



Volume 37 No 3, September 2022

DOI: 10.20473/ydk.v37i3.37426

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Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)

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FAKULTAS HUKUM UNIVERSITAS AIRLANGGA



Article history: Submitted 1 May 2022; Accepted 2 June 2022; Available Online 1 September 2022.

## The Fundamental Right for a Balanced Environment

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### Abstract

This paper reflects on the fundamental duty, extracted from art 225, caput, of the Brazilian Constitution, to protect and defend the environment. It refers to the duty arising from the fundamental right to an ecologically balanced environment. As it is a fundamental right, it defends the existence of a corresponding duty, in this case, a fundamental duty. Such a fundamental duty involves the relationship between present and future generations. The present generation must maintain and protect existing natural resources so the future generation may also enjoy the same natural resources. To reach the proposed objective, this paper adopts a deductive approach, has a qualitative character and uses the bibliographical-documentary procedure for its development. It concludes that the duty provided for in art 225, caput, is not enforceable by itself because it lacks efficacy; however, the right and duty to and with the environment are associated constitutional categories that become effective in return.

**Keywords:** Brazilian Constitution; Environment; Fundamental Duty; Future.

### Introduction

The Federal Constitution of 1988 (CRFB) is a significant milestone in protecting the environment in the Brazilian State and highlights such protection in a specific chapter in the Title of Social Order.<sup>1</sup> It acknowledges the fundamental right to a balanced environment, essential to the quality of life and pertaining to present and future generations in an authentic system of solidarity, equity and responsibility for the common thing. Related to the law, it sets the duty of the Public Power and community to defend and protect the environment for present and future generations.

This paper reflects on the extractable fundamental right from art 225, *caption*, of CRFB of protecting and defending the environment. It is a duty arising from

<sup>1</sup> Constituição da República Federativa do Brasil 1988.

the fundamental right to an ecologically balanced environment. As it consists of a fundamental right, it defends the existence of the corresponding duty, here, a fundamental right. Hence, as a fundamental right, it is inalienable. The article also literally appoints the duty that sets an intrinsic relationship with the corresponding right that, to be implemented, depends on compliance with obligations. This is studied in the first topic.

The duty of defending and protecting the environment to realise the correlated right for an ecologically balanced environment is a fundamental right guided by solidarity and intergenerational equity. Both principles of law are structural in accomplishing the duty attributed to Public Power and the community. Therefore, in this sense, we examine both, which are considered fundamental elements of the respective right/duty.

Thus, different from ordinary duties arising from the relationship with the respective rights and those directly set by the legal text, the fundamental right arising from the referred constitutional article demands strength; that is, it needs infra-constitutional regulation. The paper also aims to point out some norms implementing the so-called constitutional duty, especially in criminal, administrative and civil matters.

To achieve the described goals, this paper adopts a deductive approach, has a qualitative character and uses the bibliographic-documental procedure for its development. Thus, it is based on the generic idea that all have the right to a balanced environment. It is also based on the specific idea that the Public Power and the community have the right to defend and protect it and to understand that the duty is subject to the densification of the constitutional rule towards a boosting execution of the law for present and future generations.

This paper concludes that the duty provided for in art 225, caput, is not enforceable by itself because it lacks efficacy. However, the right and duty to and with the environment are associated constitutional categories that become effective in return.

### **The Relationship between the Law and the Environmental Duty**

The right to an ecologically balanced environment under art 225, *caption*, of the CRFB explicitly entails a right and a duty. It is a right for all – the people – to common use and healthy quality of life as the consequence of a balanced environment. The duty of defending and preserving the ecologically balanced environment is of the Public Power and the community. Notably, the subject of the law is all (the people), and the subjects of duty are the community and the Public Power. Therefore, the text of the article delimits who has the right and who has the duty.

