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CONSTITUTIONALIZATION OF THE ENVIRONMENT IN BRAZIL, SPAIN AND SOUTH AFRICA: ADVANCES AND CHALLENGES

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ABSTRACT

This search proposes to carry out a descriptive and empirical approach, as well as to promote a comparative analysis of the right to the environment in the Brazilian, Spanish and South African Constitutions, in order to present the advances and challenges to its realization. It is possible to affirm it as a fundamental right and of objective and subjective dimensions, in the context of the three countries. The Spanish Constitution, however, creates difficulty in its exercise, by denying it the action of protect, weakening its subjective dimension. Brazil and South Africa have strengthened access to environmental justice. The great divergence between countries lies in the generational classification of the right to the environment. The present research will be methodologically based on the bibliographical review

associated with the comparative analysis of the texts of the Constitutions of Brazil, Spain and South Africa.

Keywords: environment; constitution of Brazil, Spain, South Africa.

A CONSTITUCIONALIZAÇÃO DO MEIO AMBIENTE NO BRASIL, ESPANHA E ÁFRICA DO SUL: AVANÇOS E DESAFIOS

RESUMO

Este trabalho se propõe a realizar uma abordagem descritiva e empírica, bem como promover uma análise comparativa a respeito do direito ao meio ambiente nas Constituições do Brasil, da Espanha e da África do Sul, no intuito de apresentar os avanços e desafios à sua efetivação. É possível afirmá-lo como um direito fundamental e de dimensões objetiva e subjetiva, no contexto dos três países. A Constituição espanhola, entretanto, cria dificuldade ao seu exercício, por negar-lhe o recurso de amparo, fragilizando sua dimensão subjetiva. Já o Brasil e a África do Sul reforçaram o acesso à justiça ambiental. A grande divergência entre os países reside na classificação geracional do direito ao meio ambiente. A presente pesquisa valer-se-á, metodologicamente, da revisão bibliográfica associada à análise comparativa dos textos constitucionais do Brasil, da Espanha e da África do Sul.

Palavras-chave: *Meio ambiente; Constituições Brasil, Espanha, África do Sul*

INTRODUCTION

The protection of the environment is foreseen in most of the democratic Constitutions (MACHADO, 2012), in spite of the natural difference in approach to environmental protection in the various legal systems. Some have consecrated the environment as a fundamental and subjective right, providing instruments of access to the Judiciary for its implementation. Others leave room for doubt about this aspect and omit themselves as to their justiciability, compromising their effectiveness.

This paper proposes to carry out a descriptive and empirical approach, as well as to promote a comparative analysis on the right to the environment in the Brazilian, Spanish and South African Constitutions, in order to present the advances and challenges to their realization.

Initially, the constitutional treatment of the environment in Brazil, Spain, and South Africa will be addressed, investigating whether it has been recognized as a fundamental right if it has a subjective or objective character - of a state duty of protection imposed on the legislator[1] - and whether it is endowed with justiciability. It will be sought to classify the right to the environment as a right of first, second or third generation, as well as to identify the active and passive subjects, the legal nature of the right, its content, highlighting the means of access to the judiciary, to respond whether or not they are demandable and aimed at effectiveness.

Next, a comparative analysis will be carried out between the three countries, with the intention of identifying the similarities and differences and the progress made in the constitutional texts on the right to the environment, highlighting the challenges that remain in its positivation and effectiveness.

The present research will be methodologically based on the bibliographical review associated with the comparative analysis of the texts of the Constitutions of Brazil, Spain, and South Africa.

1 THE RIGHT TO THE ENVIRONMENT IN THE BRAZILIAN CONSTITUTION

The Federal Constitution of 1988 enshrined the fundamental

1 For distinction see SAMPAIO, 2013.

right to an *ecologically balanced* environment[2], including it in Title VIII, referring to the social order, in its own chapter (VI), thus defining it in the *caput* of article 225: "Everyone has the right to an ecologically balanced environment, to a healthy quality of life, imposing on the Public Power and the collective the duty to defend and preserve it for present and future generations "(BRAZIL, 1988). Subsequently, it established a list of duties to the Public Power and individuals, imposing the criminal, administrative and civil liability of the individual or legal entity that practices conducts and activities harmful to the environment[3].

