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# RELATIVIZATION OF ENVIRONMENTAL REGULATION BY EMERGENCY STATE

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## ABSTRACT

Given the current context of economic and political crisis experienced in Brazil, we propose a discussion about the state's role in the implementation of environmental protection measures, especially considering the scenario of environmental degradation in protected areas, such as conservation units, permanent preservation areas, among others, due to anthropic activities. Through a bibliographical research and using both analytical and descriptive methods, the present study is an approach into the adoption of legislative acts that regulate harmful practices for the environment in protected areas, in disregard of the indispensability of ensuring the fundamental right to an ecologically balanced environment, as foreseen in article 225 of the 1988 Constitution. In doing so, we will analyze the evolution of concepts related to the permanent state of emergency and the influence of this exceptional situation for the relativization of environmental legislation in Brazil. As a result, it is mandatory that the public authorities and the community foster the exercise of environmental citizenship, sustainable development and

the strengthening of state institutions aiming the consolidation of the Socio-Environmental State of Law.

**Key words:** Sustainable development; Environmental regulation; Fundamental right.

## *RESUMO*

*Diante do contexto de crise econômica e política vivenciada no Brasil, propõe-se a reflexão sobre a atuação do Estado na implementação de mecanismos voltados à proteção ambiental, principalmente ao se considerar o cenário de degradação do meio ambiente em áreas protegidas, como unidades de conservação, áreas de preservação permanente, dentre outras, devido às atividades antrópicas. Por meio de pesquisa bibliográfica e dos métodos analítico e descritivo, aborda-se na presente pesquisa a aprovação de atos legislativos que regularizam práticas nocivas ao meio ambiente em áreas protegidas, em inobservância à indispensabilidade de se assegurar a fruição do direito fundamental ao meio ambiente ecologicamente equilibrado, previsto no art. 225 da Constituição da República de 1988. Do mesmo modo, busca-se analisar a evolução dos conceitos relativos ao estado de emergência permanente e a influência dessa situação excepcional para a relativização da legislação ambiental no Brasil. Como resultado, demonstra-se que se faz necessária a promoção pelo Poder Público e pela coletividade do exercício da cidadania ambiental, da promoção do desenvolvimento sustentável e do fortalecimento das instituições estatais com o objetivo de consolidação do Estado Socioambiental de Direito.*

***Palavras-chave:*** *Desenvolvimento sustentável; Regulação ambiental; Direito fundamental.*

## INTRODUCTION

It is important to note that the destruction of the ozone layer, the scarcity of water and food in part of the planet, extreme climatic events, pollution and the increasing destruction of biodiversity are some of the factors that demonstrate the importance of adopting local government strategies and global values that ensure a decent present and future for humanity.

In this scenario, in view of the 'global alert' resulting from international documents such as the Brundtland Report, called *Our Common Future*, 1987, the Constitution of the Republic of 1988 was promulgated, which established in art. 225 the fundamental right to the ecologically balanced environment, a common good of the people, essential to the healthy quality of life for present and future generations.

In view of what is constitutionally established, protective legislative acts have been approved for the various elements that compose the environment, so that Brazilian environmental legislation is one of the most complete in terms of environmental regulation when compared to other countries. However, despite the legal apparatus available and the existence of environmental agencies in all Brazilian states and municipalities, as well as linked to the Union[1], the problems of degradation of the environmental quality in the country are increasing, which demonstrated the inefficiency of the State to realize this fundamental right of the third dimension.

The unsatisfactory results obtained by the country in the control of deforestation in the Amazon, as shown by data from the National Institute of Space Research - INPE[2] outline a serious problem in the protection of the environment in the country, which is the main aspect for the reflections proposed in this study: the inertia or disorganization of the State for the protection of secured areas, such as conservation units and areas of permanent preservation, which results in subsequent legislative initiatives to 'regularize' illegal conduct that has not been restricted by the State.

The problem in question is called in the present scientific work

1 The Brazilian Institute for the Environment and Renewable Natural Resources - IBAMA, created by Law No. 7,735 of February 22, 1989, and the Chico Mendes Institute for Biodiversity Conservation, created by Law No. 11,516 of 28 of August 2007, based on a restructuring and distribution of assignments that previously belonged to IBAMA.

2 According to information from the Amazon Deforestation Monitoring Project (Prodes) of INPE, deforestation in the Amazon reached 7,989 km² between August 2015 and July 2016, an increase of 29% over the previous period.