As a premise for the analysis to be carried out in this text, we understand that the holder of the right (the people) and the ones under a duty (the Public Power and the community) are involved with the environment and depend on it, specifically, in the case of essential conditions for the maintenance of human life (1<sup>st</sup> art, III, of CRFB). Like the atmosphere that encloses the human being, the law results from the social nature (*apetitus societatis* – Grócio) of the human being; that is, the law is only true in the community. There is no law without social interaction and society.<sup>2</sup> Consequently, any right and duty only have meaning in the social atmosphere (collective), one of the forms of social control.<sup>3</sup>

From the environmental crisis, a new understanding of social arises: its environmental condition.<sup>4</sup> The law, as a regulator of social relationships, then protects the environment by imposing an ideology of sustainability based on the ethics by and for life. Besides constitutionalising the subjective right to the environment and the duty to defend it, the *caption* of art 225 of the CRFB preserves it and brings an ecological meaning to the Brazilian Constitution, linking economical activities to its safeguard (art 170 of the CRFB) and setting criteria of the social function of property compatible to sustainable development (art 186 of the CRFB). Not least importantly, it is considered the Magna Carta of environmentalism,<sup>5</sup> notwithstanding its refined programmatic character.

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<sup>2</sup> Mário Reis Marques, *Introdução Ao Direito* (Almedina 2007).[17-18].

<sup>3</sup> Luis Ricasens Siches, *Introducción Al Estudio Del Derecho* (Porrúa 2009).

<sup>4</sup> Enrique Leff, *A Proposta Pela Vida* (Vozes 2016).[25].

<sup>5</sup> Antônio Herman Benjamin, *Direito Constitucional Ambiental Brasileiro* (Saraiva 2010).

Article 225, *caption*, of the CRFB sets a fundamental right and duty for the ecologically balanced environment. Although this article can be translated into the perspective of a duty that involves cooperation between the Public Power and individuals,<sup>6</sup> members of the community are found in the category of constitutional principle and central rule. However, there is a regulatory network that strengthens the rights and duties arising from this constitutional principle.

One of the characteristics of environmental law is a right and duty that ‘has aversion for empty discourse; it is a legal discipline of result, that is only justified by what it reaches, definitely, in the social framework of degrading interventions’.<sup>7</sup> On the other hand, the constitutional environmental law attributed environmental rights and duties in the claim for the consolidation of the environmental status of law based on sustainable development and constituted in the rights of solidarity that ‘propose a new approach for the protection of fundamental rights, mitigating the classical-liberal view of exclusive opposition of fundamental rights in the light of state institutions and transferring part of such obligation to the scope of private individuals’.<sup>8</sup> In the following sections, we study the environmental right and duty.

### The right to environment

The false idea that international society, conducted by the United Nations and financed by supranational organisations, could modernise the world towards equality caused an unprecedented environmental crisis mainly optimised in the last five decades when environmental law started to take shape in Stockholm (1972). A little late, but it is in line with contemporaneity. The environmental crisis, which Latour<sup>9</sup> calls climate change as he understands that a crisis might be overcome and we are currently in open change in the world, is much beyond crisis. It is a

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<sup>6</sup> Ingo Wolfgang Sarlet and Tiago Fensterseifer, *Princípios Do Direito Ambiental* (Saraiva 2017).[250].

<sup>7</sup> Antônio Herman Benjamin (n 5).[9].

<sup>8</sup> Ingo Sarlet and Tiago Fensterseifer, *Direito Constitucional Ambiental* (Revista do, 2017). [228-229].

<sup>9</sup> Bruno Latour, *Onde Aterrari? Como Se Orientar Politicamente No Antropoceno* (Bazar do Tempo 2020).[8].

costly phenomenon in this historic period. In this context, the right to a balanced environment is then mentioned in the constitutions of States in a frank approach to ecological constitutionalism.

The ecologically balanced environment (art 225, *caption*, of the CRFB) is a right for every person. Everyone has this right, and anyone may claim it individually and collectively, as ruled by the law, ‘though it is not a typical individual right, not accepting, in contrast, the exclusive qualification of social right (economic and social), although, in its implementation, some analogy is found with certain socio-economic rights, as, for instance, the right to health, an issue which did not go unnoticed to the Constitution of 1988, which resulted in the Title III of Social Order’.<sup>10</sup> Yet:

“In its collective dimension, the right to a healthy environment is a universal interest that is due to present and future generations. Now, the right to a healthy environment also has an individual dimension as it may have direct or indirect repercussions on people due to its connection with other rights, such as right to health, personal integrity or life, among others”.<sup>11</sup>

Thus, as defined in the constitutional text, this is an objective right. According to the strengthening of the legal norm that derives from the objective right, a subjective right arises that corresponds to the obligation/duty of others. The claim, linked to the subjective right, consists in the possibility provided by the legal norm of claiming from other determined persons the compliance of a corresponding legal duty, invoking the coercive apparatus of law. Firmly, the subjective right is characterised by special legal protection as it is then linked to the equivalent duty.<sup>12</sup>

The right to an ecologically balanced environment is a fundamental right guided by solidarity and intergenerational equity that presupposes a duty. The justification of rights of such nature – connected to fragmentary beneficiaries (the diffuseness of the present main subjects, future ones [the future generations]) or dismissed from the own procedural voice or stature (the living beings and the

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<sup>10</sup> Antônio Herman Benjamin (n 5).[124].

