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EXEMPTION OF ENVIRONMENTAL LICENSING FOR RURAL ACTIVITIES IN THE STATE OF TOCANTINS A THEORETICAL FRAMEWORK FOR AN ARGUMENTATIVE DISCOURSE

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ABSTRACT

This paper is the result of a descriptive research aimed at providing a theoretical framework and legal arguments for future court rulings, based on the legislative amendment brought about by Law 2,713/13 from May 9, 2019, within the State of Tocantins, which caused the exemption of environmental licensing for the exercise of agroforestry activities, contrary to the historical evolution of the treatment given to the subject. The article was put together from the gathering of bibliography research data; they are presented on a historical sequence through the observation that matters related to the environment have always been part of the Brazilian political-administrative agenda since Colonial times. During the Republican period, the first national environmental codes, the adherence to international conventions, and the creation of the National Environmental Policy paved the way for the current Brazilian situation of constitutional protection to the ecological balance. However, some local public policies still go against this historical background, such as what happened when the State Law submitted this paper analyses came into effect. We intend to look into

that Law based on constitutional, ethical, and criminal law argumentative approaches, which are vital for court dispute of environmental licensing introduced by it. It was shown that excusing environmental licensing is a dangerous step back that violates the duties of prevention and intergenerational equity. The legislation in question did not stand up to the argumentative guidelines for court dispute by environmental sciences, formal and material constitution, ethical and criminal law approaches.

Keywords: environmental protection; public policy; legal arguments.

DISPENSA DE LICENCIAMENTO AMBIENTAL PARA ATIVIDADES RURAIS NO ESTADO DO TOCANTINS: SUPORTE TEÓRICO PARA UM DISCURSO ARGUMENTATIVO

RESUMO

Trata-se de resultado de pesquisa descritiva, que objetivou oferecer suporte teórico e argumentação jurídica para futuras decisões judiciais, a partir da alteração legislativa promovida pela Lei nº 2.713/13, de 9 de maio de 2013, no âmbito do Estado do Tocantins, que promoveu a dispensa de licenciamento ambiental para o exercício de atividades agrossilvipastoris, na contramão da histórica evolução do tratamento conferido ao tema. O artigo foi construído a partir de coleta de dados próprios da pesquisa bibliográfica, apresentados a partir de cronologia histórica, mediante constatação de que os temas relacionados ao meio ambiente sempre rondaram a pauta político-administrativa brasileira, desde a Colônia. No período republicano, vieram as primeiras codificações ambientais nacionais, a adesão às convenções internacionais e a instituição da Política Nacional do Meio Ambiente, pavimentando o caminho para a atual realidade brasileira, de ampla proteção constitucional ao equilíbrio ecológico. Entretanto, algumas políticas públicas locais ainda se contrapõem a esse contexto histórico, como a ocorrida com a entrada em vigor da referida Lei Estadual, submetida à análise, neste trabalho, sob os enfoques argumentativos constitucional, ético e do direito penal, essenciais para o enfrentamento judicial da dispensa de licenciamento ambiental por ela introduzida. Resultou demonstrado que dispensar o licenciamento ambiental configura perigoso retrocesso ofensivo aos deveres de prevenção e ao dever de equidade intergeracional. A legislação em análise não resistiu às diretrizes argumentativas para enfrentamento judicial nos enfoques das ciências ambientais, constitucional formal e material, ético e do direito penal.

Palavras-chave: *proteção ambiental; políticas públicas; argumentação jurídica.*

FOREWORD

The national development is constitutionally laid down as one of the fundamental objectives of the Federative Republic of Brazil, among with the goals of building a free, fair and united society, eradicating poverty and promote the wellbeing of all people, without distinction (Constitution of the Federative Republic of Brazil, Article 3, II).

In the development context, the economic activity plays a vital role. It is, in fact, the basis for development. Guided by the purpose of ensuring a dignified living for all, the economic order must, by constitutional precept (Article 170), comply with certain principles, among which this paper wants to emphasize the defense of the ecological balance of the environment, as that is a common use property of the people and essential to a healthy quality of life (Article 225); this defense must be carried out by giving a differentiated treatment to the environmental impact of products and services and their processes of preparation and provision (Article 170, VI).

The environmental sciences claim that the Earth has a global regulation system that is the result of the delicate inter-relationship between ecosystems that are responsible for the ecological balance of the planet. As a result, certain changes in the natural environment impact local ecological systems and may ultimately affect the overall balance. Thus, whether through the influence of scientific knowledge or by a duty of complying with constitutional precepts, there is no doubt that economic development must progress hand in hand with environmental preservation.

It is the duty of all, therefore – even of those who oppose the scientific theses that the planetary equilibrium is irreversibly damaged – to raise the awareness that affecting ecosystems entails risks to the greater goods of human life, such as health, quality of life and well-being, which are also under special constitutional protection.

In this scenario, the management of public affairs is extremely important. Considering the need to preserve the regional and ultimately global ecological balance, this paper intends to offer a theoretical framework and legal arguments for decision-making on changes in the Environmental Adaptation Program for Rural Properties and Activities in the State of Tocantins that took place with entry into effect of State Law 2,713, of May 9, 2013, which exempted agro-forestry activities carried out

in the territory of Tocantins from environmental licensing.

It is believed that political-legislative measure will not be able to stand, if it is challenged in court by legal arguments supported by the precepts of ethics, criminal law and Brazilian constitutional order. This is what we intend to demonstrate in this paper.

