

ENVIRONMENTAL LICENSING IN THE LIGHT OF CONTEMPORARY CONSTITUTIONALISM: POTENTIAL OF THE INSTRUMENT FOR A STRUCTURAL ROLE IN THE NATIONAL ENVIRONMENTAL POLICY

LICENCIAMENTO AMBIENTAL NA ÓTICA DO CONSTITUCIONALISMO CONTEMPORÂNEO: POTENCIAIS DO INSTRUMENTO PARA UM PAPEL ESTRUTURAL NA POLÍTICA NACIONAL DE MEIO AMBIENTE

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Abstract

This paper reinterpreted environmental licensing as one of the main instruments of the National Environmental Policy (Law 6,938/1981), in the light of contemporary constitutionalism. Hence, it aimed at harmonizing socioeconomic development and the protection of the dignity of human life with the use of environmental goods. From a literature review, the need to adapt the

Resumo

Este artigo faz uma releitura do licenciamento ambiental, como um dos principais instrumentos da Política Nacional do Meio Ambiente (Lei n. 6.938/1981), à luz do constitucionalismo contemporâneo, considerando o objetivo de harmonização na utilização dos bens ambientais com o desenvolvimento socioeconômico e a proteção à dignidade da vida humana. A partir de uma



public administration to the context of enforcing fundamental rights was evidenced, due to the normative force of the Brazilian Constitution, by the development and/or improvement of the legal instruments made available to the Constitution in order to fulfill its goals. The design of Brazilian environmental licensing allows public decision-making to be based on scientific evidence and enables dialogical participation among all actors involved and/or affected by the licensing object. This potential for complementarity between technical practice and democratic dialogue, adding to the structuring character of complex socio-economic arrangements, elevates this licensing to a paradigmatic position regarding the institutional design of the instrument. However, in Brazilian practice there are procedural flaws in its use, which need to be better studied, so that licensing be in line with its constitutional requirements.

Keywords: contemporary constitutionalism; democracy; environmental licensing; National Environmental Policy; public administration.

revisão da literatura, realizam-se inferências que permitem defender a aplicação do tratamento dogmático e prático do licenciamento à necessidade de adaptação da Administração Pública ao contexto de efetivação de direitos fundamentais, em razão da força normativa da Constituição, com o desenvolvimento e/ou aprimoramento dos instrumentos legais colocados à sua disposição para cumprir seu desiderato. O desenho do licenciamento ambiental brasileiro permite que a tomada de decisão pública seja baseada em evidência científica e possibilita a participação dialógica entre todos os atores envolvidos e/ou atingidos pelo objeto do licenciamento. Tal potencial de complementaridade entre fazer técnico e diálogo democrático, somando-se ao caráter estruturante de arranjos socioeconômicos complexos, alça esse licenciamento a uma posição paradigmática quanto ao desenho institucional do instrumento. Não obstante, há falhas procedurais em sua utilização na praxe brasileira, que precisam ser mais bem estudadas, de modo a que o licenciamento possa coadunar-se a seu desiderato constitucional.

Palavras-chave: administração pública; constitucionalismo contemporâneo; democracia; licenciamento ambiental; Política Nacional de Meio Ambiente.

Introduction

Environmental regulation is based on universal principles that guide the actions of public authorities and private individuals in preserving life on the planet. Thus, in the name of the principles of prevention, precaution, cooperation, sustainability, responsibility and environmental responsiveness, among others, the Brazilian Constitution of 1988 delegates to everyone, both the public authorities and the community, the obligation to defend, preserve and conserve the environment, avoiding the occurrence of environmental damage and guaranteeing the prospect of life for future generations.

Environmental licensing has become one of the main instruments of environmental policy in Brazil. Since the 1980s, with the enactment of Law 6,938/1981, Brazil counts on a National Environmental Policy (PNMA), whose aim is to harmonize the use of environmental resources with socio-economic development and protection of the dignity of human life, as provided for in the Brazilian Constitution. Nonetheless, it is understood that such licensing has received a doubly clumsy treatment in Brazil, as it needs to be understood as the most important regulatory instrument for sustainable and inclusive development, with the potential to regulate not only rational interactions with the environment, but also the due social responsibility (social purpose) of economic activity. Thus, going beyond what is commonly projected by doctrine for environmental licensing, this work approaches the instrument in order to understand it in a way that is aligned with contemporary constitutionalism from a critical perspective.

