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DOGMATIC APPROACH TO THE ENVIRONMENTAL LAW

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ABSTRACT

This paper intends to discuss the meaning of the constitutional elevation of Brazilian environmental protection, in law theory terms, but also what can be gaged from said law in axiological terms. This paper includes a dogmatic, but also a zetetic concern with constitutional protection to the environment and a sense of an Environmental Rule of Law based on Theodor Viehweg. The questions that challenged this paper were: What does the Brazilian Environmental Rule of Law mean from the dogmatic approach? How can this concept contribute to social change? Through a review of the literature, we argue that the Environmental Rule of Law consists in acknowledging a dogmatic normative structure in environmental protection that demands – in the decision-making process, regardless of whether it is public or private – taking into account the interest of a balanced environment, on which man depends and is a part of, on an equal footing with social and economic issues, given the axiological value of possible sustainability.

Keywords: environmental rule of law; dogmatic; mitigated anthropocentrism; zetetics.

ENFOQUE DOGMÁTICO PARA O ESTADO DE DIREITO AMBIENTAL

RESUMO

Este artigo pretende discutir o sentido da elevação constitucional da proteção ambiental brasileira, em termos doutrinários, mas também o que se

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pode aferir desse direito em termos axiológicos. Há, neste trabalho, uma preocupação dogmática, mas também zetética sobre a proteção constitucional ambiental e o sentido de um Estado de Direito Ambiental a partir de Theodor Viehweg. As perguntas que desafiaram este artigo foram: O que significa, sob o enfoque dogmático, o Estado de Direito Ambiental? Como este conceito pode contribuir para uma mudança social? Por meio de revisão bibliográfica, defende-se que o Estado de Direito Ambiental brasileiro consiste no reconhecimento de uma estrutura normativa dogmática da proteção ambiental que demanda, na tomada de decisão, independentemente de ser pública ou privada, a consideração do interesse do meio ambiente equilibrado, do qual o homem depende e faz parte, em igualdade com as questões sociais e econômicas, ante o valor axiológico-fundante da sustentabilidade possível.

Palavras-chave: *antropocentrismo mitigado; dogmática; Estado de Direito Ambiental; zetética.*

FOREWORD

This paper intends to discuss the meaning of the constitutional elevation of Brazilian environmental protection, via Art. 225, in law theory terms, but also what can be gaged from said law in axiological terms. This paper includes a dogmatic, but also a zetetic concern with constitutional protection to the environment and a sense of an Environmental Rule of Law based on Theodor Viehweg's theory.

The subject is relevant because in the debate on environmental constitutionalism in recent years, there seems to have been a shift in discussions towards a stronger view of the environmental agenda, which believes that, given the central role of nature, it should be the central concern of the Brazilian legal system. This is because without nature, man would not exist. Therefore, we defend a Rule of Law of Nature, based on a strong, planet-wide sustainability, resulting from a biocentric ethical view (LEITE; SILVEIRA; BETTEGA, 2017a; 2017b; BOSSELMANN, 2008; MARCHESAN; 2017; WINTER, 2009) , which seems to move away from the current Brazilian situation.

Given this detachment from practice, the questions that challenge this research are as follows: What does an Environmental Rule of Law dogmatic approach mean? How can this concept contribute to social change in Brazil?

To answer them, the greening of Brazilian Environmental Constitutional Law and its meaning will be discussed. Then, we give reasons for a dogmatic approach to the Environmental Rule of Law based on possible sustainability, according to Theodor Viehweg's theory.

Through a review of the literature, we argue that the Environmental Rule of Law consists in acknowledging a dogmatic normative structure in environmental protection that demands – in the decision-making process, regardless of whether it is public or private – taking into account the interest of a balanced environment, on which man depends and is a part of, on an equal footing with social and economic issues, given the axiological value of possible sustainability. This outlook seems to match the Brazilian social situation and contribute with important achievements in actualizing the environmental agenda.

1 THE ENVIRONMENT IN THE 1988 Brazilian CONSTITUTION

Protecting and preserving the environment is a right of solidarity that necessarily requires a combination of efforts. The environment requires transindividual protection (SARLET; FENSTERSEIFER, 2014; GOMES, 2009). It is not limited to individual or collective, but rather diffuse claims (LEUZINGER, 2007; PADILHA, 2010) of the environment, which makes it essential to combine efforts to achieve results that will be beneficial to all humanity.

Constitutionalization can be a relevant means of advancing the purpose of realizing fundamental rights. In a time of globalization of the constitutional debate, not everyone is aware of the extraordinary progress that constitutions mean in the evolution of contemporary peoples and political regimes. This is because here the constitutional norm has both a symbolic and a practical role in the civilizing process (SARLET; FENSTERSEIFER, 2014, BENJAMIN, 2015). The positivization of the fundamental right to the environment in constitutional texts can play an important symbolic and practical role in its realization, in a new environmental paradigm[2] based on solidarity.

Since the appearance of Constitutionalism, a huge part of the rights to freedom and equality were already expressed in the constitutional texts (CANOTILHO, 2015; PADILHA, 2010; SARLET; FENSTERSEIFER, 2014; GOMES, 2009). However, most constitutions did not include solidarity rights in their texts. Many countries then constitutionalized environmental protection. Then came a worldwide trend of constitutional elevation of the most characteristic of solidarity rights: environmental protection. This is the greening of Constitutional Law. The birth of *Environmental Constitutional Law*.

