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THE UNAVAILABILITY OF THE FUNDAMENTAL RIGHT TO ENVIRONMENTAL PROTECTION

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ABSTRACT

This is an article whose object is to analyze the unavailability of the fundamental right to the protection of the environment. In order to reach the proposed objective, the work is divided into four parts: (i) the first part start with an ontological analysis of rights and then (ii) study the unavailability and inviolability of rights from the perspective of theory of the legal norms. Once this stage is over, (iii) will be verified the fundamental right to the protection of the environment and, in sequence, (iv) will be investigated the unavailability of this right, but this respecting the peculiarities of the legal norms that promotes transindividual fundamental rights. In turn, regarding the methodology used, the hypothetical-deductive method will be used in research whose objective is explanatory, since it seeks to identify the factors that justify the theses object of this study. In order to achieve the expected purpose, is adopted the bibliographic procedure, once it is supported by normative and theoretical references published in written and electronic media.

Key words: Environmental protection; Fundamental rights; Inviolability and unavailability of rights; Transindividual rights; Ontology of rights.

A INDISPONIBILIDADE DO DIREITO FUNDAMENTAL À PROTEÇÃO DO MEIO AMBIENTE

RESUMO

Trata-se de artigo cujo objeto consiste em análise sobre a indisponibilidade do direito fundamental à proteção do meio ambiente. Visando a alcançar o objetivo proposto, o trabalho foi dividido em quatro partes: (i) na primeira parte, faz-se uma análise ontológica dos direitos para, em seguida, (ii) estudar-se a indisponibilidade e a inviolabilidade dos direitos sob a perspectiva da teoria da norma jurídica. Encerrada essa etapa, (iii) passar-se-á a verificação da fundamentalidade do direito à proteção ao meio ambiente e, em sequência, (iv) será averiguada a indisponibilidade do referido direito; mas isso respeitando-se as peculiaridades das normas jurídicas consagradoras de direitos fundamentais transindividuais. No que toca à metodologia empregada, será utilizado o método hipotético-dedutivo em pesquisa cujo objetivo é explicativo, pois busca identificar os fatores que justificam a tese objeto deste estudo. Para atingir a finalidade almejada, adota-se o procedimento bibliográfico, já que a pesquisa está amparada por referências normativas e teóricas publicadas em meio escrito e eletrônico.

Palavras-chave: *Proteção ao meio ambiente; Direitos Fundamentais; Inviolabilidade e Indisponibilidade de direitos; Direitos Transindividuais; Ontologia dos direitos.*

INTRODUCTION

The present work seeks to analyze the unavailability of the fundamental right to the protection of the environment.

The problem is that, at a time when the proliferation of fundamental rights is being questioned, the justification of the framework of environmental protection as a fundamental right needs - as indeed would need even in the absence of any questioning - a robust epistemological substrate, as well as of a strongly based and totally coherent methodological structuring.

But not just that. The discussion on the availability of fundamental rights is now in vogue (DIAS, pp. 151-177). Therefore, what was once considered a sacred dogma by doctrine and jurisprudence has now been questioned.

In this way, one can perceive the extreme scientific importance of the research on the unavailability of the fundamental right to environmental protection, since it binds two essential objectives: the first one consists in verifying the fundamental right to environmental protection, sculpted in the article 225, *caput* of the Constitution of the Federative Republic of Brazil; the second concerns the analysis of the unavailability of said right.

In order to achieve this double objective in a methodologically structured and coherent way, this work will begin with the study *of rights*, which will be carried out through an ontological approach to the legal norm, so that it may find within the theoretical-normative perspective the juridical meaning of inviolability and unavailability of *rights*. Only when these essential methodological premises are established will we proceed to the epistemological analysis of the fundamental quality of the right to environmental protection and, stating that it is a fundamental right, it will be verified whether this right is available or unavailable. F or both, the study here presented will use the hypothetical-deductive method, notably through the analysis of constitutional and infra - constitutional legal norms, and especially doctrinal research.

1. ONTOLOGY OF RIGHTS

The first step in the analysis of the availability of fundamental rights is to establish the basic premises on which this scientific research will be built. Thus, as the object of the present study is fundamental

environmental rights, it is first of all necessary to establish what rights are.