The research that gave rise to this Article can be classified as applied research, since it aims at producing knowledge for practical application geared at solving a specific problem, namely, can the recent exemption of environmental licensing in Tocantins withstand legal argumentation based on ethics, criminal law and the Brazilian constitutional order?

Considering the approach to the problem, it is a qualitative research, especially because it aims at interpreting the phenomenon and assigning meanings to it without requiring statistical methods or techniques. From the point of view of the objectives, it is an exploratory and descriptive effort, with procedures typical of bibliographical research prepared from material already published in the worldwide network of computers, journals, legislations and, mainly, in books. For that, the text was organized into three sections. The first one reviews the historical chronology of the main environmental issues in Brazil based on the Brazilian legal system; then special attention is given to the Tocantins legislation under consideration, and finally, the legal guidelines for facing the matter based on the theory of argumentation are presented.

1 HISTORICAL BACKGROUND OF ENVIRONMENTAL ISSUES IN BRAZIL

Environmental damage has been recorded in Brazil since the time of Portuguese colonization, when Brazilian territory began to be economically exploited. Anthropological studies show that native populations lived, each in their own way, integrated with nature, before the Portuguese interest in wood for ship construction, the establishment of the "white gold" industry (sugar cane growing and implantation and the exploitation of sugar mills), and the exploitation of ores gave rise not only to large changes in the natural environment in the early 16th century (CARRILLO, 2003), but also lead to the creation of the first environmental law rules (LAPA, 2000). The dominant economic activity in itself caused damage to nature. Historical reports describe frequent forest fires caused by spontaneous combustion of alcohol evaporated from sugar mills

(CARRILLO, 2003, p. 61). It is recorded that José Bonifácio Andrade e Silva rose against Brazilian slave farming and the use of rudimentary technologies that would eventually transform our country into a desert like Libya, a grain supplier to Portugal for centuries (MEDINA, p. 2011).

The pioneering legislative framework of that time inspired the first environmental rules of the Colony. Supported by the Afonsine Ordinances (Online, 2018), the cutting of fruit trees had been forbidden in Portugal since 1393.

Along those lines, the first regulatory norms for the exploitation of natural resources were established in Brazilian territory early in the colonial period; these were logically goaded by the economic development and the concern of the Portuguese Crown with clandestine exploration of natural assets (MAGALHÃES, 2002). The first licensing requirements for the exploitation of natural resources are from this period. According to Magalhães (2002), the framework included restrictions to hunting and repeated the Portuguese penal classification against the cutting of trees, with penalties determined according to plant species. From that time, a control on logging has been instituted, with sanctions varying from pecuniary penalties up to scourging, exile, and the death penalty. (MENDONÇA, 1972).

Also during the time of the Empire, other initiatives show acts of government tied to the concern with the environmental issue, although still essentially associated to economic interests. In 1861, by order of Emperor Dom Pedro II, an effort to recover the Atlantic Forest was started. The forest had been severely affected by coffee plantations, giving rise to severe water scarcity in the city of Rio de Janeiro (BEYRUTH, 2006).

During the Republican period, beginning in the 1930s, one can notice a growing concern of the Brazilian public administration bodies with the exploitation of natural resources. Specific themes started to be regulated: forests, water, mining and hunting. The first environmental conservation units were established. Studies on Ecology were included in the academia. Following the same trend, on the international level, after the Second World War, the environmental sciences also gained prominence by the establishment of the International Union for the Conservation of Nature in Switzerland, in 1947.

In 1958, the Brazilian Foundation for Nature Conservation was established in Brazil; however, economic development remained based on the extensive exploitation of natural resources. In the following decades

of 1960 and 1970, quality of life and scarcity of resources began to cause visible warning signs, especially due to a decrease in the volume of drinking water and increasing air pollution, factors that, when added to population growth, increased the awareness about the necessity for conservation. This brought together the scientific community and international social movements, such as *World Wide Fund for Nature*[1] (WWF) in 1961, in Switzerland, and Greenpeace in Canada, in 1971.

At the same time, the national legislation continued to move forward by issuing important legislation: Law n. 4,504 from November 30, 1964 (Land Statute); Law n. 4.771 from September 15, 1965 (Forest Code); Law n. 5,197 from January 3, 1967 (Protection of Wildlife); Decree-Law n. 221 (Fishing Codes) and Decree-Law n. 227 (Mining) and the establishment of the Brazilian Forestry Development Institute by Decree-Law n. 289, all from February 28, 1967.

In the wake of the 1972 United Nations Conference on the Environment in Stockholm and the publication in the same year of the Rome Club report entitled *The Limits of Growth*, supported by the conclusions of scientists from the Massachusetts Institute of Technology (MIT), according to which Planet Earth could not support the then-current population growth rhythm, the Brazilian public administration moves forward by establishing the Special Secretariat for the Environment under the Federal Government, by means of Decree 73.030 from October 30, 1973. The purpose of the agency was to regulate and supervise the rational exploitation of resources and foster environmental preservation. The interweaving between public policies and ecological issues is thus gradually boosted.

A new tool for environmental protection, with official guidelines for sustainable development, came into effect in 1981. It was Law 6,938/81 from August 31, 1981, which provides for the National Environmental Policy, its purposes, formulation mechanisms, and enforcement. After a long maturation process, the theme reached constitutional level in 1988, with the right to a balanced environment – a common good for the use of the people and essential to a healthy quality of life – becoming part of the legal order. It then expressly became the duty of the Government and the community to defend and preserve the environment for current and future generations.