By comparatively analyzing the constitutionalization of the environment, Herman Benjamin (2008; 2015) identified five common bases in the texts. They are as follows: (a) systemic understanding, which determines the treatment of parts from the whole; (b) a commitment not to impoverish the earth and its biodiversity; (c) the updating of property rights under the guidance of sustainability; (d) respect for environmental due process, ensuring adversary proceeding, and transparent, democratic and informed decision-making processes; (e) the constant concern with

2 We argue here for the notion of a paradigm as a set of beliefs, values and techniques shared by a community (KUHN, 2009). To develop the content of this paradigm, this paper combines dogmatics and zetetics (VIEHWEG, 1979; 1997; ROESLER, 2013), as relevant approaches to the arguments to be accepted by this community in the paradigm of the Environmental Rule of Law.

its implementation, in search of results. These are the core elements of Constitutional Environmental Law, in a comparative perspective.

Brazil is part of this world trend[3]. The 1987-1988 Constitutional Convention Process was especially concerned with this aspect (SILVA, 2011; CIRNE, 2016). So much so that, from the constitutional convention work, there came Chapter VI (From the Environment), Title VII (From Social Order) of the 1988 Constitution. This is just one article – 225 – but it traces in a modern and advanced way the environmental protection guidelines and enshrines in the Brazilian text the five common bases of the constitutionalization of the environment.

Given the inclusion of only one article, which materializes in a chapter on the environment, the following question may arise: what is the importance of having chapter on protection of the environment? As we will show below, the significance of this recognition is enormous.

With constitutionalization, there are dogmatic gains, which reflect in the way of acting, thinking and the maintaining a legal system. Thus, a parameter is gained to provide answers to problems that may come up in Brazil (ROESLER, 2013). We agree here with the law theory argument that the chapter on the environment is so advanced that it corresponds to a *greening* of the Brazilian normative framework (SILVA, 2011; MILARÉ, 2014). The Brazilian Constitution of 1988 represents an extraordinary transformation in the legal approach to the environment (BENJAMIN, 2008; PADILHA, 2010).

This is because the 1988 Constitution laid down and strengthened the normative foundations of an environmental constitutionalism. Brazilian Environmental Constitutional Law.

Environmental Constitutional Law needs to be thought of as a practice, to be thought of based on problems (VIEHWEG, 1979; 1997; ROESLER, 2013). Therefore, it is argued that Law includes solidity, but also flexibility; these elements can be incorporated into the system, by statutory or by interpretation means (VIEHWEG, 1979).

In the case of Environmental Constitutional Law, the greening of the Brazilian normative framework means that it has achieved and can gage the gains of a dogmatic approach by relying on this solidity in the constitutional

3 The following examples can be cited: Constitutions of Yugoslavia (1974), Greece (1975), Portugal (1976), Algeria (1976), China (1978), Spain (1978). In America: Ecuador (1979), Peru (1979), Chile (1980), Guyana (1980), Honduras (1982), Panama (1983), Guatemala (1985), Haiti (1987) and Nicaragua (1987), Cf. Gomes (2009). José Afonso da Silva (2011) highlights the Constitutions of Germany (1949), Switzerland (1957), Bulgaria (1971), Soviet Union (1977) and Portugal (1976).

text. The foundations of Law, therefore, are revised from the legal praxis, which involves dogmatics – with a more solidly-based duty, placed beyond doubt in a given cultural context and time – associated with zetetics, which makes that idea possible to be revised. As long as these values are not revised – if they will ever be revised – this adds to the degree of reliability of dogmatics, thus strengthening the system of law without closing it for possible changes. Zetetics follows as a corrective possibility of dogmatics, which does not completely close it. Dogmatics and Zetetics are necessary and complementary approaches. Bringing together dogmatics and zetetics seems, therefore, to make sense, to make Environmental Constitutional Law produce effects on social events (ROESLER, 2013; VIEHWEG, 1997).

Despite not denying the possible gains of zetetics – with the possibility for revising and strengthening of dogmatics – guiding oneself by Environmental Constitutional Law from a dogmatic perspective allows us to apply it based on this elevation of the agenda, by making the environment not just fundamental subjective law, but also an end and task of the State (CANOTILHO, 2001). It means seeing in the right to an ecologically balanced environment, dogmatically recognized, an instrument for solving difficulties. Seeing it as a justification of interpretation to settle conflicts. Here it is recognized a legal principle that can guide decisions in a fair order in favor of sustainability.