Regarding the philological meaning of the word right, Tércio Sampaio Ferraz Jr. (1994, pp. 32-33) warns that, alongside the classic Latin expression *jus*, the word *derectum was* also used, both meaning right. However, for some time "the *derectum* and *directum* formulas begin to override the use of *jus*", being that "after the ninth century, finally, *derectum* is the consecrated word, used to indicate the legal order or a legal rule generally". (original highlight)

On the other hand, Goffredo Telles Jr. (2008, p. 375) clarifies that the word right, existing in the Portuguese language, comes from the Latin adjective *directus*, which, in turn, "designates the quality of being according to the straight line; to be arranged in such a way as to construct the shortest line between two points; that is, of being aligned in a straight line. "This idea of righteousness comes to assume a certain moral connotation and therefore presupposes acceptance and social admiration. Hence the use of expressions such as being the "right arm" of someone.

The problem is that, as Maria Elena Diniz (2009, p. 241) warns, the essential definition of law is a question of a supra-scientific nature, which is the object of analysis of legal ontology. This is an extremely difficult investigation, given the plurality of meanings attributed to the word right.

In this context, the concept of confessedly broad law adopted by Boaventura de Sousa Santos (2007, p. 290) clearly illustrates this plurality:

> I adopt here a broad conception of law: law is a body of regularized procedures and normative standards, considered justifiable in a given social group, which contributes to the creation and prevention of litigation, and to its resolution through an argumentative discourse articulated with the threat of force.

Although the aforementioned concept derives from a very particular view of juridical sociology, the point to be highlighted is precisely that the term "law" can have several meanings. Sometimes it means legal norm, according to the command extracted from a certain normative statement. In others it means the possibility of opposing a certain conduct or threat that offends legally protected interests, which belong to the agent.

Finally, there is the ethical meaning of the word right, which aligns with the idea of justice. Therefore, as Goffredo Telles Jr. (2008, pp. 373-374) states, the word right designates three different realities, which maintains a relation of interdependence. "The first reality called *Law* is *norm* (it is Objective Law). The second is *permission* (it is Subjective Right). And the third is *quality* (it is the *just*, or the quality of *the just act*). "(Emphasis in original)

According to the lesson of the said author, this plurality of meanings of the word right is due to the fact that, under the prism of language, there are two classes of words: the univocal and the plurivocal. The first are those that have a single meaning, such as the words book and table. The latter have more than one meaning, being subdivided into equivocal words and analogical words. Misleading words are those that have different and disconnected meanings, so that their multiple meanings do not relate to each other, as with the words mango (fruit or coat of arms in a sweater or coat) and pineapple (fruit or problem). On the other hand, analogical words also have different meanings - since they are plurivocal -, but, contrary to the equivocations, their senses are related to each other. This is the case, for example, with the word science (knowledge or knowledge system articulated on a given matter). That said, the word right is plurivocal - because it has more than one meaning - of the analogue species - as it has three distinct meanings that imply each other. In addition, once the existence of these three meanings of the word right has been verified, it is urgent to analyze each of them in a more detained way.

The first of these concerns the notion of law as an objective law. According to Goffredo Telles Jr. (2006, p. 324) "all the authorizing imperatives - the set of all legal norms or norm of Law - form what is called the Objective Law. " It is, therefore, a concept very close to that of positive law, in spite of which it is not confused. This is because the latter is formed by all the legal norms emanated by the State, that is, laws, decrees, international treaties, etc. - but only by them - while the former contemplates, besides these, also the norms derived from the autonomy of the will, such as promises and contractual clauses. Hence, the aforementioned author can conclude that "all Positive Law is included in Objective Law. But a large part of Objective Law is not Positive Law" (TELLES JR., 2006, p 325).

With respect to the second, that is, to the subjective right, it is possible to conclude that it concerns the permissions given by means of

legal norms. This means, therefore, that the subjective right is opposed to the objective law, but at the same time it is supported by it, that is to say, it is its counterface. After all, if on one hand the legal norm creates law, on the other hand it allows the exercise by its addressees of the right that it envisages. However, as Goffredo Telles Jr. (2006, p. 329) points out, subjective right is not merely the faculty of the agent, since the faculty is only the ability to produce an act and, therefore, precedes the act itself. In this way it can be concluded that "the permissions for the use of human faculties, when granted by means of juridical norms, constitute, precisely, the Subjective Rights" (TELLES JR., 2006, p. 332). Therefore, subjective right is the permission to use a certain faculty, not the faculty itself. Maria Helena Diniz (2009, p. 247), in turn, distinguishes two species of subjective right: the common of existence and the right to defend rights. The first species consists of the permission to do or not to do something, or even to have or not have something, protected by normative precept. The second concerns the protection of the common rights of existence. In other words, it is the authorization to assure the use of the subjective right when faced with a breach - or even a threat of violation -, allowing the resistance against illegality to cease the illegal act. Herein lies the two kinds of subjective right.

