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FUNDAMENTAL DUTIES IMPLICIT IN THE NATIONAL ENVIRONMENTAL POLICY – LAW N. 6938/81

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ABSTRACT

This article aims to cover the legal substrates, the concepts, the constitutional typicality, the concreteness, the structure and the typology, the fundamental duties contained in Brazilian Constitution of 1988 – CRFB/88 which guide the interpretation of Law 6.938/81 – the National Environmental Policy- PNMA. This is a documental and bibliographical study, with data collection was performed by indirect observation with a descriptive character. In this way, some mechanisms of the CRFB/88 were analyzed and how they are interconnected with the PNMA, specifically, within the scope of the precautionary principle and, subsequently, with the principle of environmental non-regression to establish a principled connection relationship in fundamental duties. The constitutional context is imbued with the principle of solidarity, which leads to the recognition of the precautionary principle as an authentic right-duty, binding, private and public agents in the adoption of measures, whose guarantee of the ecological function establishes duties in the protection of the environment and offering quality of health and of life and ecological balance, creating legal obligations.

Keywords: fundamental duties; National Environmental Policy; precautionary and non-regression principles.

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DEVERES FUNDAMENTAIS IMPLÍCITOS NA POLÍTICA NACIONAL DO MEIO AMBIENTE – LEI N. 6.938/81

RESUMO

Este artigo busca percorrer os substratos jurídicos, os conceitos, a tipicidade constitucional, a concretude, a estrutura e a tipologia os deveres fundamentais contidos na CRFB/88 que orientação a interpretação da Lei 6.938/81 – a Política Nacional do Meio Ambiente do Brasil – PNMA. Trata-se de estudo documental, bibliográfico, e a coleta de dados foi realizada por observação indireta com caráter descritivo. Assim, foram analisados alguns dos dispositivos da CRFB/88 e como eles estão interligados com a PNMA, especificamente, na abrangência do princípio da precaução e, posteriormente, com o princípio do não retrocesso ambiental a fim de estabelecer uma relação principiológico de conexão para com os deveres fundamentais. O contexto constitucional está imbuído do princípio da solidariedade, que conduz ao reconhecimento o princípio da precaução como um autêntico direito-dever, vinculando, os agentes particulares e públicos na adoção de medidas, cuja garantia da função ecológica estabelece deveres na proteção do meio ambiente e do oferecimento da sadia qualidade de vida e equilíbrio ecológico, geraram obrigações jurídicas.

Palavras-chave: *deveres fundamentais; Política Nacional do Meio Ambiente; princípios da precaução e não retrocesso.*

INTRODUCTION

This article aims to understand the legal substrates, concepts, constitutional definition, concreteness, structure, and typology of the fundamental duties laid down in the Constitution of the Federative Republic of Brazil of 1988 (CRFB/88). It is postulated that the principles of precaution and environmental non-regression should act directly in the interpretation of Brazil's National Environmental Policy (PNMA).

For this purpose, the descriptive, documentary, jurisprudential and bibliographic study method was used, since data collection will be performed by indirect observation. Therefore, some of the devices of the CRFB/88 will be analyzed, as well as how they are interconnected with the PNMA, specifically within the scope of the precautionary principle, and subsequently generate an interpretative framework through the principle of environmental non-regression to establish a relationship between the principles in connection to the fundamental duties laid down by the CRFB/88.

In this article, the way by which fundamental duties are connected in the objective dimension of fundamental rights will be investigated. They express values of a certain society or community that, through individuals within their socio-environmental relations, can successfully exercise the subjective right which gives them legitimacy as a presupposition of the existence, conditions, and limits to the exercise of rights by all.

With this aim, the public authorities and society have the constitutional duty to preserve the environment for present and future generations. This duty is strictly related to caution against acts that may cause damage or imbalance to the environment and, consequently, endanger life. Because of this, omission becomes a way to find caution and preserve the environment and strengthen this legal institute in the constitutional category.

The notion of duty contained in the principle of environmental non-regression as a guarantee of *status quo* of the environment for common use by people in general from an intergenerational perspective, of solidarity and rights of the third and new dimension. It is possible to see the constitutional duties as an interpretative basis of the PNMA, based on the inalienable contents that the principles invoke before the fundamental duties, in order to elevate humanism to give a broad and profound safeguard of the dignity of the human person and the fundamental rights that permeate each other.

1 FUNDAMENTAL DUTIES AND ITS FOUNDATIONS IN THE BRAZILIAN CONSTITUTIONAL STATE

In Brazil, Article 1, of Title I, of the fundamental principles laid down in the CRFB/88, contains the following foundations: "I-sovereignty; II-citizenship; III-the dignity of the human person; IV-the social values of work and free initiative; V-political pluralism" (Brazil, 1988).

The rationale of fundamental duties in Brazilian constitutional law resides in Comparative Law and in the sovereignty of the constitutional State, in the sociability of individuals who become citizens through the burdens and bonuses that citizenship imposes. These fundamental precepts are based on civic and humanitarian attitudes reflected in material aspects such as reciprocity, equal freedom for all citizens and the dignity of the human person.