Thus, it is necessary to understand the institutes and instruments used by the public administration as state capacities aimed at providing and executing rights through public policies, regarding the interests of the community. This requires a closer relationship with society in deciding its interests, without neglecting to comply with legal and constitutional commands, in accordance with the rules and principles that guide the legal system.

Initially, a reflection is made on the origins of legislation on environmental licensing in Brazil, which resulted from international understandings and commitments to the preservation of natural resources in the face of the unbridled growth of anthropic interventions economically oriented.

This is followed by a reading of environmental licensing in the light of the Brazilian Constitution and the relevant rules, understood from the perspective of contemporary constitutionalism from a critical perspective. The aim was to establish a framework for governance based on responsiveness, using democratic instruments for the participation of those involved in making decisions to favor on the environment.

Finally, the paper analyzed administrative activity related to environmental matters from the perspective of critical administrative law, taking a look at public environmental policy in the light of constitutional values and peculiarities of the aforementioned administrative environmental licensing process. Its purpose was to grant licenses or not for harmful activities that use natural resources, with the aim of balancing the interests involved towards constitutional objectives.

This study is aimed at revisiting environmental licensing in order to improve its management, modernizing and adapting it to the complexities of current

environmental problems. This implies to find out the best available techniques, improving the qualifications of professionals responsible for evaluating the procedures, and strengthening the structure of the bodies in the National Environment System (Sisnama). This should be performed in a scenario marked by the contradictory role of public agents in environmental decision-making, often characterized by a lack of transparency and technical grounds. The situation unfolds in a context in which Brazilian practice fails to fully exploit the bold and preventive potential that the environmental licensing instrument should have. The limited understanding of its true scope has contributed to its underutilization and to legislative setbacks that compromise environmental protection.

The methodology used was a review of specialized bibliography, combined with elements of theorizing based on data, which sought information on the state of the art of the debate (both on environmental licensing and critical constitutionalism), as starting points for grounded theorizing on a qualitative basis.

1 The regulatory framework of environmental licensing in Brazil

The need to control economic activities that cause significant impacts on the environment is a topic that has been part of global discussions for years in the search for better techniques to ensure balance and the defense of life on the planet. For a long time, the main focus was on the economic analysis of projects, without worrying about the impacts that these projects caused on the environment.

The United Nations Conference on the Environment in Stockholm in 1972, which was considered a historic milestone, was important in alerting society to the need to rethink its relationship with the environment, from present and future perspectives, paving the way for dialog and debates on sustainability and ecological awareness.

As the debates progressed and the environmental agenda was ever-present in international concerns, countries felt compelled to regulate the matter through laws. Added to this was the pressure from international banks, which began to demand environmental impact assessments of projects in order to release loans, and forced countries, including Brazil, to begin a culture of greater awareness in the use of natural resources (BRASIL, 2009).

In this perspective, Law 6,938/1981 was issued, which created the PNMA and the National Environment System (Sisnama), providing with important instruments for environmental management, including environmental licensing. Although there is historical evidence that environmental licensing in Brazil was

initially provided for in laws in the states of Rio de Janeiro and São Paulo, being pollution the object, Farias (2019) pointed out that it was the PNMA that came to be recognized as one of the most important instruments for controlling economic activities that degrade the environment.

The environmental issue took on an important role because of the Brazilian Constitution of 1988, which Chapter VI was reserved to deal with this matter. Art. 225 determined a systemic and structural obligation of responsibility of Public Power and collectivity, for the defense and protection of environmental goods, regarding balance and intergenerational usufruct. In this scenario of constitutionalization of environmental protection, the PNMA was accepted by the Brazilian Constitution, receiving an interpretation in line with its purpose. Since then, it has been the most important reference for environmental protection (SIRVINSKAS, 2013).

Regarding federalism, the Brazilian Constitution, in Articles 23 and 24, divided executive and legislative environmental powers into common and concurrent, respectively, between the two federal entities. Therefore, legislative production was instituted on a concurrent basis among the Union, states and Federal District, as stated in the aforementioned article; and to municipalities for issues of local interest under Art. 30. Thus, it is up to the Union to produce general rules, and it is forbidden for other entities to legislate providing less protection for the environment, due to the principles of the prohibition of retrogression, subsidiarity and the primacy of the most protective environmental rule.

Hence, it is worth noting the vast and sparse legislative production on various topics involving Environmental Law, which does not have a codification and therefore requires strict attention and care in the legal treatment of this matter by those who work in the area.

