

THE ENVIRONMENTAL ISSUE IN BRAZIL: A MATTER OF PRINCIPLES

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Abstract: The current study aims to study the challenges related to Environmental Protection Legal System in Brazil. In fact, although Brazilian legislation concerning environmental protection and reasonable use of natural resources is quite satisfactory in theoretical perspective, the greatest hindrances to nation-wide more efficient environmental protection are the lack of environmental culture and government commitment, which results in insufficient human resources and budgetary provisions to enforce the goals established in legislation. The consequences of such diagnosis is that environmental supervision in the Brazilian Republic occurs mostly at local level and sorely needs of nation-wide enforcement and coordination.

Keywords: Environmental protection in Brazil – Administrative law – Enforcement of constitutional goals.

1. INTRODUCTION

Law professors and lawyers usually say that rights should be taken seriously. Brazil is still constructing a democratic culture based on the respect for the Constitution and the whole legal system. It may seem odd for an American or a European to read this, but in Brazil there is a permanent crisis concerning the concept of authority, often understood as authoritarianism. As a consequence law, as a result of a congressional labor, is permanently ignored or simply disobeyed. In the legal tradition, obedience to the law is the foundation of a truly free and democratic society.

In terms of politics, the Brazilian Republican history presents

an unstable political development with periods of dictatorship and democracy. The political system reflects an unfulfilled gap in civil society which lay down historical roots not yet surpassed indicated by the main events in Brazilian history: the independence and the Republic were proclaimed by the military, acting as tutors of society to 1980. Therefore the main political institutions are not still ready to experience a solid democratic life though society urges reforms on the legal system, the party system, the judiciary system as well the political organization and the performance of the legislative branch of the State. A culture of civil power authority overlapping the military is still being formed.

The role and importance of the Constitution is yet not entirely understood either by society as whole or by the political ruling class as well. After more than twenty five years of democratic life in Brazil, it is possible to say – maybe simply to consider it as a fact - that some parts of the Constitution are respected while others are totally ignored. One of these parts is related to environmental protection. It is necessary to understand that the whole text of the constitution shall be obeyed. DA SILVA says the Constitution does not have useless rules¹. It may seem strange to a European or an American that some people² decide what in the *Charta* is to be obeyed or choose which parts of the Constitution shall be regulated³. From the constitutional perspective, the same behavior binding the people as well as the institutions and the branches of the State can be identified in the respect for the legal system. Otherwise some laws or Constitutional rules simply “*pegam, ou não*” (“they are followed or not”)⁴.

The aim of this paper is to discuss the environmental legal system in Brazil, which is quite complete and well detailed, although menaced

1 DA SILVA, José Afonso. *Direito constitucional positivo*. São Paulo: Saraiva, 2009.

2 Politicians taking part of the Legislative and Executive branches, and sometimes of the Judiciary branch, interpret rules and the Constitution on their personal behalf. Contempt for the Constitution is often present in the corporative world, which explains Brazil as a country with one action in court for every two citizens, i.e half the population is on court for some reason. Sometimes people go to the court only in search of their rights be applied, which could be avoided if the government and corporations observed the law correctly.

3 As an example, the former article 192 of the Constitution which established a Constitutional ‘roof’ for the interest rate in Brazil on 12% yearly. After years being ignored by official banks, official housing system, financial institutions, corporations and etc, the article was suppressed from the Constitution by the amendment 40/29-05-2003. In 2013, without any legislative attempt to reduce the interest rates, the Central Bank (Federal Reserve System) of Brazil reduced the interest rate to 9%. It is important to observe as well that such interferences from the law makers on the financial system are frequent as seen in July 1994 with the real plan when a parity between the real and the dollar as currencies was imposed by an executive act, later converted into law by the Congress.

4 Some lawyers say that depending on the content of the rule it may stick or not, that is, it could achieve people’s respect for the law or the Constitutional command.

by the lack of an environmental culture and a truly commitment of the State to enforce such laws. Despite the apparent consolidation of the democratic project in the Brazilian society, the Constitution of 1988⁵ inspires laws focusing on the protection of the environment though the government lacks an adequate structure for the controlling departments and short budgets to fulfill its task⁶.