In Nabais's view (2009), the sovereignty of the constitutional State is a legal concept based on the principle of the dignity of the human person. Thus, the State, backed by its sovereignty, is conditioned to sufficient powers in establishing fundamental duties. The idea, according to the author, creates a difference in meaning and scope from what is to be understood in terms of the consecration of the fundamental constitutional rights, since they are imposed on the constituent power of the State itself, which only has to acknowledge them, and not build them up as a pioneer, which cannot be assigned to the fundamental duties, which, in turn, are an effective and original creation of the State backed by its current constitution.

It is possible to corroborate what was said above about fundamental rights, which, guided by the state of freedom and respect for the dignity of the human person, present, as a result, a prior orientation that overlaps the autonomy of the original constituent legislator. This is something that happens in a differently with fundamental duties because there are some limits to the sovereignty of states, specifically when they adopt the legal state in form and content.

In this case, it is important to clarify that one of the criteria of these limitations inherent to the fundamental duties are the principles of international law found in the very inclusion of the duties in the sphere of the duties and powers of the individual, the dignity of the human person works as an attractive and repulsive force, depending on the case, but, which broadly speaking guides the duties likely to be included in the constitution.

Therefore, there are limits to the duties arising from what is established

as constitutional dogmatics inherent to the legal state, as well as what they may compromise in terms of effectiveness in the prevalence of international human rights and self-determination of peoples. Indeed, the formulation contained in the immanent nature between rights and duties, but from a distinct perspective, which, to Nabais (2009) based on Stober (1979), there is no substantial legal guarantee of fundamental rights without the fulfillment of a minimum of duties of man and citizen. In absolute terms, it comes down to a unilateral regime of duties that supposedly brings back the models of the authoritarian states of the interwar period.

Another limit, perhaps more incident in the current situation of constitutionalism, as a limit to the constitutional institution of fundamental duties, may be translated, especially in the social State, if considered the common sense and proportionality, and the exhaustive individualism and the ideological-liberal character inserted in the legal State, to give effective emphasis and possibility of concrete materialization of social elements through fundamental duties that strengthen the economic, social, cultural, political and ecological order (STOBER, 1979).

Fundamental duties, in addition to substantiating the assumption of material support of the State, are an indispensable condition for the recognition and preservation of what is expected, in terms of material effectiveness of fundamental rights. Such effectiveness has particularly significant repercussions in the protection of life, freedom, and property. Something that conforms, for example, to the duty to pay tolls, as a necessary assumption of the right of freedom to come and go, on highways and bridges properly built and maintained.

In addition, it plays a social role in the right of ownership, in due consideration of a person or citizen who undertakes the service enjoyed singularly. If it could not be thus stipulated, it would generate a duty for all tax-paying citizens to cover costs, distorting what is thought to be a tax state, that is, one based on the principle of tax justice, to a patrimonial state.

The background of the fundamental duties lies in the understanding of the state as an organizing structure with the role of realization of the human person, in which each participant has duties that keep the operation of the state and strengthen rights. In addition, the conspicuous need to close the accounts of the jusfundamental balance sheet, between rights and duties, if it can at all be transcribed with this type of analogy. Fundamental duties are also instruments for the realization of the dignity of the human person, from the moment they constitute a material foundation for the effectiveness of fundamental rights.

1.1 Legal basis for fundamental duties

The constitutional basis is a significant aspect of the fundamental duties. Both the Italian and Spanish constitutions stipulate a clause of social duty, which resembles the open or non-typical character of the system of fundamental rights, which can be determined in the CRFB/88 in art. 5, par. 2, in which "the rights and guarantees set forth in this Constitution do not exclude others arising from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party" (Brazil, 1988).

The oldest mention in which the non-defintion of fundamental rights can be attributed is that of the ninth amendment to the Constitution of the United States of America (1791) and which was later enshrined, without major effectiveness, however, in the Spanish Constitution (1869), in the Brazilian Constitution (1891), in the Portuguese constitutions of 1911 and 1933 (GOUVEIA, 1995).

Still, what matters here is the possibility of a general clause of social duty, which would express the possibility of constitutionally protecting duties or values on its own, although not in the constitutional text that gradually emerge from the community consciousness or what can be attributed as "effective Constitution". The foundation contained in the CRFB/88 that aims to set in perspective as a general clause of social duty is in the preamble of the Constitution, in order to ensure the exercise of social, individual rights, freedom, security and well-being in a way that is committed to peace.

In addition to the epigraph included in the CRFB/88, in Chapter – I, Title II – On the Individual and Collective Rights and Duties, there is a mention to the duties, with regard to these, since it suggests the application in relation to those duties of the principle of universality, which by their determination provides sufficient bases for an open list of the fundamental duties arising from the constitutional precepts that structure intangibility of the dignity of the human person, which both the public authority and individuals are bound to fulfill, under the bias of the principle of reciprocity by stipulating equal freedom for all in the exercise and development of their personality. In this context, even without an explicit reference to the fundamental duties, as is the case with the German Fundamental Law, there is support for each and every one to determine to the fundamental duties the equal sharing of burdens and obligations in the functioning of organized

society (HOFMANN, 1983; ANDRADE, 2009).