It should also be noted that in terms of environmental licensing, Law 6,938/1981, regulated by Decree 99.274/1990, granted the National Environmental Council (CONAMA) the power to establish rules, and CONAMA Resolutions 1/1986, 9/1987 and 237/1997 stand out for their relevance.

In this context, it is important to note that the environmental licensing process is governed by general and sparse rules, such as Complementary Law 140/2011, the PNMA, Decree 99,274/90 and Conama Resolutions 01/1986 and 237/1997, for example. In addition to these regulations, there are others established by the respective federal entities to which the state or municipal competent to license Sisnama body belongs, as well as, depending on the nature of the activity, specific special rules contained in various normative instruments,

such as laws, regulations, resolutions and ordinances whose purpose is to subsidize the final decision and the issuance of the respective license.

Although the Brazilian Constitution does not expressly mention environmental licensing, Article 225, Paragraph 1, IV, requires environmental impact studies (EIA) for the installation of works that potentially or significantly cause environmental degradation, and such studies are a specific form of environmental impact assessment (EIA), a process intrinsically related to environmental licensing (DUCATTI, 2019).

Thus, this PNMA instrument must provide for constitutional rules and principles. The Constitution is the reference base for environmental licensing, and all the rules that inform it must be read from the perspective of social and democratic constitutionalism, as embodied in the Citizen Constitution (FARIAS, 2019).

According to Rei and Lima (2022), in recent decades there has been an attempt to make environmental licensing rules more flexible, due to the dissatisfaction of the Brazilian productive sector with the length and bureaucracy of these procedures. This neglects the importance of complying with the PNMA and maintaining standards in line with sustainability. The absence of a specific environmental licensing law has heightened the debates, ending up in a proposed law that is being processed in the National Congress, Bill 3729/2004, in the Chamber of Deputies, later renamed PL 2159/2021, in the Federal Senate.

This proposal has generated significant reactions from interested sectors, as it contains provisions that could de-characterize the main purpose of the environmental licensing instrument: the guarantee of principles of prevention and precaution, being labeled a setback to a balanced environment, in guaranteeing health and intergenerational commitment, in the Constitutional Law.

Cappelli (2011, p. 1) warned of the tendency towards a paradigm shift in the structure of protection and defense of the environment of “de-formalization, dejudicialization and self-regulation”, established by the inclusion of the right to a reasonable duration of proceedings in the list of fundamental guarantees in the Brazilian Constitution, adding that “the increase in demand on the judiciary and the crisis of the state itself in contemporary times encourage discussions about the efficiency of the model practiced to date”.

According to Rei and Lima (2022), in the eagerness to exclusively solve issues of slowness and bureaucracy to serve economic interests, there is a risk of damaging these interests themselves. This is because the problems are intrinsically linked to poor environmental management, and making rules more flexible is not an effective solution. In this context, the fragility of environmental standards in

Brazil could even have an impact on economic interests, since the international community is vigilant on all aspects related to environmental issues in the country, which could make investments unviable and generate international boycotts.

The bill under discussion in the National Congress has aroused adverse reactions, given its provisions that could have a negative impact on effective environmental protection. Some of the most criticized measures include a proposal to speed up processes by prioritizing self-declaratory electronic processing. Among the points that have generated the most controversy is the introduction of simplified procedures, such as corrective licensing (LOC), aimed at enterprises already in operation that have not complied with the environmental standards for obtaining a license, including the extinction of punishment for the crime provided for in Art. 60 of Law 9,605/1998, which refers to the operation of activities without proper licenses.

The need to debate environmental licensing and improve this instrument in line with the demands of contemporary society cannot be overlooked. However, it is essential to bear in mind that environmental licensing is an integral part of a public policy and, for this reason, must be conceived as an element linked to all of the PNMA's objectives. This implies approaching it as a tool that measures and analyzes environmental, economic and social impacts, according to the principles of rationality and socio-environmental balance established in the Brazilian Constitution.

2 Environmental licensing as an instrument for achieving constitutional goals: a perspective from the critical approach of Brazilian Public Law

Environmental licensing is the constitutional instrument made available to the public administration to implement principles that guide Environmental Law, such as precaution, prevention, sustainable development and an ecologically balanced environment. However, it should be noted that in addition to preventing and mitigating possible damage to the natural environment, this instrument is also used to protect it against social impacts that affect the populations adjacent to the projects. In this way, it allows the Administration to act in a way that is consistent with constitutional values, protecting the quality of life.