From several viewpoints, there are many unsolved issues in the environmental laws and protection policies: lack of structure, budgetary limitations, political shortsightedness, immature on environmental consciousness, lack of public efficiency, and will to apply human and material resources are just some of the main problems related to the nature protection. Furthermore, with a simple observation of the penal law and criminal policies in Brazil it is possible to portrait a terrible but accurate picture of environmental protection in the country⁷.

There is no difficulty on identifying the State as responsible for endeavoring to protect environment and natural resources, by creating official procedures in the pursuit of environmental protection. It is clear that HESSE's concepts⁸ may be applied at this point, due to the well-known resistance of some civil segments of society to accept modernity, development, and the democratic and liberal rule of law, as in Europe and America. The struggle between concrete Constitution and formal Constitution remains and is raged in many fields of law. SKIDMORE's

5 HESSE, Konrad. *A força normativa da constituição*. Porto Alegre: Sergio Fabris, 1997.

6 The Brazilian nationwide daily news O ESTADO DE SÃO PAULO, i.e. *The state of São Paulo*, on an editorial article published on July 14, 2008, entitled *Ecological strip-tease*, reproduces the word of Carlos Minc, then Minister of the Environment. The situation as pictured served as a good example which inspires this paper, as the IBAMA – Brazilian Institute of Environment in charge of the environment protection, has 400 environmental inspectors in the Amazon rain forest (an area with more than 1,9305 million square miles), according to him. The budget of IBAMA for the area at that time was the equivalent of seventeen million dollars, which means that an inspector could not spend more than US\$ 0,10 inspecting every two acres!! Considering the budget it is easy to say that environment is far from being a priority concern for the government. Then and now, priority is only what brings revenue for the State, as taxes do.

7 Nowadays ninety-six per cent of all homicide crimes committed in the land remain unsolved and without punishment, despite continuous protests from society on the last two decades. If life as a fundamental right - as it is established in the fifth article of the Constitution – is disregarded to this extent, why should we expect another approach concerning the environment protection?

8 Konrad Hesse's *The normative force of the constitution*. For him the concrete Constitution was the living power on every society, like armed forces, churches, corporations, political parties etc. The formal Constitution was like a picture of this coexistence of different powers within society living together in the same space with their interests having the state as the battleground for them to clash and try to prevail one over the others in the preservation of these interests. According to Hesse, for one Constitution to endure it is necessary to build a keen correlation between the different powers or factions inside society and the formal text of the Constitution.

studies⁹ can provide a good source of information to understand the background of the Brazilian society.

2. THE CONSTITUTION OF 1988 AND THE NEO-CONSTITUTIONALISM DOCTRINE IT IS ALL ABOUT PRINCIPLES (OR: THE DOMAIN OF PRINCIPLES)

Before reaching the central theme in this paper, it is adequate to elaborate a preview of the constitutional scenery in Brazil in the transitional time from the military period until the new democratic project installed by the Constitution of 1988.

With the end of the military command in 1984, Tancredo Neves' indirect election¹⁰, and the inauguration of President José Sarney, a national assembly was called to elaborate a new Constitution. After a year and a half a democratic Constitution was drafted by the Congress and was proclaimed on October 5, 1988. Innovating the Brazilian constitutional history, the Constitution brings in the first place the fundamental rights, the social rights and then on a second place the organization of the State.

As special characteristics it could be mentioned the end of the rule of legalism - called in Europe positivism thinking - and the influence more intensively of the European Constitutions of the post second world war, with an open display of principles all over the text. According to philosophers of law and constitutionalists, principles are the cutting edge technique created to avoid the Constitution to become outdated by the effects of time. The technique demanded the report of the norm to be open in such a way that the interpreter could build its meaning when necessary accordingly to the time and the values adopted by the society. In so doing the technique allows a permanent flux of input and output of values, information, political changes and conceptions of society that would keep the constitutional text up to date. It was the time of the *neoconstitutionalism* – i. e. new constitutionalism - to be the highest point of the political life in legal society.

The recognition of this new way of thinking came to light few years after the proclamation of the text. From that point on principles were to take an overwhelming position over rules¹¹, so the main goals

9 Thomas Skidmore's book *Brazil: five centuries of change*, *apud* Daibert's paper, p794, footnote 160.

10 Tancredo Neves died a few months after being elected president. His election put an end on twenty years of military government, which began in 1964 with the military revolution happened on march 31. He was not inaugurated President. José Sarney was in charge of continuing the democratic transition and the political agenda.