Through this doctrinal way showed above, Nabais (2009) contends that it is attributable to the principle of the autonomy of the individual as not corresponding to an unregulated and overbearing emancipation, without any constraints. But rather as a freedom bound to a symmetrical social and collective responsibility, in which through a personalized and personal understanding of the citizen, one can obtain an open and compatible list in terms of fundamental duties that concern him.

It is argued that the fundamental duties have explicit and/or implicit constitutional support, always with a focus on giving preponderance to the principle of freedom and autonomy of individuals, since they are based on the realization of their fundamental rights. To achieve this goal, it is understood that the fulfillment of the dignity of the human person requires the equal consideration between fundamental rights and duties, as these contribute to balance and development of social and community supports, reorienting the reason for the existence of duties, regardless of an explicit affirmation. They thus contribute to the concrete realization of social rights personified in the economic and financial sustainability of public policies, but always grounded in the Constitution and aimed at a fair and sustainable balance and the functioning of the social body, in the political, social, cultural, economic, and ecological sphere.

1.2 The concept of fundamental duties

Fundamental duties have the legal nature of an independent legal-constitutional category, working in correlation, and democratically articulated, with fundamental rights, as brakes and counterweights of freedom. It is specified in the responsibility of citizens in the achievement of objectives that concern the realization of the common good through sustainable public policies (NABAIS, 2009).

Fundamental duties as duties of citizens that, by specifying the jusfundamental position of the individual in terms of responsibilities, have primary importance to solve collective interests, which are materialized in effectively viable public policies, under the aspect of economic-financial and ecological sustainability, in a specific context of society and the current situation of limited and scarce resources.

This reality unfolds into a legal notion backed in a certain parallelism with the concept of fundamental rights, portraying fundamental duties as

passive, autonomous, subjective, individual, universal, permanent, and essential legal positions (ANDRADE, 2009).

The passive character in which fundamental duties are covered expresses a legal situation of dependence of individuals in relation to the public authority, showing the passive aspect of the fundamental legal relationship between individuals and the State/community, safeguarding the individual's rights. This is a position diametrically opposed to fundamental rights, since the latter imply a situation where the individual prevails over the State, consolidating active legal positions of the individual vis-à-vis the public authority constituted in the organization of the State (ANDRADE, 2009).

Fundamental duties should not be understood as translating into simple inertial legal positions totally disconnected from the manifestation of the will of their holders. Fundamental duties depict active situations, which imply positive and omissive behaviors by those responsible for them and may inevitably be susceptible to transgressions. The reference to fundamental duties as passive positions has specific content with its relational meaning to fundamental rights, however it does not distort the active position that must be performed by its holder within the scope of his individuality (ANDRADE, 1997).

However, as Andrade (2009) teaches us, not all passive rights holders irremediably constitute fundamental duties as an independent legal function. After all, passive positions related to fundamental rights can be extracted from these. That is to say, duties that are the reverses of fundamental rights, and which are primarily an obligation of the State, but which incidentally can also present themselves as individual community duties incumbent on individuals with the force of absolute character conferred on fundamental rights.

According to Nabais (2008) and Carreira (1996), the duties of fundamental rights are assigned predominantly to public institutions as they concern duties of rights, that is, freedoms, guarantees, or even those pertinent to the State as a provider, strictly connected to social rights. Regarding the former, namely, the duties immanent to the State, there are at the same time negative duties, of voluntary withdrawal. And positive protection duties, such as: criminal, police, administrative, diplomatic, environmental, among others; duties of execution as the organizational and procedural rights. On the other hand, there are the parliament duties, which are the duties of legal realization of social rights, the duty not to regress regarding

the minimum structure in place in the constitution of the social and legal State, and, in the consciousness of citizens and society, as civic and political values that cannot regress.

According to this dimension, the role of the Constitution is to work as a social pact in which social rights are the instrument for the pursuit of a fully realized society, in terms of social, economic, and environmental justice. A balance of public and private obligations serves as an obstacle to State interventionism or the State as a proprietor of patrimonialism. Nevertheless, it is assumed that the definition of fundamental duties in their autonomous branch strengthens the notion of collective responsibility, which in turn leverages the realization of fundamental rights in institutional terms since it allows for sustainability in the exercise of freedoms by balancing burdens, obligations, subjections and public and private powers. Any detachment from the social agreement due to non-consideration of fundamental duties leads not only to insurmountable substantial illegality, but also a break in the political balance (SOARES, 2008).