Art. 1 of Conama Resolution 237/1997 defines environmental licensing as

[...] an administrative procedure by which the competent environmental body licenses the location, installation, expansion and operation of undertakings and activities that use environmental resources considered to be effectively or potentially polluting that, in any form, may cause environmental degradation, taking into

account the legal and regulatory provisions and technical standards applicable to the case (BRASIL, 1997).

In general, ordinary environmental licensing procedures follow a three-phase approach, comprising the stages of prior license (LP), installation license (LI) and operating license (LO). However, one of the aims of the bill currently before the Brazilian Congress is to introduce alternative, more simplified procedures, which could be two-phase, carried out in a single phase or by adhesion or commitment and LOC, similar to what already exists in some states of the Federation (REI; LIMA, 2022). These proposals have been criticized by the academic community and environmentalists, who believe that such measures could weaken environmental protection because, from another perspective, the responsible agencies may not be able to conduct adequate supervision at all levels of requirement.

Thus, environmental licensing is a complex administrative procedure available to each federal entity to act in accordance with its legally determined powers. It is presented as prior and continuous control of human activities to protect and guarantee the quality of life (FARIAS, 2019).

In turn, the delineation of administrative law is umbilically related to the normative system to which it belongs, and it is true that it has experienced countless changes over time, as it accompanies the formats outlined by the state itself. Thus, in order to better understand the local reality, it is necessary to analyze peculiarities of each legal system and get to know the concrete reality of the actions of that administration (HACHEM, 2013).

Both the right to an ecologically balanced environment (Art. 225, Brazilian Constitution) and the right to development and free enterprise, which are part of the economic order (Art. 170, Brazilian Constitution), are intrinsically related fundamental rights. Despite the fact that freedom of action by private individuals in the economy is the rule, to avoid negative impacts of being propagated in favor of economic gains, the Brazilian Constitution itself, based on ideals of preventing environmental damage and sustainable development, provides for the requirement of an EIA and environmental licensing, with this procedure being conducted before the public administration itself and subject to its conditions and determinations.

It should therefore be clarified that

[...] environmental licensing and its instruments, the assessment of environmental impacts and studies should prevent and mitigate impacts on the environment, understood as physical, which covers impacts on soil, air, water and underground, excluding living beings; biotic, which covers impacts on fauna and flora; and

anthropic, understood strictly as impacts on human life directly related to the environment; and on the social environment, which this work divides into: socio-cultural impacts, understood as those on human life and culture arising from the activity independently of the environment; and economic impacts, as they directly affect the social environment (DUCATTI, 2019, p. 36).

In Brazil, there are substantial challenges related to environmental licensing, which show a lack of prioritization of it in the PNMA. This is particularly evident in emblematic cases such as the Belo Monte hydroelectric dam in the Amazon. One of the main problems affecting environmental licensing in the country is the lack of speed in the processes conducted by environmental agencies. In addition, the technical capacity of the professionals involved is often insufficient, which can result in incomplete and inaccurate analyses of environmental impacts. The lack of resources and structure in the agencies responsible for licensing is also a factor contributing to the delay and inefficiency of the process.

More than operational issues, it is imperative to recognize that there is a problem of prioritizing environmental licensing as a crucial instrument for preserving the environment and sustainable development. This includes considering the political and economic influences often permeating decision-making and transforming them from environmental decisions into political ones. This is evident in cases such as Belo Monte, in which there has been a disregard for current environmental legislation and the rights of the populations affected by the project. The justification often given is that strict compliance with these rules would be an obstacle to economic development (FAINGUELERNT, 2016).

The changes brought about by the Brazilian Constitution, which established a new democratic order, mean that mechanisms need to be developed to enable the reading of the legal categories capable of “making effective the enacted Constitution” (HACHEM, 2013, p. 344-345). The development of human rights presents the challenge of understanding the democratic consolidation of fundamental rights, making it necessary to systematize the characteristics of these rights in contemporary society (COELHO, 2012).

Bjnenbojm (2014 p. 50-51) states that:

It can therefore be said that there is a relationship of interdependence or reciprocity between fundamental rights and democracy. It is from the combination of these two elements that the democratic rule of law emerges, structured as a set of legal and political institutions built on the foundation and for the purpose of protecting and promoting the dignity of the human person.