11 According to Humberto AVILA's book *Teoria dos princípios* – i.e., *Theory of principles*,

of the constitution would be brought into a concrete reality. Dignity of the human being, democracy, freedom, fraternity, welfare, and property would be some of the ideas and values to be pursued by society and by the State as it can be seen in the very opening text of the Constitution, as well as in the first three articles. All these values are legal undetermined concepts which need conceptual framing by the interpreter before being applied. Everyone would feel free to build its own perception and interpretation of the norm which would ground an action and judge an action. And because they are open to various interpretations according to one's values, changeable in time, nothing was predetermined and everything became possible to be pursued. The principles were like – still are - an open gate to achieve such goal on changing society for better.

Based on these new guidelines, the interpreter of the Constitution manages to grasp the desirable meaning of a value inserted on a principle at a specific moment. The Constitution becomes an object of permanent construction and changing – for good and sometimes for bad. Hence the judiciary adopted a more proactive attitude overcoming public administration's natural incapacity of implementing the fundamental and socio-economic rights and principles contained in the *Charta*. More specifically in the financial and budgetary constitutional microsystems a principle emerged as a restraining mechanism, the reserve of possibility. For the State it means the public administration does not deny its constitutional duties, but it acknowledges that they are going to be fulfilled accordingly to the amount of funds hold by the State's treasury in a certain moment, depending of course on the will of the government. Accountants working for the State, central bank technicians and economists now give the final word over the Constitution, deciding which rights would be implemented according to the funds available.

That is why courts can convict the neglecting State, but cannot order it to print money, as they do not master this financial expertise. The controversy is installed in the academic and legal universe and

p. 78: "The rules are norms are immediately descriptive, primarily retrospective and with the pretension of "decidability" (to be decided) and embracement, for which applicability demands the evaluation of correspondence, always centered on the end which gives it support or in principles which are axiologically overlaid, between the conceptual construction of the normative description and the conceptual construction of the facts. The principles are norms immediately finalistic, primarily prospective and with the pretension of complementing and partiality, for which applicability demands an evaluation of the correlation between the state of things to be promoted and the following effects by a behavior taken as necessary to its promotion". Another important reading on principles and environmental protection can be found on the work of Paula Cerski Lavratti, *El derecho ambiental como instrument de gestión del riesgo tecnológico*, pp. 83-106.

citizens watch astonished to the debate. Citizenship as it has been built, based on the fundamental rights, could no longer count on principles to base their claims against the State, because the Judiciary is not able to request the public administration to provide funds where there is none. Politicians cannot be blamed either for deficient conditions left by the predecessor governments, or by economic unfavorable conditions abroad reflecting inside the country¹².

Therefore apparently what emerges as a solution to the issue evolving the enforcement of constitutional culture became distorted in such a way by State lawyers and by some high court judges that the situation returns to the starting point, the stalemate was renewed. So, it is all about a matter of principles, and the will of politicians to make the Constitution a vividly concrete experiment and not a mere letter of intentions¹³. With this brief view of the political major events which has taken place in Brazil on the last thirty years one could easily conclude that the Constitutions have become a theatrical fake to deceive people. It is reasonable to affirm that living under this “reason of the State”¹⁴ in Brazil one should live for centuries in order to find an “astrological merge of ideal factors” – budgetary equilibrium, good will of politicians, environmental consciousness, culture of fundamental rights enforcement – and so the *Charta* being applied harmlessly on a daily basis.

3. ENVIRONMENTAL LAW ENFORCEMENT IN BRAZIL: AN INSIGHT INTO PUBLIC ADMINISTRATION AS THE NATURAL LAW ENFORCER.

Law enforcement in Brazil is related directly with State apparatus, i. e., police forces, State agencies and institutions. Thus a brief retrospective of Brazilian history is needed so the reader can get familiar with the typical difficulties faced by law enforcers and environmentalists¹⁵. Brazil was settled by the Portuguese who ruled the

12 The deception of society came to its climax in June, 2013, when millions of people went to the streets in the main cities of Brazil to protest for better public services, health and education conditions, urban mobility, infrastructure, public security, repelling any attempt to associate the protests with any political party. The protests and rallies lasted for almost three months. Somehow analysts compared the rallies to similar ones occurred in Europe and the Occupy Wall Street movement.