The concept of the environment used in the Constitution is "sufficiently open and broad, allowing the expansive interpretation to integrate the anthropocentric vision and, in a certain sense, the biocentric or ecocentric vision" (CARVALHO, 2011, p. 235); it can be seen in the first paragraph, items I and VII, that man is removed from the centrality of the destination of environmental protection and placed in this position

2 The Brazilian and Spanish Constitutions have chosen to the right adjectives to the environment as ecologically balanced, the first, and appropriate, the second.

3 § 1 In order to ensure the effectiveness of this right, it is incumbent upon the Public Power:

I - preserve and restore essential ecological processes and provide for the ecological management of species and ecosystems;

II - preserve the diversity and integrity of the genetic heritage of the country and supervise the entities dedicated to the research and manipulation of genetic material;

III - to define, in all units of the Federation, territorial spaces and their components to be specially protected, being alteration and suppression allowed only by law, any use that compromises the integrity of the attributes that justify its protection is prohibited;

IV - require, in the form of the law, the installation of a work or activity potentially causing significant environmental degradation, prior environmental impact study, to be publicized;

V - to control the production, marketing and use of techniques, methods and substances that may endanger life, quality of life and the environment;

VI - promote environmental education at all levels of education and public awareness for the preservation of the environment;

VII - protect fauna and flora, prohibited by law, practices that jeopardize their ecological function, cause extinction of species or subject animals to cruelty.

Paragraph 2. Anyone who exploits mineral resources is obliged to recover the degraded environment, according to a technical solution required by the competent public agency, according to the law.

§ 3 - The conducts and activities considered harmful to the environment shall subject the offenders, individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damages caused.

Paragraph 4. The Brazilian Amazon Forest, the Atlantic Forest, the Serra do Mar, the Mato Grosso Pantanal and the Coastal Zone are national patrimony, and their use shall be made, under the law, under conditions that ensure the preservation of the environment, including the use of natural resources.

Paragraph 5 - Are unavailable the vacant lands or those collected by the States through discriminatory actions, as necessary for the protection of the natural ecosystems.

Paragraph 6 - The plants that operate with nuclear reactor must have theri location defined in federal law, without which they can not be installed.

Paragraph 7 For the purposes of the final part of item VII of paragraph 1 of this article, sporting practices that use animals are not considered cruel, provided they are cultural manifestations, according to § 1 of art. 215 of this Federal Constitution, recorded as an intangible asset that is part of the Brazilian cultural heritage, and must be regulated by a specific law that ensures the welfare of the animals involved. (BRAZIL, 1988)

ecological processes, species and ecosystems, fauna and flora, valued in themselves.

There is a deep but not fruitful debate about the legal nature of the environment in the Brazilian context. On the one hand, it is defended the nature of a diffuse good (MILARÉ, 2015; FIORILLO, 2011; MACHADO, 2016), on the other hand, they believe to have the good legal nature of social patrimony (DERANI, 2008).

The constitutional approach of environmental protection met what Ingo Sarlet and Tiago Fensterseifer (2012) call dual functionality, whose protection assumes both the form of objective and state task as fundamental right. Aligned with what José Adércio Sampaio (2016) calls cycles of ecological constitutionalism, the Federal Constitution is inserted in the second cycle, to overcome the traditional programmatic character of the constitutional environmental norm and add the fundamental meaning. Tiago Fensterseifer (2008) defends the fundamentality of this right in a material way, relating it with human dignity. The right to the environment is not included in Title II, which deals with fundamental rights and guarantees; nevertheless, it is considered a fundamental right, because it carries this dimension, being made available to the legitimate ones the access to the Judiciary.

The recognition of the right to the environment in Brazil has contemplated a subjective dimension (MACHADO, 2016), whose importance lies in the attribution of greater normative force to the right that it seeks to protect, since it is legally enforceable, that is, the individual can promote its guardianship vis-à-vis the state or another individual, making it effective (FENSTERSEIFER, 2008).