Bourges (2018, p. 39) proposes “a social administrative law, so that the end of administrative law is the defense, promotion and protection of the fundamental rights of the person”, advocating the updating of this branch of law to be capable by itself of using instruments at its disposal, to “achieve administrative efficiency and the spontaneous realization of fundamental social rights”.

Hachem (2013, p. 383), dealing with the right to development in conjunction with equality, points out that

[...] the structural changes needed to characterize the phenomenon must not only be capable of modifying the socio-economic reality, but also of giving it the attribute of sustainability, thereby making it possible to maintain the increase in the quality of the population's living conditions, and the consequent continuity of the development process. Sustainability consists, according to Juearez Freitas, of “ensuring physical, psychological and spiritual well-being today, without making future multidimensional well-being unfeasible”.

Thus, it is proposed to make decisions in line with Brazilian environmental policies, to promote sustainability in systemic terms based on the Brazilian Constitution (COELHO; ARAÚJO, 2011), in its environmental, social and economic levels, so that democratic environmental management be possible, with the use of environmental licensing.

By understanding the concept of sustainable development as an ideal of intergenerational justice, based on the tripod of economy, environment and society, it is clear that the participation of the actors involved is necessary to weigh up the initially conflicting interests between economic development, environmental conservation and the mitigation of social impacts. The instrument constitutionally provided for to achieve this is environmental licensing which, as well as being preventative in nature, includes popular participation in its procedural design. Thus, local and directly affected communities participate in popular hearings to be heard and honored (DUCATTI, 2019).

The licensing process is based on a dialogue established among the public administration, the entrepreneur and society, with the primary objective of gathering criticism and suggestions on the project and possible mitigating measures to be stipulated in the licenses. This dialog takes place through public environmental licensing hearings, in which the population is informed about the project and its impacts, so that “discussions can be held on the project and existing doubts can be resolved, in addition to determining subsequent requests for supplements and clarifications made by the licensing body to the entrepreneur” (DUCATTI, 2019, p. 43).

In fact, effective environmental management is, in fact, the responsibility of public officials, who must act with integrity, transparency and in compliance with environmental laws and regulations to protect the long-term interests of society and the planet.

As mentioned, environmental licensing is not free of critics. Indeed, the highly technical nature and complexity of the procedure can lead to problems regarding its implementation in federal entities with few resources, and hinder the effectiveness of communication to the population and consequent popular participation, as well as situations of conflict among the executive powers of the different federal entities. In this sense, Ramires (2015, p. 963) lists the following criticisms:

In relation to environmental licensing, according to Pinheiro, there are institutional, legal and technical obstacles to its correct functioning, as well as vagueness regarding the competence of federal entities and subjective views imposed on the constitutional concepts of sustainability and environmental balance. These findings lead to the urgent need to improve, speed up, make transparent and efficient the environmental licensing system.

The Brazilian Constitution enshrines the model of the state that unfolds in the idea of the material plurality of public administration, permeated by the responsibility to make sociality effective in all its dimensions, materialized in the values set out in Art. 3 and benefits of Art. 6 of the Brazilian Constitution. Thus, the plurality of the administration must be structural and material to guarantee the fundamental constitutional precepts, seeking to optimize the performance of its different internal spheres to make the state's objectives viable. The constitutional imperative of participation influences decision-making encompassing cross-cutting areas in more than one relevant public interest (BITENCOURT NETO, 2017).

Therefore, whenever we are faced with projects that potentially cause socio-environmental impacts, there will be a need for environmental licensing to be carried out, as provided for in Brazilian legislation, and this administrative process should be thought of in the light of a democratic and dialogical public administration.

Regarding the importance of reading legal instruments in the light of democracy in the context of contemporary constitutional law, especially referring to the right to environmental, economic and social development are expressions that guarantee of human dignity in the Brazilian legal system, there are lessons from Bourges (2018, p. 31):

[...] the Constitution began to regulate economic and social rights, as well as rights to freedom and equality, and treats the individual as belonging to the state and not in opposition to it, as in liberal constitutionalism. Furthermore, the normative force of the Constitution and the demand for effectiveness of fundamental rights are recognized, with emphasis on social rights and the dignity of the human person. [...] thus, a new paradigm has been adopted, the normative system has become based on the dignity of the human person and the fundamental rights that emanate from it. As a result, constitutional law now has an emphasis on effectiveness, with a concern to achieve legal efficacy and ensure the social efficacy of constitutional provisions.

