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Tension between enviromenment and private property under the contemporary constitutional hermeneutics

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ABSTRACT

The aim of this paper is to investigate how the Supreme Federal Court has faced the challenges of sustainability, particularly the tension between the right to an ecologically balanced environment and the institution of private property, evaluating if a "new" constitutional hermeneutics has been being constructed in the process. Until recently, the Constitution was being interpreted through the same methods and criteria applied by traditional Civil law. Recently, authors like Friedrich Müller, Konrad Hesse and Peter Häberle began to devote themselves to the study of the specifications of the Constitution in pursuit of interpretive methods that would enable the realization of its normative force. In the ideas of these authors, the present article sought theoretical basement to conduct analytical research on the decisions of the Supreme Federal Court which show the conflicts between ecologically balanced environment and property, seeking to discern whether it is being built on the SFC a new constitutional hermeneutics.

KEY-WORDS: hermeneutics; Constitution; sustainability.

A tensão entre meio ambiente e propriedade privada à luz da hermenêutica constitucional contemporânea

RESUMO

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O objetivo deste artigo é investigar como o Supremo Tribunal Federal vem enfrentando os desafios da sustentabilidade, em especial a tensão entre o direito ao meio ambiente ecologicamente equilibrado e o instituto da propriedade privada, verificando se neste processo vem sendo construída uma "nova" hermenêutica constitucional. Até há pouco tempo, a interpretação da Constituição ocorria pelos mesmos métodos e critérios tradicionais do Direito Civil. Recentemente, autores como Friedrich Müller, Konrad Hesse e Peter Häberle passaram a dedicar-se ao estudo das especificidades da Constituição, na busca de métodos interpretativos que possibilitassem a concretização de sua força normativa. Nas idéias destes autores o presente trabalho buscou o referencial teórico para a realização de pesquisa consubstanciada na análise de decisões do Supremo Tribunal Federal que evidenciam o conflito entre meio ambiente ecologicamente equilibrado e propriedade, procurando vislumbrar se está sendo construída no âmbito do STF uma nova hermenêutica constitucional.

PALAVRAS-CHAVE: hermenêutica; Constituição; sustentabilidade.

1 INTRODUCTION

The aim of this paper is to investigate how the Supreme Federal Court has faced the challenges of sustainability, particularly the tension between the right to an ecologically balanced environment and the institution of private property, evaluating if a "new" constitutional hermeneutics has been being constructed in the process. The phenomenon of constitutionalization brought evident consequences to private law, and property is perhaps one of the institutes of civil law that best expresses this phenomenon.

German scholars are at the forefront for the formation of a specific hermeneutics to constitutional interpretation, although this is a matter that is still being developed. Until recently, the Constitution was being interpreted through the same methods and criteria applied by traditional Civil law. Recently, authors like Friedrich Müller, Konrad Hesse and Peter Häberle began to devote themselves to the study of the specifications of the Constitution in pursuit of interpretive methods that would enable the realization of its normative force.

In the ideas of these authors, the present article sought theoretical basement to conduct analytical research on the decisions of the Supreme Federal Court, which show the conflicts between ecologically balanced environment and property, seeking to discern whether it is being built on the SFC a new constitutional hermeneutics.

2 TRADITIONAL HERMENEUTICS

The word hermeneutics has its origin in God Hermes, from Greek mythology, who acted as an intermediary between the gods who inhabited the Olympus and men (FERRAZ, 2003, p. 23). Mediation between the Word of God made manifest in the biblical texts and human knowledge, was the task of which hermeneutics was responsible for at its origin. The hermeneutic method was therefore created aiming to study the biblical texts. By the second and third centuries, as pointed Peixinho (2003, p.2) the patristic exegesis put the hermeneutical problem from two angles: the School of Antioch, which consecrated the literal interpretation, and the School of Alexandria, which "sought to achieve a higher spiritual sense in a symbolic-allegorical exhibition"(PALMER, 1986, p. 6).

Luther revolutionized theological hermeneutics in preaching the Christian could have a direct knowledge of the Bible, without the intervention of the church. In a way, this event, which is a landmark at beginning of modernity, has similarities with the latest movement sponsored by Peter Häberle (1997, p.9), in the sense that "whoever lives the Constitution is its legitimate interpreter". Luther (2000, p.27) advocated the democratization of the Word of God to which should have free access everyone who wanted to learn it. Häberle defends the legitimacy of whoever lives the norm to interpret it (Wer die Norm "lebt" interpretiert sie auch (mit) (Häberle, 1997, p. 13).

