept of sustainability dimensions, as this was not the desired vision that was being idealised. Having made this distinction, the core concept of procedural sustainability was then sought.

It was defined as the need to view procedural law through the lenses of sustainability. Effectively, this means establishing a legal procedure that understands the importance of cost-effective, environmentally safe, and socially attentive actions when jurisdiction is used.

Two different aspects of procedural sustainability were identified: the outcome feature, a mission of procedural subjects to conduct procedural actions, including the decision, ensuring sustainability, and the structure feature, which is the need for legislators to build procedural norms that are socially, environmentally, economically, ethically, juridically-politically, and technologically sustainable, and also viable and effective for future generations.

Lastly, a discussion on how prevalent procedural sustainability already is in Brazil was carried out. It was possible to conclude that this is already an implicit preoccupation in Brazil, but further advances must be made, both for its recognition as well as for its complete conformation.