Currently, the correlation between economic, political and social concepts allows for a re-reading of the idea of development, focusing on qualitative and sustainable changes (HACHEM, 2013).

Farias (2019), when dealing with the importance of environmental licensing, highlights Paulo de Bessa Antunes' discourse on the fact that it is essential for the regularity of economic activity, and the results obtained in this process are of interest to both public authorities and civil society; in addition, respect for its procedure is a condition for the social respectability of those involved. The author goes on to point out that environmental licensing "promotes the interface between the entrepreneur, whose activity may interfere with the structure of the environment, and the state, which guarantees compliance with the objectives set out in the PNMA" (FARIAS, 2019, p. 30-31).

Based on these arguments, it was found that the Brazilian Constitution established a democratic state of law and recognized fundamental rights that complement each other to guarantee the dignity of the human person. As a result, the public administration needs to re-evaluate its stance on the implementation and enforcement of these rights and, considering the complex relationships that have arisen in modern society, it must delineate the path that best suits the context of contemporary constitutionalism.

As already pointed out, given the need for the public administration to adapt to the context of fundamental rights due to the normative force of the Brazilian Constitution, it is necessary to develop and/or improve legal instruments available to fulfill its purpose. That said, in the context of seeking to resolve issues surrounding the need to protect the environment (Art. 225, Brazilian Constitution) and the development of the economic order (Art. 170, Brazilian Constitution), environmental licensing is introduced, which "aims to control effective and potentially polluting activities, through a set of procedures [...] in order to defend the balance and quality of life of the community" (FARIAS, 2019, p. 30).

In this dialogical, transparent and responsive space, it is possible to present technical studies capable of supporting the debate and preceding administrative decisions in environmental matters, so that they are always convergent with constitutional precepts, guaranteeing the accessibility of intergenerational rights. This promotes concerted, democratic and less bureaucratic administrative management.

3 The teleological complexity of environmental licensing among the economy, society and the environment

As mentioned above, environmental licensing is the main instrument of the PNMA and, as defined by Farias (2019), it consists of an administrative process whose result is the issuance of an act by the executive power granting or not the required environmental license. Similarly, Sirvinskas (2013, p. 223) states that it is a “succession of concatenated acts with the aim of reaching a final decision expressed by the environmental license (prior license, installation and operation)”.

Scatolino and Cavalcante Filho (2020, p. 298) define an administrative act as

[...] a unilateral declaration of will by the state, or by whoever represents it, in the exercise of its administrative function, at a lower level than the law, with the purpose of serving the public interest, with the aim of creating, restricting, declaring or extinguishing rights and subject to judicial control.

Salvador (2013, p. 32) points out that “determining the legal nature of Environmental Licensing is of crucial importance”, insofar as it implies the establishment of the legal being, which consists of the existence of a certain institute in the world of Law, since this is what defines the legal regime to be applied to it.

There is no consensus in the specialized literature as to the nature of environmental licensing. Some argue that it is a true license, i.e., a binding administrative act, while others maintain that it is an authorization, i.e., a discretionary administrative act.

Krell (2008, p. 6) states that

[...] it seems more coherent to consider the environmental license as a new type of administrative act, which combines the characteristics of the two traditional categories mentioned above, which is evident due to the fixed term of these licenses and their lack of precariousness, making it impossible to revoke them for mere reasons of convenience and opportunity. At the same time, the environmental LO is precarious by its very nature, as it must be renewed periodically.

From this perspective, it is necessary to understand the implications of the definition of the nature of the administrative act of the environmental license, whether it is binding or discretionary, as well as to analyze if environmental matters bring *sui generis* characteristics that should be considered a priori when weighing up the interests involved in the administrative process of environmental licensing.

Administrativists define a binding act as one that has all the requirements and elements defined by law, with no freedom of decision for the public agent; and a discretionary act is one that leaves a margin of freedom for the agent to decide on the convenience and opportunity of its realization (SCATOLINO; CAVALCANTE FILHO, 2020).

Krell (2008) points out that Brazilian legislation lacks clarity in defining the nature of environmental licensing, presenting generic attributions regarding the competence and procedures of this instrument. This lack of definition is evident in all the legislation and normative acts of the federal entities, which do not provide specific guidelines on when to grant or deny environmental licenses. As a result of this legal gap, decisions in this context generate uncertainty, are vague and lack technical standards.