The recognition of Environmental Constitutional Law in its dogmatic aspect (ROESLER, 2013; VIEHWEG, 1997), amounts, therefore, to many gains in the Brazilian situation. There is, therefore, the recognition of a theory of substantive laws associated with a practice, which fixes a dogmatic theory of interpretation in order to guide how texts are to be interpreted. This way, it guides not only the legislation but also the application of the law. These enormous benefits gained from this constitutionalization can be listed[4] in eight material benefits: (a) the establishment of a limited

4 To develop this list of law theory benefits, the following works were consulted: Benjamin (2015); Padilha (2010); Canotilho (2015); Canotilho (2001); Bello Filho (2006); Sarlet; Fensterseifer (2014). Herman Benjamin (2015) lists the following benefits: (a) the establishment of a generic constitutional duty of not degrading as the basis of the limited and conditioned exploitation regime; (b) the greening of property and its social function; (c) environmental protection as a fundamental right; (d) the constitutional legitimation of the state's regulatory function; (e) reduction of administrative discretion; and (f) the expansion of public participation. At the formal level, he lists the following as benefits: (a) maximum urgency and prominence of environmental rights, duties and principles; recognition of fundamental rights, duties and principles; (b) regulatory security; (c) replacement of the environmental legality paradigm; (d) control of constitutionality of law. Canotilho (2015) argues for 4 essential aspects of environmental legality: (a) a guidance toward providing guarantees and defense; (b) a positive provision aspect; (c) a legal direction spreading toward the whole legal system; (d) a legal-participatory aspect. Norma Sueli Padilha (2010) breaks down constitutionalization of

and conditioned exploitation regime based on environmental balance; (b) the greening of rural and urban property and its social function; (c) autonomous environmental protection as a fundamental right guided by the principle of solidarity, protected as an indelible clause and part of the essential core of the Brazilian legal system; (d) the duty of the state to act and the legitimation of its action; (e) the reduction of administrative discretion, with possible accountability; (f) transparency and broadening social participation; (g) the recognition of an environmental hermeneutic including environmental principles.

It should be acknowledged that these material benefits are only possible because the constitutionalization of Environmental Constitutional Law brought together with these material aspects the following instrumental aspects: (a) the infraconstitutional rules must be interpreted in accordance with the constitutional text; (b) if they are in nonconformity, constitutionality control shall obtain; (c) greater normative certainty was provided, as it was an indelible clause that is part of the core elements and required a differentiated quorum and procedure for constitutional amendments; (d) a systematized environmental public order was formed; and (e) it allowed for a pro-environmental exegetical reinforcement of infraconstitutional norms by principiological means.

Although it is recognized that the implementation of Brazilian Environmental Constitutional Law still has a long way to go, one cannot disregard the enormous gains of this normative achievement. These are the fruits not only of its material aspect, but above all of the interpretation of its material content.

In short, the elevation of the right to the environment to a fundamental right and the related provisions formed a system that created a new interpretative paradigm (CANOTILHO, 2010), which needs to be present in governmental decisions. There was, then, an environmentalization of the legal order, with the imposition of a constitutional reserve for the environment in the decision making process.

It has been concluded that the constitutional innovation of the

legal protection of the environment into the following aspects: (a) the environment in the 1988 Federal Constitution; (b) an Ecological Constitutional State; (c) an environmental constitutionality commitment; (d) a new paradigm of environmental legality in the 1988 Constitution; (e) a new ethical--environmental paradigm in the 1988 Constitution; (f) a duty to implement the new environmental constitutional paradigm; (g) the fundamental right to the environment; (h) the environment as a right of a metaindividual kind; (i) the addressees of the environmental constitutional norm; (j) a duty of solidarity among generations; (k) the environment as an autonomous legal asset; (l) the environment – a multidimensional concept; (m) the environment and its assimilation into the legal aspect; (n) scope of Environmental Constitutional Law.

environment was so important that it created – from a dogmatic perspective – a new paradigm: the *Environmental Rule of Law based on sustainability.*

The next topic will deal with this paradigm shift and its meanings.

2 THE ENVIRONMENTAL RULE OF LAW AND VALUE OF POSSIBLE SUSTAINABILITY

It is known that the constitutionalization of the environment – that is, the inclusion of a written text in the constitution – is not enough to solve the Brazilian environmental problems. This is a very important step that can yield huge benefits, but is far from solving the problems.

Despite acknowledging the importance of this advance, there is still a whole process of struggle to make it effective (PADILHA, 2010; SANTOS, 2000; 2009). In this regard, when it comes to the environmental agenda, it is worth recognizing the effects of the environmental crisis and of living in a risk society (BECK, 2016; LEITE; BELCHIOR, 2010), which makes giving attention to such difficulties even more urgent. The current time is known to be marked by the permanent risk of disasters and catastrophes. The scientific human limitations regarding knowledge of these risks is also acknowledged. Even so, this paper argues that this cannot mean excessive distrust in institutions. Similarly, the role of the state cannot be lessened. In this paper view, it seems too much to accept the idea of organized irresponsibility[5] or the concentration of efforts on utopias[6]. It is known that the challenges posed by modernity are enormous, especially in a context of a risk society, but this cannot deconstruct the possibilities of advances that may still derive from law and its instruments. The achievements and experiences of modernity cannot be allowed to go to waste (BELLO FILHO, 2006).

This is because, even when aware of the complexity of the environment, with its planet-wide requirements, discussions within the borders of national sovereignty are still relevant. They are indeed indispensable. This is the first step to be taken (BOSSELMANN, 2008). Domestic level advances (CANOTILHO, 2001) cannot be neglected. It can even be said

5 It consists in the concealment of risks by the Government and private agents, despite being aware of the existence of these risks. In this view, the state would be a make-believe construct, a puppet (BECK, 2016; LEITE; BELCHIOR, 2010), which seems too much, and runs teh risk of discrediting the capacity for institutional responses.

6 Utopia is the exploration of new human possibilities and wills by opposing imagination to the needs of what actually exists, in search of something radically better for which it is worth fighting (SANTOS, 2000).

that looking at the advances in the national context is a preliminary step to allow for the planetary debate. One step to overcome on a climb. In other words, you can't talk about reorganizing your house without first getting your room in order.