If the normative-constitutional force of fundamental duties is not recognized, it would be thought that Lassalle (2011) in the opposition between written or legal constitution that would depend on an "endorsement" of the actual Constitution. However, Hesse (2004), by means of the concrete concept, a relationship of legal materiality in the normative force of the Constitution would be determined, so fundamental duties cannot simply portray one side of the rights. But also, to represent a specific autonomous character capable of realizing what is identified in the realization of public policies, materialized in values stipulated by social rights, and especially as assumptions of their feasibility.

Another argument that strengthens the autonomous nature of fundamental duties lies in the fact that constitutional problems are not strictly problems of power but also legal problems specific to the science of constitutional law. If the fundamental rights would be considered without the connection and counterpart, even autonomy, of fundamental duties, than the constitutional law could be a "science of the law without laws", simply regulating power relations in a way that is unrelated to the juridicity imanent to social sustainability. The consequence would be to exclude from juridicity most lively part of the relations of effectiveness of social rights to be propagated in constitutionally determined public policies, as well as to learn the essence and ends of the modern State (SOARES, 2008).

According to Nabais (2009), in a portrait of the autonomous nature

of fundamental duties, these assume subjective positions imputed to the individual by the power of the Constitution. Unlike what could be understood as objective positions that could constitute competencies and organizational characteristics of the State. By way of consequence, these are legal positions with perspective to the various constitutional fields. They adhere to the political and economic field of the State than with the constitution of the individual, a field constituted in the fundamental duties in a peculiar sense. This time, such predominantly objective positions do not constitute the formal constitution of the individual, therefore they are related to, but are not part of, what guides fundamental rights.

Thus, it is noticed that the fundamental duties related directly to the sustainability of the community globally considered, that is, defense of the fatherland, electoral duties that are bound to the functioning of the democratic State, the economic duties that concern an equitable distribution of burdens, the duty to work, the duty to generate social dividends by using the resources immanent to the means of production available. And, finally, the duty to care for the environment structured in precaution and prevention of the ecological heritage for present and future generations.

1.3 Fundamental duties in their constitutional definition

Nabais (2009) teaches that fundamental duties, differently from what is imposed on fundamental rights, can only be identified via the constitutional route, based on the principle of legal definition, that is, to a *numerus clausus:* only those which the constitution expresses categorically, or which can be determined implicitly with contextual elements of the Constitution itself.

This implies qualifying fundamental duties strictly as the object of a constitutional discipline, the others being non-constitutionalized, even if fundamental, but not constitutionalized, legal duties, that is, originating in infra-constitutional legislation.

From there emerges the subject matter pertinent to the structure of fundamental duties. According to Canotilho (2003), constitutional norms enshrine fundamental duties, and only exceptionally have the nature and structure of a "fully applicable law". They occasionally enshrine some duties directly required in the words of Miranda (1999) and transposed into the CRFB/88, as illustrated in the education of children as a duty of the State and the family (art.205, CRFB/88). However, the generality of

fundamental duties presupposes, according to Canotilho (2003), an indispensable legislative interposition for the creation of organizational and procedural models capable of defining the regulations for the fulfillment of duties. Thus, the norms enshrining fundamental duties refer to the category of norms devoid of legal-constitutional definition, in which case they need legislative mediation.

Still regarding the teachings of Canotilho (2003), it is possible to see that the ideas of solidarity and fraternity point to fundamental duties among citizens. It should be alluded that there are fundamental duties of defense and protection of the environment (Art. 225, of the CRFB/88), of respect and solidarity towards citizens with disabilities (Art.227, § 2º of CRFB/88), the duty to respect and comply with the quality standards of goods and services for consumers and users of public services (arts. 5º, XXXII, and 37, § 3º, I). Still on this way, those certain fundamental duties, such as the duty to obey the laws and the duty to respect the rights of others, seem to refer to a bias of their immediate applicability.

It subscribes to the doctrine of Nabais (2009) about fundamental duties, in which the aforementioned lack of openness of the system of duties meets the democratic condition that guides modern constitutions. This includes the CRFB/88, in which freedom is embodied in the preponderance of fundamental rights as opposed to the powers of the State. However, they must be offset and counterweighed to the community values that serve as the support to the fundamental duties.

In this same conceptual foundation, it is assumed that constitutions contain a general clause of social duty, which, in the case of the Brazilian constitution, is identified by the preamble: "to ensure the exercise of social rights", as prescribed in the Italian, Spanish and, in a certain way, Portuguese constitutions, which recognize and guarantee the inviolable rights of man, whether as an individual or integrated into the social formations in which his personality is developed, while simultaneously requiring uncontested compliance with the duties of political, economic, social and ecological solidarity (CHULVI, 2001; NABAIS, 2009; DIAZ, 1982).

Furthermore, Nabais (2009) identifies an individualization of the social duty category through various subjective situations included in it as something broader and more comprehensive, without allowing a branch of duties of extra-constitutional political, economic, social or ecological solidarity, although legalized in ordinary ways. This position, which again assumes the uncontested duties opposed to the open character granted to

fundamental rights, does not make the status conferred to fundamental duties a secondary one. After all, considering this not as a subsidiary category of fundamental rights allows us to assert the freedom inherent in the inviolable rights of man and to assert dutifulness, as uncontested duties to the minimum of sustainability immanent to the functioning of society and the State.