The legal hermeneutics, in turn, has always been linked to the interpretation of law. Among the classical methods of interpretation of law, stands out the exegetical school, originated form the French Revolution (1789-1799) and from the Napoleonic Code (1844), which intended itself to be complete, repository of predictions about all the possibilities of human conduct.

The Napoleonic Code represented the rising interests of a bourgeoisie who, holder of the economic power, needed to protect its assets against the privileges and the power of the nobility. That is why the vocation of the Code was patrimonial, serving to protect the private property of a character: male, white, married, owner of assets.

The rise of the bourgeoisie brought, however, as a counterpoint, the formation of a mass of workers which constituted the work force of the industrialization process that occurred in the nineteenth century Europe and, with it, it became apparent that they were excluded from the ideals of equality, liberty and fraternity that had inspired the French Revolution, and that until today make up the liberal ideals[2]. As asserted Marx (1848, p. 2), "a specter haunted Europe": the discontent of the working class at their exclusion from goods and services that the liberal state had reserved for the bourgeoisie.

This scenario provided the rise of the "Free School of Law", which had among its precursors Rudolf Von Jhering (2009, p.25), whose thoughts reserved to judges the possibility of interpreting laws taking into consideration the social purpose of Law[3]. François Gény, in France, added to analogy and customs - to which one resorts when facing legislative omission, the possibility of using the free scientific research to solve

[2]At this point, it is inevitable to remember the reflection of HABERMAS, in the sense that the ideals of equality, liberty and fraternity are yet to be realized. In fact, the formal equality no longer meets complaints of a society in which it is whooping the number of people excluded from existential assets minimally necessary for a dignified existence. The project of modernity, therefore, is still unfinished. Hence, we must learn "from the mistakes that accompany the project" (HABERMAS 1992, p.118).

[3] Ihering says that "the right considered as final cause, placed amidst the chaotic gear of purposes, aspirations, human interests", does not take place automatically, "must constantly yearn and strive to find the best way and strike down all existence that imposes barriers. "(2009, p.29). He defends the necessity of the struggle for the realization of justice, which is not given by inertia, but by the constant activity in its pursuit.

issues not covered by the law. In Germany, Herman Kantorowicz went further by publishing in 1906 "The Struggle for the Science of Law," in which he defended the freedom of the judge to decide even *contra legem* (against the law), but always in favor of justice (MONTORO, 1993, p.378).

Social movements sponsored by workers brought to light the appalling conditions they were subject to, which led to the idea that the state should no longer be mere warrantor of individual rights tied to the non state intervention: the rights to freedom. It was necessary that the state started to promote conditions of proletariat access to goods essential to life, such as health, education, security and decent work, thereby ensuring the "social welfare". It is the Welfare State doctrine, which acquired strength especially in the second half of the twentieth century, after World War II, when the repugnance toward the horrors practiced then led to an environment propitious to the discussion of rights that would be fundamental, inherent to he human being, regardless of their ethnicity, religious beliefs or economic status.

“Human rights" became part of the international agenda and hit the streets, which led to the reversal of values in force until then. The Constitution served as a vector to this movement, no longer seen as a mere repository of "programmatic rules", designed for the State; its content started to conquer ruling force, including the citizen among its recipients. The Code lost its strength due to the complexity of social and economic issues in the twentieth century, which led to the creation of legislative micro-systems (Statute of the Child and the Adolescent, Code of Consumer Protection, City Statute, etc.).

Women gained the right to vote, and burned bras in public squares, claiming equal rights in the material dimension [4]. As a result of the sacrifice of thousands of women's

[4] The right to vote was acquired by women in Portugal in 1911. In Brazil, in 1928, the Governor of the State of Rio Grande do Norte authorized the female vote locally. There are records of women who voted through an application to the Electoral Judge, or having obtained judicial authorization. But the right to vote was only implemented with the Decree. 21,076, of February 24, 1932, which established the Brazilian Electoral Code which predicted as voter the citizen with over 21 years old, regardless of gender, listed in the form of the code (ALVES, 1980, p.32).

lives, man ceased to be the central character of legal protection, giving way to the human person.

Private property was no longer seen as an absolute right, and now has to comply with its social function, recovering the concern with the "common good" referred to by Aristotle [5]. This was the scenario in which the Constitution migrated from the supporting position in the legal system, starting to occupy the center from which gravitate all other pieces of legislation. From these facts, there was the rise of hermeneutics in the field of constitutional law, breaking legal positivism, which hampered the consideration of principles and values that are present in the structure of the Constitution.