It is well known that a planetary consensus – in the current situation of social awareness about the environmental agenda – remains far away. Recognition of a worldwide paradigm (KUHN, 2009) in this regard remains difficult to achieve. So, an interesting way to deal with the problem is to start with simpler challenges. Facing the difficulties of realizing the advances of article 225 of the 1988 Constitution, based on a possible sustainability value as an important input for a more ambitious and planet-wide future objective. This does not mean denying the complexity and risks involved, or the planetary nature of the environmental agenda, but knowing where this route can begin to bear fruit.

Therefore, the importance of the zetetic approach[7] – which can review and even improve the premises of this paper – is not denied, but the dogmatic context of the Environmental Rule of Law, guided by the value of possible sustainability in the Brazilian situation still remains as a working space of this paper. This is because, while in zetetics investigation is feasible – with attempts and questioning to reach a planetary context – dogmatics focuses on an idea of finding answers to problems posed. It is in dogmatics that one can find answers to decide the social conflicts existing today in Brazil.

In the Brazilian context, the dogmatic approach can help to materialize this Environmental Rule of Law by asking some questions, such as the eight listed material benefits, as points beyond question. By accepting them from their dogmatic outlook, they become attack-free, as they are embedded in a possible cultural context that allows them some protection. This is because the idea of the Environmental Rule of Law – in the light of the dogmatic approach – can be able to have effects on social developments. Now, dogmatics legitimates itself within its historical context, as long as it is within an acceptable structure in the thinking of its time (ROESLER, 2013; VIEHWEG, 1997).

This dogmatic security, given its social complexity, is known to be limited. But it is precisely here – in Art. 225 of the Constitution, which

7 The role of zetetics is to critically examine the assumptions that underlie dogmatics, providing conditions for dogmas to be revised, adapting and rationally grounding them (ROESLER, 2013). While in zetetics, questioning is emphasized, in dogmatic, the emphasis is in the answers (FERRAZ JÚNIOR, 2001).

is the central axis of the Environmental Rule of Law – which is the further development – that discussions and arguments can move forward. A lawmaker who aims at achieving practical results cannot depart from that internal legal system (VIEHWEG, 1997). Within these guidelines of the institutional framework, incorporated in the ordering of the 1988 Constitution, we seek to move from the moment a constitution is established to the one in which this Constitution is lived (ROESLER, 2013; AGUILÓ REGLA, 2003). It turns out that this debate needs to be connected to problems faced by Brazilian society, in a debate that starts from the constitutional text, but interprets it within legitimated social guidelines. It is necessary to guide the debate within the limits of the problems to be discussed in the environmental agenda.

For these reasons this paper finds it difficult to adopt concepts such as the Natural Rule of Law, based on a strong, planetary sustainability, resulting from a biocentric ethical vision (LEITE; SILVEIRA; BETTEGA, 2017a; 2017b; BOSSELMANN, 2008; MARCHESAN; 2017; WINTER, 2009).

In the debate on environmental constitutionalism in recent years, there seems to have been a shift in discussions towards a stronger view of the environmental agenda, which believes that, given the central role of nature, it should be the central concern of the Brazilian legal system. This is because without nature, man would not exist.

Continuing along the lines of such reasoning seems to lead to a view of the Rule of Law that, in the face of serious imminent risks, sees the environment as the most relevant concern, which requires a reinterpretation of other rights. Strong sustainability, then, would need to be defended as the maintenance of ecological integrity of planet Earth, and this would only be possible in a biocentric ethical view, whereby animals and nature are given the role of subjects of rights.

This shift toward strong sustainability (WINTER, 2009), however, seems to resort to a view that, without this shift in perspective towards a systemic, planetary, and holistic outlook, environmental problems cannot be solved. Justifying this shift assumes that, therefore, a new green movement is underway in each country that would justify a maturity for this new sustainability that would provide for the World Environmental State (BOSSELMANN, 2008; CANOTILHO, 2001).

This paper, however, which is based on the effectiveness of environmental constitutional norms, argues that it is necessary to step

back and address environmental problems in the Brazilian situation. The domestic aspect deserves a differentiated attention.

In light of this, in the following topic we will list four reasons for moving away from this new outlook and adopting a domestic Environmental Rule of Law dogmatically founded on a mitigated anthropocentrism human dignity, guided by a possible sustainability value.

2.1 Reasons to advocate a dogmatic approach to the Brazilian Environmental Rule of Law

Firstly, we must recognize that environmental problems – viewed from a domestic environmental perspective – do matter.

It can then be recognized that environmental problems are divided into two generations. The first one is national, based on pollution prevention and control, its causes and effects, in addition to the enforcement of the fundamental environmental right. A second one is based on ecological, systemic sensitivity and a global legal pluralism of ecological issues from the planet's point of view (CANOTILHO, 2015). Despite recognizing this duality, it is advocated that the development of a planet-wide ecological sensitivity, which is present in the second layer, does not prevent focusing efforts in realizing the fundamental environmental law, which is central in the first layer. To achieve environmental goals, domestic and international mechanisms must be institutionalized (CANOTILHO, 2015). The domestic and the planetary levels are not separate from each other. Precisely for this reason, by putting too much energy on the planetarium, one can ignore the possible gains of a rational debate within the domestic situation.