The objective dimension of environmental protection, inserted in the constitutional text, expresses the conjugation of the obligation of the State to fulfill a task or duty of environmental governance as a way of guaranteeing the protection of that right. The Brazilian Constitution, in this sense, enumerated positive and specific obligations to be fulfilled by the State, with no scope for state omission nor for its insufficient performance, in light of the principles of prohibition of backsliding and deficient protection (SARLET; FENSTERSEIFER, 2012). Unlike other Constitutions, there is no explicit provision for a negative obligation on the State not to interfere with the free enjoyment of the individual's subjective right.

The sharing of responsibility in the general duty of defense and preservation of the environment between the State and the community was rightly foreseen, although the omission of specific duties by the individual *per se* implies, to a certain extent, the exclusion of its important contribution to that objective. The foundation of this shared responsibility in environmental matters lies in the principle of solidarity, since "third generation rights or solidarity are characterized as individual and collective whose realization depends on the cooperation and solidarity of individuals, states, private institutions and public and the international community" (CARVALHO, 2011, p. 255). Moreover, it is affirmed that the principle of solidarity is the new legal-constitutional framework of the Socio-environmental State of Law (FENSTERSEIFER, 2008).

The identification of the active and passive subject is salutary for the promotion and protection of the environment, with the Constitution indicated as taxable persons the State and the individual that omit or act threatening or violating that right. It has, therefore, a multidirectional effectiveness, that is, the responsibility will be on the relationships established in the vertical and horizontal planes. Ownership of the right to the environment was granted to the individual, individually considered, and also to the undetermined collectivity of persons, and they have the procedural legitimacy for their protection. It is, therefore, a transindividual right.

It is also noted that the Federal Constitution established the present and future generations as recipients of environmental protection, consecrating an "ethics of solidarity" and creating an environmental responsibility between the generations, which translates into the idea of sustainable development (MACHADO, 2016, p. 154).

The transindividuality of this third generation right raises problems in the use of the traditional instruments of access to the judiciary since these are formulated to exclusively attend to individual rights and demands. However, adequate instruments and procedural means were created for the realization of the right to the environment, with the Federal Constitution highlighting popular action (art. 5, LXXIII), the collective warrant (art. 5, LXX) and injunction order (article 5, LXXI), and, in the infraconstitutional scope, the public civil action (Law 7347/85). Along with all these actions, there is no provision in the Brazilian legal system

for the complaint, an important instrument for the defense of fundamental rights, adopted by the Spanish Constitution.

2 THE RIGHT TO THE ENVIRONMENT IN THE SPANISH CONSTITUTION

The Spanish Constitution of 1978 established the right to an *adequate* environment[4] in Chapter Three, which deals with the governing principles of social and economic policy, characterizing it as essential for the development of the person and denoting his anthropocentric bias. Thus, in its article 45:

> 1. Everyone has the right to enjoy a suitable environment for the development of the personality, as well as the duty to preserve it.
> 2. The public authorities shall ensure the rational use of all natural resources in order to protect and improve the quality of life and to defend and restore the environment, based on the indispensable collective solidarity.
> 3. In order not to violate the provisions of the previous section under the terms established by law, penal or administrative sanctions will be established, as well as the obligation to repair the damage caused[5] (SPAIN, 1978, our translation).

The fact that the right to the environment has been inserted in the Third Chapter and not in Chapter Two, which deals with fundamental rights and public freedoms, establishes the discussion about the character of subjective right. Ramón Martin Mateo (2003, p. 61) denies this dimension, precisely because of its topographical location in the constitutional text, stating that for that reason it would only be possible to apply for it within the ordinary jurisdiction, being denied the remedy handled before the Constitutional Court.

Part of the doctrine understands that it is only possible to affirm

4 The Spanish Constitution, as well as the Brazilian Constitution, adjectived the right to the environment.

5 Article 45. 1. Todos tienen el derecho a disfrutar de un medio ambiente adecuado para el desarrollo de la persona, así como el deber de conservarlo.
2. Los poderes públicos velarán por la utilización racional de todos los recursos naturales, con el fin de proteger y mejorar la calidad de la vida y defender y restaurar el medio ambiente, apoyándose en la indispensable solidaridad colectiva.
3. Para quienes violen lo dispuesto en el apartado anterior, en los términos que la ley fije se establecerán sanciones penales o, en su caso, administrativas, así como la obligación de reparar el daño causado. ” (SPAIN, 1978)

