

# ENVIRONMENT: A SECOND-CLASS FUNDAMENTAL RIGHT

**José Adércio Leite Sampaio<sup>1</sup>**

Escola Superior Dom Helder Câmara (ESDHC)

**Elcio Nacur Rezende<sup>2</sup>**

Escola Superior Dom Helder Câmara (ESDHC)

## ABSTRACT

In Brazil, the right to ecologically balanced environment is a fundamental right recognized under formal and dogmatic considerations. The lack of more in-depth elements to conceptualize and justify this right may explain the legal and judicial disruptive treatment towards it. In practice, Environmental Law is still treated as a chapter of Administrative Law or a Special Administrative Law, and the right to an ecologically balanced environment is still treated as a fundamental second-class right. This article aims to explain this legal treatment, indicating its manifold aspects. The hypothetico-deductive method was used, and we concluded that a doctrine and jurisprudence must be developed to provide an effective protection of the environment.

**Keywords:** Federal Court of Justice; fundamental right; fundamental right to an ecologically balanced environment.

## *MEIO AMBIENTE: UM DIREITO FUNDAMENTAL DE SEGUNDA CATEGORIA*

### *RESUMO*

*No Brasil, o direito ao meio ambiente ecologicamente equilibrado é um direito fundamental. Seu reconhecimento se tem dado à base de considerações formais e dogmáticas. A falta de elementos conceituais e justificantes mais aprofundados talvez explique um tratamento legislativo e judicial*

1 Postdoc, Doctoral and Master's Degree in Law. Professor at the Escola Superior Dom Helder Câmara. Federal Prosecutor. ORCID: <https://orcid.org/0000-0002-9452-4811> / e-mail: joseadercio.contato@gmail.com

2 Postdoc, Doctoral and Master's Degree in Law. Professor at the Escola Superior Dom Helder Câmara. National Treasury Prosecutor. ORCID: <https://orcid.org/0000-0002-2369-8945> / e-mail: elcionrezende@yahoo.com.br

*pouco deferente a esse direito. Na prática, o Direito Ambiental ainda é tratado como se fosse um capítulo do Direito Administrativo ou um Direito Administrativo Especial, e o direito ao meio ambiente ecologicamente equilibrado, como um direito fundamental de segunda classe. Este texto objetiva explicar esse tratamento jurídico, apontando seus multifacetados aspectos, concluindo pela necessidade de se conferir ao meio ambiente maior proteção. Foi utilizada a metodologia hipotética dedutiva, concluindo-se pela necessidade da elaboração de uma doutrina e jurisprudência que seja capaz de conferir uma efetiva proteção ambiental.*

**Palavras-chave:** *direito fundamental; direito fundamental ao meio ambiente ecologicamente equilibrado; Supremo Tribunal Federal.*

## INTRODUCTION

The right to ecologically balanced environment is considered a fundamental right in Brazil, which has been affirmed by the Supreme Court on several occasions. However, this fundamentality has been little discussed.

In this context, this study addresses the issue of: what makes a right or a claim fundamental? And further, what are the legal and political consequences arisen from this consideration? This debate must be faced by the constitutional and environmental literature of the country.

The central theme is: to approach the reception of the fundamentality of a right solely based on its dogmatic consideration may weaken it when challenged by other pretensions or interests. The judgements implied by the adequacy of a legislation and its judicial application tend to be less demanding, providing greater practical protection to its challengers, especially when it comes to economic interests.

This study is justified by the need to confirm such thesis, which is expected to be achieved in this article.

Thus, this study aims to perform both a bibliographic review and a call to jurisprudence – namely, the Supreme Court – to analyze whether the right to an ecologically balanced environment (DMAEE) is properly treated as a fundamental right.