<sup>11</sup> CIDH, ‘Opinião Consultiva OC-23/17’ (2017) <[www.mpf.mp.br/atuacao-tematica/sci/dados-da-atuacao/corte-idh/OpinioaoConsultiva23versofinal.pdf](http://www.mpf.mp.br/atuacao-tematica/sci/dados-da-atuacao/corte-idh/OpinioaoConsultiva23versofinal.pdf)>.

<sup>12</sup> Siches (n 3).[141-144].

essential ecologic processes) – brings the absolute presumption that its existence or claim does not depend on the permanent and immediate rebellion of the victims against the violations possibly practised.<sup>13</sup>

Furthermore, although it is not recognised in any United Nations treaty, the right to the environment is a human right. It is of universal interest, soaring to a dimension of principles of common concern of humankind; that is, a common responsibility of all States to defend and preserve the environment for the benefit of worldwide rights.<sup>14</sup> After all, the damage to the environment affects the whole planet, human beings, nature and the rights of nature.<sup>15</sup>

From this perspective, the Inter-American Court of Human Rights, in Advisory Opinion No 23,<sup>16</sup> recognises the existence of an undeniable relationship between environmental protection, human rights<sup>17</sup> and sustainable development, for which it sets several environmental duties for the States<sup>18</sup> that we will analyse in the next sub-topic. Because it is a fundamental right, such as the environmental one, the option of requiring the achievement of the duty becomes an obligation corresponding to the possibility of enjoying such a right. The legal claim is not a mere option; it becomes an obligation of requiring the ones in charge to carry out actions that maintain the right to an ecologically balanced environment. After all, a fundamental right has immediate applicability (CFRB, art 5, s 1º).

In this logic, the arrangement between human rights and environmental rights added to the rights of nature is appropriate to promote an ecology of law towards adequate socioenvironmental justice. Sarlet and Fensterseifer justify this arrangement:<sup>19</sup>

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<sup>13</sup> Antônio Herman Benjamin (n 5).[118-119].

<sup>14</sup> Edith Brown Weiss, 'Um Mundo Justo Para Las Futuras Generaciones: Derecho Internacional, Patrimonio Común y Equidade Intergeracional'; Mundi-Prensa, 'Besides This, the Worldwide Rights Are Collective to Each Generation, in Contrast to Traditional Human Rights That Concentrate Mainly in Relationships between Individuals and the State [135]' (1999).[119].

<sup>15</sup> The Constitution of Ecuador 2008.

<sup>16</sup> CIDH (n 11).

<sup>17</sup> CIDH, 'Protocol of San Salvador' <[http://cidh.org/basicos/portugues/e.protocolo\\_de\\_san\\_salvador.htm](http://cidh.org/basicos/portugues/e.protocolo_de_san_salvador.htm)>.

<sup>18</sup> CIDH (n 11).

<sup>19</sup> Ingo Sarlet and iago Fensterseifer (n 8).[52].

“It is compiled to the Law, therefore, in order to restore the balance and the security in social relations (now *socioenvironmental*), the mission of positioning in relation to these new threats that undermine and put at risk the order of values and the republican principles and the democratic state based on the rule of the law, as well as it strongly compromises the survival (human and non-human) and the quality of life”.

The human and fundamental right to a balanced environment demands from the human being a behaviour linked to the ethics of life, solidarity, intergenerational equity and its corresponding responsibility in a systemic thought atmosphere and observation of ecological dignity of the human person, acknowledged by STJ (REsp 1.797.175/SP)<sup>20</sup> in 2019, and the dignity of non-human animals and life in general.

### **The Duty of Caring for the Environment**

The duty expressed in art 225, *caption*, of CRFB is legal, as it concerns a valid norm, although it may represent a moral, religious, political, cultural and ethical duty, among others. It is a set of ‘expressions of common values or interests constitutionally acknowledged’,<sup>21</sup> and it is an objective legal duty, as there is no definition of the conduct or omission that leads to an ecologically balanced environment.