13 As Ferdinand Lassale quoted on his book *The essence of the constitution*, printed in Germany on the end of the XIX century.

14 The French expression ‘*raison d’état*’ comes vividly in mind, as coined by Nicholo Machiavelli in his masterpiece *The prince*, from 1513.

15 This issue was detected by CRAWFORD, Defending public prosecutors and defining

country from April 19, 1500, until its independence on September 7, 1822. The Portuguese empire never raised an efficient administration in the land, but only the minimal structure necessary to protect the colony from other empires' attacks as well as to exploit the natural resources like gold, silver, wood and other plantation goods¹⁶. The independence did not change the frame of the State, which kept the same guidelines as previously applied by the Portuguese, in the field of public administration¹⁷. As long as the land provided wealth to sustain the Brazilian crown, nothing was to be done in a hurry so the country could be modernized. The land had just changed the ruling hands and now was more politically aligned to England, which was interested on the Brazilian market for its industrial goods and banking industry. The Brazilian empire lasted for sixty-seven years, when the Republic was proclaimed by the military on November 15, 1889.

With the Republic proclaimed by the military, the first Republican Constitution came to life in 1891. It opens the cycle of the majority American constitutional influence in Brazil¹⁸. Rui Barbosa was the man in charge of conceiving this Constitution and he put his heart on this job, bringing the Brazilian society nearer the United States of America in terms of political and constitutional organization. However it is widely known by constitutionalists and historians that the very depository of the republican project in Brazil was not on the hands of civil society, but instead on the militaries'. The agricultural and aristocratic ruling

Brazil's environmental "public interest": a review of Lesley McAllister's making law matter: environmental protection and legal institutions in Brazil, p. 619: "Despite the strength of its laws, enforcement remains a problem in Brazil (a point covered more expensively below)". Further, in p. 622-23: "Brazil is a country where, despite an abundance of thoughtful and well-constructed laws, cultural norms and social practice often preclude observance of legal norms". 16 According to DAIBERT's, p. 815: "The colonization era was a mere succession of cycles of overexploitation and exhaustion based on one or two major items. (...). During the centuries of colonial rule, there had been no concern for building institutional capacity, economic development, or social improvement in Brazil, let alone environmental protection".

17 According to DAIBERT's, p. 816: "Independence came also in 1822 but did not mean a true opportunity for the country to build its own political identity. (...). At the time of Brazilian independence, the rural oligarchy was already, for all intents and purposes, the de facto ruling class of the country. Even the urban elite and the bourgeoisie in Brazil were derived from the power of the *latifundiários*". Again, keeping the same line of thinking, at p. 821: "For roughly seventy years following independence, the political, social, and economic situation in Brazil progresses little".

18 This term was marked by North American influence in constitutionalism, but did not mean other constitutional influences were entirely put aside definitely, like French and somehow the first conceptions of German legal concepts and political approaches on state theory. The Brazilian civil code of 1916 was based on the German one of 1900. For more details, see Paes de Andrade e Paulo Bonavides, *História constitucional do Brasil*. 9ª ed. Rio de Janeiro: OAB editora, 2004.

elite until the Republic – favorable for slavery – was then opposing the republican and democratic project, which pursued the aim of modernizing the country in the same way the United States did right after the American civil war in the 1860s.

Anyway, the Republic was not successful in modernizing the public administration under republican and democratic guidelines. Therefore, society could not expect much from a public administration composed by clerks chosen according to political alliances, guided by non democratic and non republican criteria to fulfill proper technical qualifications required to the job. All the following Constitutions failed on this purpose also¹⁹. In terms of the doctrine of administrative law, even under the current Constitution of 1988 the process of modernizing and bringing public services unto a modern conception remains a challenge in a society which lives a permanent struggle between conservative segments contrary to modernization and other favorable and genuinely adherent to the republican project and concept. The 1988 Constitution was clear on establishing criteria for selecting clerks by wide open public exams for all citizens who wish to join the State clerk staff. This criterion, as many other principles firmly established in article 37, try to develop a profound transformation on public administration, by imposing the concepts and republican values of transparency, democracy, efficiency, legality, morality and many others²⁰.