### 1 THE RIGHT TO AN ECOLOGICALLY BALANCED ENVIRONMENT AS A FUNDAMENTAL RIGHT

Defining a fundamental right is a complex task, which must gather formal and material, legal and sociological, political and historical elements. In Law, the concept is often applied only in its formal aspect: fundamental is what the Constitution says it is. However, understanding what the Constitution “says” is a problematic process itself. The Brazilian Constitution, for instance, devotes Title II to “Fundamental Rights and Guarantees,” but does this Title comprise all the fundamental rights recognized by the Constitution? Any beginner in the study of Constitutional Law, influenced by the dogmatic thinking and the Supreme Court’s jurisprudence, will answer negatively. The Court has already acknowledged that some taxpayers’ rights, safeguarded (although as institutional guarantees) by the Art. 150 of the Constitution, are part of jusfundamentality heritage (BRASIL, 2014a; 2014b).

Considering the imminent possibility of the Court's hermeneutic construe, no repertoire will be exhaustive or static. Regarding the presentation of the right to an ecologically balanced environment, this formal dimension has been accomplished. Although stated in Art. 225 of the Constitution (legal-miles apart from what is contained in Title II), the Supreme Court has held it as a fundamental right. How could anyone forget Minister Celso de Mello's profound vote, which emblematically inserted the right to an ecologically balanced environment in the list of jusfundamentality? The synthesis is conceptual:

Everyone has the right to an ecologically balanced environment. It refers to a typical third generation (or brand new) right that assists the entire human race (RTJ 158/205-206). The State and the collectivity itself are responsible for defending and preserving, for the benefit of present and future generations, this collective and trans-individual right (RTJ 164/158-161). Complying with such irrevocable burden guarantees that serious intergenerational conflicts – characterized by disrespecting the duty of solidarity, imposed on all, in protecting this essential public good – will not be established within the collectivity (BRASIL, 2005, our translation).

This vote addressed not only the fundamentality of the right, but also its (generational) dimensionality, trans-individuality and trans-generationality, solidary root, and its promoters or passive subjects of the jusfundamental relationship (State and collectivity). Something else needed to be addressed for the Law; Not for some people. Such recognition made the Supreme Court itself undertake a task to accomplish, under penalty of insufficient tutelage, a topic that we will discuss soon. What remains to be said is that declaring a right fundamental cannot be solely grounded in its rhetoric or apologetics. The right should be treated as such, and material elements must substantiate its quality.

Fundamentality construe by the Supreme Court was based on the constitutional systematicity in the gaps of the second paragraph of Art. 5th (legal dimension). It derived from a confluence of material elements substantiating it: the interpellation of its historical and factual circumstances (sociological or empirical dimension) and the support from often bold or at least innovative literature (epistemic dimension), reflecting the result of struggles and social conflicts that are sometimes invisible (or unexpressed) in this "revelation process" (political dimension).

This is the typical process of affirming "in fieri" rights, which may either already be present in the form of insufficiently matured claims – in any of the four dimensions to affirm jusfundamentality or, more

accurately, “jusfundamental judicial right” – or rest in a somehow near future. No countermand will be done if one is soon speaking and claiming a fundamental robotic or clonic right (MEHLMAN, 2012; ROBERTSON, 2014; GUNKEL, 2018). Fiction not only simulates, but also anticipates virtuous or problematic situations of human individual and social existence.

Both the existing and future struggles and conflicts are translated into material legal arguments to justify a fundamental right (SAMPAIO, 2004; DUSSEL, 2015). The massive human intervention in the environment caused a toxic periclitation of life and health with serious repercussions for equality that are indicted by the desires for environmental justice, mobilizing the society organizational energy, as well as struggles of a legal, social, political, and sometimes physical nature that, given their proportion, required a political and constitutional arbitration. Considering the inconceivability of a logical leap between the concreteness of the real (of claims stemming from conflicts) and the generalizing abstraction of the norm, it is customary to seek a norm of inference, logic or paralogic, to underpin the affirming judgment. Most innovative and bold literature defines such inference.

The tautological appeal is more common in the case of an ecologically balanced environment is a fundamental right, considering its importance or indispensability for a health-related quality of (preferably human) life (RENEDO, 2002). It is fundamental because it is important, indispensable, fundamental. These adjectives often designate justifications referring to life or health. However, more recently, appeals to post-humanist justifications, of a diffuse ownership by nonhuman animals or even Gaia or Pachamama, are very common. This is how the material element is tied to the right.