For its part, the third meaning of the word right carries the sense of the quality of the just. It should be noted that the task of defining the just is one of the most arduous with which legal science has ever encountered, and this subject is more commonly debated in the ethical and philosophical field of law. However, although the question of justice must be analyzed with a view to ethical and psychosocial issues, within the transdisciplinary approach proper to a theory of justice, for now this work will focus on its more substantially legal-normative aspect, which rests on the notion of retributive justice, which is precisely that meaning which is more deeply rooted in the word right. In this perspective, justice consists in the retribution equivalent to the act that was practiced. That is to say, then, that the notion of justice implies a bilateral relationship, inasmuch as the idea of equivalent retribution presupposes the practice - before retribution - of a first action. Therefore, there is first a certain action of a certain agent and, subsequently, an equivalent reaction practiced by another. However, this proper equivalence of justice does not imply a Solomonic equality, eye to eye, tooth to tooth. On the contrary, it admits the retribution performed by means other than the action originally employed, but provided it is

proportional. At this point it is worth remembering the caveat made by Goffredo Telles Jr. (2008, p. 357):

> The '*equivalent*' of the definition of justice does not imply *any* equality. The equivalent (*equi* + *valent*) is something that has value equal to or proportional to the *value* of something else. Justice, then, consists in the retribution to someone of something *of equal value* (or *proportional*) to the *value* of what one gave or did. It is an effective equivalence. (original highlight)

In these terms, it can be concluded that the word law, when conceived in its meaning of justice, refers to the remuneration equivalent to a certain act, that is, it concerns a reactive conduct (reaction) proportional to the action originally attempted.

These are, in short, the meanings of the word right that can be obtained within an ontological perspective of law. However, depending on the type of investigation to be carried out, the lawyer will use one of them, and may even use more than one. As Maria Helena Diniz (2009, p. 242) explains, regarding the study of law, "the choice of the prism in which it is known depends on the system of reference of the jurist, presupposing a reflection on the purposes of the legal system".

It happens, however, that the approach proposed in this item 1 consists of the ontology *of rights* within the legal science, and not *of the law* as complex of legal knowledge. This fact alone excludes from this investigation - at least in this stage of ontological approach - the meaning of law as justice, insofar as it integrates the field of legal zetetics[1] that is, its approach is not exclusively legal, in spite of the legal phenomenon occupying a certain space in its inquiries, insofar as it has a "constant opening for questioning objects in all directions" (FERRAZ JR. 1994, 44).

At this point in the investigation, what matters is an approach

1 On the subject of zetetics, Tércio Sampaio Ferraz Jr. points out that: "The juridical zetetics, in the most different discrimination, corresponds, as we have seen to the disciplines that, having as object not only law, can, however, take it as one of its primary objectives. Hence the nomenclature of the disciplines Philosophy of Law, Legal Logic, Sociology of Law, History of Law etc. The jurist, in general, takes care of them. They are regarded as auxiliary to legal science strictu sensu" (1994, p. 47).

within the parameters of legal dogmatics[2], that is, an approach that accept the premises given by the legal system and, from them, present the logical conclusion resulting from the study carried out. However, within this perspective of legal dogmatics, both objective law and subjective right play a role. More than that, both are in strict consonance with the ontology *of rights*, inasmuch as having rights means to hold a subjective right provided in a norm given by the objective law. Therefore, it is from these that the juridical phenomena of violation and the disposition *of rights* will be analyzed.

2. INVIOLABILITY AND UNAVAILABILITY OF RIGHTS

From the study carried out in the previous item it is possible to affirm that to all objective law corresponds a subjective right, preserved, however, the autonomy of each of them. So much so that Maria Helena Diniz (2009, p. 250) states that "clear is the correlation between objective law and subjective right. Although closely linked, they are unmistakable."