State of Emergency, in the sense that is created factual situations of illegality with respect to the occupation of spaces representing relevant environmental interest. From the realization of these nunjuridical conduct, laws are edited to remove the illegality of these acts, so that it reduces the scope of protection of these spaces, causing damage to ecosystems in these areas and making the obligation of the government and the community to promote the enjoyment of the fundamental right to the ecologically balanced environment provided for in Article 225 of the 1988 Constitution unseen.

From the perspective of environmental protection, the prevalence of a state of emergency, where new limits are created for state action, can be verified by analyzing the provisions of articles 61-A, 61-B, 61-C and 63 Law No. 12,651 of May 25, 2012 (New Brazilian Forest Code), which allow for the consolidation of environmental damages resulting from violations of the legislation protecting the permanent preservation areas practiced until July 22, 2008, by which in face of these and other provisions of the said infra-constitutional legislation, were interposed by the Attorney General's Office the Direct Unconstitutionality Actions No. 4901/13, 4902/13 and 4903/13, which are pending judgment.

It is important to record that environmental emergency situations are created even in the face of the common competence of the Union, the States, the Federal District and the Municipalities to "protect the environment and fight against pollution in any form" and "preserve forests, fauna and flora", as provided in art. 23, sections VI and VII of the Constitution of the Republic of 1988. It should be noted that, in addition to the organs of the executive branch, there are others which are legitimated to protect objective law such as the Public Defender's Office, the Public Prosecutor's Office, among others provided for in art. 5 Law No. 7. 347 of July 24, 1985 (Public Civil Action Law).

On the other hand, society has the obligation to obey the laws instituted, especially those that ensure the enjoyment of fundamental rights, as well as the collection of the organs and institutions legitimized to protect the environment, since it should not be attributed the responsibility for legal compliance only to the Public Power. The Democratic State of Law provided for in art. 1 of the Constitution of the Republic of 1988 presupposes not only the right of the people to elect their representatives but also to supervise and above all to act in the management of public affairs or goods of diffuse interest.

Thus, the objective of the present study is to analyze the problems related to legislative setbacks that have been attempted in Brazil with the objective of 'regularizing' illegal practices implemented due to the lack of state control in protected areas, especially in conservation areas, that is denominated in the present scientific work of State of Emergency from the environmental point of view.

It is also intended to analyze the relationship between 'neo-constitutionalism' and the state of emergency, since from the onset of legal conflicts related to the relativization of environmental regulation in protected areas, it is indispensable to perform the action of the 'State of Judges' for the respect for the fundamental right to an ecologically balanced environment.

Finally, it is intended to address aspects related to the exercise of environmental citizenship, since from the constitutional establishment of the Socioambiental State of Law, it was established the responsibility of the Public Power and the community to protect the elements of the environment, with the objective of implement the development model that is sustainable for the country.

## 1 RELATIVIZATION OF CONSTITUTIONAL RIGHTS BY THE STATE OF EXCEPTION

In its origin, the postulates of the state emergency have been used for the suspension of fundamental rights and guarantees with the objective of achieving certain purposes by the State, more specifically to prepare the state apparatus against threats to sovereignty, which occurs in wars, for example[3]. Besides, it is formally foreseen in the modern constitutions the state of exception, defined by Agamben (2004) in Schmittian doctrine as the place where the opposition between the norm and its achievement reaches the maximum intensity.

Agamben (2010) also states that the exception is a kind of exclusion characterized as the singular case excluded from the general rule, to maintain the relationship with the legal standard in the form of suspension. Therefore, for the author, it would not be the state of exception the chaos that precedes the order, but the situation that results in the suspension of the general rule; the exception is thus considered the original

3 This understanding is embodied in the exception provided state model in Articles 136 and 137 of the Constitution of the Republic of 1988.

form of the right.

The state of exception passes through an evolutionary process that has not always been shown beneficial in relation to the maintenance of the social achievements reached by humanity. As criticized by Bercovici (2008), the banalization of the state of exception has been occurring. This banalization is related to the need to achieve economic, social or political ends by the State through the suspension of fundamental rights and guarantees.

In this scenario, the achievements of contemporary constitutions (after World War II), responsible for elevating human dignity to the level of fundamental value, are being partially relativized in view of the institutional direction to maintain a certain state order. The permanence of this state of exception that shapes reality to transform into a rule that which was to be transitory minimizes the importance of state action in the realization of fundamental rights, among which the one related to the maintenance of the ecologically balanced environment.

The theoretical foundations of the state of emergency that relativize environmental regulation are similar to what Bercovici (2006) calls a state of permanent economic exception, in which the economic dictatorship of markets prevails as a result of threats or dissolution of state structures, as well as similar to the concept defended by Schmitt (2006), which tends to become a rule since, according to the author, the exceptional situation does not constitute anarchy or chaos, since it always subsists in order even if it is not legal.