1 World Wide Fund for Nature

The concern with the occupation and use of land is not new in Brazil. It was present throughout the national development from colonial times down to the present day. However, the advanced legal guidelines of today, now based on a pioneering constitutional environmental protection, alone have not proven sufficient to contain the dangerous ravages of nature, which are truly unbridled in Brazil. Nalini stresses that

> [...] one must react to the devastating fury that has already reduced the Atlantic Forest to an almost insignificant sample of the green exuberance found here by the discoverers and that made them believe that the Land of Santa Cruz had once been the Earthly Paradise. A devastating fury that will soon convert the Amazon Forest – the last great rainforest in the world – into a desertified and poor area, unworthy of representing the dream of sustainable development. (NALINI 2008, p. 366).

Effective ecological protection has therefore become imperative, as an essential condition for the continued exploitation of natural resources, and the government assumption of sustainable development is indispensable, as the Federal Supreme Court has pointed out:

> Besides laced with an eminently constitutional character, the principle of sustainable development finds legitimizing support in international commitments taken on by the Brazilian Government. It stands out as a factor for obtaining the right balance between economic and ecological demands. The application of this principle is subject, however – when a situation of conflict between relevant constitutional values occurs –, to an unavoidable condition, compliance with which must not compromise or deplete the essential content of one of the most significant fundamental rights: the right to preservation of the environment, which is a common use asset of all people in general and needs to be safeguarded for current and future generations. (ADI 3540 MC, Reporting Judge CELSO DE MELLO, Full Court, tried on 01/Sep/2005, DJ 3/Feb/2006, p. 14).

In this legislative scenario, the requirement of environmental licensing for any and all productive activities is unequivocally and historically present in the Brazilian situation. This is linked to environmental supervisory and control agencies, especially regarding human activities that interfere with the natural environment, whether they have any relation with economic exploitation or not.

2 REPEAL OF THE NEED FOR ENVIRONMENTAL LICENSING IN THE STATE OF TOCANTINS

On July 8, 2011, the Environmental Adaptation Program for Rural Properties and Activities, provided for in Law 2,476/11, was established in the State of Tocantins, a Brazilian state with significant agro-industrial activities directly related to the use and exploitation of natural resources. The government effort aimed at legalizing rural properties by entering them into the Rural Environmental Registration System (CAR) and the Single Environmental Licensing (LAU).

As a way of encouraging legalization, the spontaneous registration of properties by their owners implied in being excused from paying penalties from assessments preceding the publication of the law and caused by virtue of other statutes related to environmental matters. These included State Laws 261/91 and 771/95 and Federal Law 9605/98 from February 12, 1998, which provide criminal and administrative sanctions for conducts and activities harmful to the environment. It also entailed suspension of the collection of fines resulting from infractions.

Other measures essential to ecological preservation were laid down in the program, such as identification of activities developed in rural areas; quantification of forest assets and liabilities; illegal deforestation monitoring; verification of compliance with current environmental standards; maintenance of reserves and protected areas; definition of procedures and policies for the formation of ecological corridors.

The program requirements included obtaining the Single Environmental Licensing, a requirement for the deployment and operation of agrosilvipastoral activities, which are the joint agricultural, foraging, tree and animal raising and growing in the same area. Based on a premise of regularization and environmental adequacy, sustainable development seemed to guide the original state program.

However, some two years after its entry into force, the program was replaced on May 9, 2013 by Law n. 2,713/13, with substantial changes, notably with regard to the summary repeal of the need for environmental licensing for development of agroforestry activities, with the following working: “Art. 10 Agrosilvipastoral activities are excused from environmental licensing.” This ignored the historic requirement of environmental licensing for the deployment of rural activities applied on Brazilian soil since colonial times. Excusing was justified by its designers

as reducing rubber-stamping, which harms investments and stalls the growth of the State.

Despite the huge scope of the matter, the new law approval process was surprisingly swift. The bill was presented in a plenary session at the Legislative Assembly on May 7, 2013 and unanimously approved the following day. There were reports[2] that the Federal Prosecutor's Office, Federal Government agencies (IBAMA and INCRA), and non-governmental organizations received a copy of the bill without the licensing waiver provision (Article 10), later included by the Legislative Assembly in the final text.

This fact led to the elaboration of a report by the Specialized Federal Prosecutor's Office (PFE/IBAMA-TO) stating that the approval of the law implied extending the mechanisms for comprehensive protection of the environment, converging into an unsustainable developmental situation. It also gave rise to the statement by the Office of Federal Prosecution in Tocantins saying that the law contradicted the National Environmental Policy (Law 6,938/81); this culminated in an unconstitutionality proceeding being filed at the Superior Court of Justice via Direct Action of Unconstitutionality n. 5312, which is still pending final judgment of merit.

Finally, the legal amendment occurred about two months before the outbreak of a police operation that brought to public knowledge the official investigation into an alleged illegal scheme for the sale of environmental permits by the state supervisory body called Tocantins Nature Institute (NATURATINS), which culminated into the precautionary arrest of that agency servants[3].

As will be seen below, from the point of view of the principles of prevention, precaution, responsibility and the ratchet effect – which are the bases for sustainable development – the precept contained in article 10 of State Law 2,713/13 is cause for concern, especially given the fragility of the *cerrado* (Brazilian savannah) biome that predominates in the territory of Tocantins. The aforementioned exemption from environmental licensing is under imminent threat of being questioned in the local courts, requiring special attention from the justice system players.

2 http://ambientalistasemrede.org/para-fomentar-o-agronegocio-estado-derruba-a-necessidade-de-licenciamento-ambiental/, accessed on 18/May/2018.

