

# **RETHINKING BRAZILIAN CONSTITUTIONAL LAW: THE USE OF POLICE POWER IN THE CURRENT RISK SOCIETY FOR SUSTAINABLE DEVELOPMENT**

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## **ABSTRACT**

The right to an ecologically balanced environment (provided in article 225 of the Brazilian Federal Constitution) is classified as "essential to healthy quality of life", because of its importance for human life for the present and future generations. For this reason, there is a need for commitment and responsibility in the maintenance of adequate environmental levels by the Public Power and by the current Risk Society (i.e., technological, evolutionary and globalized, which increasingly extends the risks inherent in human survival), to that future generations can enjoy a dignified life with environmental quality, which consequently provides other fundamental rights (such as health, feed, housing, leisure, among others). It is also necessary to redefine the Constitutional Law and Justice to include the importance of the environmental aspect. In order to do so, the Public Power can use legal, political and legislative instruments to safeguard environmental risks, outsourced by the Environmental Police Branch, guided by sustainability. It is the Environmental Police Power, which contributes to externalizing and legitimating sustainable development, as preached by so many Brazilian national instruments (such as the Federal Constitution and the National Environmental Policy, among others) and international documents (such as the Declaration of Stockholm, the Rio Declaration and 2030 Agenda). In this sense, the present article, at first, addresses the Brazilian Environmental Constitutional Law, in order to identify its re-signification for a State of Law that gives the due importance to environment. Then, it assesses the Risk Society and its effects on the current globalization, in order to indicate the need to address sustainable development. Finally, it analyzes the contribution of the Environmental Police Power in the perspective of this sustainable development, for the precaution and prevention of damages to the environment, in order to guarantee quality of life and human dignity for the present and future generations.

**KEYWORD:** environmental constitutional law; state of ecological law; police power; precaution; sustainable development.

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## **INTRODUCTION**

Living in a suitable environment is essential for attainment of the dignity of the human person. For this reason, the right to ecologically balanced environment is classified as "essential to healthy quality of life". It is clear that there is a need for commitment and responsibility in maintaining adequate environmental levels by Government and by the current society, since the protection and defense of the environment depends on the participation of all. This so, that future generations can enjoy a dignified life with environmental quality, which will enable them to obtain other fundamental rights.

In this sense, it is also necessary to redefine the Constitutional Law and Justice to include the importance of the environmental aspect for life with quality. In order to do so, the Public Power can use instruments, with the purpose of precaution of environmental risks and guided by the sustainable development.

This is the Power of Environmental Police, which contributes to externalizing and legitimating sustainable development, as preached by so many Brazilian instruments (Federal Constitution and National Environmental Policy, among others) and international instruments (Stockholm Declaration, Rio Declaration and 2030 Agenda, among others).

In this line of reasoning, the present article aims to address the Brazilian Constitutional Law, in order to identify its re-signification for an Ecological Law State. Then, it assesses the Risk Society and its effects on current globalization to indicate its influence on the production of environmental damage. With this, the need to address sustainable development. Finally, the contribution of the Environmental Police Power in the perspective of this sustainable development already indicated, for the precaution and prevention of damage to environment, in order to guarantee quality of life and dignity of human being for the present and future generations.

### **1. BRAZILIAN ENVIRONMENTAL CONSTITUTIONAL LAW: CONTEXTUALIZATION IN THE LIGHT OF THE STATE OF ECOLOGICAL LAW**

It is a striking feature of the time in which we live the dependence of the resources and services available to the population, as well as the countries themselves. Such a peculiarity is remarkable with regard to the elements that make up the environment, since environmental systems and ecosystems do not fit perfectly into political boundaries.

Environmental degradation can reach the environment of other sites, causing a deterioration at a still unknown pace and scale. Take, for example, environmental disasters, emission of pollutants, oil spills, acid rain, accidents with radioactive or nuclear materials, among others. The intensity of these risks provoked the awakening of the states to the emergence in discussing new mechanisms and instruments of defense and protection of the environment.

This environmental characteristic was called "transnationality", since the environment is a collective right, inserted in the third generation of human rights. It is a right that holds indeterminate persons, bound by circumstances of fact, with indivisibility of the object.

It is a right that needs to be achieved through effective public management for its protection. On the other hand, at the internal level, the perception that there was a need to consolidate environmental norms led to the constitutionalization of the fundamental human right to the ecologically balanced environment, as is the case of the Brazilian Federal Constitution.

From a distant reality, the protection of the environment has come to be considered a concrete obligation, directed towards imposing on individuals, besides the right and duty of State, and there is a need to treat the matter on a legal hermeneutic basis, in that the subject must always be addressed in an interdisciplinary and multifaceted way.

In this sense, a process begins in which the objective of the decision-making of a new model of Ecological Law is initiated, in which importance is given both to the environment and to the social sphere in decision-making. In addition, it allocates sufficient elements to confer rights to the environment, in view of the basic principles considered (prevention, precaution, intergenerational solidarity, among others).