Therefore, in the sphere of social dutifulness, the fundamental duties both categorically expressed an implicit in the Constitution are a source of support backed by solidarity. This legitimation provides checks and balances to fundamental rights and duties which are not expressly written in the constitution but can be extracted by interpretation in relation to the implicit matter of dutifulness. In short, extra-constitutional fundamental duties are considered not as broad and unrestricted openness to the imposition of restrictions and arbitrary curtailment of the values of freedom and guarantees, but rather as a a constitutionally legitimate openness to the value of solidarity, from which a community of citizens can never abstain (DIAZ, 1982).

Noting the consequences that this idea calls for, there is the design in which dutifulness implies fundamental rights. At first in the limits relevant to rights, freedoms and guarantees, acting primarily in the discipline of legal duties, also relevant to the restrictions to those rights. With the significant difference that fundamental duties have a greater propensity for practicability as a normative force in comparison to duties strictly defined by law.

1.4 The concrete dimension of fundamental duties

In the sphere of delimitation of the frameworks of fundamental duties, it is possible to mention the subjective aspect, as it is stamped in positions of passivity or availability/subjection of the individual and/or the citizen given the primary public interests, based on the institutional mission of the State aimed at the common good. In addition, there is an objective field of action of fundamental duties, since according to Nabais (2009), under the bias of their internal structure or content, they present themselves as fundamental social rights through an intervention of the legislator, which makes them concrete for legal and administration agents.

The objective nature of fundamental duties can be shown in their functional aspect in the fact that they prescribe values or legal-constitutional assets that extrapolate the orbit of interests of the individual who carries

them, and their primary and immediate function is the protection of the community. Secondarily, it encompasses the mediated or indirect function of the protection of the individual, even though this provision prioritizes the interests of the community, in a democratic legal state, there is a clear prevalence of the values of freedom as opposed to the values of authority. Thus, fundamental duties are an instrument of realization of individual persons, hence the need to keep their intrinsic character of realization of the dignity of the human person (HOFMANN, 1983).

According to Hofmann (1983), in the background of the fundamental duties lies the dignity of the human person considered individually, since there is a requirement for the costs of the instruments needed for its realization, that is, the collective duties must be shared by all. In such terms, it can be concluded that fundamental duties do not contain duties, but instead the right to an equal sharing of community obligations, in which the existence and functioning of the modern state are currently dimensioned.

As values and guidelines of the intention of the original constituent legislators, fundamental duties extrapolate to a large extent the legal-subjective figure in which they could be identified, especially in totalitarian states, in which they were unilateral. They thus acquire a functional significance included in all their disposition. Therefore, they are the fundamental duties, in this second moment of constitutional adequacy, an expression of collective responsibility of citizens supporting legitimacy for affectations both reasonable and proportional to the rights, freedoms or guarantees posted in the constitution. Under the bias of directing the legal realization of the fundamental tasks inherent in the priority tasks, for example: the proportional distribution of costs in the material realization of the freedom to come and go on roads maintained by the public authority, which may even include restrictions of use aimed at protecting ecological rights (HOFMANN, 1983).

This helped show that fundamental duties are directly associated with social rights – such as ecological rights – which, besides converting them into solidarity, also contribute to the realization of the current constitutional state strongly influenced by social element.

1.5 The structure of fundamental duties

To explain the structure of fundamental duties, it is essential to distinguish active and passive ownership to subsequently expose the content,

their legal definition and the relations they have with fundamental rights and constitutional principles, as well as the relations that have arisen between them.

According to Nabais (2009), all fundamental duties are duties toward the community, and they are assumed directly to the services of the realization of state values, translated into the very raison d'être of the State as an organization aimed at the pursuit of the common good. Thus, fundamental duties structure the very constitutional sovereignty of the State by establishing normative parameters of the primary legal discipline that will have repercussions both in itself and in relation to the State, but also, and particularly, in the duties towards the community in general.

This time, it is possible to point out the classic fundamental duties, which compose assumptions about the existence and functioning of a politically organized community in a democratic legal State, for example: the duties of defense of the Fatherland, the duty to pay taxes and with political duties, the duty to vote, to assist in the election process, *etc.*. There are also the duties committed to the economic functioning of society and the State, of which the community is the active holder. The duties that it exposes civic-political content come to integrate the first two dimensions of fundamental duties. They are the other side of the set of fundamental rights of freedom and political participation.

Conversely, there are the fundamental duties of economic, social, or cultural content, which, as consequence of the social State, are intended to enable certain social values. Their importance for the community can be seen in terms of sustainability by taking on a new aspect that comes to strengthen the fundamental rights of economic, social, cultural and ecological bias. In order to correct the shortcomings of the State, for example, a prominent role is given to local finance to create and manage environmental taxes, increasing the effectiveness of environmental intervention, legitimized by a fundamental duty, the background of which is responsibility at community level (NABAIS, 2009; SOARES, 2001).