3 See details at the following webpages: http://g1.globo.com/to/tocantins/noticia/2013/07/policia-prende-outro-acusado-de-fraudar-licencas-ambientais.html;
http://www.redeto.com.br/noticia-3391-operacao-para-desmantelar-quadrilha-que-agia-no-naturatins-cumpre-sete-mandados-de-prisao.html#.V3gDdPkrJGo;
http://www.t1noticias.com.br/plantao-de-policia/policia-prende-3%BA-servidor-do-naturatins;-escutas-comprovam-existencia-de-fraude/50475/

3 THE IMPORTANCE OF ARGUMENTATION: GUIDELINES FOR FACING A LEGAL TRIAL

To give a judicial solution to environmental conflicts is a highly complex task. It demands sophisticated argumentative efforts, especially in the face of the economic arguments against the principles of environmental protection. As warned by GUIMARÃES (1997 apud FREIRIA, 2011, p. 12): "The causes and implications of the environmental crisis bring to light political, economic, institutional, social and cultural aspects, and their effects transcend national borders."

The importance of effective environmental court rulings stands out without major difficulties; this situation shows up the major role of legal argumentation theories in the exercise of court activities, which "resultan un abordaje constructivo y sustancial del derecho, describiéndolo y proponiendo herramientas que permiten evaluar la razonabilidad de las decisiones jurídicas y com ello colaborar – según nuestro entender – em la tarea de aproximar el fenómeno a la comunidad política que lo vive"[4] (GRAJALES, 2014, p. 514).

In the environmental field, the arduous task of judicial provisions, made actual by the court rulings, is added of the need to make public policies on sustainability effective, or to remove government acts that pose environmental damage risks, an equally difficult task. As Lanfredi (2002, 249) points out, "the challenge for the judge on ecological matters is to make the application of the laws governing matter effective". The fragility of the results is therefore predictable, when the support to court efforts is not adequate to the magnitude of the challenge.

One can see in the subject under study that the government's initiative to eliminate the need for environmental licensing in the Tocantins territory is a fertile ground for legal arguments, which, if well structured, will be an effective demonstration of the serious mistake made by Tocantins public administration. The essential argumentative approaches for judicial confrontation of the environmental licensing waiver introduced in the State of Tocantins by Article 10 of Law 2,713/13 will be approached under this light.

4 "result from a constructive and substantive understanding of the law, describing it and proposing tools that allow us to evaluate the reasonableness of legal decisions and thereby collaborate – in our view – to the task of bringing the phenomenon closer to the political community that lives it"

3.1 Argumentation based on the environmental sciences approach

According to data cataloged by the Brazilian Institute of Geography and Statistics, the State of Tocantins has almost all of its territory (91%) occupied by the *Cerrado* biome, the second largest biome in South America, extending to about 2,036,448 square kilometers (about 23% of the entire Brazilian territory). The Ministry of the Environment describes a *biome* as

> [...] a set of vegetation types covering large continuous areas on a regional scale, with similar flora and fauna defined by the physical conditions predominant in the regions. These climatic, geological and lithological (rock) aspects, for example, endow a biome with a unique biological diversity of its own. In Brazil, the existing biomes are (from the largest to the smallest): the Amazon, the Cerrado, the Atlantic Forest, the Caatinga, the Pampa and the Pantanal (PORTAL BRASIL, 2009, no page number).

The Cerrado also takes up the whole territory of the Federal District, almost all of Goiás (97%) and more than half of Maranhão (65%), Mato Grosso do Sul (61%) and Minas Gerais (57%). It is found in smaller extensions in six other Brazilian states. In the State of Tocantins, it makes up the transition area with the Amazon, a circumstance that makes it especially important for the ecological balance between ecosystems.

The three largest hydrographic basins in South America (the Amazon/Tocantins, São Francisco and Prata) have their spring in the Cerrado, which stresses its high aquifer potential, justifying the name of cradle of waters given to it and resulting in its great biodiversity (LIMA, 2011).

Another important transition area in Tocantins soil is the Jalapão (the transition between the Caatinga and Cerrado biomes), a priority region for the conservation of the Brazilian ecological balance (DOS SANTOS; ADORNO; SANTOS, 2008). In spite of that, studies point out that only about 20% of Cerrado native vegetation in a relatively intact state

> [...] after the Atlantic Forest, Cerrado is the Brazilian ecosystem that has suffered the most changes from human occupation. One of serious environmental impacts in the region was caused by ore prospection, which contaminated the rivers with mercury and caused the silting (dirt clogging) of the watercourses. The erosion caused by the mining activity has been so intense that, in some cases, it even made it impossible to

> mine gold downstream. In recent years, however, the expansion of agriculture and livestock farming has become the greatest risk factor for the Cerrado (WWF-Brazil, no year)

As reported by the Federal Government[5], it is one of the most threatened Brazilian biomes, since it has already lost almost half of its original vegetation cover; over 14,000 km^2 of land are cleared every year; forest fires are directly related to deforestation; 132 species of flora are threatened with extinction; the degradation of the remaining vegetation threatens the quality of water resources; a total of 975,700 km^2 have been cleared – almost half of the total area of the biome.

From environmental science data, it is important to note that the environmental and legal principles of prevention, precaution, responsibility and ratchet effect – which are the bases for sustainable development – are linked to the environmental situation of the state of Tocantins. Based on this approach, there is sufficient argument to show that waiver of environmental licensing to rural activities in the State of Tocantins not only increases the fragility of the cerrado biome, but disregards its importance for the global ecological balance.