Sirvinskas (2013) pointed out that an environmental license should not be confused with an authorization or permission under administrative law, which are precarious acts, since it is a business act with a pre-established deadline that can be revoked if the beneficiary of the license is causing damage to the environment, human health or failing to comply with the environmental standards and conditions imposed. This confirms the reasoning presented earlier that environmental licensing seeks to protect the environment in its different meanings – physical, biotic, anthropological, social, cultural and artificial – through economic interests, seeking to establish the best techniques and the least environmental impact, as a means of ensuring sustainable development.

It is argued that in the process of balancing environmental and economic interests, the environmental interest should prevail. This is the reasoning defended in this study, since the very purpose of the PNMA is to make it possible to reconcile socio-economic development with the use of natural resources, in the quest to guarantee the guiding principles of environmental matters. It would not be consistent with the system if, for example, a license were granted that prioritized economic interests, on the grounds of serving the public interest in the administrative merit decision, justifying the need to support negative socio-environmental impacts due to the lack of mitigating technologies and actions for

the situation presented. This argument is supported by the Brazilian Constitution itself, which establishes the responsibility of public authorities and the community to protect the environment, i.e. the entrepreneur and the state have a constitutional obligation to shape their actions and decisions, primarily with the guarantee of an ecologically balanced environment and a commitment to the future.

In the opposite direction, Bim (2020) argues that weighting is allowed by the Brazilian Constitution itself and the conflicting interests must be balanced, with the environmental agency having no obligation to prioritize environmental protection, nor to seek the lowest environmental impact at any cost. This is because this decision can trigger a “tragic choice”, as it is a discretionary decision by the public administration, which can decide what it considers best for the public interest, even though this implies the prevalence of interests that cause negative impacts on the environment. In support of his argument, he argues that the Brazilian Constitution itself, as prescribed in Art. 170, IV, proclaims that the economic order must observe the environment as a principle, as it is necessary for the development and guarantee a dignified life.

In the same vein, Fiorillo (2013) argues that environmental licensing cannot simply be seen as a simple administrative act because differently, it takes on the nature of a *sui generis* discretionary act. This means that in certain circumstances, the granting of an environmental license can occur even when the previous environmental impact study does not produce results favorable to the environment. This approach is justified based on the interpretation of Arts. 170, V, and 225, both from the Brazilian Constitution. In this context, it is up to the public administration to decide, considering the convenience and opportunity for granting or not granting the license, since sustainability is a principle that permeates both environmental preservation and the economic order.

It is possible to disagree with the opinions of the authors, who misinterpret the aforementioned constitutional norms. This work in no way seeks to minimize the importance of economic and social development for a dignified life. However, reading the chapter that deals exclusively with the environment, in the Brazilian Constitution, especially the caput of art. 225, it is undeniable that this is a diffuse and collective right, classified as a good for the common use of the people, and its defense is a constitutional imposition on public authorities and the community; in addition, in any decision, present interests must be weighed against those that preserve life for future generations. In turn, it is in the chapter on the economic order that the constitution alerts to the inclusion of environmental protection as one of its principles, and the economic order is therefore bound by the dictates of environmental protection.

In environmental licensing processes, the public agent must be guided by sustainable decisions, always opting for the best techniques and the lowest socio-environmental impact, imposing all the necessary measures to preserve, repair and, if necessary, recover the adverse effects on the natural, anthropological and socio-cultural environment. However, in extreme cases, where there are no technologies available to guarantee the preservation of the environment, or where the social and environmental damage outweighs economic development, the public interest dictates that the license for the economic activity be denied, given the impossibility of imposing mitigating measures.

While referring to decision-making of the agents responsible for granting environmental licenses, Krell (2008, p. 7) stresses that “the criteria for the correct exercise of this legislative option should be the degree to which fundamental rights are affected in the specific case, as well as the level of danger and social harmfulness of the respective works and activities to be licensed”.

Thinking about the concept of sustainable development, and based on inter-generational justice, accepting significant impacts on the environment in the present, in the name of development, is to act contrary to the constitutional principle itself. Furthermore, the entrepreneur himself and the public agent responsible for the administrative decision are obliged, by imperative of the legal order, to prioritize the protection and preservation of the environment in all its meanings, but there will only be sustainability if there is compatibility between the social and economic needs of human beings and the preservation of the environment (SIRVINSKAS, 2013).