It happens that this implicational relationship between objective law and subjective right rests on essentially juridical-normative elements. Because of this, it is necessary to enter the genesis of the legal norm, so that one can then understand the legal content - and consequently the extension - of the expressions inviolability and unavailability *of rights*.

The conception of the idea of having *rights* resides in a different plan from the one in which the sense of justice is found. In spite of both - the idea of law and the sense of justice - being experienced by a certain subject (of rights), while the former finds scientific support in juridical dogmatics, the latter is based scientifically on legal zetetics. After all, having a right means being protected by a legal norm that establishes a specific duty of action or omission opposed to others, which entails a situation of legal-normative protection to a certain faculty normatively conferred to a given subject. On the other hand, the feeling of justice consists in the recognition by the subject that a certain legal norm - whether legal or jurisprudential

2 Dogmatics is explained by Tércio Sampaio Ferraz Jr. as follows: "It explains that lawyers, in terms of a strict study of law, always try to understand it and make it applicable within the bounds of the prevailing order. This order which appears to them as given, which they accept and do not deny, is the ineluctable starting point of any inquiry. It constitutes a kind of limitation within which they can explore the different combinations for the operational determination of legally possible behavior" (1994, p. 48).

- is not supported by the ethical framework in force in that society, and/or is contrary to common social customs and practices, thus transmitting the feeling that the normative prescription presents wrong content, being unable to achieve the objectives of retribution proportional to the initial conduct practiced, and of social pacification.

When it comes *to rights* - which at the moment is what interests this work - it is possible to see that they are supported by legal norms whose language is prescriptive - not descriptive - and that are structured in logical formulas composed by an implicational relation between antecedent and consequent, which use the deontic "must-be" modality. According to the teachings of Lourival Vilanova (2005, p. 106), when a fact (F) occurs, provided in a given proposition (p) a subject that is in a deontic relation with another must act on the prescribed manner (q). If a person conducts a behavior opposite to that established as deontically due (non-q), then another relationship (r) will be established between the subjects involved. In this way, the first situation is described by the formula "p → q", while the second one would be "non-q → r". But one must pay attention to the fact that it is precisely the deontic "must-be" model that creates the implicational situation between antecedent and consequent, allowing the legal norm to prescribe, not only describe. At this point they are clear to the words of the author mentioned above (VANOVA, 2005, p. 106):

> Without the deontic modality ('must-be', 'it is legally valid'), prefix to the implicational proposition, 'q' would not be implicated by 'p', nor 'r' would be implied by 'non-q '. In this the normative proposition of the proposition whose objective meaning is the natural law differs.

From the logical-structural realization presented, it becomes possible to perceive that the deontic "must-be" model generates an implicational relation between antecedent and consequent and, with this, creates a structure that simultaneously contemplates rights and duties. After all, from its form of propositional structuring - which is at the same time prescriptive and deontic - abstracts that to every right there is a corresponding duty - no matter whether of action or of abstention -, which causes the very normative reality *of rights* to be dichotomous.

This dichotomy inherent in the normative reality *of rights* extends to the search for the meaning of this expression, to the point that

it is only possible to understand the real meaning *of rights* (*ego*) through the analysis of its *alter*, that is, of the duties that oppose them. This *ego*/*alter* duality necessary for the search of the meaning *of rights* is due to what Niklas Luhmann defines as a social dimension for the measurement of meaning (2010, p. 244). This is because the author states that, within the systemic perspective, the whole experience of meaning can be immediately decomposed into what is current and what is possible. However, besides this fundamental difference, he affirms that there are three other basic dimensions within which the meaning can be decomposed: the objective, the temporal, and the social. The first is analyzed within the perspective inside/outside, that is, it is possible to inquire about the composition of things, specifying their details (inside), as well as turning out of the object, seeking to classify it and/or locate it spatially. The second is based on the past/future distinction, using the allocation of the object in time to seek its meaning. Finally, the latter is marked by the concepts *ego*/*alter*, which constitute in horizons of meaning. In these terms, "the approach of the other is not obtained by the analysis of the equals, but only occurs in a dual horizon of observation, in which the I considers what the *alter* must do for me" (LUHMANN, 2010, p. 246).