In short, they are ‘common values that contrast to individual values and interests which are claimed in the fundamental rights, which does not mean that the fundamental duties merge the matter of fundamental rights in a broad sense’.<sup>22</sup> It is in this sense that the duty of protecting the environment overlaps individual interests, although the right to a balanced environment may be, besides transindividual, also individual. They are also associated with constitutional categories that are accomplished in contracts; that is, the fundamental duty of protecting the

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<sup>20</sup> ‘NoTitle’ <[https://jurisprudencia.s3.amazonaws.com/STJ/attachments/STJ\\_RESP\\_1797175\\_fe70b.pdf?AWSAccessKeyId=AKIARMMD5JEAD4VJ344N&Expires=1605561416&Signature=uSjFU9ykb9kVDYzy5zRxRrnUqrA%3D](https://jurisprudencia.s3.amazonaws.com/STJ/attachments/STJ_RESP_1797175_fe70b.pdf?AWSAccessKeyId=AKIARMMD5JEAD4VJ344N&Expires=1605561416&Signature=uSjFU9ykb9kVDYzy5zRxRrnUqrA%3D)> accessed 10 October 2020.

<sup>21</sup> Rogério Santos Rammê, ‘O Regime Jurídico-Constitucional Dos Deveres Fundamentais, 15 Revista Eletrônica Do Curso de Direito Da’ (Universidade Federal de Santa Maria 2020).[10].

<sup>22</sup> *ibid.*[10].

environment may implement the corresponding right to which the duty will be an influential materialising aspect.

There is the expressed delimitation of the beneficiaries: the Public Power represented by the State (in its federal spheres and competent bodies) and the community, responsible for achieving the duty referring to the subjective right, which is the maintenance of an ecologically balanced environment. Regarding collectivity, it is understood as all individuals and legal entities responsible for defending and preserving (not-degrading or reviving) the environment for the present and future generations.

The technique of constitutional rights, according to Benjamin,<sup>23</sup> groups the duties of art 225 into four categories: (i) the generic, substantive and positive explicit requirement of defence and preservation of the environment; (ii) the generic, substantive and negative but implicit of not degrading the environment; (iii) explicit and special duties to the Public Power (s 1º); and (iv) explicit and special duties, enforceable to individuals or the State (ss 2º and 3º). Therefore, they are negative and positive duties of the state and individuals.

The general and positive duty of protecting and preserving the environment belongs to the community and the Public Power. It is the most important to sustain the necessary environmental balance to quality of life; they are 'expressions of community responsibility of the citizens'.<sup>24</sup> It constitutes a principle-norm in line with the principles of prevention and precaution and supports the environmental legal principles, whose purpose is to inhibit the known and unknown environmental damage, respectively.

In turn, the 1<sup>st</sup> paragraph of the article studied imposes on the Public Power seven specific duties that cover the safeguard of environmental complexity; that is, of all elements included in the ecosystems, such as in the biodiversity and the territorial spaces especially protected (units of preservation). In this perspective, it reaches the systemic, ecological thought, concentrated in the context as part of a

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<sup>23</sup> Antônio Herman Benjamin (n 5).

<sup>24</sup> Rammê (n 21).[15].



wider whole<sup>25</sup> to the detriment of the parties.

Moreover, this instrument norm establishes that the Public Power shall require an environmental impact statement (EIS). This statement is the most important mechanism of prevention in the context of the Environmental Policy (Law 6938/1981) that limits the right to property and the inequitable or rational use of natural resources, resulting in a defensive positive provision to possible harms.

However, it is understood that the duty present in this paragraph – promoting environmental education for public environmental awareness – is the most important norm for executing environmental duties. It is the National Policy of Environmental Education (Law 9975/99) that sets the necessary ‘development of an integrated understanding of the environment in its multiple and complex relations, involving ecologic, psychologic, legal, political, social, economic, scientific, cultural and ethical aspects, contributing, thus, for a complex view, transdisciplinary of knowledge’,<sup>26</sup> as a follow-up of the systemic thinking. More importantly, only from the environmental consciousness will the human being be able to understand he divides and does not lead the environment, a common asset, with other beings – animate and inanimate – and that we need to preserve it for its survival.