According to Hofmann (1983), there are fundamental duties that are duties for the recipients themselves, namely the duty to protect one's own health, with co-responsibility in the dictates of public health. They thus get a legal-constitutional value of support and imposition of behaviors on individuals, defining situations of rights and duties.

1.6 The definition of fundamental duties

From the perspective of active subject, fundamental duties may be: (a) duties that bind citizens in their relationship with the State, as is the case with duties related to civic and political processes; (b) duties which are mandatory for individuals, particularly in their relations with the community, that is, economic, social, cultural and ecological duties; (c) duties that assign responsibilities to people in their mutual relations with each other, such as the duty of parents to the care and provide for their children, and vice versa in another stage of life; and (d) duties to oneself, such as to the duty to care for one's health so as not to burden public expenditure on public healthcare (MIRANDA, 1999; CANOTILHO; MOREIRA, 2007; HOFMANN, 1983; NABAIS, 2009).

In the first two types of duties, the subjection of the citizen or individual is an integral part of a given community, for the simple fact of belonging. In the following types depicted above, there is a reference to duties of man, an expression of a counterpart whose responsibility derives from his character as a human person, rooted in what can be identified in natural duties in which the substrate resides in human dignity (NABAIS, 2009).

Duties in their relations with fundamental rights are correlated and intrinsic, with a threefold division between duties associated with, or related to, rights, duties related to rights, and duties autonomous or separate from rights in the strict sense. Verified under this paradigm, fundamental duties are duty-duties or main duties, which constitute unique community values or existing by themselves; guarantee-duties or accessory-duties to other duties, which take shape as instruments or means of fulfilling other duties such as, for example, the duties to collaborate in the electoral census, related to the duty to vote, and the fundamental duties associated with rights that are guarantee of other rights-duties or duty-rights.

Nabais teaches (2009), that, from the historical-constitutional evolution that permeates the modern State, fundamental duties can be segmented into classical duties, the content of which refers to civic-political issues, and modern duties, which are those that interfere in the economic, social, cultural and ecological contents of fundamental rights. Therefore, in the former the individual is subjected to the relevant state powers to maintain the democratic legal state. The latter take ownership with collective responsibility of each one, in the sustainability and promotion of society, in economic, social, cultural and ecological parameters.

2 IMPLICIT PARAMENTERS IN LAW NO. 6,938/81 – NATIONAL ENVIRONMENTAL POLICY: A DIALOGUE BETWEEN THE PRECAUTIONARY AND THE ENVIRONMENTAL NON-REGRESSION PRINCIPLES

In 1981, Law No. 6938/81 was drafted as a result of the international developmental effects and practices of the twentieth century. The PNMA came into force under the auspices of a period of constitutional instabilities – the dictatorship. At the same time, a new standard of development was aspired to, especially with a zealous look at the environment, whose interests began to gain an aspect both limiting and protectionist of natural resources, in which the PNMA incorporated the most important space among the environmental infra-constitutional norms, having only the CRFB/88 above it in its regulation.

To enable economic and social development with the preservation of the environment and ecological balance, the PNMA exposes that in its art. 3 – for the purposes provided for in this law, the following definition applies "I – Environment, the set of conditions, laws, influences and interactions of a physical, chemical and biological order, which allows, houses and governs life in all of its forms" (Brazil, 1981). Thus, the PNMA has "as a general objective the preservation, improvement and recovery of environmental quality conducive to life, aiming to ensure, in the country. Conditions for socio-economic development, to the interests of national security and the protection of the dignity of human life [...]" (Brazil, 1981).

Thus, the precautionary principle is implicitly incorporated into the legal system in the authentic perspective of the right-duty, also carved into art. 225, par. 1, IV and V of the CRFB/88. As a result, the precautionary principle as "corollary of the constitutional directive that ensures the right to an ecologically balanced environment and a healthy quality of life" (STF, 2016, p. 02-03).

Furthermore, the precautionary principle permeates the PNMA, which aims at:

> I – compatibility between economic and social development and the preservation of the quality of the environment and the ecological balance; IV – the development of national research and technologies focused on the rational use of environmental resources; (Brazil, 1981).

In effect, the PNMA has consolidated itself as a source of environmental public policies reflecting in an improvement in legislation between

actors in the economy and the Brazilian institutional apparatus at federal, state and municipal levels as the starting point, in which "the environment becomes fully protected, that is, as an integrated ecological system (the parts are protected from the whole) and with) autonomous values" (BENJAMIN, 1999, p. 52)

The PNMA standard was structured to continue facilitating economic growth. After that, Brazil started playing a significant role in world governance, with strategies for natural resources that became an aspect of regional and international geopolitics. On the other hand, environmental bodies are still suffering the effects of a major reduction in loss of technical personnel, salary degradation, decreased share in the budget, the trivialization of technical-scientific knowledge and the recommendations of professionals dedicated to the topic, regarded as potential factors of environmental degradation. Sequentially, the environmental issue concerning the survival of the Earth's species became the central theme of the agendas, also because the Eco-92 conference was a watershed for the Brazilian environmental area, when it became possible to have a political opening to the world, and even being under the influence of economic liberalism, there were discussions on decarbonization, biodiversity, climate change and new technologies.