The same reasoning goes for the focus, in the Brazilian environmental discussion, in the international treaties. Although there is a huge amount of environmental laws that are quite advanced in many points, they are not always examined and discussed as central to the domestic agenda. They are then placed second in environmental debates, to the detriment of international treaties, which contributes to their weakening.

What we want to clarify here is that domestic achievements do matter. The complexity of the environmental agenda is known, but the constitutional text does matter and the norms that find their foundation in it also matter. It is as part of this implementation that one can move from a "self-against-the-state" (individual) paradigm to "we-against-the-state" (collective) to reach "all-of-us-in-favor-of-the-planet" (sympathetic)

(BENJAMIN, 2015). At the domestic level, this solidarity paradigm could be seen as "all-of-us-in-favor-of-a-sustainable-Brazil". This does not negate the complex and planetary aspect of the environment, but one cannot lose sight that the notion that a domestic understanding of the environmental concern is not only possible, but indispensable (VIEHWEG, 1997).

In this claim of a sympathetic future (not only of those who exist now – present generations – but also of those who will one day exist – future generations), the notion of an Environmental Rule of Law within the Brazilian situation can be an important guideline for constitutional interpretation from a dogmatic approach, as argued in this paper.

The aim of this paper is to establish a stepping-stone that seems indispensable: the definition of a dogmatic framework for the notion of the Environmental Rule of Law.

This is because, in this Brazilian Environmental Rule of Law, there is a paradigm with dogmatic notions that need to be accepted and socially legitimized. So, when summarizing the discourse on planetary issues, we move away from the problems underway here in Brazil, based on the Brazilian legal system, which diminishes the understanding and effectiveness of that right. It should be noted that we are not denying that the environmental agenda goes beyond barriers, but rather that a debate within them, to boost concepts such as environmental balance and environmental responsibility can be an important rationale. This can help to materialize the agenda in its social effects.

While the legal side has already found room in the 1988 constitutional text, the environment still remains as an ethical/axiological component, which demands a constantly changing cultural outlook in permanent construction. The paradigm of this Brazilian social context is being formed (KUHN, 2009), but it is within this limit of cultural possibilities, of socially accepted reasons, that actions and decisions can be worked out. The Environmental Rule of Law, therefore, can be seen as a possible axiological parameter, within the Brazilian situation, to transform the relationship between man and nature. Along with the constitutional change, the affirmation of the interpretative possibilities of this paradigm of the Environmental Rule of Law focused on sustainability must take place. The planet-wide view is important, but so is the domestic one, and it needs to have its space. Therefore, we intend to move away from the globalist

postulate[8] to focus our energies on a postulate that brings together the public-based and associative perspectives[9]. It focuses on the possibilities of a type of environmental protection performed by the government and the Brazilian citizens. It is necessary to talk about the Brazilian Environmental Rule of Law and what is its significance for the environment, given the roles of the state and the community in this framework. The first reason, therefore, draws attention to a focus on the domestic environment.

Secondly, it is necessary to be clear about the meaning of the Brazilian Environmental Rule of Law paradigm. This second reason, therefore, follows from the first. Rather than skipping steps and moving on to new planet-wide or transnational environmental discussions, we need to be clear about the meaning of the Brazilian Environmental Rule of Law. Here. This is because, in environmental law theory, there seems to be several terms and meanings for it. For some authors, it is the Environmental Rule of Law (PADILHA, 2010)[10]. For others, the Socio-Environmental Rule of Law (SARLET; FENSTERSEIFER, 2014). Some argue that it is the Natural Rule of Law (LEITE; SILVEIRA; BETTEGA, 2017a; 2017b; MARCHESAN; 2017). Another view is the Environmental and Ecological Rule of Law (CANOTILHO, 2015). Those are not strictly semantic, terminological differences. There is in this multiplicity of terms a conceptual difficulty as well, which seems to hamper the actualization of norms of constitutional environmental protection.

Although the authors of the Brazilian law theory generally argue for a notion of a State that seeks to protect the environment, the objectives and the way to achieve them seem very disparate. Once that is demonstrated, it can be seen that part of the law theory argues that Brazil is already in an Environmental Rule of Law, given the 1988 Constitutional Text (SARLET;

8 According to Canotilho (2001, p. 10), the globalist postulate argues that "the protection of the environment should not take place at the level of isolated legal systems (whether state-based or not), but rather at the level of international and supranational legal-political systems, so as to achieve a reasonable global environmental ecological standard, while at the same time structuring a global responsibility (of states, organizations, and groups) regarding environmental sustainability requirements".

9 According to Canotilho (2001, p. 11-12) the publicist perspective focuses on "the idea of the environment as a public asset of common use, and the protection of the environment as an essentially public function". The associative perspective, in turn, is based on "environmental democracy". It has some features common to the public-based perspective, especially when it considers the environment as a public asset of common use, but it is contrary to the technocratic idea of environmental management ("government of environmental know-it-alls").

10 This was the outlook of Morato Leite, according to Leite; Belchior (2010); Leite (2008), but it seems to have changed into a biocentric view, actualized in the Natural, or Ecological Rule of Law (LEITE; SILVEIRA; BETTEGA, 2017a; 2017b). Some, like Kamila Pope (2017), believe that the Environmental Rule of Law and the Ecological Rule of Law are synonymous.