Not least important is the duty of the 2<sup>nd</sup> paragraph, which ascribes criminal, administrative and civil liability to conduct considered detrimental to the environment and the 6<sup>th</sup> paragraph, which provides that nuclear plants shall have their location established in federal law.

The fundamental duty of protecting and preserving the environment, along with the constitutional duties concerning the family and children’s education, are the most evident in the CRFB. They are, therefore, considering the perspective of autonomy, ‘fundamental duties connected or associated to fundamental rights’,<sup>27</sup> whatever they are, to a balanced environment, health, life and work at a clean place, among others.

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<sup>25</sup> Fritjof Capra, *Ateia Da Vida* (Cultrix 1996).[41].

<sup>26</sup> Maria Anaber Melo e Silva and Márcia Bertoldi, ‘Educação Ambiental Para a Cidadania, Instrumento de Realização Do Direito a Um Meio Ambiente Equilibrado No Brasil e Em Portugal’ (2016) 17 *Veredas do Direito*. [297].

<sup>27</sup> Rammê (n 21).[19].

Finally, it is important to highlight the duties the Inter-American Court of Human Rights establishes to the States in Advisory Opinion No 23,<sup>28</sup> which are found in the CFRB and infra-constitutional laws: prevent significant environmental damage; carry out environmental impact studies; establish a contingency plan to minimise the possibility of great environmental accidents; mitigate significant environmental harm; act according to the principle of precaution; cooperate, in *bona fide*, for the protection against cross-border damage and notify the States potentially affected when they are aware of an activity in their jurisdiction that may cause the risk of cross-border damage; check and negotiate, in *bona fide*, with the affected States; and assure the rights to information, public participation and justice.

### **The Duty (and principle) of Solidarity**

The duty (and principle) of solidarity to be viewed in environmental law is the duty to human and non-human beings. It is a guide for promoting the right to a balanced environment that reaches the dimension of intergenerational equity, which will be analysed in the next issue. That is why the ‘solidarity expresses the fundamental need of coexistence of the human being in a social body, forming a web of inter-subjective and social relations that intertwine in the space of the state community’.<sup>29</sup> Therefore, it is the solidarity of medium and long-term prospective results. The realisation of the right to an ecologically balanced environment of today brings results to the future. Then, besides being a present right to some, it is a future right to others, such as the right to social security. Some solidarity arises in environmental law and tends to be applied in other branches of law (eg the social security law).

Besides forming a constitutive constitutional principle of one of the fundamental purposes of the Brazilian state – that is, constructing a free, fair and solidary society (3<sup>rd</sup> art, I, of the CRFB) – solidarity is present in important international legislative instruments. In art 29(1) of the Universal Declaration of

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<sup>28</sup> CIDH (n 11).

<sup>29</sup> Ingo Sarlet and iago Fensterseifer (n 8).[91].

Human Rights (UN, 1949), every human being has duties to the community, in which the free and full development of their personality is possible. In art 32(1) of the American Convention on Human Rights (OAS, 1969), every person has duties to family, community and humankind. In Principle 7 of the Rio Declaration on Environment and Development (UN, 1992), the States shall cooperate with the spirit of world solidarity to preserve, protect, and re-establish the health and integrity of the Earth's ecosystem. It is highlighted that when applied to environmental affairs, solidarity overcomes the sovereignty of the States regarding their natural resources.

It is a duty to create, preserve and, when due, recuperate the conditions of habitability with health for living beings that share and will share a single space: Planet Earth. If all beings inhabit the same space, all are privileged or underprivileged in terms of environmental conditions. However, human beings and their rational, economic particularity have a decisive environmental impact with their activities. The duty of solidarity is a responsibility of human beings to their species and environmental elements. Therefore, this duty is a recognition of another's right and the rights of nature to have ecologically balanced environmental conditions for a dignified life. In this sense, solidarity requires levels of reciprocity to the common good; that is, the environment. All actions that aim at and result in an ecologically balanced environment are solidarity; it is the responsibility of all human beings to act jointly.<sup>30</sup>

Mateo<sup>31</sup> suggests that the principle of solidarity has a dual dimension: communal and intergenerational. The duty of solidarity is also intergenerational and is set between generations, present and future. It consists of diachronic solidarity (through time), referring to generations to come and opposing the synchronic (at the same time) that fosters the relations of cooperation with the present generations.<sup>32</sup>

The peculiarity of this solidarity is that future generations, in some moments, are the present ones and shall be using an ecologically balanced environment and

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<sup>30</sup> Guilherme Camargo Massaú, 'A Solidariedade Como Elemento Essencial Para a Sustentabilidade Na Perspectiva Do Direito' (2016) 2 Revista Direito à Sustentabilidade.[95-96].