Pompeu and Siqueira (2017, p. 162) affirm that the Federal Constitution of 1988, as an element that introduced the objective of the economic order to concretize the social order, succumbs every day to the financial order and that in Brazil, as a "caricature of what was predicted by Schmitt", the state of permanent exception has decisions taken by the guardian of the Constitution (the Judiciary), in usurpation of national sovereignty and attacking the harmony between the powers of the State.

According to Bobbio (1992), the right to live in an unpolluted environment is the most important of the rights that emerged at the end of the 20th century. In this sense, the fundamental right to the ecologically balanced environment is a relevant social achievement obtained from the Constitution of the Republic of 1988, since environmental protection is directly related to the right to healthy life, so it is impossible to provide quality of life for the degraded environment in its multiple elements.

Brazilian environmental regulation directs the country towards sustainable development[4] thus finds itself in a kind of 'middle way' between the theoretical foundations of traditional or classical anthropocentrism, which philosophically centralizes man as the recipient of all elements of nature, and biocentrism, which recognizes the ownership of rights of nature on the basis of equality in relation to human rights. As Kalil and Ferreira (2017), although biocentrism, defended by deep ecology has not been adopted in the 1988 Constitution, there are devices that go beyond the classical anthropocentrism, to give intrinsic value to environmental goods, such as the constitutional prohibition of practices that put at risk the ecological function of fauna and flora (art. 225, VII, § 1).

In this sense, it is highlighted that the theoretical bases of sustainable development are located in what Leite and Belchior (2014, p. 22) call "broad anthropocentrism", which maintains the centrality of the discussions about the environment in the figure of the human being, although it proposes different views on environmental goods, by extending this anthropocentric view into considerations that imply ideas of autonomy of the elements of the environment as a requirement for the guarantee of the survival of the human species itself.

It is noted that the main problem to achieve sustainable development in Brazil is not in the field of environmental regulation but in the implementation of legal instruments and mechanisms provided by law. Undoubtedly, there is a need for improvements and modernization of aspects of Brazilian environmental laws; however, in the field of implementation of the legal postulates, which are directed to this form of development, there is the greatest fragility in the relationship between man and the environment in the country.

Thus, the legislator is criticized in certain regions, such as in the Legal Amazon, which in order to meet specific interests 'regularizes' the environmental illicit caused by state inertia in protecting the environment. These interests, as a rule, are related to landowners and large rural producers, since the Brazilian macroeconomics has been directed towards the strengthening of agricultural production, which is a positive aspect, especially in a country with ample territorial space and vast areas productive. However, this important economic activity finds boundaries that must be observed with respect to its social and environmental effects.

4 Endorsed in the "Our Common Future" report, launched in 1987 (also known as the "Brundtland Report"), as meeting the needs of the present without compromising the ability of future generations to meet their own needs.

This state inertia is called in the present state of emergency, which relativizes environmental regulation, characterized by the absence or deficiency of state action in protected areas, such as permanent preservation areas and conservation units, resulting in environmental illicit that after the implementation of these illicit acts, the State itself, by means of legislative acts, removes the unjustified character of the conduct, by imposing legislative setbacks in norms that tend to ensure the enjoyment of the fundamental right to the ecologically balanced environment.

As a recent example of this problem, we highlight the edition of Provisional Measures (PM) Nos. 756 and 758, both of December 19, 2016, under the competence of the Presidency of the Republic, covered urgently and relevantly[5]. Through Provisional Measure nº 756, the Environmental Protection Area of Jamanxim was created in Novo Progresso, in the state of Pará, which constitutes a conservation unit for sustainable use and changed the limits of the National Park (Parna) of Rio Novo, as well as reducing the limits of the National Forest (Flona) of Jamanxim, created by Decree no, of February 13, 2006, which constitute a conservation unit of integral protection, more restrictive in relation to human occupation.

Through Provisional Measure nº 758, the limits of the National Forest (Flona) of Jamanxim and the increase of the Environmental Protection Area of the Tapajós, which constitutes a category of conservation unit of sustainable use, have been reduced, more permissive in relation to the human activities. It is envisaged that, through these acts emanating from the Executive Branch, there is an increase of area in conservation units of sustainable use, as well as the reduction of the limits of conservation unit of integral protection, in this case, the National Forest (Flona) of Jamanxim[6].