this subjective character if the Constitution assigns to the holders or procedural substitutes the right of access to the Judiciary to demand the fulfillment of the related duties (SAMPAIO, 2013; 2016). The inclusion of the right to the environment in Chapter Three of the Spanish Constitution has brought a serious disadvantage in relation to access to the Judiciary, since Chapter Four, which deals with guarantees regarding freedoms and fundamental rights, provides for the amparo remedy only in view of the fundamental rights recognized in Article 14 and in the first Section of the Second Chapter, as provided in Article 53. 2[6].

The main purpose of the appeal for amparo is the judicial defense of fundamental rights. The Spanish Constitution establishes two mechanisms for the protection of fundamental rights. They are the constitutional amparo appeal, also referred to as extraordinary amparo, which is brought before the Spanish Constitutional Court and the judicial, also called ordinary, amparo through which access to ordinary courts. Special protection procedures are provided for, based on the principles of preference and summary.

It should be noted, therefore, that the constitutional legislator, in an express way, suppresses the appeal of amparo to the holders of environmental law, in addition to highlighting its informative nature, reporting access only through the ordinary channels, according to a legal provision[7] that, until then, did not exist. The environmental law seems to have been instilled into a purely programmatic norm. José Adércio Sampaio (2016) affirms that the Constitutions, as is the case of the Spanish, that expressly define environmental law as a guiding principle of state action are generally dismissed from judiciality, differentiating it from the regime of fundamental rights.

A literal interpretation of Article 53. 2 of the Spanish Constitution must be rejected as indicative of a merely objective right. In spite of the drafting of the constitutional text and the doctrinal understanding that environmental law in Spain would be mere objective law, jurisprudence

6 Artículo 53. 2. "Cualquier ciudadano podrá recabar la tutela de las libertades y derechos reconocidos en el artículo 14 y la Sección primera del Capítulo segundo ante los Tribunales ordinarios por un procedimiento basado en los principios de preferencia y sumariedad y, en su caso, a través del recurso de amparo ante el Tribunal Constitucional. Este último recurso será aplicable a la objeción de conciencia reconocida en el artículo 30". (SPAIN, 1978)

7 Artículo 53. 3. "El reconocimiento, el respeto y la protección de los principios reconocidos en el Capítulo tercero informarán la legislación positiva, la práctica judicial y la actuación de los poderes públicos. Sólo podrán ser alegados ante la Jurisdicción ordinaria de acuerdo con lo que dispongan las leyes que los desarrollen". (SPAIN, 1978)

began to give it a subjective sense, as long as it is linked with other fundamental rights, in a reflexive way (SAMPAIO, 2016). In this sense, other ways have been found to seek state tutelage by overcoming the content of the right to the environment with the content of other fundamental rights, such as life, health, privacy or property (LOSSO, 2011).

Angela Burrieza defends the subjective nature of environmental law, through a systematic interpretation of the Constitution, notably Article 9.1[8], which brings normative force and its binding character, and Article 10.2[9] which provides for the interpretation of fundamental rights in accordance with the Universal Declaration of Human Rights and with international treaties and agreements ratified by the country.

The Spanish Constitution, like the Brazilian one, attributes the triple responsibility (criminal, administrative and civil) to those who violate the constitutional duty of environmental protection (art. 45. 3), which represents an inhibitory and reparatory factor for the harmful behavior against the environment.

3 THE RIGHT TO THE ENVIRONMENT IN THE SOUTH AFRICAN CONSTITUTION

The South African Constitution of 1996 explicitly enshrined environmental law which was *not detrimental to health or well-being*[10] in the Second Chapter, in which is drafted the bill of rights granting it the same *status* as other fundamental rights and making it possible to apply to the court. The topography is indicative of the configuration of a subjective right (SAMPAIO, 2016), as well as establishes the differentiation in relation to the objective law, is outlined as follows:

> Article 24 Everyone has the right:
>
> 1. to an environment which is not detrimental to their health or well-being; and
>
> 2. to have the environment protected for the benefit of present and future generations

8 Artículo 9. 1. “Los ciudadanos y los poderes públicos están sujetos a la Constitución y al resto del ordenamiento jurídico”. (SPAIN, 1978)

9 Artículo 10. 2. “Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España”. (SPAIN, 1978)

10 Unlike the Brazilian and Spanish Constitutions, the South African did not adjectivate the right to the environment, choosing to conceptualize it.