3 NEW HERMENEUTICS: FOR THE CONCRETENESS OF THE CONSTITUTION

Among the different possibilities for constitutional interpretation, as the integrative method and the topic method[6], this article will highlight the method known as "hermeneutic concretizing", developed by Friedrich Müller, Konrad Hesse and Peter

[5] The doctrine of human rights regained the discussion of natural law concerning what is reasonable or not, what is legal and what is right, and the existence of a "natural right." This debate is present in the thinking of classical authors such as Aristotle, Plato, Hobbes, Locke and Rousseau. These authors are reproduced here under a contemporary perspective, in which is discussed the need even of a "new social contract", appropriated to the environmental requirements of this new century.

[6] The integrative method had the exponent Rudolf Smend, whose conception, according to Bonavides (1994, p. 436) "is pioneer systemic and spiritualist: sees in the Constitution a set of distinct integrative factors with varying degrees of legitimacy. These factors are the key part of the system, as is the territory its most concrete part". The topic method, as highlights Peixinho, "presupposes some fundamental assumptions (practical character, openness, and preference for discussion), with the primary objective to provide, through a process of reasoning, the pluralism of interpreters and the adequacy of the rule to the specific case." Theodor Viehweg is pointed as a pioneer in the design of this method, whose premises are partly incorporated by Müller, Hesse and Peter Häberle. The difference between topical and implementation, however, is that the first abandons the connection to the rule, since the interpretation is made by means of *topois* (points of view), while the concretizing method instead recovers the rule priority, starting from this to the specific case.

Häberle, who drew attention to the limitations arising from the traditional hermeneutics, which focus part of the rule to promote adaptation to the specific case through subsumption.

Müller takes into account the actual result of the implementation of the rule, defending the idea that the legal rule does not identify itself with its text, but is the result of a construction work. The rule is not, therefore, the starting point of concretization, but rather the point of arrival. Rule and reality integrate the same hermeneutical process, as opposed to the separation proposed by the traditional syllogism. (Müller, 1995, p. 13:14).

To Müller's ideas came to add those of Konrad Hesse; both denounced the lack of neutrality of the rule, since the interpretative activity always involves the subject who interprets: its history, its customs, its values. Every interpretation presupposes, therefore, the pre-understanding of the interpreter. For Hesse (1991, p.22), the rule only "happens" when interpreted, the process of constitutional interpretation must seek strength in the facts of life in order to achieve "the great achievement of the rule" ("Gebot optimaler Verklichung der Norm ").

The theory of constitutional interpretation according to Häberle (1997, p.11) until then developed itself around two key issues: i) the question about the tasks and objectives of the interpretation, and ii) the question of the methods (the process of constitutional interpretation). Peter Häberle brings forth a new question concerning "iii) who are the participants of interpretation." He proposes a transition from what he called "the closed society of the interpreters of the Constitution" for and to an "open society", stating the following

> A constitutional theory that is conceived as a science of experience should be able to decisively explain the specific groups of people and the factors that make up the public space (*Öffentlichkeit*), the kind of reality that it deals with, the way it acts over time, the existing possibilities and needs. (HABERLË, 1997, p. 19)

In Brazil, it has been remarkable the influence of Häberle to the new constitutional interpretation, which can be perceived through the constant references in the Academy to the need of pluralism in the interpretation. But it is the role of the Supreme Federal Court that the influence of Häberle is more present, in the extension of mechanisms for opening the constitutional process to the plurality of subjects, among which stands out the figure of the *Amicus Curiae*[7]. It is pertinent to verify, in this scenario, if there is influence of Häberle's thinking also with regard to the content of discussions made in proceedings under the jurisdiction of the Supreme Court. This is what will be showed following.

4 THE SFC AND THE CHALLENGES OF SUSTAINABILITY

In this section, the proposal is to investigate how the Supreme Federal Court has managed the challenges of sustainability and, in particular, the tension between private property and the environment. In this framework, we intend to verify that it is being built a new constitutional hermeneutics. For doing so, it is sought the influence of Peter Häberle's thinking in the content of decisions and discussions made in the SFC, followed, for that matter, the following paths: 4.1. search for express references to author's name by the Ministers of SFC; 4.2. analysis of the decisions that deal with the themes of "environment - private property."

4.1 THE OPEN SOCIETY OF INTERPRETERS

When entering the SFC website, by clicking the link jurisprudence, and then the word "search", it will open a screen titled "search of case law." By typing the name of

[7] Law 9.868/99, in its Article 7, paragraph 2, allows the Constitutional Court to admit the intervention in the process of agencies or entities, called *amici curiae*, to enable them to express an opinion on the constitutional issue that is being discussed by the SFC.

Peter Häberle, it can be found 46 documents, of which are highlight two in order to illustrate the influence of the new hermeneutics proposed by Häberle concerning environmental protection[8].