From the analysis of the dimensions in which the meaning can be decomposed, it is easy to see that current/possible, inside/outside and past/future approaches do not help in the definition of the sense *of rights* and, consequently, are useless to the comprehension of the unavailability and inviolability of rights expressions, even though these approaches prove to be useful to measure another juridical aspects such as legality (in/out), legitimacy (current/possible), and contemporaneity (past/future). On the other hand, the social dimension composed by the concepts of *ego* and *alter* is presented as the north to be followed for the identification of the solution of the proposed question, because it includes the right/duty dichotomy, and at the same time contemplates the existing implicational relation between objective law and subjective right, which go hand in hand.

This particular dichotomy *of rights* was well captured by Hans Kelsen (1998, pp. 140-141), who states that within the science of law legal duty is opposed to (subjective) right. The point is that, according to the author, the latter occupies a position so highlighted that duty almost disappears behind it. So much so that in several languages the law is designated by the same expression that names the system of norms that form the legal order, such as *Recht* in German and *droit* in French - the

same occurs with the Portuguese language, which uses the expression *direito*. It is precisely because of this similarity of nomenclature that the jurist must pay attention to the difference between two distinct but closely related legal phenomena: subjective right and objective law. It should be noted that the confusion between them - as a result of language - is a rule in countries with a Roman-German juridical tradition, since in countries whose law has an Anglo-Saxon matrix, such as England, the subjective right is designated as *right* and the objective law is called *law*.

Notwithstanding the possible linguistic confusion that the use of the same expression that designates the normative system can imply to subjective right and objective law - especially to the first one -, Hans Kelsen emphasizes that the duty precedes the (subjective) right, inasmuch as its duty follows directly from the norm that prescribes certain conduct (objective law) and, simultaneously, establishes the sanction to be applied in case of noncompliance. In this sense, it is worth paying attention to the author's own words (KELSEN, 1998, p. 143):

> That is to say: the conduct of the individual in the face of which duty exists, correlative of due conduct, is already connoted in the conduct that forms the content of duty. If we designate the relation of the individual, in the face of which a particular conduct is due, with the individual obligated to this conduct as 'right', this right is only a reflection of that duty.

In spite of the disagreement with the ontological superiority of duty suggested by Hans Kelsen, it is necessary to emphasize the lucidity with which he rescues the notion of duty inherent *in rights*. After all, the counterfactual *of rights* are the duties that they impose, for a right that does not imply a duty no longer fits the formal-logical structure of the legal statements, insofar as the duty corresponding to a right is a consequence of the use of the deontic "must-be" mode, which is inherent in the logical proposition - formulated in prescriptive language - of a legal norm. Without duty there is no right, for the right of one necessarily implies the duty of another, as well as the duty of a precise one to derive from the right of another. That is, a right without a corresponding duty is a mere desire, a pure expectation of the agent, while a duty that does not derive from a right

characterizes mere moral obligation, devoid of obligation and dismissal of sanction - other than the mere possibility of social disapproval. Therefore, without the use of the deontic "must-be" model, a logical, and not a prescriptive, proposition will be in the natural sciences, so there is no need to speak of duties, not even in rights.

Well, if rights and duties are closely linked - even under the prism of the propositional logical-legal structure - consequently objective law and subjective right are also. After all, the first is the set of normative statements that establish the rights and, consequently, due to their logical formulation, also create the duties of action or abstention corresponding to the established rights, as well as the sanction to be applied in case of noncompliance. The second is the right that a subject has as a result of the existence of a given legal statement, which allows him to require the performance of the prescribed conduct of another, or seek the application of the sanction provided for in the case of noncompliance. Therefore, on one hand the objective law gives rise to the subjective right and, on the other hand, establishes a duty. At this point the words of Hans Kelsen (1998, p. 143) are elucidating, although in the end they merit some considerations:

> Incidentally, it should be noted that 'subject' in this relationship is only the obligee, that is, that individual who by his conduct may violate or perform duty. The individual who has the right, that is, the one in the face of which this conduct is to take place, is only the object of the conduct which, as corresponding to the conduct due, is already connoted in this.

As can be seen, for the author cited above subjective right is presented as a simple reflection of a legal duty. However, this position does not seem correct, insofar as the ego/alter relation presents itself in the form of the right/duty dichotomy. It is not a question of mere reflection, but of distinct but interconnected legal phenomena, since their existence is interdependent.