> through reasonable legislative measures and other reasonable measures which:
>
> a. prevent pollution and ecological degradation;
>
> b. promote conservation; and
>
> c. ensure the development and ecologically sustainable use of natural resources while promoting justifiable economic and social development[11]. (SOUTH AFRICA, 1996, our translation)

On the other hand, most South African jurists agree that Article 24 presents characteristics of a socioeconomic right, that is, it has a material basis of social well-being (KOTZÉ; RENSBURG, 2010). This understanding can lead to a weakening of the 'judiciality' of the right to the environment, subjecting it to a policy of progressive effectiveness.

Kotzé emphasizes the *sui generis* nature of the right to the environment, stating that it contains aspects of first generation rights or civil rights and political *rights* (*blue rights*), including because it was formulated in negative terms (KOTZÉ, 20), and rights second generation or socioeconomic rights (*red rights*), for imposing on the government duties of protecting the environment for present and future generations. A joint reading of Articles 24 and 7. 2 of the South African Constitution makes it possible to deduce that environmental law is related to negative and positive duties imposed on the State and individuals to "respect, protect, promote and fulfill the rights in the Bill of Rights"[12] and therefore environmental law. It expresses, therefore, the subjective and objective dimensions of this right.

In this sense, Loreta Feris (2008) says that the Article 24 has two general objectives: to guarantee an environment for all and to require the state to carry out measures to promote that guarantee.

The availability of instruments of access to the judiciary to protect the environment, in contraposition to the mandate directed to the Legislative to elaborate reasonable measures, as well as to the Executive

11 "Article 24. Everyone has the right:
1. to an environment that is not harmful to their health or well-being; and
2. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
a. prevent pollution and ecological degradation;
b. promote conservation; and
c. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development." (SOUTH AFRICA, 1996)

12 "Article 7. 2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights" (SOUTH AFRICA, 1996).

to adopt other measures of protection (art. 24. 2) raises the question about the autonomy of environmental law (24. 1) and its possibility or not of being immediately executable. Considering that the right was formulated both negatively and positively, it is possible to argue that, in the first case, it is autonomous and, in the second case, it is limited, translating into a programmatic norm. Although Article 24. 2 only requires the State to protect, prevent, promote and guarantee environmental law exclusively through those measures, Article 7. 2 also requires compliance with them (KOTZÉ, 2010).

The wording of article 24 makes it possible to affirm that it contains multidirectional effectiveness, having an effect against the State and against third parties that may act negatively in the face of the fundamental right to the environment. In this regard, Article 8 of the Constitution states that the Bill of Rights applies to all law, and binds all State powers and organs as well as individuals and legal entities[13].

The justiciability of environmental law was inserted in the South African Constitution, Article 34, in the following terms: "Every person has the right to have decided any dispute that can be resolved through the application of the law in a fair public hearing before a court or, if applicable, another independent and impartial tribunal or forum"[14]. Loretta Feris (2008) correctly points out that this article has three distinct rights to its holders: access to courts or forums, their independence and due process of law.

The South African Constitution also guaranteed the *locus standi* rule in relation to environmental law. This is a significant advance in the procedural framework for the protection of this right, by which the individual is entitled to trigger the Judiciary in litigation of public interest in the environmental area, being exempt from the evidence of having been personally harmed or injured. Article 38 deals with the *locus standi* as follows:

13 Article 8. 1. "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
8. 2. "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right" (SOUTH AFRICA, 1996).

14 Article 34. "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal". (SOUTH AFRICA, 1996).

> Any person listed in this section has the right to appeal to a competent court, claiming that a *Bill of Rights right has* been violated or threatened, and the court may grant appropriate relief, including the declaration of that right. People who can approach a court are:
> (a) any person acting in their own interest;
> (b) any person acting on behalf of another person who can not act on his own behalf;
> c) any person who acts as a member or in the interest of a group or class of persons;
> (d) any person acting in the public interest; and
> (e) an association acting in the interest of its members[15] (SOUTH AFRICA, 1996, our translation).