It is important to highlight that the aforementioned provisional measures, used to define new limits for protected areas confront the art. 22, paragraph 7 of Law 9,985 of July 18, 2000, as well as art. 225, paragraph 1, III of the Constitution of the Republic of 1988, since the reduction or alteration of conservation units can only be carried out by means of a specific and formal law. The Supreme Federal Court, through the Special Appeal for Extraordinary Appeal 519. 778/RN, and the Superior Court of Justice (STJ) have already appeared in this sense, in the judgment of

5 Art. 62 of the Constitution of 1988 establishes that "in case of relevance and urgency, the President of the Republic may adopt provisional measures, with force of law, and must immediately submit them to the National Congress. "

6 There was a reduction of 1. 3 million hectares to approximately 542 thousand hectares of this integral protection conservation unit.

Special Appeal 1071741/SP.

It should be noted that PM nº 758 and PM nº 756, both of December 19, 2016, according to the Socio-environmental Institute[7] benefit landowners, prospectors, illegal loggers and *grileiros* of lands, a recurring fact in the units of the federation that corresponds to the Legal Amazon, contributing to the advancement of economic activities harmful to the environment on these protected spaces due to the difficulty of access and low presence of the state apparatus.

It is inferred that in this context exceptional and illegal behaviors are carried out within institutional normality, an emergency situation aggravated by the State's action at a later time to regularize the illegal activities that have been carried out in violation of the postulates that confer substance to the right fundamental to the ecologically balanced environment, which characterizes the permanent state of emergency that relativizes environmental regulation.

The provisional normative acts mentioned were not converted into law, losing their validity for a term, however, the Executive Branch proposed Law No. 8. 107 of July 13, 2017, which provides for the reduction of the limits of the National Forest of Jamanxim, which is detrimental to the ecosystems that exist in this integral protection conservation unit.

As an example of the exceptional conduct adopted by the Public Power to enable research and mineral exploration in areas rich in ecosystem attributes, the controversies related to the Copper National Reserve and its Associates, established in 1984 and located in the States of Pará and Amapá, which was terminated through Decree No. 9147 of August 28, 2017, without discussing the aspects and impacts of this legislative measure with civil society, as is the case with the bills that are processed in the National Congress.

As a result of this legislative act emanated by the Union, judicial actions have been filed and by means of a judicial decision originating from the Judicial Section of the Federal District of the Federal Regional Court of the First Region, in the Popular Action registered under No. 1010839-91. 2017. 4. 01. 3400, "any and all administrative action intended to extinguish the Copper National Reserve and Associates" was suspended, which can only occur from "observance of the constitutional guarantee established in art. 225, paragraph 1, item III […]", which deals with the need for a law in the formal sense, approved by the National Congress, for the alteration or

7 Available at: <http://www. socioambiental. org/en-us/noticias-socioambientais/mps-de-temer-contra-florestas-beneficiarao-garimpo-grilagem-e-madeira-ilegal >. Accessed on: 12 Jul. 2017

suppression of protected areas.

The problem described has affected the areas destined to environmental protection in Brazil, which leads to the reflection on the interests related to the state's performance in the country, since it is essential to carry out the constitutional postulates directed to the protection of the elements of the environment as a form to materialize what is termed by Lassalle (2001, p. 10) as "real factors of power," which constitute the active and effective force of the Constitution which informs all existing laws and legal institutions.

## 2 PROTECTION OF THE ENVIRONMENT IN THE CONTEXT OF NEO-CONSTITUTIONALISM

Brazil has adopted a broad system of protection of the environment with an extensive role legitimized to the adoption of protective actions, established through norms that regulate from the common competence of federal entities (Union, State, Federal District and Municipalities) for the environmental inspection[8] to the possibility of proposing reparatory actions[9], which provide for environmental crimes, as provided by Law No. 9,605 of February 12, 1998 (Environmental Crimes Law), among other aspects.

The programmatic nature and the low jurisdictional effectiveness of constitutional norms delegated to the Constitution the secondary function of merely guiding conduct and values considered supreme. In this scenario, according to Pedra (2008), constitutional law seemed to be literature, fiction or sociology, but in the last decades this picture has changed, with the Constitution becoming a norm and constitutional law as an effective and indispensable legal discipline, in which the permanent search for the maximum effectiveness of the constitutional postulates stands out, thus overcoming the stage in which the Constitution was considered as a mere set of political promises, as well as a programmatic and non-pragmatic document.

This phase received the neo-constitutionalism denomination, in which, among other things, the principles and constitutional norms are replaced by the normative force required to mark social behavior and the judicial review gives the Judiciary a relevant role in the execution of

8 Predicted in article 17 of Complementary Law nº 140 of December 8, 2011.

9 In particular by means of the Public Civil Action (Law No. 7. 347 of July 24, 1985).

fundamental rights. This allows the decision of the State Judge, based on constitutional values, to replace legislative inertia, to regulate legal situations relevant from the point of view of constitutional effectiveness.