Also, a commitment was made to a balanced environment, governed by art. 225 of the CRFB/88, which was defined as a right of all and gives it the status of a common good of the people and essential to a healthy quality of life. The public authority and society as a whole were charged with the duty to defend it for present and future generations. The Brazilian constitutional normative structure on the environment was consolidated by the CRFB/88, with several main systems guiding the decision-making process in administrative and judicial spheres. As a result, fundamental duties are specifically governed by the respective specific constitutional principles and norms, stipulated in reference to the principle of constitutional definition.

It is certain that the precautionary principle is not described in the list of constitutional principles pertaining to fundamental duties, but it is considered to be implicit because of the explicit interests of the constituent power of the State, because the environmental issue is a right of fundamental collective interest centered on the dignity of the human person and the constitutional social order. The precautionary principle is recognized as part of the system of sub-constitutional environmental principles and is therefore fully applicable. For all this, it is consolidated in doctrine and

jurisprudence, recognized in the infra-constitutional legislation and applied daily in the administrative activities of the bodies of protection, custody and management of environmental resources and assets.

Caution means any scientific and technical study previously conducted in an environmental project or program, of interest to the State and society, to identify the risks of the activity of the State or private persons connected to projects and programs likely to cause damage and injury to environmental public property. Milare (2004, p. 144) teacges us that precaution "is a noun from the verb to be cautious (from Latin *prae* = before and *cavere* = take care), and suggests early care, caution so that an attitude or action does not result in undesirable effects". It is important to clarify that the precautionary principle aims to prevent because the consequences and reflexes that a certain action or scientific application may generate to the environment, in space or time, are not known, hence scientific uncertainty. When it comes to use, control, management and supervision of environmental resources, the precautionary principle is the right source of the feasibility of planning for an activity to be carried out by the public or private authority that seeks to work with environmental resources.

Based on Principle 15 of the Rio Declaration of the ECO-92 conference, it is determined that the precautionary principle aims to achieve the capacities of States to act in the application of the precautionary principle "there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (UN, 1992, p. 03).

It is thus possible to verify that the aforementioned principle seeks to identify imminent risks and dangers to avoid the destruction of the environment by using a preventive environmental policy. From a constitutional procedural perspective, the precautionary principle has as its characteristic the inversion of the burden of proof, and Milaré (2004, p.145) argues that "scientific uncertainty favors the environment, transfering to the interested party the burden of proving that the intended interventions will not have unwanted consequences to the environment in consideration". From there, the likely perpetrator of the damage must demonstrate that his activity will not cause damage to the environment, so that he can be exempt from implementing precautionary measures. Moreover, it exposes the need for States to control of harmful activities that generate ecological risks, exposing the potential damage to the environment and its unknown adverse effects.

Considering that the precautionary principle is implicit in the CRFB

88 and the PNMA, it should be stressed that the principle of non-regression is:

> [...] in the midst of the consolidation process –, it was made a general principle of Environmental Law, to be invoked to assess the legitimacy of legislative initiatives aimed at decreasing the level of legal protection of the environment, especially with the regard to what may affect in particular a) essential ecological processes, B) fragile ecosystems or on the verge of collapse, and C) endangered species (BENJAMIN, 2011, p. 62).

There is an express link of content, validity and application between the precautionary principle and the principle of non-regression, not least because they are inseparable elements of the constitutional principle system. Put simply, the precautionary principle has the purpose of planning activities or action involving the environment to avoid injury or damage beyond bearable as defined by research techniques and scientific projects. In turn, the purpose of the principle of non-regression is not to regress in the study, creation and application of such standards and techniques. The principle of non-regression, with its content of rules and norms, advise that legislation and actions of the State and society should never regress or worsen, but always evolve towards improving the protection of the environment. It application is indispensable with the aim of protecting and preserving the environment.

In addition, with the introduction of the PNMA, the precautionary principle has the objective of establishing the healthy quality of life, the dignity of the human person and the ecological balance. “Art. 2 The powers of the Union, independent and harmonious among themselves, are the Legislative, the Executive and the Judiciary”, thus, one cannot legislate to worsen or degrade the environment, but are charged with the duty to preserve it and defend it collectively. Thus, an intergenerational conservation bond is established, in which “the principle of non-regression means that legislation and regulation concerning the environment can only be improved and not worsened. It is the improvement of “environmentally good”. The “environmentally good” is an indispensable situation to be found in all elements of the environment – water, air, flora and fauna – so that the ecological balance can be achieved. The “environmentally good” can only be changed to turn it into “environmentally excellent”. The regression of environmental standards translates into the occurrence of the “environmentally worse”, that is, ecological imbalance” (MACHADO, 2020, p.149).