3.2 Argumentation based on the constitutional approach

The statutory provision involved suffers from glaring defects of unconstitutionality, both in the formal (constitutional defect of form) and the material aspect (constitutional defect of content). In view of the principle of the hierarchy of norms and the duty to make any law compatible with the Federal Constitution, the legal argument about the invalidity of the legal measure analyzed here must begin with the constitutional aspect.

To make things easier to understand, the formal (structural) and material (content) defects will be discussed separately below.

3.2.1 Unconstitutionality: a violation of Article 24, VI of the Constitution of the Republic

Firstly, it is easy to verify the formal unconstitutionality of Article 10 of Law 2,713 from May 9, 2013 from the State of Tocantins, already charged before the Superior Court of Justice by the Federal Prosecutor's

5 <http://www.mma.gov.br/biomas/cerrado, accessed on 18/May/2018.

Office in the records of the Direct Unconstitutionality Suit n. 5312/TO. According to the author of the suit, the local Legislative Assembly usurped the powers assigned to the Government to provide general environmental protection norms (Article 24, VI, of the Federal Constitution), extrapolating the permission for additional regulation given in paragraphs 1 and 2 of the same Article 24.

According to the rationale outlined in the ADI, in creating an exception to the environmental licensing obligation, the state law violated the precautionary principle, which is contrary to Art. 225 (1) of the Federal Constitution (FC). In the complaint, it is also argued that although the integration of agriculture, livestock raising and forestry aims at sustainability and low environmental impact, the "agrosilvipastoral" denomination does not guarantee, by itself, no damage to the environment, reason for which the previous study of environmental impact and the consequent licensing are indispensable.

Such findings are unequivocal and will certainly lead to a ruling by the Supreme Court of the unconstitutionality of the legal provision, a claim that already finds backing in the opinion appended to the case record on January 28, 2016[6], issued by the Attorney General of the Republic, according to which it is the responsibility of the state law to rule on the need for environmental licensing in the case of joint activities of crops, pastures, forests and cattle raising.

In its statement in the case records, the representative of the federal prosecution service restated the Federal Government's power to legislate on the general rules regarding forests, hunting, fishing, fauna, nature conservation, soil and natural resources protection, environmental protection, and pollution control. It is the responsibility of the Brazilian states to issue only specific regulations, without prejudice to the powers of the Federal Government, as expressly laid down in the Federal Constitution and the National Environmental Policy, which assigns to the National Environmental Council the duty of laying down environmental licensing criteria.

This way, the formal unconstitutionality of Article 10 of the State Law that ordered the excusing of environmental licensing is clear, as it blatantly violates Article 24, VI, of the Federal Constitution.

6 <portal.stf.jus.br/processos/downloadPeca.asp?id=308572468&ext=.pdf>. acessado em 24/05/2019.

3.2.2 Material unconstitutionality: violation of Article 225 of the Constitution of the Republic

At the international level, environmental matters are part of the positive development of several countries, mostly at the constitutional level. In order to boost international protection, the 1948 Universal Declaration of Human Rights, together with the Declaration on the Environment (Stockholm, 1972) and the Convention on Biological Diversity (Rio de Janeiro, 1992) place the environment in the list of protected rights of humanity.

In Brazil, since 1988, the right to an ecologically balanced environment (Article 225) and the assumption of sustainable economic development (Article 170, VI) have been explicitly embedded in the constitution. Besides environmental protection, environmental issues are also directly linked to the fundamental principles of citizenship and the dignity of the human individual (Article 1, II and III) and fundamental rights and guarantees (Article 5 – right to life, Article 6 – right to health). Constitutional protection is therefore unquestionable.

As said before, the importance of the Cerrado Biome for the environmental balance is fully verified in the field of natural sciences, due to its strategic position among other Brazilian ecosystems, especially the Caatinga and the Amazonian Forest, which gives it a fundamental role of transition and ecological integration. The requirement of environmental licensing that was part of the Tocantins statute until its repeal by Law 2,713/13 played an important control role in the degradation of the Cerrado biome, greatly contributing to the effectiveness of the environmental principles of precaution and prevention.

Therefore, scientific findings about the functioning of ecosystems and the current Brazilian situation of fraternal constitutionalism, which focuses on the quality of life of current and future generations, clearly shows up the material unconstitutionality of the recent excusing of licensing established in the State of Tocantins. In addition to the rules of the National Environmental Policy, the new environmental program of Tocantins disregards the ratchet effect rule. This is a general principle of Environmental Law, geared at safeguarding the progress made in avoiding or limiting the deterioration of the environment and

> [...] the expression of a ratchet effect imposed on the Government [...] specifically in the area of the environment, we understand that there are different degrees of environmental protection and that legislation progresses consist in progressively ensuring as high a protection as possible in the collective interest of mankind (BRASIL, 2012, p. 14).

The very unhealthy global and regional ecological scenario – especially in the current situation of serious environmental damage – stresses the neglect of the Tocantins' government measure regarding local environmental protection. The violation is clear not only to the precepts of Article 225 of the Federal Constitution, but also to the ethical principles that should guide the focus of all human actions, especially in the area of public policies, as will be seen below.

3.3 Argumentation based on the ethical approach

In brief, ethics can be defined as "the science of moral behavior of men in a society" (Vazquez, 2004, p. 23). In the words of Aristotle, mentioned by Siqueira Jr. (2012), ethics indicates the moods of the human being in the face of life. The author defines it as "the part of philosophy that is concerned with human action, or more precisely, with acting correctly, and that has morality as its study subject matter" (p. 349). Therefore, all reflection on *ethics* includes a reflection on values, as Reale points out about the imperative of the valuation guidance of a chosen behavior, from the point of view of its effects to the collective:

> [...] ethical norms do not only entail a value judgment on human behavior, but culminate in the choice of a guideline considered as mandatory in a community. Taking an axiological standing results in the chosen path becoming an *imperative*; this way, it is not merely a result of an arbitrary decision, but rather the expression of a complex process of value options, which the decision-making power is more or less conditioned to (REALE, 1990, p. 33).