The first document pointed at the research concerns the judgment of the Direct Unconstitutionality Action (ADI 4029 / AM - AMAZONAS), proposed by the NATIONAL ASSOCIATION OF IBAMA SERVANTS - NATIONAL ASIBAMA. The defendants are the PRESIDENT and CONGRESS OF THE REPUBLIC. The applicant alleged, in summary, that the Provisional Executive Order that gave rise to the law that creates the Chico Mendes Institute was not examined by the Joint Committee of Deputies and Senators referred to in art. 62, §9, of the Constitution, and therefore would be unconstitutional under the formal point of view.

On the material side, the unconstitutionality would be present by the violation of Article 225 of the Federal Constitution, heading and §1, for the creation of the Chico Mendes Institute for Biodiversity Conservation (ICMBio) would weaken the protection of ecologically balanced environment, fragmenting the integrated environmental management and fractionating and reducing the executing agency for the National Environmental System (SISNAMA). According to the proponent of the action, it would be unnecessary to create a new autarchy as it already exists another entity , IBAMA, which performs similar functions, and can be reached more quickly in granting environmental licenses by changing the legal procedure. Also being violated, would be the principle of efficiency, since the creation of the ICMBio would result in increased public spending, with no offsetting improvement in environmental protection.

But the aspect that interests the objectives of this study relates to the debate about the illegitimacy of the Association for the bringing of the action, which was raised by the Attorney General's Office, arguing that the applicant had not proven itself to be an association nationwide, in addition to assembling only a small portion of the federal

[8] The selection criteria for the two trials highlighted in this section was the relevance to the objectives set for the research.

public servants of careers that not even have original identity in the *Magna Carta*, lacking, thus, representativeness.

Justice Luiz Fux, when analyzing the active legitimacy *ad causam*, said the new regime of the 1988 Constitution, when establishing a broad list of legitimated for the proposition of the direct unconstitutionality action, valued the opening of channels for democratic participation in discussions by the Judiciary, "collimating to establish what Häberle defined as open society of constitutional interpreters." Fux said that the German author stressed the importance that the constitutional debate be done amid plural interlocutors . On page 11 of the minutes of the trial it appears that the Justice came to explicitly cite the following passage from the Häberle:

> The theory of constitutional interpretation was closely linked to a model of interpretation by a "closed society." It reduces also its scope of investigation, by focusing primarily in the constitutional interpretation by judges and formalized procedures. The strict correspondence between attachment (to the Constitution) and legitimation for the interpretation, however, lose its power of expression when considering the new knowledge concerning the theory of interpretation: interpretation is an open process. It is not, therefore, a process of passive submission, nor to be confused with the reception of an order. Interpretation knows several possibilities and alternatives. The link becomes freedom as it recognizes that the new hermeneutic orientation can counter the ideology of subsumption. The widening of the circle of interpreters here sustained is only the consequence of the need, defended by everyone, for the integration of reality in the process of interpretation. It is that interpreters in a broader sense compose this pluralistic reality. If one recognizes that the rule is not a prior decision, simple and finished, it must inquire about the participants in their functional development, on the active forces of law in public action (...).

This passage quoted by Justice Fux exemplifies the influence of a new constitutional hermeneutics in the Supreme Federal Court's way of thinking, with regard to environmental protection, in that the civil society assumes relevance as an interpreter of the Constitution. Fux states that it would be wickedly undemocratic "to deviate the popular participation of this process of transformation of the axiological into the

deontological," noting that the court today, "the manifestation of organized civil society gained an important role in the Brazilian constitutional jurisdiction."

It is important to note that the vote also informs that Justice Gilmar Mendes, in joint work with Ives Gandra, reported that until February 2008 were extinct by active illegitimacy of class one hundred fifty-four direct unconstitutionality actions, which reveals a mismatch between "the democratic aspirations of the Constitution and the rigor of the Exalted Praetorium". Thus, the position of the SFC to recognize the legitimacy of ASIBAMA for filing the Direct Action is a demonstration that the new constitutional hermeneutics is changing the winds that blow in that Court.

Also worth mentioning is the excerpt from Justice Ayres Britto's vote, which is on page thirty-nine of the minutes of the trial, which adds the following:

> And in terms of the environment, I tend to think that everything is urgent and everything is relevant for the qualification made for the environment by the Federal Constitution, as expressed in Article 225, saying that the environment is a right - ecologically balanced, of course - of all, it is "asset of common use by the people and essential to a healthy quality due."
> That is, the environment is a concept now twinned with public health, health of each individual, healthy quality of life, says the Constitution, that's why I'm talking about health, and today we all know that it is imbricated, conceptually twinned with development itself. If we used to said before that the environment is consistent with the development, today we say, from the Constitution, technically, there can not be development but with an ecologically balanced environment. The twinning of the concept seems of technical accuracy, because jumps out of the Federal Constitution. And the fact that there is already IBAMA does not prevent the President of the Republic, using the powers also constitutionally based, to create another autarchy, a foundation, an entity also specialized in management, in the design, the administration of the environment.