This constitutional provision represents a paradigm shift in the South African legal order since judicial defense of the environment was only possible at an individual level. With the adoption of the *locus standi,* the trans-individual nature of this right and the public interest for its defense are recognized, expanding access to environmental justice[16], in an unprecedented and irreversible way.

4 ADVANCES AND CHALLENGES TO ENVIRONMENTAL LAW IN BRAZIL, SPAIN AND SOUTH AFRICA

There are many challenges to the legal protection of the environment. But it is certain that the insertion of environmental law in a Constitution raises its importance greatly, even if its normative force influences and determines the political and social reality (HESSE, 1991). Not that the institutionalization of a right is sufficient for its effectiveness, but, it opens space for debate, awareness and social integration.

Following the global trend of the so-called ecological constitutionalism, the Constitutions of Brazil (America), Spain (Europe) and South Africa (Africa) recognized the right to the environment. In fact,

15 "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members" (SOUTH AFRICA, 1996).

16 In strengthening the access to environmental justice, the National Environmental Management Law (NEMA) was issued in 1998, embodying section 24 of the Constitution of South Africa, including in relation to the means of access to the Judiciary.

among the new fundamental rights, the aforementioned right is the one that was most recognized constitutionally in the last forty years (SAMPAIO, 2016). These countries affirmed an authentic environmental right, breaking with the Constitutions group that was limited to predicting the traditional programmatic norms and, therefore, is classified in the second cycle of ecological constitutionalism (SAMPAIO, 2016).

The adjectives and conceptualization used to qualify the environment to be defended in the Constitutions of Brazil (ecologically balanced), Spain (suitable) and South Africa (not harmful to health) show that positive and negative formulations, of this, try to establish a standard of environmental quality compatible with the existence and human dignity, whose relation enunciates the fundamentality of the human right to the environment. Noteworthy is the development in a negative sentence of environmental law in South Africa (Article 24. 1), putting on the first dimension of law, is required to ready.

Although only the South African Constitution inserted the right to the environment in the *Bill of Rights*, the defense of this *status* in the Brazilian Constitution, which framed it in the title referring to the social order, and in the Spanish, that framed it in the chapter on the governing principles of social and economic policy, does not face resistance. The fundamental importance of this right in the Spanish context is affirmed on the basis of its mixed character, that is, of subjective right and civic duty of conservation, as well as of governing principle of the activities of the State (BURRIEZA, 2005; MACHADO, 2016).

There is no doubt as to the subjective nature of the environment in South Africa, as well as in Brazil, in view of the fact that individuals can promote their protection before the Judiciary in the face of another individual or of the State itself. In relation to the Spanish Constitution, the doubt remains, once the right was included among the governing principles of social and economic policy, he was denied the remedy of amparo. And yet the defense of the subjective character of the right to the environment is possible, either through a systematic interpretation of the constitutional provisions dealing with legal force and its binding character or proposing the interpretation of fundamental rights under the Treaties and Agreements interpretation of this right to other fundamental rights (BURRIEZA, 2005).

The three prominent countries have adopted rules of express

attribution of rights contained in the same expression “everyone has a right”, in an interesting approximation. Also, its constitutional texts impose duties or tasks to the State, a manifestation of the objective dimension of the right to the environment, as well as positive obligations extensively delineated, especially in the Brazilian Constitution, being the Spanish text the most succinct.

The Constitutions of Brazil and Spain established the sharing between the State and the collectivity of the general duty to preserve the environment. But none of the three Magnas Cartas attributed to the individual, in isolation, any specific type of duty, underestimating his contribution addressing the environmental issue. Unlike Brazil and Spain, South Africa made explicit provision for a negative obligation to the State, determining its abstention in the free enjoyment of the right to the environment of the individual. The proposal is to avoid undue interference by the State in the free enjoyment of property by the individual.