Material arguments partner with the formal component (and vice-versa) to equip a given situation, quality, or legal position of a rhetoric – almost apologetic – of a fundamental right. However, it is not always possible to carve the appropriate legal consequences from this partnership. It lacks the legal and constitutional attributes to excel it within the arsenal of concepts and rights: to serve as a shield against majority incursions that diminish or endanger minorities, the long-standing – but not obsolete – Dworkin’s formula of “trumps” individual and minority group rights (DWORKIN, 1977; TRIBE; DORF, 2007). Such existential resistance – of the empirical world – is conveyed in the deontic modality of a legal position of resistance to legislative interventions promoting that diminishment or danger.

The “freedom of configuration of the legislative” is, in fact, a protection duty that ensures that other constitutional interests, competing with those of minorities, may coexist without diminishing or endangering them. By “endanger” we understand challenging this group physical or moral integrity, synchronously and diachronically; whereas “diminish” refers to cease treating them and their pretensions with due respect and consideration. This is a serious problem in delimiting DFAEE.

## **2 THE FUNDAMENTAL RIGHT TO ECOLOGICALLY BALANCED ENVIRONMENT TAKEN SERIOUSLY – EMPIRICAL DUTIES OF LEGISLATIVE INTERVENTION AND JUDICIAL CONTROL**

The fundamental right to ecologically balanced environment presents some particularities that surpass a high index of semantic indeterminacy and a need for knowledge outside Law. More than in any other legal field, here the “auxiliary sciences” are crucial for attributing meanings to institutes and in formulating public policies of jusfundamental promotion (CARREÑO, 2019). This aspect often goes unnoticed or does not receive proper attention. The particularities, as aforementioned, are also situated within Law.

The nature of protected legal assets and the need for their effective protection justify the development of principles such as polluter-payer and precautionary<sup>3</sup>, both recognized by the Supreme Court. For better or worse, they implicate yet another: the reversal of the burden of proof<sup>4</sup>. The proposer to intervene in the environment must prove that no damage will be inflicted beyond those agreed in the cost-benefit trade-offs. Similarly, those responding to environmental degradation are responsible for pleading innocent or proving they have done it on a smaller scale.

This principle, still limited to the process, must also be applied to public policies resulting in greater ecological intervention – its formulators must testify, using factual supports and credible prognoses, that the

3 The Supreme Court has already recognized the precautionary principle as part of the environmental law. Its application is problematic. The decision in question seems to contradict itself by mentioning that uncertainty demands the Courts’ silence: “Institutional capacity, absent in a scenario of uncertainty, enforces Judicial self-restraint, precluding it from replacing state agencies choices by their own” (our translation) (ADC 42. Item 18 da Ementa). In a time when uncertainty is considered the new usual, adopting this doctrine can imply disclaiming the jurisdiction, notably in the environmental field.

4 It is a peaceful matter within the Superior Court of Justice (Summary 618). The Supreme Court recognizes it as consumer protection matter (Pleno. ARE-ED-AgR 1224559/PR. Rel. Min. Dias Toffoli, j. 11/11/2019). It was not referred to extraordinary appeal, for dealing with an intraconstitutional issue (1a. Turma. AI-AgR 794553/RS. Rel. Min. Dias Toffoli, j. 18/06/2013).

ecological integrity will not be seriously jeopardized or, in case it is, that the preservation interests and the benefits stemming from the new policy were adequately balanced, justifying the environmental “trade-off”.<sup>5</sup> Such presumption cannot be disregarded when assuming the constitutionality of a law or an administrative act.

On the contrary, you must behold it. Presumption is only possible if there are enough elements to ascertain the prognosis. The Supreme Court itself, drawing upon its American peer’s understanding, waived the empirical scrutiny of the legislative choice that can be based on “rational speculations unsupported by evidence or empirical data”<sup>6</sup>. Legislative changes that are supposedly more burdensome to the environment should be grounded in empirical evidence that allows the interpreter to identify the correctness of its prognoses and justification.