The notion of justice is extended to encompass not only human elements, but all forms of life, which propitiates the beginning of a proposal for the implementation of Environmental Justice.

[The Ecological State of Law] distances the anthropocentric guidelines adopted in the traditional State and aims at the protection of all life forms through a new institutional ethics, delimiting a change of rationality and attitudes, seeking the awareness through the empowerment and the institutionalization of policies that respect nature (GONÇALVES; MUCCINI; FLORES, 2017, p. 57).

This environmental characteristic is intensified due to the intrinsic processes of globalization, which interweaves the geographical borders approaching people, as well as its negative effects amplified by the problems brought by Risk Society.

## **2. RISK SOCIETY: INFLUENCE IN THE PRODUCTION OF ENVIRONMENTAL RISKS**

The society preached by Ulrich Beck as a "Risk Society" (BECK, 2011), from the post-industrial era, contrasts with the classical industrial society lived previously, which gave rise to the development of various techniques and technologies that increased living conditions and the needs of individuals.

"Industrial society is a society of industrial production which, in its evolution, gives rise to a society of industrial sequels that reflects itself, which exceeds it in its dimensions" (BECK, 2000, p.14). Sequelae that produce inherent risks and that must be managed, under penalty of compromising the continuity of plural, complex and global society.

These risks are caused by human decisions, which endanger survival and prolong life. They are, therefore, possible consequences for certain decisions, which can affect both present and future generations.

This is because, the effects of degrading actions are not delimited in time and space.

There are several examples of disastrous activities in this area of risk, such as the ecological disaster in Dañana, the so-called BSE disease, the famous "Lederspray" case or the "Colza" case, not yet mentioned in the Chernobyl disaster, and in the many questions that are terrifyingly posed concerning the cloning of animals and humans, genetic manipulation, among others. Such risks, which are produced in a market logic, where the logic of a greater gain predominates, in a faster financial return, with lower possible costs of production, covering a greater number of consumers, obeys criteria of production and efficiency never previously experienced, which makes those risks unpredictable and unmanageable (FERNANDES, 2001, p. 20).

This reality is intensified by globalization, giving rise to the so-called "global international order" or "global village" (MCLUHAN, 1962), where borders and geographical barriers have shrunk, which allows risks to be cross-border, covering long regions of the globe and sometimes transcending generations. It must be managed by the whole society, without distinction of frontiers, nationality or political confrontation, as the effects are felt on all.

The impact of environmental risks and the need to protect the environment for present and future generations must be brought to the people's conscience so that they can

take appropriate actions, putting into effect the socio-environmental concern about sustainability, grounding the instruments brought by the Ecological Law State.

It is, therefore, necessary to create a global ethical conscience regarding the preservation of the environment, fostered by the "Sustainable Development Goals", paradigms implemented by 2030 Agenda, of United Nations.

### **3. DEVELOPMENT FROM A SUSTAINABILITY PERSPECTIVE**

The Brundtland Commission (on document entitled "Our Common Future") defines sustainable development as

a process of transformation in which resource exploitation, investment direction, technological development orientation and institutional change harmonize and reinforce the present potential and future, in order to meet human needs and aspirations. (COMISSÃO MUNDIAL SOBRE MEIO AMBIENTE E DESENVOLVIMENTO, 1991, p. 09).

The concept of sustainable development is, therefore, achieved when there is a balance between economic and social development and respect for sustainable environmental values.

The challenge of environmental sustainability requires the verification of concepts to ensure a better applicability of existing resources to ensure over time the interaction between man and nature. Hence, the intrinsic need for correct information for the production of environmental knowledge that leads to the creation of awareness of present and future generations, which, in turn, tends to cause "affirmative actions" or "positive actions" regarding the environment, aiming at the defense and protection of it, implementing the principle of sustainable development. This is what the Sustainable Development Goals aim to achieve.

The Sustainable Development Goals, brought by 2030 Agenda, describe the post-2015 development agenda to replace the Millennium Development Goals of formalized a new pattern of development aimed at strengthening the global consensus around the commitment of the signatory countries to sustainable development and environmental cooperation.

Broadly speaking, SDGs have five main characteristics: (i) they are expressly presented as integrated and indivisible, thus no hierarchy must be derived from the order in which different issues are addressed; (ii) they are country-based, which

means that, while recognizing the importance of global, regional and sub-regional efforts, they place the essential responsibility at the national level; (iii) they concern all countries, not just developing countries (which introduces an important difference with the Millennium Development Goals or MDGs); (iv) they emphasize the different positions of countries and the ensuing need for differentiation; and (iv) they emerge from a truly inclusive and open process (which, again, introduces an important difference with the top-down approach followed to draw the MDGs) (VIÑUALES, 2016, p. 3).