For this reason, "States, subnational entities and regional integration organizations should not allow or undertake actions with the concrete effect of decreasing legal protection of the environment or access to environmental justice" (our translation) (IUCN, 2016, p. 04). For that:

> [...] the guarantee of protection from (social) environmental regression would be conceived so that legal environmental protection – both in a progressive way in the context of socio-environmental relations, to expand the quality of life existing today and to meet increasingly rigorous standards of protection of the dignity of the human person, not allowing regression, in factual and normative terms, to a level of protection below the one in force today" (SARLET, FENSTERSEIFER, 2014, p. 195).

Therefore, the prohibition on regression works as a support to challenge measures that generate suppression or restriction of fundamental rights that, in turn, do not have absolute autonomy in the constitutional body to realize the dignity of the human person as a right-guarantee to the existential minimum (MACHADO, 2020).

Therefore, the principle of non-regression and the fundamental duties show themselves to each other as a matter of intergenerational justice in order to leave as a legacy identical environmental conditions *(status quo ante)* to those received by previous generations, with the prohibition to change the ecological dimension for the worse. Constitutional duties serve as a shield against regression, without impeding the restriction of duties and without interrupting the dynamism of society, whose environmental effectiveness keeps the use of legal mechanisms aimed at protecting the environment in order not to change the properties that are intrinsic to it.

In this sense, with the analysis of principles, the precautionary principle and the non-regression principle, although not provided for by the CRFB/88, have the same characteristic of being implicitly in force and accepted by the doctrine and the jurisprudence, signed by art. 225, *caput* c/c art. 2 c/c art. 60, par. 4, IV of the CRFB/88. The meeting point between the two is that their social roles are to meet the existential minimum, to ensure a healthy quality of life, the dignity of the human person within the environment in an extension of solidarity and interdependence. The difference is that precaution can be invoked with greater reach for environmental mitigation and/or fight beyond the constitutionality found in the jurisprudence.

Non-regression requires more extensive criteria to be applied, such as control of constitutionality, whose duties of ecological protection by the State and also in the administration are established based on the duty of

progressiveness in environmental [3]matters, which validates the dialogue of normative sources shown in a two-dimensional perspective, in which the principle of proportionality, of prohibition of excess and prohibition of insufficient protection represent the obligations of state powers, in the form of duties of protection and environmental promotion

In evidence, the study and resolution of environmental conflicts, under the aegis of the principle of non-regression, in Brazil it is already possible to point out that as a guarantor that there are no intergenerational conflicts arising from the disregard of the duty of shared protection of the environment imposed on all citizens, it is of common use by people in general of a meta-individual and intergenerational nature. In addition, the cited jurisprudential guidance consolidates the understanding that everything must be done by the State and society with the goal of always improving and evolving in the making, application and execution of laws in the activities requiring the use of natural resources.

FINAL CONSIDERATIONS

The idea that the fundamental duties laid down in the CRFB/88 form an interpretative basis for the PNMA is appropriate in terms of the implementation of the precautionary principle and the principle of environmental non-regression. In this sense, the historical evolution of fundamental duties promotes the positivity of human interaction with the environment, reaching the sphere of ecology and solidarity

The Brazilian and international legal systems do not allow the use of environmental resources in degrading activities, with regression in the use of natural resources for any activities without research, planning and use of these resources. This happens because there are constitutional duties guiding the interpretation and execution of the PNMA. Under the conjugation of the constitutional duty in the application of the precautionary and non-regression principles, specifically in the execution of the PNMA, it is possible to identify that it takes shape as a state policy and not a government policy, making unconstitutional and illegal any administrative acts, in the three fiscal levels, that contradict the dictates of environmental justice.

The importance of understanding the dimension of fundamental duties in the planning and execution of the PNMA, is to identify that there is an insurmountable line, of constitutional bias, which guides the prohibition

3 See art. 3, c, of the Escazú Agreement, which regulates access to information, public participation and access to environmental justice for Latin America and the Caribbean.

of regression, regardless of the ideology of the government that won the democratic vote. Added to this, it dynamizes the interpretation of legislation that has been received by the current CRFB/88, giving shape to the objective and concrete precepts of preservation and environmental justice. Without such institutional and legal precautions, it is difficult to ensure a reasonable minimum of an ecologically stable environment between present and future generations.

Based on the premise that the duties are aimed at the behavior of individuals and indirectly of institutions, this insertion, in turn, does not provide legitimacy to interventions by public authorities, in certain social relations or in certain areas of their constitutional powers detached from these environmental duties. Such interventions by governments are aimed at fulfilling certain obligations toward their community or social body, and in Brazil they follow a formula designed in the preamble to the 1988 Constitution, by which the constituents claimed to be gathered to promote a democratic State to ensure the full dignity of the human person, so that the PNMA can never be applied as a permission for regression.

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