FENSTERSEIFER, 2014; PADILHA, 2010; BENJAMIN, 2010). Another side thinks that the discussion is very far from being realized, and there is only a theoretical debate on the subject (LEITE; SILVEIRA; BETTEGA, 2017a).

For this paper, the dogmatic approach, subject to zetetic revision, of the Environmental Rule of Law seems to solve this question.

With this choice, we can acknowledge the existence of an Environmental Rule of Law based on environmental dogmatics – limited and legitimized by the present culture, according to a possible sustainability value – but, on the other hand, recognizing that this parameter is susceptible of reevaluations and reaffirmations, which are made possible by zetetics. It is necessary to consolidate an opinion[11] and seek to guide the actions on this Environmental Rule of Law in a dogmatic way, and move it away from questioning to allow further progresses in the environmental agenda.

The Brazilian legal system needs to be understood as an Environmental Rule of Law before the establishment of an environmental public order (BENJAMIN, 2015). This means that this environmental order is not limited to Art. 225, but rather includes a huge number of provisions that directly or indirectly enshrine environmental values to be taken into account in decisions made, regardless of whether they are public or private. This does not mean making the environment the single objective of the legal system, but rather putting it as one of the factors to be taken into account in the decision-making process, whether public or private. In this context, we seek an axiological duty regarding the generic duty of defense and preservation of the environment (BENJAMIN, 2015), as one of the founding values of the Brazilian State. In this paper, this value is considered to be sustainability[12].

The 1988 text as a whole, therefore, has an internal and external organic coherence and a final environmental direction: sustainability. The normative instruments for achieving an Environmental Rule of Law are, therefore, in the text and warrant an interpretation in these terms, but this cannot mean that the main objective of the state shall be the defense

11 Dogmatics is based on an opinion and the formation of an opinion, while zetetics focuses on the revision of that opinion (VIEHWEG, 1997). For this research, before trying for the results achieved in the environmental agenda, these results should given security.

12 It can be understood that the sustainability value is part of values such as justice, freedom and equity (BOSSELMANN, 2008), but the sustainability advocated in this paper is part of solidarity, not justice. There would no longer be four values, but three. Moreover, as will be explained further, sustainability in this research is possible, with a depth other than that argued by that author, since this research starts from a Brazilian dogmatic context, limiting it in its legitimacy and social acceptance.

of nature. In the Brazilian Environmental Rule of Law, therefore, there seems to be a conditional reserve for the environmental asset to be taken into account in legislative, administrative and judicial decisions, but this does not make it a higher value than the others. There are, within the Environmental Rule of Law accepted in this paper, freedom, equality and solidarity, the latter has having become sustainability.

In terms of terminology, Environmental Rule of Law seems to be the best term, since the concept of environment seems to be broad and dynamic enough to cope with complexity. Chapter VI of the Constitution expressly talks of "The Environment". Within this concept, which is adopted in the text, one can identify not only the democratic but also the social bias, along with the environmental one[13]. Nor does it seem necessary to also include the term ecological[14], as this element would already be included in the phrase "environmental". Even recognizing the importance of the social factor[15] present in the socio-environmental outlook, this component also seems sufficiently included in the phrase "environmental". If each of the facets – already found in the environmental notion – had to be included in the terminology, the designation would be too broad. It would be the Ecological Socio-Environmental Democratic Rule of Law. But for this paper, the term "environmental", besides being adopted by the 1988 Constitutional text and also internationally[16], seems to be the broadest and most complex, including various aspects, encompassing the four kinds of environment (natural, cultural, artificial and workplace) and able to communicate the intended meaning. It seems to be able to integrate the interdisciplinary character required by the challenges posed by Environmental Constitutional Law.

The concept of environment adopted in this paper, then, starts from

13 This was the position of Canotilho in 1995, but it seems to have changed, since he later talks about the Ecological Constitutional State (2001) and in his following works he mentions Environmental and Ecological (CANOTILHO, 2015).

14 Canotilho (2015) speaks of an Environmental and Ecological Rule of Law. Note also that the environment can be the object of countless sciences, both natural scences and the humanities. Among the natural ones, called hard sciences, we can mention ecology, biology, geography, chemistry, and physics. So, to account for this complexity, the focus is kept on the concept of the environment, as it seems to more broadly include all these facets (PADILHA, 2010).

15 Ingo Sarlet and Tiago Fensterseifer (2014) use the Socio-Environmental Rule of Law, when proposing an addition to the social dimension (started as freedom, and added of the social, combined with the ecological one). Molinaro (2007) argues for the existence of a Socio-Environmental and Democratic Rule of Law.

16 Kamila Pope (2017) explains that the term Environmental Rule of Law was adopted in an international document negotiated in 2013, in Ruling No. 27/9 on the advancement of justice, governance and Law to achieve environmental sustainability, issued by the UNEP Board of Directors.

the definition of José Afonso da Silva (2011), but includes the workplace aspect of the environment as an autonomous kind, instead of including it in the artificial aspect. For this paper, the environment is the set of natural, artificial, cultural and workplace elements that provide for the balanced development of life in all its forms. To endorse the correctness of the choice of the term environment, it should be pointed out that STF has already recognized Brazil as an Environmental Rule of Law in its judgment of ADI No. 4066/DF on chrysotile asbestos (BRASIL, 2018), which reinforces the importance of maintaining the law theory construction in this perspective. The second reason, therefore, is to lay down a terminological basis – the Environmental Rule of Law – and to work on its content in light of a dogmatic proposal.