Despite the various views, Reale's idea that the true understanding of the jurisdicity and morality of human behaviors depend on the assumption of the obligatory nature of ethical norms is quite seductive. According to Bittar (2013), ethics corresponds to the social exercise of

reciprocity, respect and responsibility. With accurate sensitivity, the author points out that "it is in the balance of ethics that differences in behavior must be weighed, in order to measure their utility, purpose, direction, consequences, mechanisms, fruits..." (BITTAR, 2013, p. 25).

Just as for duties, the concern of ethics also turns to rights, breaking down into two scientific fields: deontology, the study of duties, and diceology, the study of rights (SIQUEIRA JR. 2012, p. 349). Emphasizing the greatness of the subject, Nalini (2008) conceptualizes it:

> What would designate ethics would be not just a moral set of rules proper to a culture, but a true "metamoral", a doctrine situated beyond morality. Hence the precedence of ethics over morality: ethics is deconstructive and founding, it enunciates principles or ultimate foundations (Nalini, 2008, 115).

Ethics is thus the regulator of human conduct, and it can be said that humanity has its ethical heritage, made up of the set of actions that serve as benchmarks and mirror for future generations. We concluded that "every process of forming an ethical identity and an ethical conscience for a community stems from a principle: individual action." (BITTAR, 2013, p. 93). There is, therefore, no way of disentangling human action from ethics, especially in the field of political activities, government administration and the creation of public environmental policies.

3.3.1 Professional ethics of public and political agents

On the field of political action, due to the great strength and meaning they carry on directing conducts, the actions of government administrations gain special relevance. Hence, the indispensable ethical need – that goes beyond the legal and moral duty – of government administration always guiding itself by constitutional directives. Bittar stresses that "responsibly managing is a juridical and political duty, no doubt, but above all, it is an ethical duty, arising from the very trustworthiness deposited by the voter on the elected official" (2013, 512). The author concludes with moderation:

> What is of interest to all cannot be left to the winds, much less be driven by one single will. If one or a few are assigned the task of performing for many and for the sake of many, this means this assignment is an act not of granting powers, but above all of assigning social duties. (BITTAR, 2013, p. 513)

Responsibility and ethics thus form the main line of conduct for public or political agents, and should be the have protecting the interests of the community – and not of certain categories or groups – as its endeavor. However, excusing of environmental licensing in the State of Tocantins stand out as linked to these precepts.

3.3.2 Ethics and the principle of responsibility

There is no way to find any collective interest that, in an evaluative graduation, should come before the preservation of human life on the planet. Regardless of ideological, economic or religious factors, a healthy environment, which, from the point of view of natural conditions for life, is a prerequisite for the existence of any individual or the development of any society. One can only aim at something when one is alive, and life depends on certain natural conditions to occur and develop, for "[...] if we keep up the development model hitherto adopted, we may arrive at an irreversible situation for nature and, therefore, for human life [...] (MEDINA, P., 2011, p. 81).

Undeniably, the conditions for human life are linked to the health of the environment. It can be said, therefore, that having an environment where one can live is the primordial value that allows for everything else to take place in or result from human life, because

> Nature is a requirement for human life, for the Earth sets conditions to exist amidst the connections that evoke the protection that the world needs. The Earth is more than a planet, it is the space of accomplishments in the world, as the sum of human experiences in history, that is, it is what makes up the human reality and condition. It is from her, from Earth, that the conditions for living and creating have always come. When alive, we are permanently attached to it. (MEDINA, 2011, p. 81)

It is easy to see that ethics and responsibility are inextricably linked in the human-nature relationship. Therefore, the preservation of the ecological balance of the planet must guide all human conduct. In the same vein, the expansion of ethics aspects at the global level still during the Cold War era, as JONAS (2006) analyses, represented a paradigm shift and remains to this day – and perhaps for a long and indeterminate time in the future – extremely relevant.

In pondering on technological advancements, on the strength of human actions and their effects on the planet, JONAS (2006) concluded that an entirely new object, no less than the whole biosphere of the planet, was added to the things we must be responsible for, as we have power over it. He therefore pondered that the Kantian guideline – "Act according to the maxim that you would wish all other rational people to follow, as if it were a universal law" – deserved to be altered to "Act so that the effects of your action are compatible with the permanence of a true human life on Earth" (p. 48).

This is undoubtedly the foundation for all human conduct. In the words of Bauman (1997), "duties tend to make all humans equal; responsibility is what individuals do" (66). Therefore, it is from the point of view of the principle of responsibility that the issues related to economic and social development must be addressed.

Once again, we see the principle of responsibility being ignored by the removal of the requirement for licensing that took place in the Tocantins territory.

3.3.3 Ethics and the environment

Currently, preservation of the ecology can be said to be humanity's greatest challenge. The balance of the environment as a condition for the existence of human life on Earth brings together individual and collective values of the highest order.

From the point of view of the goals to be achieved by the States, especially the Brazilian ones, in view of the guidelines in Articles 170 and 225 of the Federal Constitution, the subject finds a good treatment on the transpersonalist conception, according to which it is possible to reconcile elements found in isolation in the opposing individualist and collectivist visions (NADER, 2013).