Having said this, one must take into account the fact that the object of duty is not the subjective right, but rather a determinate conduct prescribed to the agent himself by normative enunciation. On the other hand, this same conduct - when prescribed to others, other than the subject

of law - is the object of subjective right. Hence it can be concluded that the same normative prescription of conduct can be object of both a subjective right and the corresponding duty - but this only when the conduct prescribed in the normative statement is concretized in the real world (world of being), since if it is considered abstractly (world of must-be) it will be in the realms of objective law. Therefore, the same normative prescription of conduct will generate different legal consequences depending on the prism one looks at, either from the point of view of subjective right, or from the perspective of legal duty.

However, if the legal relations corresponding to the subjective right and the legal duty are autonomous and have their own characteristics, this means that its legal regime, as well as the legal consequences imposed on the subjects involved, will also have their peculiarities, which help in the distinction of each of these phenomena. It is precisely at this point that the distinction between unavailability and inviolability lies.

Following the reasoning initiated, from the logical propositional structure of normative enunciation it is perceived that the deontic modal "must-be" establishes a duty, which is characterized as being the obligation imposed on the agent for, through an action or omission, respect the subjective right of others when their conduct affects the legally prescribed hypothesis. In other words, the duty establishes a legal protection against the violation - practiced by another - to a legally prescribed right belonging to a certain subject.

On the other hand, the subjective right - as the name itself says - is a right and, as such, derives directly from the same normative prescription that establishes the corresponding duty (ego/alter). However, the legal protection conferred on it aims to protect it against acts of third parties (violations), therefore, it is within the legal sphere of protection conferred normatively to the subject, leaving him the option to exercise it or not. In this sense, the lesson of Maria Helena Diniz corroborates this conclusion when affirming that "the subjective right is subjective because the permissions, based on the juridical norm and in the face of the other members of the society, are characteristic of the people who possess them, being able to be or not used by them" (2009, p. 247). Therefore, it is from the essence *of rights* the possibility of being disposed by the subjects who entitled them. At the same time, it is the essence of the duties to protect the rights of the violation practiced by third parties - hence why *the rights are* considered inviolable.

Although it is the essence *of the rights* to be disposed of by their holders, it is necessary to point out that there are exceptional hypotheses in which this possibility is restricted, either expressly by the legal system, or even as a result of doctrinal and jurisprudential construction. These hypotheses are commonly called unavailability of rights, and as a rule are linked to those rights considered fundamental.

3. THE UNAVAILABILITY OF FUNDAMENTAL RIGHT TO ENVIRONMENTAL PROTECTION

As mentioned above, the unavailability *of rights* is usually related to so-called fundamental rights. But the question at hand is what makes a fundamental right?

In spite of the predominance of the natural law (FINNIS, 2007) and post-positivist (BARROSO, 2010) currents, it is necessary to keep in mind that the fundamentality of a right can derive from reasons of a systemic, logical and ethical order. In the first case, within a systemic structure, depending on the form of structuring attributed to the system in question, certain rights may take precedence over the others, and may even act as a (systemic) basis for other rights - eg the right to equality, which appears as a support to the right of access to public office, through a public tender, within the structure of the legal system.

Conversely, from an eminently logical point of view, one right may be prior to the other, as the basis for the existence or validity of subsequent rights - for example, the right to life, which on one hand is the logical antecedent of any another right that can be exercised by someone, since lifeless there is no logical condition for the existence of other rights, but the same right to life, on the other hand, is a basis for the validity of the rights of the unborn child, since the exercise of these rights is conditioned to the birth with life.

Finally, the fundamentality of a right can be structured on ethical grounds, that is, founded on the values that are valid and socially accepted by a collectivity at a certain historical moment. Here, therefore, a given right will be considered fundamental not because of a systemic structuring, not even with a view to a logical relation of precedence, but rather to legally guarantee - by means of coercive norm - the values considered essential (fundamental) for the wellness of that society. This is the foundation that reflects the significance of fundamentality rooted in the contemporary

consciousness of peoples.

Thus, it can be concluded that fundamental right is a right guaranteed by a legal norm (objective law), which reflects a valuation option considered essential for the well-being within the ethical panorama prevailing in a certain society, in a given historical context, and which can be exercised by a certain subject that falls under the prescribed normative hypothesis (subjective right), causing third parties a duty (legal duty) of obedience, under penalty of coercion.