Third, in recognizing the Environmental Rule of Law, the dignity of the human individual, which is the foundation of the Brazilian legal system, needs to be dealt with ethically with a different outlook. Thus, it is argued that one of the foundations of the Brazilian legal system – the dignity of the human individual – deserves an ethical review in the context of the Environmental Rule of Law. This is because this notion of human cannot be restricted to a strictly biological or physical idea; it cannot be based on an individual or collective, but rather a diffuse idea. The idea of human dignity, the foundation of the Brazilian Democratic Rule of Law provided for in Art. 1, III of the 1988 Constitution and based on the principle of solidarity (which, from an environmental perspective, becomes sustainability), is designed not to be restricted to human interests.

In the Brazilian Environmental Rule of Law, the dignity of the human individual takes on a new meaning. It implies a duty to dignity to be fulfilled by all human beings in view of their intrinsic and inseparable relationship with nature. Thus, it is recognized that the weakening of nature also puts human life at risk (SARLET; FENSTERSEIFER, 2014). Man is part of nature. Human dignity, therefore, is also the dignity of the environment man is a part of.

The environmental human dignity argued for in this paper is based, therefore, on mitigated anthropocentrism, which does not see nature in an instrumental way, as it acknowledges an intrinsic value in other living beings, the animals, which imposes restrictions on human action, but at the same time, does not equate these restrictions with rights (SARLET; FENSTERSEIFER, 2014; BENJAMIN, 2015; PADILHA, 2010). Brazil does not seem to support the adoption of a biocentric outlook[17]. He preferred

17 In this sense, STF has already recognized the Brazilian adoption of an anthropocentric ethic in ADI No. 4066 (BRASIL, 2018), but it is worth pointing out that there are judgments as that of the

here to accept an ethical perspective for this dignity based on a mitigated anthropocentrism, to argue for the legal protection of the environment, regardless of its direct utility or benefits to men. An ethical notion of deep ecology is not adopted here (CANOTILHO, 2001; 2015), which understands animals as subjects of law, or an outlook of pure anthropocentrism, which sees man at the center of everything. In ethical terms, Brazil seems to be exactly in this process of moving from a pure anthropocentrism to a mitigated version of anthropocentrism (CANOTILHO, 2001; 2015; WOLKMER; FERRAZZO, 2017).

That is precisely why, as this process is currently ongoing, that to propose a radical biocentric view would be to jump steps in the paradigm actualization process (KUNH, 2009). It would amount to recognize an Environmental Rule of Law content that seeks for a sustainability that Brazilian society does not seem willing to share and adopt. If we want to include concepts that are not accepted by dogmatics, we miss the opportunity to influence decisions and actions on the environmental agenda, because the debate then takes place away from what is the opinion of society.

By moving away from the scope of dogmatic possibilities (VIEHWEG, 1997), researchers begin to defend their position only among themselves, without thereby guiding actions and influencing them. It would be to recognize as dogmatic a zetetic approach that does not seem to have been accepted. To advocate an environmental law in biocentric terms would then amount to speak in a language that is not accepted or used to decide the problems that arise in the Brazilian situation. It would be a discourse in a language that is not understood, which seems to be unproductive.

Given these reasons, mitigated anthropocentrism seems to be the best way, as it recognizes an intrinsic value in animals, based on an ethical duty to be taken on by humans, and allows a debate that is embraced and legitimated not only by the 1988 constitutional text, but also by social discursive legitimation.

Therefore, this paper does not abandon the Environmental Rule of Law to pursue a Rule of Law for Nature. Protecting nature is known to pose enormous challenges, such as the 12 obstacles listed by Bugge (2013 apud LEITE; SILVEIRA; BETTEGA, 2017a, p. 70-78), but this cannot mean abandoning the benefits that Environmental Constitutional

unconstitutionality of vaquejada [Brazilian rodeo] (ADI 4983, BRASIL, 2017), that maintain the mitigated aspect of the Brazilian position.

Law can bestow on everyone. It is believed that the acknowledgment of environmental rights in a constitutional text was an important step forward and the instruments included with such recognition can play a relevant role in the realization of these rights. Achieving a biocentric environmental ethic, in which the concepts of justice and equity can be broadened to include animals (MILK; SILVEIRA; BETTEGA, 2017a; BENJAMIN, 2015) deserves to remain a goal to be achieved one day. It must eventually be questioned in a zetetic way, and accepted from a dogmatic perspective. However, neither the written text nor the legal debates about its application start from these assumptions. They are very far from that. The third reason, therefore, is acknowledge human dignity as the foundation of the Brazilian order, based on a mitigated anthropocentrism.

The fourth reason is the recognition that the Environmental Rule of Law means a paradigm shift that is underway; it is being disputed, and is built on possible sustainability. The Environmental Rule of Law amounts, then, to a triple element of the current paradigm, by: (a) diluting the traditional forms of creditor and debtor by saying that everyone has the right and duty to protect the environment; (b) acknowledging that both public and private agents can degrade, and account for that damage; and (c) point to a review of the idea of nature as something at the disposal of human beings (BENJAMIN, 2015). The solidarity value seems to be largely responsible for this transformation by becoming, in the environmental agenda, the sustainability value.