Only the Spanish Constitution made express reference to solidarity as being indispensable to environmental protection; however, it is possible to affirm that this is the constitutional legal framework for the assertion of an authentic socio-environmental state (FENSTERSEIFER, 2008). In tune with the evolution of the second cycle of ecological constitutionalism, Brazil and South Africa incorporated the principle of intergenerational equity and sustainable development into constitutional language. Paulo Affonso Leme Machado (2016) argues that this principle was included in the *caput* of article 225 of the Constitution since the protection of the ecologically balanced environment was destined to the “present and future generations”.

There are major differences in access and procedural means for the judicial defense of the right to the environment in the context of the three countries analyzed. Brazil has made several constitutional and legal actions available to the holder or the procedural substitute to handle, such as: the popular action, the collective warrant, the writ of injunction and the public civil action, which is provided for in an infraconstitutional law. Spain has an important means of direct access to the Constitutional Court, the amparo appeal, but did not contemplate the environmental right; however, it is possible to use it by overlapping the environment with other fundamental rights and promoting its defense by reflex. South

Africa, by the *locus standi,* has authorized the individual as the rightholder or procedural substitute to act in the public interest demands, and the environment recognized as such.

In Brazil, the environment is classified as a third-generation right or dimension[17]. In Spain, it is argued that it should be included among the second-dimensional rights. In South Africa, there is a bipartition: the right provided for in art. 24. 1 is classified as a first-class right and that provided for in art. 24. 2 is considered second class. Different aspects are taken into account for this differentiation: Brazil considers the law itself, Spain takes into account the topography in the constitutional charter, and South Africa is based on the formulation of the right (24. 1) as well as its topography (24. 2).

There is an identity in the context of the three countries regarding the taxable persons against whom the duties of protection and conservation of the environment, identified in the State and in private individuals and legal entities, can be judicially demanded. This is called multidirectional effectiveness. On the other hand, the ownership of this right belongs to the collectivity and to the individual. In the Brazilian case, the Public Prosecutor's Office has legitimacy for the defense of this interest, through public civil action, with other actions by means of which individuals also have access to the judiciary.

FINAL CONSIDERATIONS

The comparative analysis between the Constitutions of South Africa, Brazil and Spain revealed the different approach to environmental protection, and it is possible to affirm that the Brazilian one has the most extensive and progressive writing, in order to succeed in identifying the active and liabilities, to define the rights and obligations and to make available the procedural means for its effectiveness, such as popular action, the collective writ of mandamus and the writ of injunction. In addition, it is peaceful to defend the fundamental and subjective third generation right to the environment, although it is not included in the title that deals with

17 At the Extraordinary Appeal 627189/SP, decided by the plenary of the Supreme Court, the Minister rapporteur Dias Toffoli emphasized and developed in his vote the content of the fundamental right to a healthy environment and equilibrad the highlighting it as a right of third generation, as well as pointed out by Minister Celso de Melo, and the position of the court on the subject is positive, given the salutary role of the courts in the development of the jurisprudence of constitutional environmental law (BRAZIL, 2017).

fundamental rights and guarantees.

The right to the environment that is not detrimental to health or well-being in South Africa is a *sui generis* formulation framed as a right of the first dimension, such as civil and political, demandable immediately and second generation, as socioeconomic rights. On the other hand, Article 24 has not expressly included the duty of the State to protect, prevent and promote the environment, although it may be inferred from a systematic interpretation of Article 24. 2 in conjunction with Article 7. 2. Another advancement in the South African Constitution is the consecration of the environment as a fundamental and subjective right, providing instruments of access to the Judiciary for its effectiveness, being important the institution of *locus standi,* for authorizing the individual defense of the public interest to the environment, dispensed proof of private interest in demand.

Although there is an express reference to solidarity as an indispensable element for environmental protection, whose responsibility is of the State and of society, the greatest controversy within the Spanish Constitution is to answer whether the right to the environment is a subjective right, especially as it is included in social and economic rights (and therefore of the second dimension) and because it has not been granted amparo. This Constitution authorizes the defense of the subjective character and the possibility of reflexive protection of the environment, through other fundamental rights, whose amparo appeal has been assured to them, is this an important instrument of access to environmental justice, absent in Brazil and in South Africa. Accordingly, the great challenges in the Spanish context are the procedures for the protection of the environment.

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