This vote is important for demonstrating the relevance that environment protection is reaching in the discussions within the Supreme Court, adding a new interpretative bias, claiming guardianship of urgency when it comes to environmental matters. When the

environment conflicts with private property, both cases of fundamental rights, what is the position of the Supreme Court? This subject is to be discussed further in the next section.

4.2 TENSION BETWEEN ENVIROMENT AND PRIVATE PROPERTY

In order to fulfill the objective of this article in verifying the tension between environment and private property in the debates of the Supreme Court, it moved to the second stage of the research on the SFC website, by clicking the link jurisprudence, and then the word "search", it will open the screen titled "search of case law." Typing "environment private property," the result consisted of six documents, which were read and analyzed[9]. In this article, three cases are noteworthy for they guard greatest relation to the objectives of the proposed research. They are:

4.2.1 CONFLICT OF INTERESTS: INDIVUDAL X COLLECTIVE

[9] Of the six trials indicated in the research, the first is the MS 25284/DF highlighted in this article. As for the other five what was found follows: 1. In RE 349191/TO, the Appellant raises the incompetence of the state court for the judgment of environmental crimes. The appeal was not recognized, keeping the condemnation by the state courts. 2. ADI 2213 MC/DF, is about the presidential abuse in the indiscriminate and contumacious issuing of provisional measures and, although it touches the social function of the property when discussing the land issue and the agrarian reform, it does not debate the environmental issue and therefore did not deserve prominence in this research. 3. ADI 2396 MC/MS, proposed by the Government of Goiás against the State Law 2.210/01 through which the State of Mato Grosso do Sul restricts the production and trade of asbestos chrysotile kind, despite federal law allowing the use of this particular asbestos. Injunction was granted by Justice Ellen Gracie, subsequently confirmed. The decision, on the merits, was unfavorable to the environment, because asbestos is highly polluting, but the SFC recently revised its position, placing the environmental interest above the formal issue and, therefore, this matter is highlighted in this article topic itself. 4. MS 22164/SP: deals with expropriation as a sanction for noncompliance with social function, and involves the implementation of a project of environmental interest. The decision was favorable to the owner on the grounds that he was not personally notified of some procedural acts, thus occurring violation of due process. This injunction is relevant to the research, but it was also pointed out in the third step that specifically investigated the case of the wetland, and therefore, is detailed in section 4.3. this article. 5. RE 134597/SP, in which the owner claims compensation due to the expropriation for environmental purposes also deserves further comment.

The first trial indicated by the research, the Injunction MS 25284 / DF - DISTRITO FEDERAL effectively illustrates the tension between private property and the environment. In this injunction, the SFC understood that, being in conflict the individual interest (private property) and the collective (environment, since the impugned act is the creation of an environmental reserve), the latter shall prevail. The core of the matter revolves around the creation of forest reserves which, according to the authority against which the injunction was filled, aimed to protect the environmental interests and also the twenty-two thousand riverside dweller of Port Moz, against the massive deforestation promoted by loggers and "speculators from various regiões "as it reads on page 4 of the minutes of the trial. The report highlighted the broad democratic participation of the community in public consultations.

Justice Marco Aurélio was the rapporteur of the trial, and in his vote, said that "property protection does not outweigh the common interest," and that "the property, of clear individual character, is not an absolute right" and is subject to a greater value present: the collective interest. The order was denied by unanimous judgment of the SFC, demonstrating that the tension between environment and private property was decided with the prevalence of environmental interest.

The weight that popular participation achieved in the debate at the trial session was evident, as the Rapporteur made a point of noting that the Minister of Environment, Marina Silva the time, "reported to the local population, which was organized as an association and was supported by environmentalists and local religious figures, demanding the creation of the reserve". This shows that the theory of the open society of interpreters of the Constitution thrived at the time the constitutional jurisdiction provided the last word on the interpretation. According to Häberle (1997, p.14) "it is unthinkable an interpretation of the Constitution without the active citizen." Aresto This shows that the active citizen in Brazil has been present in the minds of Supreme Court Justices.