The historical inefficiency of the Brazilian State since independence has never changed – and for this critical analysis the three branches of the state are considered. It was not before the fifties of the XX century that Brazil paid some attention to the environmental issue. Society was underdeveloped and nature protection could not be matter of interest in a country which did not know sophisticated industrial methods, mass production and modernity itself. Furthermore Brazil remained an agricultural society until the late seventies. Although its insertion in the international society of nations was increasing, the inland reality followed a different rhythm. The political frame was unstable since the end of World War II, with the proclamation of the democratic Constitution of 1946 and the Constitutions of the military regime of 1967 and 1969. Only a few years before the restoration of the democratic life in 1982, a bill numbered 6.938/81 was approved by the Congress and considered a very advanced piece of legislation for the time in terms of environmental protection and enforcement²¹, as it still

19 Constitutions of 1934, 1937, 1946, 1967, 1969.

20 Article 37 specifies principles for the public administration on all federative levels, i. e., the Union, states and counties: legality, depersonalization of the public administration, morality, publicity and efficiency.

21 Says DAIBERT in p. 830: “Nevertheless, during the military governments’ rule, a surprising number of laws concerning land, the environment, or both were enacted”.

remains.

The bill n. 6.938/81 creates the PONAMA – Política nacional do meio ambiente, i.e., national environmental policy, indicating the environmental values to be protected, the guidelines, the principles and the courses of action to be adopted and implemented by all levels of the federation; it means that the Union, the states and the counties were to share an equal responsibility according to its both budgetary and administrative capabilities. Reflecting the advance on this issue, says DAIBERT “*In 1985, an executive order created the first Brazilian Ministry of Urban Development and the environment*”²². The law was enacted seven years prior to the current Constitution proclaimed on October 5, 1988. It was the consequence of the main international treaties and conventions have signed by the Brazilian diplomacy concerning international environmental law since the late 1950s. In fact Brazil plays an important role as a player in terms of environment engagement, having participated in almost all international forums in the concert of nations, as noticed by PATRIOTA²³.

Following this tendency of struggling for a better future and the motto which was carved in the souls of the seventies generation on the last century – “*think global act local*” – the Brazilian Constitution of 1988 states in the article 226 the values which are mandatory for the public administrations in all levels²⁴. The article is inserted in a constitutional microsystem of norms and commandments related to the social order organization²⁵. The microsystem itself is inserted in a much wider and broader cosmos of rules, the Constitution itself guided by the opening text and the principles contained in articles 1 to 3. To understand the current view of constitutional law, it is necessary to perceive that a new era for this branch of law has been inaugurated in Brazil, bringing to its soul and heart the predominance of the principles over the rules as a way to keep the Constitution of 1988 open to a permanent flow of input changes and new social values from society. In so doing this new technique leaves the interpreter the task of interpreting the Constitution

22 DAIBERT, p. 835. Aside, the first political party was founded on 1986, the Brazilian Green Party (Daibert, p. 835).

23 PATRIOTA, Antonio de Aguiar. *An introduction to brazilian environmental law*. 40 Geo. Wash. Int'l. Rev 2008-2009. Disponível em <http://docs.law.gwu.edu/stdg/gwilt/PDFs/40-3/40-3-1-Patriola.pdf>. Acessado em 24 de setembro de 2013.

24 Art 225. All have the right to an environment ecologically balanced, good of common use of the people and essential to a healthy quality of life, being imposed to the public authority and community the duty to defend it and preserve it for the present and future generations.

25 The social order in Brazilian Constitution belongs to Title VIII, embracing articles 193 to 232. The title covers a wide spectrum of issues, including social security, education, science and technology, social communication, environment, family, youth, adolescent and elder, and Indians.

– as well as the law – to build the concrete and real meaning of the norm based on a concrete case, which will be considered valid and adopted by society, if confirmed by the courts of law. Though this technique means that too much freedom is required to choose the grounds and to raise a new truth to be followed and observed by the society, the founders of the new republican State started in 1988 established in the first three articles of the Constitution the values which shall be followed in the process of building of new constitutional reality²⁶.