It is by means of much struggle and debate that the Environmental Rule of Law can be realized, which still has not been achieved. While acknowledging the challenges of the 21st century, especially in the face of risk society and the Anthropocene Age, in this paper we propose that the best path is still the Environmental Rule of Law. It is in this scenario that the concentration of forces based on mitigated anthropocentrism seems valid, which does not see nature in an instrumental way, as it acknowledges an intrinsic value in other living beings, the animals, which imposes restrictions on human action, but at the same time, does not equate these restrictions with rights. With that, we aim at reconciling human and ecological values to provide for their integration, while recognizing their interdependence (SARLET; FENSTERSEIFER, 2014), based on the legal system Brazil has today.

The solution to the problems must come from here, from the domestic context and from the constitutional text, which in the Brazilian case is

considered one of the most modern and promising in the world. Rather than seeking solutions in an ethics still far from that acknowledged in the norms and current stage of culture, the choice of law and its refinement – stemming from debate and critical construction of arguments – seems to be a better way to achieve effective realization of this Environmental Rule of Law. It is a process with a long way to go. The objective needs to be an adequate justification, should it bump heads with its essential core (CANOTILHO, 2015). The best way to actualize the constitutional text is to start from it in the battle to realize the fundamental rights embedded in it. Especially in the face of so many attempts to reduce or alter it[18]. The war has not been won and remains open.

For these reasons, the dogmatic content of the Environmental Rule of Law and the meaning of possible sustainability need to be established. It will be filled up with sustainability possible, and with this choice, its conceptual and pragmatic challenge will be faced.

Sustainability should then be recognized as a founding principle (BOSSELMANN, 2008; CANOTILHO, 2010) – or value – of the Brazilian legal system. Thus, its removal in the face of a clash of rights is not feasible. However, it is a basis for the legal system, which cannot be relaxed. However, in segregating the prospects of weak and strong sustainability, aiming at the latter seems an overly ambitious goal at this time in Brazil. Strong sustainability has not been embraced by dogmatics. To insist on it would be to adopt a zetetic view of the discussion, which fragments (VIEHWEG, 1997) the material content of sustainability and makes it more vulnerable. The goal to be achieved would be so far from the present context that it would put major victories at risk. Therefore, we argue for a possible sustainability.

This is because, by placing nature's ecosystem at the center of concerns, as advocated by strong sustainability – which guarantees a preponderance in the interpretation of environmental problems in favor of the environment – seems to be too dissociated from the Brazilian context. In other words, preaching strong sustainability – which makes environmental protection the central element of the legal system, since only then will life exist – provides an advanced ethical component, but one that does not interface with the Brazilian situation.

18 Examples of such attacks are the many ways environmental legislation has been relaxed. In this context, the new forest code and PEC 65 on environmental licensing (SARLET; FENSTERSEIFER, 2017) stand out. To take a look at the legislative setbacks in the House of Representatives, see: Garcia (2016, p. 130-147).

Possible sustainability becomes the value of this Environmental Rule of Law, but its meaning aims at more pragmatic and relevant objectives, closer to the Brazilian context. With that, we take a snapshot of the Brazilian situation regarding the Environmental Rule of Law. A diagnosis is made of the extent to which this paradigm has advanced along dogmatic recognition within this community that puts its concepts into practice (KUHN, 2009). With this, we are fighting for a consolidation of the Environmental Rule of Law, where we migrate from anthropocentrism to mitigated anthropocentrism in the ethical context. Just like we go from an instrumental view of nature to an idea of considering nature on the same footing as social and economic issues, in search for possible sustainability.

Then, we conclude that the Environmental Rule of Law, in acknowledging a dogmatic normative structure in environmental protection that demands – in the decision-making process, regardless of whether it is public or private – taking into account the interest of a balanced environment, on which man depends and is a part of, on an equal footing with social and economic issues, given the axiological value of possible sustainability.

CONCLUSION

This paper aims at addressing the advances in the 1988 Constitution regarding the environmental agenda, materialized in the right to an ecologically balanced environment and the value of sustainability.

Although expressed in the 1988 Constitutional Text, it seems indispensable to discuss not only its symbolic meaning, but also its content. The innovation of the environmental chapter is a watershed for the implementation of the environmental agenda in Brazil. Therefore, this paper has presented not only the meaning of this constitutional elevation, in terms of law theory, but also what can be inferred from this right, in axiological terms.

In this paper, there was a dogmatic, but also zetetic, concern about environmental constitutional protection and the sense of an Environmental Rule of Law. This step seems important to provide a concept of Environmental Rule of Law based on sustainability that can contribute to social change, based on Theodor Viehweg.

The differentiation between the Environmental Rule of Law and the Natural Rule of Law makes it possible to argue for a concentration of forces

in the former. The need to consolidate a dogmatic normative framework for Brazilian environmental protection must be acknowledged.

Through a review of the literature, we argue that the Environmental Rule of Law consists in acknowledging a dogmatic normative structure in environmental protection that demands – in the decision-making process, regardless of whether it is public or private – taking into account the interest of a balanced environment, on which man depends and is a part of, on an equal footing with social and economic issues, given the axiological value of possible sustainability.

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