4.2.2 THE (UN) SUITABILITY OF COMPENSATION IN EXPROPRIATIONS FOR ENVIRONMENTAL INTEREST

The most recent decision pointed out in the research concerns the Extraordinary Appeal RE 134597/SP, in which the state of São Paulo appealed against the decision of the São Paulo Court of Justice that compelled the state to pay compensation to the owner victimized by an expropriation for the creation of the Juréia-Itatins Ecologic Station, designed to safeguard the integrity of ecosystems and the local flora and fauna.

The property in question is located in the Serra do Mar, declared by paragraph 4º of article 225 as "national heritage" and that, according to the state of São Paulo, implies that "the right of property was already born scanty", being unsuitable to claim compensation on the grounds that it does not motivate greater activity. The Supreme Court, however, considered by the unsuitability of the thesis sustained by the Applicant, in the sense that the properties located in the Serra do Mar can not be compensated in the event of expropriation or administrative possession.

The SFC acknowledged the "sensitive economic emptying" of the property right of the Defendants, and kept the entire compensation. Antonio Herman Benjamin (2011), which is currently a Justice in the Superior Justice Court, offers an interesting counterpoint in a doctrinal framework:

> The decomposers found out that, instead of carrying direct acts of disrespect against the existing environmental rules, was easier and more lucrative to despoil the environment simply by brandishing their *property rights*, making use of the technique - at the most absolutely legitimate - *of indirect expropriation.* Around this matrix of pathological behavior, it is estimated that only the state of São Paulo has already been sentenced to more than *2 billion dollars*, an amount that would certainly be enough to acquire, at market prices, much of the conservation units in Brazil! Why and how did we get to this extreme of disregarding for public patrimony (financial and environmental)? What were the material, human and regulatory conditions that enabled the captious use (in some cases, truly criminal) of legal institutions as important as the right to property and the indirect expropriation?

The alert by Herman Benjamin highlights the complexity of the issue. Indeed, the combined interpretation of articles 5, XXIII, 170, III, 182, paragraphs 2 and 4, 184 and 186 of the Federal Constitution, leaves no doubt as to that the social function is a part of property, and not just limits it. The social function is a property, and not something external to the property right. Once unfulfilled the social function, the right to property will be emptied. What is questioned, however, is the content of this social function.

In the case of the areas whose need for environmental protection was highlighted by the Constitution itself, it is plausible that the individual demand from the state (and, ultimately, from the rest of the community) compensation, due to the limitations on the economic result of the exercise of their right to property imposed by the Government in defense of environmental interest, which belongs to present and future generations?

This question remains to be answered, despite the position of the SFC in the trial of the RE 134597/SP. Perhaps in the near future, the Exalted Praetorium will review its understanding, adopting a position even more effective in protecting the environment and the public interest, as in the case of the direct unconstitutionality actions which were related to asbestos, as will be detailed in the next section.

4.2.3 THE ASBESTOS ISSUE

The research using the entries "environment private property" pointed out as one of the six outcomes, the direct unconstitutionality action (ADI) - ADI 2396 MC/MS, proposed by the Governor of Goiás, which rebelled against the State Law 2.210/01, through which the state of Mato Grosso do Sul restricted the production and trade of asbestos in its chrysotile kind. As the Federal Law 9055, from 1st. June 1995, allows the use of this specific kind of asbestos, Justice Ellen Gracie understood that the state of Mato Grosso do Sul could not have invaded the sphere of competence of the Union,

which is why the injunction was granted in favor of Governor of Goiás, suspending the articles of State Law 2.210/01 which restricted the use and transport of asbestos.

The Supreme Federal Court has been facing several actions on the production, marketing, transportation, or simply the use of Asbestos[10]. Therefore, this research collated the ADI 2396 MC/MS with other actions that deal with the same subject. It was found that it was common to grant injunctions against state laws that restricted the use, trade and transport of asbestos. This is what happened in the Injunction in Direct Unconstitutionality Action 3937 MC/SP-São Paulo[11], in which the National Confederation of Industry Workers - NCIT, argued the unconstitutionality of Law 12,684, July 26, 2007, of State of São Paulo, that "prohibits the use, in the State of São Paulo, of products, materials or goods containing any type of amianthus or asbestos, or other materials that accidentally have asbestos fibers in its composition." The Rapporteur was Justice Marco Aurélio, who upheld the cautionary measure to suspend the Law 12.684 of the state of São Paulo, until the final decision of the direct unconstitutionality action.

The other Supreme Federal Court Justices, however, denied the injunction granted by the Rapporteur, maintaining the effectiveness of the law of the State of São Paulo, which prohibits the use of asbestos. This decision was extremely important because it changed completely the position that the Supreme Federal Court had been adopting, in that it would be unconstitutional the state laws that prohibited the use of asbestos, for

[10] The issue of Asbestos was also discussed by the SFC in the case of the Direct Unconstitutionality Actions numbered 2.656-9/SP and 2.396/MS.