This relationship between objective law, subjective right and legal duty in the field of fundamental rights may seem simple. However, the issue is far from being pacified. As Paulo Ferreira da Cunha (2000, p. 216 ss.) teaches, it is possible to find several frameworks for fundamental rights among the great juridical figures, which are sometimes framed as objective laws, subjective rights, potestative conditions, onus, legal situations or as legally relevant interests. Despite the divergence pointed out, the author reiterates that they have the legal nature of *rights*.

Nevertheless, it is necessary to consider that J. J. Gomes Canotilho affirms that there is no parallelism between the subjective - which guarantees a subjective right - and objective dimensions - that from the objective law establishes a juridical duty - of the norms that guarantees fundamental rights (2003, pp. 1255-1256). According to him, therefore, there is no correlation between the legal norms that enshrine fundamental subjective rights and those consecrating fundamental legal duties. The author wishes to state, therefore, that the objective law can generate a legal duty without, on the other hand, creating a subjective right.

With due respect, it is not possible to agree with the aforementioned author since, as previously demonstrated, there is a dichotomous ego/alter relationship inherent both to subjective rights and objective laws, as well as to legal rights and duties, being in both cases a consequence of the propositional logical structure of normative enunciation, which is ruled by the modal deontic "must-be. "In this way, although it is admitted that, depending on the case, the subjective dimension (rights), or the objective dimension (duties) will prevail, it is not possible to accept the nonexistence of a correlation between the two in relation to fundamental rights. This is because fundamental rights are first and foremost *rights* and, as such, must fit into the logical propositional structure of legal norms. After all, it is precisely this structure that differentiates the legal norm from the mere ethical commandment.

It must be remembered, however, that the existence of a structural difference between the legal norm and the ethical commandment does not imply an absolute separation between Law and Ethics. After all, as it was rightly pointed out, the fundamentality of a right arises precisely from the fact that its normative content reflects a value option considered fundamental in the light of the ethical panorama prevailing in that society within that historical context.

In view of this observation, it must be verified whether the right to environmental protection, which is provided for in the text of the Constitution of the Federative Republic of Brazil, reflects or not a value option considered fundamental based on the ethical values currently in force.

Well, according to Leonardo Boff (2000), the relation of man to nature has an ethical character insofar as the former cannot be conceived without taking into account the environment in which he lives - although subject and environment are different things. That said, the values that constitute good living necessarily take into account environmental issues to allow man to achieve happiness. Hence the author's use of the Greek term *ethos* in the sense of human dwelling (BOFF, 2000, pp. 68-69).

It is important to emphasize that this type of ethical-environmental conception can be seen in the notion of environmental justice, reigning today. After all, as Rogério Santos Rammê (2012, p. 46) points out, the concept of environmental justice is a kind of umbrella concept, "capable of encompassing all the concerns and forms of social action linked to the understanding that the balanced environment is a determining factor for human subsistence".

Since the environment is fundamental for human subsistence - insofar as it is the dwelling place of humankind - it is clear that, without a balanced environment, the human being, no matter how hard he tries, cannot live with dignity. But dignity, in turn, as Immanuel Kant (2007, p. 77) reminds us, is an inherent attribute of the human being. After all, while things are priced, the human being has dignity, which is above all price. In this sense, the author's own words:

> In the realm of ends everything has either a **price** or a **dignity.** When a thing has a price, it can be put any other instead of it as *equivalent;* but when a thing is above all price,

> and therefore does not allow equivalent, then it has dignity.
>
> But that which constitutes the condition only by virtue of which anything can be an end in itself, has not only a relative value, that is a price, but an intimate value, that is, *dignity*. (original highlights)

Thus, for the maintenance of dignity, it is necessary on numerous occasions to resort to the apparatus of state coercion, which can only be done through law, through legal norms. Thus, the juridicization of ethical desires of environmental nature - especially its ethical matrix that is the protection of the environment - through the recognition of its importance through the attribution of constitutional status, corroborate the constituent option to reflect in the text of the Constitution of the Federal Republic of Brazil the fundamental ethical value of environmental protection.