The legislative receives a wide space in the discursive construction of possible consensus, according to the normativeness of claims of certainty and moral and ethical correction, as well as the facticity of agreements of equitable interests that, within their space of discretion, must be immune to judicial scrutiny (HABERMAS, 2005). It does not mean to say that the legislative is entirely free to control its prognoses. In fact, the courts transit in this insyndication doctrine. The weighing judgment itself, so dear to the Supreme Court, is a form to scrutinize the legislative instrumental motives. The concession is limited.

### **3 THE FUNDAMENTAL RIGHT TO ECOLOGICALLY BALANCED ENVIRONMENT (NOT REALLY) TAKEN SERIOUSLY – EMPIRICAL DUTIES OF UNFULFILLED LEGISLATIVE INTERVENTION AND JUDICIAL CONTROL**

Constitutional language is a way to name the alleged conflict resolution tests among constitutionally protected interests. Reasonability, proportionality, weighting, balancing, and practical agreement are some

5 In general domains, control is more deferential, and some advocate the “non-controllability of legislative prognoses” (CANOTILHO, 1991, p. 1123). In Germany, the lack or failure in prognoses, *ab initio*, can result in legal nullity. Prognostic error, verifiable only *a posteriori*, does not enable control, given that it has been performed in the context of a regular legislative process (MENDES, 2000). Regarding the need to perform a legislative prognosis delimited by empirical data, as expressly required by Art. 170 of the Swiss Constitution (SCALCON, 2017; BICKENBACH, 2016).

6 Item 17 of the ADC No. 42 reads: “The Constitutional Jurisdiction encounters obstacle within the limits of the institutional capacity of its judges, notably in the context of public policies, and the Judiciary is responsible for the rational analysis of the legislative scrutiny, as understood from the American Supreme Court *FCC v. Beach Communications, Inc.* 508 U.S. 307 (1993), which consigned that ‘legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data’” (our translation).

of the denominations employed in conflict resolution – either differential, by theoretical or relational matrix, or equivalent, by error or deliberation. Such denominations are but semantic-syntactic operations based more on argumentative coherence and cohesion than on pragmatics, although this is essentially the most decisive aspect. We understand language “pragma” as both the operation impacts (reported, by some forums, as consequentialist and invasive in political domains) and the decision profound motivations, relegated to social sciences studies and the historiography of the domination system language games (TANFORD, 1990; STINSON, 1997; NORTON, 2006; GIBSON, 2008; RACHLINKSKI, 2010)<sup>7</sup>.

The judge is a “being-in-the-world,” subjected to his time contingencies and his prejudices. He is not an automaton, machine, or robot. His impartiality is a partiality restrained by a deontological sense of correction. He is unable to subtract such sense from value clashes, especially in fields of interaction between social (sub)systems demands (im)pressing him<sup>8</sup>. The culture of the Anthropocene, for example, absorbs both the judge and his decisions, possibly bringing reasonability and proportionality to many legislative interventions that translate economic values superimposed on environmental interests. In other fields, as in the sale of human organs or sexual enslavement contract handling, such culture would be entirely refuted by being considered unreasonable, disproportionate, and absurd. In this sense:

The socio-environmental crisis entails a new generation of fundamental rights – the third generation, – which challenges the Rule of Law to insert, among its priorities, environmental protection. This new generation uproots from a purely anthropocentric view towards a broad anthropocentrism, justifying a new state standard founded on constitutional, democratic, social, and environmental prescriptions (our translation) (KALIL, FERREIRA; 2017, p. 329)

The equivalence we state here will surely be deemed as unreasonable. Economic dominance over body, sexuality, and freedom adopts a different grammar than the Ecological. However, the Institution of slavery – sex as an accessory and principal’s franchise – was not always considered disproportionate. For many years, in debates about a possible law for slavery abolition in Brazil, arguments advocating property and the right acquired against the legal figure of slavery were often weighed (COSTA, 1997; 1999; GRINBERG, 1998-1999; SAMPAIO, 2004; MENDONÇA, 2008)

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<sup>7</sup> It does not differ from other decision-making processes (HASTIE; DAWES, 2009).

<sup>8</sup> See the indications in the previous note and, especially: Prado (2003), Ribeiro (2006) and Gibson (2008). And yet: Irwin and Real (2010), Neitz (2013) and Carvalho (2020).