Barroso (2009) affirms that in neo-constitutionalism theoretical, philosophical and ideological premises of traditional interpretation were affected, including and notably the relevance of the norm, its possibilities and limits, besides the interpreter's attributions, their function and circumstances, including categories that were created or re-elaborated, such as the ways of assigning meaning to constitutional provisions, the recognition of normativity to principles, the perception of the occurrence of collisions of constitutional norms and fundamental rights, the need to use weighting as a decision technique and the rehabilitation of reason as a basis for the legitimation of judicial decisions.

In treating neo-constitutionalism as an axiological theory that approximates the law of morality, for Comanducci (2003), methodological neo-constitutionalism argues, at least as far as constitutional rights are concerned, that constitutional principles and fundamental rights constitute the bridge between law and morals - the thesis of the necessary, identifying or justifying connection between law and morals[10].

In spite of the fact that the objective of this work does not allow to penetrate deeply into the theoretical constructions on neo-constitutionalism, it is important to highlight the legitimizing function of the Socioambiental State of Law, which arises from this new model of normative effectiveness, and the challenges that are opposed to the permanent state of emergency, since there is an increasingly evident trend from the neo-constitutionalism to the realization of fundamental rights, among which is what ensures the ecologically balanced environment for present and future generations.

In this sense, the Brazilian Supreme Court decisions that declared the unconstitutionality of state laws that aimed to regulate sporting activities with birds, called 'rows' or 'cockfights', which subject the animals to cruel treatment, in violation of the provisions of art. 225, §1, VII of the CR/88[11]. Under the same legal basis, more recently, Law 15,299 of January 8, 2013,

10 Originally: *"El neoconstitucionalismo metodológico sostiene por el contrario – al menos respecto a situaciones de derecho constitucionalizado, donde los princípios constitucionales y los derechos fundamentales constituirían un puente entre derecho y moral – la tesis de la conexión necesaria, identificativa y/o justificativa, entre derecho y moral"*.

11 ADI 3. 776, Rel. Min. Cezar Peluso, trial on 14-6-2007, Plenary, DJ of 29-6-2007. In the same sense: ADI 1,856, Rel. Min. Celso de Mello, judgment on 26-5-2011, Plenary, DJE of 10-14-2011; ADI 2. 514, Rel. Min. Eros Grau, judgment on 29-6-2005, Plenary, DJ of 9-12-2005.

of the state of Ceará, was declared unconstitutional, regulating the practice of the *vaquejada* as a sporting and cultural activity[12].

According to Benjamim (2008), in art. 225 is the main core of environmental protection of the Constitution of the Republic of 1988, which represents only the port of arrival or the most salient point of other devices that, directly or indirectly, establish a real regulatory framework that composes environmental public order, based on the principles of environmental primordiality and the limited exploitation of property, both of a general and implicit nature.

In view of the legal framework that regulates art. 225 of the Constitution of the Republic of 1988, as mentioned by Herman Benjamim, the state behavior that grounds the existence of the permanent state of exception regarding environmental regulation will find strong resistance in the Judiciary, resulting in the increase of legal conflicts, especially before the search for the effectiveness of the fundamental rights from the movement denominated 'neo-constitutionalism'.

## 3 ENVIRONMENTAL CITIZENSHIP AND STATE ACTIVITY IN THE EFFECTIVENESS OF THE SOCIO-ENVIRONMENTAL STATE OF LAW

In the state of permanent emergency in environmental matters, as stated above, social behaviors that should be exceptional in the face of the constitutional postulates related to environmental protection are being transformed into rules, contradicting especially art. 225 of the Constitution of the Republic of 1988, which provides for the fundamental intergenerational right to the ecologically balanced environment.

These social behaviors result in the relativization of environmental legislation and weaken the Socio-environmental State of Law, understood by Wolkmer and Paulitsch (2013) as a state in which the constitutional order focused on environmental protection occupies a fundamental place and hierarchy. As a result, in the promotion of benefit rights, the preservation of environmental conditions will be the basis for state actions and public policies, since they will allow for the future existence of generations to come.

The Socio-Environmental State of Law is an important achievement obtained with the 1988 Constitution, in which society and

12 ADI 4. 983, Rel. Min. Marco Aurélio Mello, judgment on 6-10-2016, Plenary.

the government are given the duty to transform social reality, shaped by predatory exploitation of the environment and lack of concern for justice so that, through legal mechanisms and the institutional apparatus of state powers, sustainable development is promoted.