Managing to intertwine public administration and the environment, Nalini (2008) talks about an ecological or environmental ethics, reflecting on the need to consider the future, "and not in the measly time period of a government administration or plan" (366). The author points out that, "if the attacks on nature come from man, ecology is an eminently ethical subject" (pp. 368/369).

Regarding the performance of public and political agents, ethics requires constitutional principles and requirements relating to the assets

and values mentioned above be always complied with, especially when dealing with issues linked to economic development and preservation of the environment. Moreover, they must be put on the foreground, especially during the exercise of parliamentary activity (Legislative Power) or public administration (Executive Power), with the same duty obtaining in the field of judiciary provisions (Judiciary Power).

It should be borne in mind that "in economic activities, ends do not justify the means" (BITTAR, 2013, p. 122), and "man does not own nature; he received it on loan and will have to account for its misappropriation" (Nalini, 2008, p. 369). Complying at the same time with the constitutional provisions of environment ecological balance preservation and sustainable economic development is not limited to fulfilling a positive duty. In the field of ethics, it reflects a responsible attitude geared at the preservation of human life. It has, therefore, a double value. In tune with Jonas' postulates on the principle of responsibility, Bittar (2013) rightly states that "betting on the ways of ethics means investing in hope" (p. 19). And so it should be.

3.4 Argumentation based on the Criminal Law approach

Briefly, without pretending to expound on doctrinal or critical positions on Criminal Law, it can be said that in its various evolutionary phases this branch of legal sciences has always been guided by the duty of protecting juridical property and values established by societies; we cannot forget, however, that at times such protection has merely a symbolic – or as many see it – innocuous function.

The defense of criminal minimalism or the minimal criminal law has been increasing. According to them, criminal punishment is justified only in cases of felony, on the grounds that punishment does not effectively contribute to decrease crime rates.

In contrast, there are those who argue for the maximum exercise of criminal law, as a means for totally eliminating impunity. In the environmental field, the need for penal tutelage is often argued in favor of. Along these lines, specialized Brazilian law theory is almost unanimous in stressing that:

> Most European countries punish individuals and legal entities who damages the environment not only administratively or civilly, but also criminally. Protection of the environment has not been effective in the administrative and civil fields. At the

> administrative level, only six percent of all fines levied by IBAMA in 1997 were collected for the public treasury, and in the civil area, not all public civil actions have been successful, especially because their legal procedures take too long. Hence the need for penal tutelage, given its not merely repressive but intimidating and educational effect. It is a general and special prevention. (...) Nowadays, the trend in the modern world is to hold individuals and legal entities that commit crimes against the environment criminally accountable. (SIRVINSKAS, 2011, p. 47)

In this same sense, Freitas (2012) effectively explains that the struggle in defense of the environment has found one of its most significant instruments in Criminal Law. He then notes that civil and administrative sanctions are not enough to repress aggression against the environment.

> Obviously, it would not be necessary to hold certain conducts as criminal if society had an understanding of the importance of preserving the environment, of environmental ethics. The reality, as José Renato Nalini reminds us, is that "protection of nature does not depend on education, wealth or even religion. We find offenders on all social levels. From the big lumber companies, without a fatherland and lawless, to the dispossessed, who decimated areas near the springs." (FREITAS, p. 33)

Acknowledging a strong tendency toward the minimum intervention principle, especially in Latin countries, Freitas (2012) opposes the application of the *ultima ratio* thesis to the environmental field; he notes that the importance of penal tutelage has long been stressed on an international level. The author recalls that the 12th International Congress on Criminal Law held in Warsaw in 1975 passed a resolution for treating aggressions against the environment as crimes against humanity and to submit them to severe repression. The author also points out to the same thinking in the Portuguese doctrine of Anabela Miranda Rodrigues, according to which "penal dignity and the need for penal tutelage are categories that intervene to legitimize penal intervention, and we can't see any reason why they should not intervene here." (op. cit., p. 35).

Without opposing or directly defending minimum or maximum Criminal Law, Oliveira (2012) presents a historical overview of penalty in the legal tradition, ranging from punishment as an ethical-moral-religious sanction down to the instrumental construction of the purpose of any penalty, in defense of rationality. He argues for the applicability of Habermas' conceptions to the field of Criminal Law. The author sheds light

on the rationale in favor of establishing the legitimacy of penalties:

> Although Zaffaroni rightly speaks against the justifying illusion (which is fostered by instrumental rationality), he is mistaken in saying that the penalties cannot find legitimacy. They *can*, but not from an *instrumental*, but rather from a *communicative* point of view, finding support in the rationally motivated *consensus* of the participants, which guides the individual actions of the social addressees of the norm. (OLIVEIRA, p. 121)

The *true consensus* advocated by Habermas, always conceived in an *ideal speech situation*, presupposes, in short, a principle of truthfulness, or sincerity, arising from the validity of what is argued for, without deception or intimidation by the interlocutors, who are, in the case under study, the addressees of criminal legislation. That is why it depends on an universal value or at least one that can be made universal.

In the environmental field, the defense of the ecological balance of the planet – the only effective means, in the current scientific scenario, of preserving the human species – is endowed with a very strong pretension to validity. It is hoped, therefore, that this will fully allow for the communicative action of severe criminal norms when dealing with environmental crimes; this, of course, considering the damage resulting from harmful conduct to the environment, as suggested by Santos (1996):

> Reflecting along these lines, we understand that the typification of the ecological crime and its respective penalty must follow along two paths: a vertical and a horizontal one. On the first, we must have a punitive system where the penalty becomes more severe according to the gravity of the wrongful act committed, which must occur in a cumulative way. (...) This way, we would have an increase in the sentence severity matching the seriousness of the offense. (SANTOS, 1996 pp. 101-102)

The solutions provided by Criminal Law must always include aspects of criminal policy, namely, social usefulness of punishment and preventive social intervention. Therefore, not only penal tutelage, but the imposition of really high pecuniary penalties seem feasible, as well as community services aimed at restoring and preserving the environment, in the place of incarceration.