These values represent the commitment of society to maintain the democratic project with freedom, equality, preservation of the private property and the highest one, the dignity of the human being²⁷. The last one indicates for the State a major turn in the history of Brazilian society, which has been characterized by lacking maturity to live and experience a democratic government and the ideal concept of human rights. So, the dignity of the human being is the starting point to fulfill (represent) the will of the constitution all over its text. It has a vital importance on the chapter of the nature protection, because the main guideline is to preserve nature for the present and the future generations, reflecting the intergenerational equilibrium principle.

The Constitution of 1988 is ‘salted’ with (is plenty of) principles throughout the text, which may be and are often used to counterbalance the constitutional rules as well as to perform as hermeneutical vectors, applied for other principles and the rules of the entire legal system as a whole. The ‘*relato da norma*’²⁸ – i.e., the report of the norm – is wide open in the case of principles and closed on the rules. This is why principles tend to have a longer resilience on the ruling reality, in comparison with rules which tend to be put aside by the flow of time due to social transformations. Principles under such new constitutional engineering shall prevail over rules, keeping the way open to get new inputs of the social reality. The Constitution so conceived is kept up to date with the transformations and changes of society in a constant input-output mechanism. In case of principles clashed in a concrete case level, the interpreter had to choose which principle to apply and the technique is based upon the weight the interpreter gives to the interest to prevail in that specific case, valid only for that case. A similar further case may receive another solution by the use of another principle. This construction leaves to the judges and courts the task of measuring the political backgrounds of the cases with the current legal and

26 See arts 1st, 2nd and 3rd of the Brazilian Constitution.

27 The principle of the dignity of the human being was already in the text of the German Constitution of Weimar – 1919. Its first appearance in a Brazilian constitutional document was only sixty-nine years later. Even now the principle is far from being a concrete experience.

28 See BARROSO, Luís Roberto. *Curso de direito constitucional contemporâneo*. 4ª ed. São Paulo: Saraiva, 2013.

constitutional frames in order to decide properly the case. In a certain way similar to the U.S. legal system, one decision will never be the same as another case though of the facts are alike; in effect, Brazil has been adopting the Anglo-Saxon system of judicial precedents, with previous and similar cases directly influencing the decision on a following one. Such conception has been object of criticism, because it represents a bypass in the traditional conception of Brazilian constitutional decision making system.

4. STATE BUDGETARY LIMITATIONS (WHAT?) AND CONSTITUTIONAL HERMENEUTICAL ISSUES

Brazil as a developing country has always had (or: has) budgetary limitations. There are too many goals to be achieved by public administration and an equal amount of political demands from society to be served by limited funds. The creation of a welfare state in Brazil was with the Constitution of 1934, clearly influenced by the social revolutions occurring in the world at that time, such as the Mexican Constitution of Querétaro of 1917, the Soviet Constitution of November 1918 and the Weimar Constitution of august 1919. All the following Constitutions – 1946, 1967, 1969 and the 1988 – either democratic or not kept the compromise of a welfare state in order to reduce the social and economic inequalities in society, at a time when Brazil was predominantly rural. Nevertheless, the country has never been prepared economical or financially to create, to support and to keep definitively a welfare state structure.

With the Constitution of 1988 Brazil tries again to raise a version of a social State following the idea established in the pioneer Constitution of 1934, deeply influenced by the German Social Democratic Constitution of Weimar, signed on August 11, 1919. Therefore, the articles from 6 to 8 establish a vast panorama of social rights to be accomplished by the State and followed by private businessmen, mainly related to labor rights. The Constitution of 1988 was daring in face of the turning point of world history occurred at that time: the fall of the Berlin wall, the decay of communism and the beginning of the collapse of the welfare state in the European states. The neoliberalism thinking was emerging as an overwhelming idea in the western world, deeply shaking political parties compromised with the idea of the welfare state.

The question of equality guaranteed by a State public policy is problematic in a poor society as the Brazilian is. It becomes worse (dramatic) if seriously examined in a State where the public administration is historically ineffective. The cost of all these social fundamental rights are high for both parts – State and market – and despite being obligatory and considered mandatory rules which can

be object of judicial claims²⁹, a limit to these costs has already been reached. It is shameful to recognize that even the fundamental rights of the first generation such as the right to safeguard life and property are not entirely assured by the State, as it can be seen by the high statistics of violence and menace to both personal integrity and property inside the land.