According to Santos (1997), social development is affected by the way in which basic human needs are met. There must, therefore, be a strict balance between the three main forms of property, which are the individual, the community, and the state. The Socio-Environmental State of Law aims at this balance between the forms of property mentioned by the author so as not to allow the misappropriation of environmental goods and to safeguard the fundamental right to the balanced environment, with a view to sustainable development.

## 3. 1 Sustainable development as a new paradigm and exercise of environmental citizenship

The relativization of environmental legislation through what is called in the present work of Permanent State of Emergency tends to cease from the broad understanding by the social actors of the fundamentality of the fulfillment of their duties in favor of sustainable development. This model of development that Sachs (2007) defines as a classic three-leaf clover, which is economic efficiency, environmental conservation, and social equity, will only take place from the effective engagement of the stakeholders since there is a need to reshape secular social structures that have proved unsustainable only in recent decades.

According to Latouche (2006: 49), this model of economic growth that excludes the less favored and causes degradation of the elements of the environment, which "generates a great deal of inequality and injustice, creates a rather illusory welfare, does not grant the privileged a society of coexistence, but an anti-society sick in its wealth"[13].

Judicial instruments to protect the environment, mandatory environmental education in basic education, the exercise of administrative police power for environmental inspection, among others, are elements of society acting in favor of the ecologically balanced environment, but the levels of environmental degradation and negative externalities continue to increase in Brazil, which demonstrates that the core of the problem

13 Originally: *"[...] engendra, una buena cantidad de desigualdades e injusticias, crea un bienestar considerablemente ilusorio, no suscita para los privilegiados una sociedad convivencional sino una antisociedad enferma de su riqueza."*

in question is not the absence of environmental laws. The problem lies in the deliberate failure on the part of society and the government itself, materialized from discourses that polarize the conservation of the environment on the one hand and economic development on the other as if it were not possible to reconcile these two fundamental needs. It is necessary to remodel globally the structures of human development, which is based on the utilitarian and individualist view of the elements of the environment.

The commitment to this remodeling has already been assumed by 193 member countries of the United Nations, including Brazil, on the occasion of the United Nations Summit on Sustainable Development held in New York in September 2015. In this opportunity, the global agenda was approved called "Transforming Our World: Agenda 2030 for Sustainable Development", bearing 17 Sustainable Development Goals (SDGs).

Carducci (2010) describes that, in spite of the discourse related to the norms of international law for the protection of human rights, which mainly deals with the obligation of States to make these normative instruments effective, in a world of increasingly complex social relations, intensified by globalization, it is increasingly evident that there are other subjects, such as intergovernmental and non-governmental organizations (horizontal effectiveness of human rights), which are obliged to respect human rights, the ones aimed at protecting the environment included.

In this sense, the exercise of environmental citizenship is seen as a necessary presupposition for the achievement of SDGs. Villarroel (2013, p. 192-193) mentions that the attempt to link the question of citizenship to the problem of the environmental crisis has been called in various forms, such as "environmental citizenship", "green citizenship", "ecological citizenship" or "global environment citizenship". According to the same author, environmental citizenship should establish a commitment to the common good, preponderantly to the private interests of individuals. The environmental citizen is concerned, in this constant approach, with the selfish solutions given to environmental problems, since they would risk inhibiting the ability to find and implement the best collective solutions that aim at the common good.

The understanding of environmental risks favors the exercise of environmental citizenship so that it is necessary that this behavior is materialized in all forms of social action, especially in the exercise of economic activities in the country. Thus, it is mentioned that there are

occasional initiatives of business groups with a view to the protection of biodiversity and the promotion of sustainable development, especially in the Amazon region[14].

On the other hand, it should be recognized that the voluntary exercise of environmental citizenship is a complex activity in the face of the model of development experienced in contemporary society, as Reich (2008) argues that companies are not aimed at achieving public purposes; act in this way or by force of law, if the initiative is profitable, to polish its image, to improve the financial results or to avoid the promulgation of new law or regulation that perhaps entails heavier burdens; in this hypothesis, good 'voluntary' actions tend to be limited and temporary, to continue only as long as conditions that guarantee their positive returns endure.

For this reason, it is relevant for Brazil to create forms that materialize the protection of the environment and the reduction of regional and social inequalities, which are general principles of the economic order, foreseen in art. 170, items VI and VI of the Constitution of 1988, and must be observed in the exercise of any wealth-generating activity at a national level in order to provide conditions for a healthy and egalitarian life for the population. In this sense, Derani (2008, p. 224) affirms that the achievement of satisfactory quality of life capable of reaching the whole of society is directly related to the way in which this society has the appropriation and transformation of its resources, that is, how it develops their economic activity; for the accomplishment of this purpose mentioned by the author, the exercise of environmental citizenship is fundamental.