[11] The menu and the full content of the judgment are available on the SFC website at the following address: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=553763, accessed March 17, 2012. In this decision, the SFC reviews the understanding that fortifies the validity of Federal Law. 9055, 1st. June 1995. This law prohibited the use of asbestos in national soil , but in a specific article excepted of that ban the use of asbestos "chrysotile" kind. In other words, in practice the Federal Law would eventually "authorize" the use of chrysotile. That being so, states could not ban it, otherwise they would be invading the sphere of legislative competence of the Union. States, however, started adopting laws more restrictive than the federal law prohibiting statewide the use of any kind of asbestos, including chrysotile. By the time of this trial, prevailed the discussion around legislative competences, which favored asbestos manufacturers, to the detriment of the environment.

contradicting the Federal Law. 9055, 1st. June 1995. The understanding was that the competence of the Federal Government to legislate on the matter deviated the ability of states to do so and therefore on previous actions, the SFC did not even penetrate the merits, quashing processes without trial on the merits.

In his vote, Justice Joaquim Barbosa recalled that six direct unconstitutionality actions proposed by the National Confederation of Industry Workers (NCIT) against state laws that deal with asbestos are pending trial in the Supreme Federal Court. According to the Justice "most varieties of asbestos is already banned in Brazil." Federal Law 9055, 1st. June 1995, authorizes the use of a kind of asbestos called "chrysotile". The question to ask in these direct unconstitutionality actions is the disrespect of states for that legislative authorization conferred by the Union to this kind of asbestos.

The authorization of the use of asbestos chrysotile kind had already been recognized by the SFC in the judgments of two direct unconstitutionality actions (ADI): the ADI 2396 MC/MS indicated at the beginning of this topic, in which was Rapporteur Justice Ellen Grace, and ADI 2656, in which was Rapporteur Justice Mauricio Correa. In both, the SFC understood that it should move away from the discussion on the harmful effects of chrysotile asbestos to health and the environment, due to a issue that precedes the merit: the Federal Law 9.055/95 is a general rule which excludes the impact of state laws.

In the Injunction in Direct Unconstitutionality Action 3937 MC/SP - São Paulo, however, Justice Joaquim Barbosa decided to study thoroughly the topic, convincing himself of the evil consequences of the use of asbestos to health and the environment. He took into account the fact that the National Council of the Environment-CONAMA in 2004 had recognized the lack of safe limits for human exposure to asbestos, according to the criteria adopted by the World Health Organization The arguments presented by Justice Joaquim Barbosa impressed his peers, including Justice Cesar Peluso, who accompanied him in his decision.

It also was decisive in changing the position which had been previously adopted by the SFC, and which favored the use of asbestos, the explicit recognition of Justice Eros Grau that he was wrong in the judgment of past actions, when he gave his vote because "the matter can not be examined solely from the formal perspective". The federal law in this case, according to the Justice, "clashes with the Constitution, when admitting the use of on kind of asbestos", also as understood Justice Carlos Britto [12]:

> So that, resuming Justice Joaquim Barbosa's speech, the state rule, in this case, fulfills much more the Constitution in this plan of health protection or to avoid risks to human health, to the general population and to the environment.
> State law is much closer to constitutional designs and therefore performs better this high principle of maximum effectiveness of the Constitution on fundamental rights (...)
> And, as we are in seat of precaution, there are two principles that advise against the **referendum** to the injunction: the precaution principle, which seeks to prevent risks or damages to the environment for present generations, and the prevention principle, which serves the same purpose for future generations.

This beautiful excerpt of Justice Carlos Britto's vote reveals that the principles of environmental law have been illuminating the mentality prevailing in the Supreme Court, surpassing the formalism that serves the law but not justice. It is a powerful example about the construction of a new hermeneutics that seeks the will of the Constitution, through new techniques and parameters, among which those identified by Barroso (2010, p.312):

> In this scenario, the ponderation of rules, assets or values is the technique to be used by the interpreter, through which he or she (i) *will make reciprocal concessions*, trying to preserve as much as possible of each of the interests at stake, (ii) shall *select* the asset that will prevail in concrete, for performing more adequately the constitutional will. Key concept in this field is the instrumental principle of *reasonableness*.

[12] This excerpt from the vote of Justice Carlos Britto is on page 134 of the minutes of the trial of the Injunction in Direct Unconstitutionality Action 3937 MC/SP-São Paulo.