Constitutional authors have to deal with a new issue then, i.e., how to raise a welfare state in a country with a huge budgetary deficit. Without a solid financial stability and having to deal with a remaining inflationary culture, such drain of resources have to be refrained. State lawyers conscious of this dramatic constitutional frame have found a way to contain the money drain and to respect the constitution as well, and the solution is a principle conceived by the German constitutional doctrine, the principle of the reserve of possibility³⁰.

What has been considered as a solution to the lack of State efficiency and mandatory rules in order to build a satisfactory welfare state, the use of principles as a hermeneutical technique puts the legal academic society on a stalemate (at stake). Courts from different ranks now have a door to open (an escape) whenever they are confronted by citizens claiming their social rights, mainly health and education –, because courts do not feel comfortable to intervene in the State budget or during the fiscal year. Nor they want to be blamed for producing a negative number on the budget due to unforeseen expenses by the politicians or public accountants. Anyway, it should be assumed that human rights have no price, otherwise would have to admit the sad reality that the budget could only confirm those rights if the numbers were positive. Then it seems undeniable that social rights are a matter of principles. It depends on which principles we can counting on. It all depends on the *Weltanschauung* of the public administration, its ideological and political grounds and the degree of commitment from the ruling party. If life depends so much on health and education, and if

29 This is the case of education and health, considered by the Constitution as fundamental rights. The Brazilian judiciary system is constantly asked by citizens through civil actions, and sometimes by civil society associations which present their demands on class actions, to provide the right injunction and to convict and to oblige state organs to supply a certain medicine, or even to accept a pupil in a school. In most of the cases the action is not accepted due to the principle of the reserve of the possibility.

30 See the paper of Rafael Sergio Lima de Oliveira and Mario Lucio Garcez Calil presented in the XVII CONPEDI Congress in Brasília-DF, on 2008, describing the origins of the principle at the German constitutional court – in which is named after *Vorbehalt des Möglichen* - in the 1970s and its field of action on the social rights, as following the famous German case *nummerus clausus Entscheidung*. The way this principle was imported to Brazil and how it is being distorted by public administration to avoid the constitutional duties against citizenship clearly portraits the problem of the environmental protection and how to create an aura of credibility concerning environmental law.

they were put aside so easily by such superficial arguments, how could we actually believe that environmental law and protection will deserve a much bigger attention from the State as trees and animals don't have the right to vote.

5. CONCLUSIONS

Nature protection in Brazil does not lack environmental laws. There are plenty of them. The issue lays on the degree of the commitment of the State to enforce environmental laws by providing minimum conditions to competent agencies, especially in terms of human and budgetary resources to uphold the Constitutional provision of environment protection.

It is necessary a more serious attitude towards environmental protection administrative branch, so every citizen and every businessperson knows that breaking the law will no longer be tolerated, specifically those related to nature protection. Fines are a good and reasonable mechanism to give some sort of punishment for polluters, but they should be more effectively enforced and the sum transferred to the State treasury instead of being pardoned, cancelled, or reviewed by higher administrative instances.

Truth to be told, these issues are but the same previously seen on other areas of administrative law, which is the lack of political commitment verified through all levels of the federation to provide enough material and human resources in order to enforce the constitutional goals³¹.

However, considering current standards of general public administration established on Brazilian Federation, one could actually see that central government (Federal Union) still lacks of institutional and political resources to establish comprehensive environmental projects on a national level. In sum, given the lack of material and institutional (but not legal) provisions at federal level, a "bottom-up" approach of environmental supervision has been established so far, since only local authorities (counties or *Municípios*) have both human and budgetary resources available to enforce environmental supervision.

Therefore, it is clear that all kind of civil servers and especially politicians (as law-makers) must urgently be aware of these grave problems related to environmental cause. In fact, it would be truly advisable to create a completely new branch of Brazilian public

31 See CRAWFORD, p. 623, apud McALLISTER: "Environmental agencies tend to be weak both in terms of their resources and their power to coerce compliance". CRAWFORD, p. 623: "By contrast, at the state level, again as in the United States, the resources for environmental enforcement at the agency level vary greatly", reporting an advance in the agenda in Brazil in the 1980s and 1990, but shortages in resources.

administration, directly related to the Environmental protection and enjoying of a higher degree of constitutional accountability in such a way to finally and properly address environmental issues on a national level.

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