Silva and Bertoldi (2016) affirm that the consecration of citizenship translates into the capacity of the individual individually or collectively organized to enjoy rights and fulfill the duties provided for in legal norms and that the existence of norms that require a state action directed to environmental education is not capable of promoting in isolation the necessary changes in the development model that has been experimented. The involvement of private social organizations and citizens' interference in environmental matters is fundamental, as well as an active attitude of citizens aimed at ensuring the guarantees provided for in the Constitution.

The exercise of environmental citizenship through the materialization of behaviors that promote sustainable development in the

14 There is the example of the cosmetics company Natura, which develops initiatives for the sustainable exploitation of forest resources, by strengthening community organization and the empowerment of traditional populations in the Amazon.

various forms of action in society constitutes one of the pillars necessary for the concreteness of the Socioambiental State of Law and minimizes the possibility of prevalence of the conditions that favor the existence of the state of environmental emergency, which relativizes environmental regulation, which results in the exteriorization of the social structure responsible for its duties to the environment and compliant with the norms tending to guarantee the enjoyment of the fundamental right to the ecologically balanced environment.

### 3. 2 State performance in the realization of fundamental rights

The prediction of social rights in the Constitutions after the First World War[15] shows the concern in the maintenance of the monopoly of the power of the State before the necessity of transformation of the society, due to the problems evidenced in the Liberal State. In this context, the most decisive factor for the end of liberalism was the market's permission to 'self-manage' freely from the state, which generated discontent among the salaried class, the precariousness of working conditions and the concentration of capital in the minority belonging to the bourgeois class.

From this point of view, the State starts to intervene in the economy by using the Constitution as a normative instrument, in order to control market forces and ensure to society the expansion of the list of rights aimed at observing the minimum level of dignity in social relations, economic and political, which characterize the state model called the Social State.

Leal (2003) mentions that in this process of social evolution, extensive catalogs of economic, social, and cultural rights were constitutionalized, consubstantiated in the possibility of demanding benefits from the State. Thus, according to the author, the constitutional texts incorporate emancipatory purposes with the purpose of correcting or transforming the current social and economic order, so that the Constitution is given the most leading role, in the sense of constituting a program of action for government and governed.

The State ceases to act as a secondary player, as a spectator of social and economic life, by intervening more strongly, especially in the economy, with the aim of balancing forces and observing the

15 In particular in the Mexican Constitution of 1917 in the 1919 Weimar Constitution, the Spanish Constitution of 1931 and the very Brazilian Constitution of 1934.

new constitutional precepts. Agra (2010) describes that in this period (early twentieth century) there were already numerous laws that granted prerogative benefits, however, its relevance was to constitutionalize this content, by endowing it normatively of greater importance, in which it helped to increase its normative force.

Hence emerges what has been called the 'governing constitution', aimed at the realization of state goals and the transformation of society. Within this context, the Brazilian constitutions since 1934 foresee programs and the list of fundamental rights that materialize the Social State. However, this model that inspired the constitutions that emerged in the post-World War II period, from the end of the twentieth century, has come to be criticized in the face of the reflections on state interventionism and the inability of the State to achieve the goals envisaged in the constitutional text.

According to Nunes (2011), constitutions do not guarantee the effective realization of consecrated fundamental rights, but from the establishment by the sovereign people, when certain rights are treated as fundamental and the organs of democratic political power feel politically and legally linked to acting in the direction of its effectiveness. It is verified that, despite all the legal and institutional apparatus, the existence of conflicting interests has been moving away from the State's stronger action for the protection of the environment in the country.

Hesse (1991) clarifies that although the Constitution cannot accomplish anything by itself, it can impose tasks and become an active force if these tasks are effectively carried out, if there is a willingness to guide one's own conduct according to what is established therein and if it can identify the will to realize this order, despite all the questions and reservations coming from the judgments of convenience.

Bercovici (1999) argues that part of the critiques of state and constitutional models that exist today comes from theories such as the theory of reflexive law, which is based on the postulate that the State and its normative legal instruments no longer have the capacity to regulate the complexity of contemporary society; the legal order becomes a coordination order, as a way of enabling the autonomy of systems to maximize their internal rationality, without imposing a solution to the systems, but based on the principles of social responsibility and global consciousness, which leads these systems to the reflection on the social effects of their decisions and action, inducing them not to exceed limits situations in which all would

lose.