In the case under review, the SFC chose the environmental and public health interests represented by the state laws, rather than the interests of the industries that manufacture asbestos under the mantle of the Federal Law. 9.055/1995. On a first reading, this law prohibits the use of asbestos, but actually turns out to permit the use of chrysotile, by excepting it from the prohibition. It is therefore a ploy to encourage the use of chrysotile asbestos kind, which only benefits its manufacturers; this demonstrates the need to "clarify the specific groups of people and the factors that make up the public space", as warned Häberle (1997, p. 19).

But this was not the understanding of Justice Ellen Gracie[13]; for her, in this case, what was at stake was "the constitutional equation of legislative competences" and, therefore, was favorable to the ratification of the injunction, arguing that the Constitution set the competence to the Congress to legislate in this matter. Justice Ellen's vision was not successful, which shows the robustness achieved by environmental protection within the STF, in line with one of the five principles of constitutionalism highlighted by Rawls (2000, p.282) - the distinction between the higher law and the ordinary law:

> The higher law is the expression of the constituent power of the people and has the highest authority of the will of "We the People", while the ordinary law has the authority of the parliament's and the electorate's ordinary power, and is an expression of that power. The higher law restricts and guides this ordinary power.

In the case under comment, the Federal Law 9.055/95, by freeing the use of a kind of asbestos recklessly[14] conflicts with the "higher law": the Constitution, which has the authority of the people's will. The court was here anti-majority in relation to the ordinary law, but, as pointed Rawls (2000, p.282) "the higher authority of the people supports it."

[13] This passage from the vote of Justice Ellen Gracie is on p. 136 of the minutes of trial.
[14] The temerity stems from the fact that the safety for human health and the environment have not been fully proven.

5 FINAL CONSIDERATIONS

The research conducted under this article revealed that the Supreme Federal Court has been managing the challenges of sustainability, particularly the conflict between environment and private property, with the prevalence of the collective interest over the individual one, while respecting individual rights such as the right to due process and compensation, even in cases of expropriation for environmental interest (as decided in the Extraordinary Appeal RE 134597/SP). It has also been verified that are being built methodological premises introduced by a new constitutional hermeneutics, among which we highlight the following:

a) the opening to a plurality of interpreters of the Constitution, as advocates Härbele;

b) the process of constitutional interpretation has sought strength in the concrete facts of life trying to reach the "great achievement of the rule" which discussed Konrad Hesse;

c) it has been attempted to clarify the specific groups of people and the factors that make up the public space, according to the Häberle's warn;

d) there is a tendency to recognize the absence of the neutrality of the rule, denounced by Friedrich Müller.

These factors highlight the strong influence of concretist hermeneutics in the debates that have been made in the Supreme Federal Court. What has been sought is the realization of justice in the material aspect, which can be verified by the analysis of the decisions collected and analyzed here.

In the Direct Unconstitutionality Action (ADI 4029 / AM - AMAZONAS), the SFC recognized the legitimacy of the NATIONAL ASSOCIATION OF IBAMA SERVANTS - NATIONAL ASIBAMA for bringing the action, and in debates effected a mea culpa, pointing that until February 2008 were extinct by active illegitimacy of class one hundred fifty-four direct unconstitutionality actions. Intended, thus, to correct the mismatch between "the democratic aspirations of the Constitution and the rigor of the Exalted Praetorium".

In the Injunction MS 25284/DF, the SFC understood that, being in conflict individual interests (private property) and collective interests (environment), the latter shall prevail. The decision kept the creation of the reserve, complying with the local population, which was organized as an association and was supported by environmentalists and local religious figures, claiming the creation of the reserve, presenting themselves as active and effective participants of the constitutional interpretation.

In the case of asbestos (ADI 2396 MC/MS), the SFC minimized a formal issue (the invasion of the legislative competence of the Union by the states which passed a more restrictive law than the federal one) in favor of the material interest of protecting the environment.

All these decisions demonstrate that the SFC is sensitive to the protection the environment requires, and has sought the solution to environmental conflicts using the suggestions of Peter Häberle that, according to Bonavides (1994, p. 472), reflect the democratic ideology itself and demand, in the society in which they are implemented, some fundamental requirements: solid democratic consensus, strong institutions, developed political culture-assumptions not found in underdeveloped social and political systems. These are indicators that Brazil is experiencing a new moment through the consolidation of democracy, to which has been contributing the Constitution.

In this new era, the tension between property and the environment has been administered by the SFC in light of new methodological premises, in which it has been taken into account those who are the interpreters of the Constitution, and also the result of the implementation of the rule, as consequence of a construction work. In this context, rule and reality have been integrating the same hermeneutical process, as opposed to the separation proposed by traditional syllogism.

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