– what would be considered, nowadays, attentive to the human rights and dignity. It would not be difficult to find in the literature of the period (if the terms were a trend) assertions on the unreasonable and disproportionate interventions of the state in the private relations.

Although no hierarchy is recognized among fundamental rights, the aforementioned examples show that, in practice, it does exist. The best thermometer for such stratification is the tolerance conferred to the legislative intervention in the normative scope and incidence of a right; the more tolerant, the less “fundamental”.<sup>9</sup> Such tolerance is the empire of time, of the right contingencies and values; a facticity challenging normativeness.

The institutionalism of democratic appeal refutes these observations. According to it, the legislative must establish the spaces for jusfundamental protection, meeting the “due” constitutional process or proportionality just cause, by the scrutiny of weighting, which must respect the essential content of the right (HÄBERLE, 1997; SAMPAIO, 2013). Thus, no relationship of priority would exist among rights, but rather a task of “harmonizing constitutional values”.

In the essential content of the right, as a threshold, we would identify – whether in the proportionality residue (in its relative hue) or in the impregnable human dignity (in its absolute feature) – the sealed point of the legislative overtaking and equate it to the forbidden zone of diminishment or endangerment of minorities. This would, recurrently and often mistakenly, amalgamate Dworkin and the German Constitutional Jurisprudence (SAMPALIO, 2013).

Even such amalgam may hide the different treatment given to the “arbitration” of conflicting rights. A quick survey in the Supreme Court’s jurisprudence showed a greater deference to the legislative in establishing boundaries to the right to an ecologically balanced environment than in other fundamental rights<sup>10</sup>. The economy punched the core of environmental rights with greater ease, squeezing its essential content. In fact, this is a trend in comparative jurisprudence. The United States Supreme Court, for example, is reluctant in giving credence to arguments of environmental defense. Technical and political discretion often upstages preservation theses (FARBER, 1996; LAZARUS, 1999; PAUTZ, 2016). But we must

<sup>9</sup> Another way of picturing the problem is from the right, interest, or good that justifies the limitation or intervention of the right. See: Gervier (2014) and Sampaio (2015).

<sup>10</sup> Regarding the Court’s jurisprudence on environmental matters: Wedy (2008), Vilani (2009), Rocha (2013) and Gaio (2015).

give some credit to the Supreme Court American peer: in there, the environmental protection has a registered office.

The most emblematic decision we may possibly mention is the one in which the Supreme Court examined the constitutionality of the Law No. 12,651/2012, which established the new Forest Code. The setbacks caused by the new legislation raised several enquiries. Considering it was a fundamental right of special greatness – as the environment is “essential” to the health-related quality of life of present and future generations, – it was expected that the Supreme Court would correct its setbacks. Expectations were frustrated right at the decision: “institutional capacity, absent in a scenario of uncertainty, enforces Judicial self-restraint, precluding it from replacing state agencies choices by their own” (BRASIL, 2018, our translation).

Legislative deference was required not only due to technical uncertainties that, according to the Court, surrounded a number of matters under discussion, but also because the law drafting process extended to society. Over seventy public hearings were held, enhancing the transparency and legitimacy of legislative decisions and reinforcing the “epistemic and hermeneutic discretion guaranteed to the Legislature by the Constitution”. Under these premises, the attack on the (constitutional) principle of the prohibition of retrogression could not excel the democratic principle, nor justify waiving “more efficient legal arrangements for the sustainable development of the country as a whole”. Nor could the “thesis that the most environmentally-friendly norm should always prevail” be hastily associated, during trial, with “*in dubio pro natura*,” as the “regulator [must] distribute scarce resources to satisfy other legitimate interests” (BRASIL, 2018). These are important defining elements, genuine “conceptual tools” of the fundamental right.

The Court seemed inclined to let the Congress define the environmental public policy and the applicable content of the fundamental right – which seemed to contradict the concept of the fundamentality of a right. The ministers declared four unconstitutional norms and interpreted other six according to the Constitution. Conversely, they declared the constitutionality of thirty-three rights. What draws attention is the full delegation of the competence of various environmental institutes to the legislative, without requiring technical reasons to justify the choices made.