According to the same author, the 'utopian' claim of the State and of the Constitution to regulate social life is criticized by means of a program of tasks and objectives to be fulfilled according to the constitutional determinations, and the utopian idea is proposed instead that the various systems will act coordinated by the idea of 'social responsibility', so that the author concludes at the end of the analysis of this problem that the constitutional concretion is necessary, since no more rights are demanded, but guarantees of its implementation, for both there is no lack of legal means.

Given the complexity that surrounds the protection of the environment and the effectiveness of the Socio-environmental State of Law, the search for the 'global consciousness' proposed by the theory of reflexive law must be worked within the context of the implementation of a set of actions that also cover the regulation state, but that should be redirected in order to promote efficiency in all processes, and not only in the 'State of License', as it happens in the increasingly bureaucratized role of the public apparatus.

There have been significant advances in society's understanding of the importance of preserving the environment. However, despite this evolution, problems such as the annual growth of deforestation in the Amazon and pollution in large urban centers demonstrate that there is a need for effective state regulation through not only of the 'legal means', as Bercovici argues, but mainly for the improvement of the State's inspection action by objectifying the implementation of the legal instruments available to the whole community and to the Public Power itself.

Market forces tend to maximize profit to the detriment of cost socialization, especially with regard to environmental impacts, resulting in the uncontrolled increase of the "ecological footprint", an expression that, according to Bursztyn and Persegona (2008, p. 375) was created in 1992 by Willan Rees to compare the consumption of resources by human activities with the ability of nature to support it by showing if its impacts on the global environment are sustainable in the long run.

Sen (2000) clarifies that individuals live in the world of institutions and the opportunities and perspectives depend crucially on their existence and how they work, and so the author proposes rational evaluation and examination under the optimum of integration of these institutions, especially with respect to the generation of socio-environmental benefits.

In this sense, the State institutions have the fundamental attribution related to the promotion of the compatibility of economic development with environmental protection in the face of the predatory action that is still seen in the market institutions, which is typical of the development model that has been implemented in Brazil.

## CONCLUSION

Since the Schimidttian doctrine, the concepts linked to the state of exception have evolved, so that in contemporary society, the suspension of fundamental rights for the achievement of certain purposes by the State materializes, even with respect to related environmental regulation protected areas, where the state apparatus is not efficient for the conservation of these spaces, and before irregular occupation, to edit legislative acts to regularize these occupations in violation of the fundamental right set forth in art. 225 of the Constitution of the Republic of 1988.

The discourse of economic growth and the need to overcome the crisis experienced in the country has been used to weaken environmental legislation, which contributes to the destruction of biodiversity, especially in the Legal Amazon. In this sense, criticism was made of the State, which has the duty to protect and manage spaces of relevant environmental interest (conservation units, permanent preservation areas, indigenous reserves, among others), but which does not exercise adequate environmental control; there is thus the action after the irregular occupation of these areas, through the publication of normative acts that relativize environmental regulation, by encouraging other spaces of the same nature to be degraded.

This problem can be verified by the analysis of the provisions of articles 61-A, 61-B, 61-C and 63 of Law 12. 651 of May 25, 2012 (New Brazilian Forest Code), as well as in Provisional Measures No. 756 and 758, both of December 19, 2016, that make environmental legislation more flexible by reducing the space destined to the conservation of biodiversity in order to allow human exploitation, as well as to allow the consolidation of illegal practices of environmental degradation, in violation of the ecologically balanced environment.

The obligation of the Public Power and of the collectivity of effectiveness of the Socio-ambiental State of Law, which arose with the 1988 Constitution, leads to a reflection on the legality of normative acts tending to relativize environmental regulation. It is important to mention

that, through the Judiciary, the maximum effectiveness of the constitutional postulates has been sought through the axiological model denominated 'neo-constitutionalism', which can result in legal conflicts and arguments of formal unconstitutionality of these normative acts.

However, as it was clarified in the present work, the State has limited capacity of action, so that the consolidation of the Socio-ambiental State of Law will only be possible with the exercise of environmental citizenship in the various forms of social action, since the increase of the environmental degradation in the country does not stem from the absence of protective legislation of environmental elements; is a result of the non-compliance of environmental regulation by the Public Power and by society.

Brazilian environmental legislation is directed towards the remodeling of the way of appropriation of environmental goods in the country, through the promotion of practices that lead to an economically viable, environmentally sustainable and socially just development model. And this intention of the legislator will only be realized from the institutional strengthening in which the state action more concerned with the effectiveness in the society of the Socioambiental State of Law is instrumentalized and through the materialization of behaviors that effectively promote the sustainable development.

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