It must be admitted that the ideal speech situation may, in fact, be unattainable. Even in Habermas' view, humanity is not ready for consensus. The quest for true consensus, while it may be an Utopian ideal, must be

pursued. But the approximation to true consensus happens as the empirical evidence of what is examined evolves.

Scientific evidence, in turn, is always provisional, subject to new discoveries. Its assumptions are, therefore, the result of it being open to discussion on an ongoing basis. That is why the values established by means of scientific findings are endowed with a transience that is inherent to the dynamics belonging to the human condition.

Thus, in the context of current environmental findings – which include the scientific proof of the irreversible damage to the ecological balance of the planet – the need for rigid tutelage achieves a very strong pretension to validity. In other words, in the short term, the most optimistic scientific findings will not suffice to overcome the need for environmental protection. With that, a scientific truth of an almost perpetual or immutable character is achieved: the risk of extinction of humankind. This truth creates the open possibility of ideal speech. After all, what reasoning or value could override the guarantee of continuity of life on the planet?

Despite the validity of this all-encompassing interest (sustainable life, preservation of humankind), not everyone directs their gaze and conduct to future generations. The situation is all the more serious when such behavior comes from the public authorities, or public administrators, as in the case being considered here, for

> The support that is proper to parental or **governmental** duty are expressed in a worldwide way and cannot be discontinued. These responsibilities do not cease and there is no end to an obligation. What is at stake is the whole existence of the person or the social identity to be guaranteed, namely, the governmental one. (MEDINA P., 2011, p. 142)

For those – who in theory do not accept the consensus on the need for penal tutelage of the environment – there remains the strategic action of the norm and its intimidating and punitive character, since the protected asset is, ultimately, the preservation of humankind itself, a value that stands above life when considered individually, since the effects of power also give rise to content of duty in response to events that transpire. It may be said that if the effects put the conditions of human existence at risk, it is reasonable to propose that, for a certain time and under certain conditions, the most private aspirations, fruition, and ethics geared to good will should be replaced by duties imposed on ourselves, born of the will

as an element of self-control of our own power as consciously exercised (JONAS, 2006).

It can be said, therefore, that preserving of the ecological balance of the environment is an all-encompassing interest, so that in order to defend life – should humanity never reach the fullness of consensus (the ideal speech scenario) – the strategic action of strict and severe environmental penal tutelage is justified.

CONCLUSIONS

Recent scientific findings supported by the United Nations Organization demonstrate we are under threat of experiencing a global environmental catastrophe still in this century, as a result of climate changes arising from human actions, especially the burning of fossil fuels and deforestation. As most scientists see it, the planetary ecological equilibrium is already irreversibly damaged; this can lead, in the most drastic hypothesis (from an anthropocentric viewpoint), to the extinction of the human species.

Reversing this scenario requires knowledge and wide awareness raising regarding human behaviors harmful to the environment, which involves the difficulties inherent to the interdisciplinary nature of the issues involved. In today's society, human values are directly linked to economic development. Nevertheless, the assurance of continued human life on the planet depends on the global ecological balance; this makes the assumption that maintaining this balance must guide any and all human behavior, of any community, state or nation unequivocal, regardless of political regime or economic development, of beliefs or ideals desired by peoples, of domestic legal orders, or of international treaties and conventions.

It is indispensable that, in political and economic activity, especially in public management, the order of constitutional values is complied with[7]. The recent legislative change in Tocantins – exemption from environmental licensing for agrosilvipastoral activities – shows that the concern of current administrators remains focused only on obtaining wealth, despite the need for shifting the central axis of administrative behavior toward *responsibility and the future*.

7 "In short, when the economic outlook is conducting the orchestra, the symphony is that of individualism, not of collectivism. To dismantle this ideology and unmask its traps is the duty of all ethics." (BITTAR, Eduardo C. B. *Curso de Ética Jurídica*, 2013, p. 124).

What in fact characterizes the full responsibility for a life, whether individual (parental) or collective (governmental), is a concern with the future, more than the present, aspect, which is entirely neglected by the passing of the law in question. The future includes the totality of existence, beyond the direct influence of the person in charge and, for this very reason, beyond concrete and singular calculations geared at the more immediate needs that encompass only a lifetime. The future evades predictability both because of its unknown variables that, together, constitute the objective circumstances, and also due to the spontaneity and freedom proper to life.

Local political and public officials acted against the constitutional directive on sustainable development. They have put the necessary and perfectly achievable balance between economic development and preservation in the background, which demands considering the effects, which those responsible can no longer answer for. Human rights violations are expected, and damages may be irreversible. Waiving environmental licensing is a dangerous setback; it violates the duties of prevention, which imply the duty to avoid all that is known to be harmful to the environment and of precaution; this means a ban on reckless actions when the results of human interventions are still unknown, as well as the duty of intergenerational equity, which make up the principles of responsibility and are part of the pillars for sustainable development.

When provoked, judicial action has at its disposal – in the field of ethics, criminal law and constitutional protection of fundamental rights – legal argumentation that is solid enough to convince everyone on the mistake by the government of Tocantins in enacting State Law 2,713, of May 9, 2013, for excusing agrosilvipastoral activities from environmental licensing.

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