The recognition that the legislative could change the extent of permanent preservation areas (PPA) did not account for the meaning of such

areas. Reducing it by 10 or 50% would impact gene or migratory flows? Would it promote greater or lesser siltation of rivers and lakes? Why has the reference for measuring the environmental preservation area along rivers and watercourses changed, becoming their respective bed, and no longer their highest level? What technical criteria was adopted to calculate the percentage of PPAs within the legal reserve? Which legal reserve ecological function can authorize the law to exempt its existence in the exploitation of hydropower potential and in the construction or expansion of highways and railways? It would not be enough to formally implement paramount opposing interests, such as ownership or provision of electric power services, fulfillment of the right to transport, and regional integration.

Such “policy” vectors would perfectly justify the legislative measure if their ecological effects were known, what would enable a better weighting. Environmental institutes seem to be “biological (and “rhetorical”) ornaments” with no ecological functions, and available to the legislative as it pleases. We find it quite interesting that the discussion on the possibility of introducing exotic forest species for recomposing legal reserves was concerned with empirical and technical elements. It was stated that no “scientific evidence [proved] that using exotic species for the reforestation of biomes always harms native species or unbalances the habitat” (BRASIL, 2018). In one case, they are useful; as for others, they are not. In an anti-consequentialist self-restraint, the Court granted amnesty to those who had caused damage before August 22, 2008. The Court understands that it is the legislative responsibility to “establish a zero milestone for the country environmental management,” as if the norms hitherto in force did not exist. Really? On environmental matters? The debates about creating new amnesties were not even considered, as if, indirectly, a license to deforest was granted. Legislative control was due, as erratic as it was discretionary.

## FINAL REMARKS

The right to an ecologically balanced environment is a fundamental right affirmed by the Supreme Court several times. This is the formal or dogmatic justification of jusfundamentalidade, to which sociological and empirical aspects must be aggregated (as the social, economic, and ecological effects of environmental degradation), as well as epistemological aspects (mainly regarding its advocacy for specialized literature), and political

projection from social struggles and conflicts generating degradation-related issues.

Considering the semantic inaccuracy in the “ecologically balanced environment,” both the judge and the legislative must resort to technical and scientific fields to properly discipline its content. However, for the essential content of this right to be respected, some principles must be regarded – particularly because implementation often entails a trade-off with other interests, of notably economic expression.

The legislative has a wide space in the discursive construction of possible consensus, according to the normativeness of claim certainty and moral and ethical correction, and the facticity of agreements of equitable interests – which compose its discretion space. It does not mean to say that the legislative is entirely free to control the empirical bases and prognoses employed in its task.

Rather, it is responsible for proving to the judicial inquiry that appropriate technical elements were used in the practical adjustment exercise, and that the enforced law and policy were not simply a legislative clothing of *a priori* predominance, unconditioned of opposing interests. The legislative is also responsible for proving that, based on its calculus, the social-ecological integrity will not be seriously jeopardized or, if so, that it is duly justified by the benefits stemming from the new legislative policy adopted. The reversal of the burden of proof mitigates or rebuts the presumption of constitutionality within a law whenever it significantly impacts the environment or retreats the protection framework in effect. It stems from the very nature of the involved right, the primacy of “*in dubio pro natura*,” the protective principle, and the user or polluter-payer. Call it the legislative-intervener principle.

Supreme Federal Court’s jurisprudence, although apologetic to the fundamentality of the right to an ecologically balanced environment, does not grant it due protection – and this is well revealed by examining the Forest Code’s constitutionality. According to the Court, the uncertainties regarding the degree of affectation to the environment caused by the adopted legislative policy were situated within its free assessment. In case a constitutional judge cannot or does not feel legitimized to deal with uncertainties, environmental protection will be subject to adjustments made by the Legislative power. It means to say that, ultimately, the right to an ecologically balanced environment is legal, but not fundamental. Such consideration entails yet another: Environmental Law is but a specialization of

the Administrative Law influenced by the State logic – with an aggravating factor, for some people, a pleonasm: by the State and the economy.

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