Supporting his narrative, Bim (2020) argues that it is impossible for the Judiciary and the Public Prosecutor's Office to interfere in the administrative decision of the environmental licensing process, as the license is a discretionary administrative act that does not permit intervention in the administrative merit. He also argues that not even other federal entities with an interest in the licensing process can interfere in the decision of the competent body regarding the environmental licensing process.

Once again it is possible to disagree: after all, the Judiciary cannot replace decisions on administrative merit, i.e. the reasons for opportunity and convenience that determined the act, but there is no impediment to the annulment of discretionary acts in terms of their legality (SCATOLINO; CAVALCANTE FILHO, 2020). In this context, it is imperative for the system to ensure that conduct is consistent with environmental protection, both due to the objectives of the PNMA and the constitutional provisions, in particular the principles

of prevention (precaution), sustainable development, ecologically balanced equilibrium, limits, the polluter pays, the prohibition of retrogression and socio-environmental responsibility.

Finally, a balance must be struck between the interests at stake in an administrative environmental licensing process decision and the determination of conditions involving the mitigation and recovery of damage and the periodic monitoring of licensed activities, with those who fail to comply with the legislation and conditions imposed being liable to lose the granted license.

Conclusions

By analyzing environmental licensing as one of the main instruments of the PNMA, we can see its relevance to the realization of rights promised by the Brazilian Constitution, as the instrument has the potential to consolidate sustainable decisions and arrangements in the country's economic and social development.

Due to its characteristics (a broad and complex object translated into an analysis of the environmental and social impacts of a project; the ability to coordinate actors and entities; multiple openings for social participation; solutions formatted by means of conditions, etc.), environmental licensing can be considered a structural administrative process, aimed more to preventing than correcting damage and impacts.

The duty of all actors to protect environmental interests must be emphasized, as well as the search for a democratic and concerted space between them in environmental management. In addition, it is up to the public administration, responsible for implementing public policies that make fundamental rights a reality to outline a path adapting to the participatory and dialogical context. Environmental licensing is effective if it is well applied and conducted by the public administration. Unfortunately, specialized literature indicates that the practice of environmental licensing in some Brazilian states is permeated by low transparency and poor dialogicity (DUCATTI, 2019).

The dogmatic treatment of acts practiced in environmental licensing as mere exercises of discretion by the public administration must be avoided. If thought of as procedurally chained acts aligned with a well-defined public policy, such acts have a low degree of discretion, even though they are carried out amid considerable complexities, issues that cannot be confused. Furthermore, even when making a decision based on convenience and opportunity (merit), the

public agent cannot deviate from legality. Hence, they must always focus on: (a) the constitutional obligation to defend the environment; (b) the obligation to guarantee an ecologically balanced environment as essential to a healthy quality of life, which would be the path to a dignified living; (c) understanding that they are dealing with a diffuse and collective good, so any decision must be based on the best interests of all or the greatest number of people; and (d) a commitment that their decisions will be weighted with respect for present and future interests.

In the meantime, it is important to read the instruments made available to the defense and protection of the environment, in line with the constitutional order in force, while maintaining the importance and autonomy of environmental law and the search for better techniques and technologies that serve the interests of humanity. In this context, there is a need to promote constant ecological awareness and a better understanding of sustainable development. It is appropriate to state that environmental licensing is a considerable instrument in favor of defending an ecologically balanced environment.

Thus, it is suggested that studies on environmental licensing move forward in order to improve solutions for protecting the environment and guaranteeing sustainable development, strengthening understanding of the responsibility that is imposed on everyone, based on the development of transparent and participatory public policies for society as a whole. Furthermore, it is hoped that the lack of specific and reliable rules can be resolved by enacting a complementary law, under the terms of Art. 23, sole Paragraph, of the Federal Constitution, establishing rules that comply with constitutional and environmental principles, in accordance with the legal system.

It is necessary to advance critical studies on the practice of environmental licensing in Brazil, so that the full potential of the instrument is not depreciated in merely symbolic occurrences, in an alibi regulation (NEVES, 2018), or even in a substitute for the contemporary phenomenon of the constitutionalism of the spectacle (ASSIS; COELHO, 2017).

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Authors' participation

Saulo de Oliveira Pinto Coelho was responsible for the revision and final approval of the work. Tiago Ducatti de Oliveira e Silva was responsible for the revision and final approval of the work, with active participation in the discussion of the results. Daniela Haun de Araújo Serafim played an active role in discussing the results.

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