In each of these Goals, there is a relation of environmental matter with economic and social aspect, which implies the effectiveness of management and cooperation for the growth and sustainable development, considering that, with respect to ethical parameters, the Earth Charter (created in Rio-92) states that a healthy relationship between society and the environment is necessary, integrating "the formal education and lifelong learning the knowledge, values and skills necessary for a sustainable life "(Principle 14).

Exactly as according to Brazilian National Environmental Policy, Law n°. 6.938, of 1981, which brings the concept of "sustainable development", with the objective of "preserving, improving and recovering environmental quality conducive to life, aiming to ensure conditions in the country for socio-economic development, interests of national security and the protection of the dignity of human life", while states that: "National Environmental Policy shall aim at: [...] making economic-social development compatible with preserving quality of the environment and ecological balance [...]".

### **3.1. The contribution of Police Power in the Risk Society from the perspective of sustainable development**

The protection of the right to ecologically balanced environment should be one of the main functions of the State, with the imperative of adopting well defined positions in favor of the environment, in order to ensure a balance between the environmental, social and economic aspects, by promoting a process of clarification of priorities by aligning the meaning of the intrinsic value of environment with sustainability and the need for binding protection mechanisms.

These are paradigms focused on precautionary instruments, such as environmental licensing and inspection.

Precaution defines a new environmental management, in the search for sustainable development combined with the minimization of risks to environmental goods, given its complexity, since it imposes the obligation to prevent or avoid damage when it can be detected in advance. Thus, it determines the analysis of all projects potentially aggressive to the environment, applying instruments to minimize or even prohibit such aggressions.

Such determination was contemplated in the Brazilian Constitution, which requires the Government to adopt mandatory measures to control environmental risks, aiming at maintaining the ecologically balanced environment, since it establishes the requirement of a "Prior Environmental Impact Assessment" for "installation of work or activity potentially causing significant degradation of the environment", while it also imposes control of production, marketing "and the use of techniques, methods and substances that present a risk to life, quality of life and the environment", i.e., intervention even without proof of the concreteness of the risk of harm.

Uncertainty can not be used as an excuse for not adopting regulatory measures and precautions for environmental damage, as determined by the Rio Declaration.

Several international instruments have underlined the importance of predicting, preventing and avoiding harmful transformations to human health and environment. As an example, the Convention on Biological Diversity, which states that it is "vital to anticipate, prevent and counteract at the outset the causes of the significant reduction or loss of biological diversity", as well as the United Nations Framework Convention on Climate Change, which brings the precaution among its principles, stating that "parties must take precautionary measures to predict, avoid or minimize the causes of climate change and mitigate its negative effects", reiterating that the lack of scientific certainty cannot delay measures.

In addition, this principle is also adopted by the current Brazilian Environmental Policy, which imposes several precautionary mechanisms, which can be issued through the Power of Environmental Police, to the extent of impositions intended to prevent or minimize environmental degradation, whenever there is danger of serious damage or irreversible, even if no complete or up-to-date scientific data is available.

Police Power is an instrumental power of the State, which restricts the use of individual liberty and/or property rights to suit the public interest, precisely creating the prerogative for the State to manifest itself through general norms or individual acts, in view of the principles of supremacy and the unavailability of the public interest, so as to reconcile the behaviors with the social interests.

This involves the inspection and control of environmental agencies, such as licensing, investigation and application of sanctions to violators. It is thus perceived a coercive action of the Power of Environmental Police, in the sense of modifying the mentality of the individuals so that they can act in favor of the environment.

Punishments may occur through the application of administrative sanctions to their offenders, as well as the adoption of measures to promote recovery/correction when verifying the occurrence of environmental damage, in accordance with current environmental legislation (ZUCCHI, 2017, p. 1244).

This is because, in addition to being constitutionally guaranteed, environmental protection is an intrinsic condition for living with quality, as well as ensuring a fundamental human right, namely: the right to the ecologically balanced environment.

## **CONCLUSION**

The environmentally harmful effects of the risks produced by the present society are enormous and incalculable, since it does not respect borders and reach several generations. In the face of this reality, a relationship of long-term social and legal responsibility emerges to define actions in favor of the environment, environmental quality, life and dignity of human person.

In this sense, sustainable development seeks to combine quantitative and qualitative factors in the search for social integration and economic growth, as well as preserving the environment so that present and future generations can enjoy quality of life.

In order to do so, the Public Power should use the Power of Environmental Police to control activities potentially harmful to the environment, both preventively and repressively, in the current context of Risk Society, as a precautionary mechanism and/or prevention, which have the same essential purpose: to avoid damages to environment.

Thus, Environmental Police Power is the existing instrument, in a context of environmental crisis and Risk Society, but also of State of Ecological Law to protect and/or prevent environmental damage and promote sustainable development.

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