From this point of view, it is possible to affirm that, under the prism of contemporary ethics, the preservation of the environment integrates the value core considered fundamental by society. So much so that the original constituent reflected this value in several provisions of the Constitution of the Federative Republic of Brazil - see Articles 5, LXXIII (popular action); 23, VI (common competence of Union, States, Federal District and Municipalities); 24, VI (concurrent competence of the Union, States and Federal District); 129, III (institutional functions of the Public Prosecution Service); 170, VI (principles of the economic order); 174, §3 (cooperatives of gold prospectors); 186, II (social function of rural property); 200, VIII (competencies of the single health system); 225 (environment). In this way, in reproducing it and in several legal norms, the constituent attributed to it the status of fundamental right. But this was not simply because of the number of constitutional provisions in which he mentioned it, but because he had converted it into a constitutional principle establishing fundamental right, which, in turn, due to its legal nature, influenced the creation of several normative statements of the Brazilian Constitution.

Notwithstanding the primal nature of the fundamental right to preserve the environment, it should be borne in mind that, in the case of Article 225 of the Constitution of the Federative Republic of Brazil, the constituent was expressed in stating that "everyone has the right to the environment ecologically balanced, (...) imposing on the Public Power and

the collective the duty to defend and preserve it for present and future generations. " The reading of the content of this constitutional device points out a peculiarity of this fundamental right, that is, it belongs to the collective and was not individualized. This is due to the fact that it integrates the category of transindividual fundamental rights, which transcend the exclusive figure of the individual as subject of rights, expanding its scope of incidence for an entire collectivity, whether or not they are identifiable.

In view of this observation, and recalling a previously settled question, it can be affirmed that, when dealing with transindividual fundamental rights, the objective dimension prevails, whereas in individual fundamental rights there is a prevalence of the subjective dimension.

However, as stressed earlier, the prevalence of one dimension does not mean exclusion from the other. Therefore, the fact that the objective dimension prevails in the fundamental right to the protection of the environment does not mean that the subjective dimension has been removed from this right. So much so that, according to the lesson of Maria Helena Diniz already presented (2009, p. 24 7), the two types of subjective right are present in the said right, namely, the common law of existence and the right to defend common rights of existence. However, in view of the prevalence of the objective dimension, these two kinds of subjective rights have been affected, since, on the one hand, the protection of the environment is a right of everyone and, if one or some individuals wish to abdicate this right, any other individual may exercise it, regardless of the manifestation of contrary interests of the others. But on the other hand, since all individuals are holders of this right, any one of them can defend it, even if without the aid or even against the other owners.

This position, contrary to individual fundamental rights, whose normative structure, with a view to the prevalence of the subjective dimension, allows the existence of a discussion about its availability, in the case of transindividual fundamental rights, this discussion is not possible because its normative structure, in which the objective dimension prevails, makes them unavailable. Therefore, the possibility of the provision of these fundamental rights infringes the very legal essence of this kind of *rights*. This time, because the fundamental right to the protection of the environment is an integral right of the latter category, there is no doubt that it is an unavailable right.

CONCLUSION

Given the above, it can be concluded that, based on the analysis of the ontology *of rights*, coupled with the verification of the propositional logical implicational structure of normative enunciation - which is marked by the deontic modal "must-be" -, it becomes possible to identify an ego/alter relationship existing both between subjective right and objective law, and between law and legal duty. This implicational duality, in turn, means that the legal norm object must always be taken in view of existing dichotomies, otherwise its meaning cannot be correctly understood.

From this, it can be seen that the inviolability constitutes a protection against the action of third parties, while the unavailability consists in a restriction on the possibility of not exercising a (subjective) right on the part of its holder. It was noted, too, that in some legal rules prevail the subjective dimension, while in others, the prevailing dimension is the objective one, without this meaning that there is no connection between both dimensions.

Once this stage of research has been carried out, it has been confirmed that the right to environmental protection is a fundamental right, insofar as it reflects an ethical value considered essential for the well-being of contemporary society and then that it is part of the transindividual fundamental right, in which there is the prevalence of the objective dimension of the legal norm. In this regard, it was seen that all are holders of this right. This means that everyone can decide to exercise it, and also that everyone can defend it in case of violation, either jointly or individually, or even against the will of other owners.

Thus, it is clear that the normative structure of the fundamental right to environmental protection does not include the availability of the right, insofar as one cannot dispose of what is common. In addition, in case of violation, any owner can defend this common law, even against the will of the others.

Hence, it can be concluded that the protection of the environment is an unavailable fundamental right.

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