<sup>31</sup> Ramón Martín Mateo, *Derecho Ambiental* (Trivium 1998).

<sup>32</sup> Edis Milaré, *Direito Ao Ambiente* (Revista dos Tribunais 2015).

natural resources on equal terms with the previous generation. In the international scope, solidarity is in the principle of intergenerational equity.

### **The duty (and principle) of Intergenerational Equity**

The problem between generations concerns access to natural resources, which has been a preoccupation of the United Nations since the Conference of Stockholm in 1972. The preamble to the Declaration (UN, 1972) from this Conference, held 50 years ago, is more current than the time it was written: ‘the defense and improvement of the human environment for the present and future generations has become an imperative goal of mankind that shall be pursued [...]’. Principle 1 states that ‘man has a fundamental right for freedom, equality and the enjoyment of adequate conditions of life in a good environment that enables having a dignified life and have well-being, having the formal duty of protecting and improving the environment for the present and future generations [...]’.

Intergenerational equity is a principle of international law<sup>33</sup> that sets the duty of present generations in relation to future ones in preserving natural resources, which implies sustainable use for equitable access.<sup>34</sup> Thus, the duty presupposes implementing sustainable development and equitable use of natural resources for present and future generations. It also implies the preservation of options, the preservation of quality and the preservation of access to diversity based on cultural and natural resources in order not to deplete the possibilities of future generations.<sup>35</sup>

Said differently, intergenerational equity ‘is concentrated in the intrinsic relationship that each generation with the other generations, past and future concerning the use of the general heritage of natural and cultural resources of our planet’.<sup>36</sup> It acknowledges that ‘each generation is, at the same time, safeguards and

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<sup>33</sup> For a historical analysis of the principle of international law, see Weiss (n 14); Mundi-Prensa (n 14).[60-66].

<sup>34</sup> Besides the CFRB, the Policies of Environmental Education (Law n. 9.795 1999) and Solid Waste (Law n. 12.305) 2010 serve this principle.

<sup>35</sup> Weiss (n 14) Mundi-Prensa (n 14).[69].

<sup>36</sup> Weiss (n 14) Mundi-Prensa (n 14).[54].

uses our common natural and cultural heritage'.<sup>37</sup> It also means 'intergenerational justice in the context of the use of the general heritage of natural and cultural resources of our planet'.<sup>38</sup>

The intergenerational equity theory by Weiss<sup>39</sup> defends five classes of duties of use to promote intergenerational justice: the duty of taking positive measures to preserve resources; the duty of assuring equitable access to the use and benefit of these resources; the duty of preventing or reducing the negative impact on the resources and environmental quality; duty of preventing disasters, minimising damage and providing emergency assistance; and duty of compensating the costs for the damage to these resources or environmental quality.

It is not always that the person (individual or legal entity) that has a duty is the holder of the responsibility. However, it is understood that in environmental terms, this responsibility is a correlation despite the difficulty in taking responsibility for something you do not care for. Thus, assuming responsibility is selective, and the choice for something closer is linked to the finitude of human nature.<sup>40</sup> It is important to mention that Jonas's theory strongly correlates to this principle, 'as the principle of responsibility may be configured as the philosophical dimension that complements and stimulates the voluntary and collective action of the duty of care as an essential condition to keep some ecological balance'.<sup>41</sup>

The theory of responsibility by Jonas, in stimulus for the principles of solidarity and intergenerational equity, proposes for the technicist civilisation, marked by the exploratory action of environmental resources, that threatens its own existence the following imperative: 'act in a way that the effects of your action are compatible with the survival of an authentic human life on Earth' or 'act in a way that the

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<sup>37</sup> Weiss (n 14) Mundi-Prensa (n 14).[54].

<sup>38</sup> Weiss (n 14) Mundi-Prensa (n 14).[55].

<sup>39</sup> Weiss (n 14) Mundi-Prensa (n 14).[79-110].

<sup>40</sup> Hans Jonas, *O Princípio Responsabilidade* (Editora PUC 2006).[183].

<sup>41</sup> Márcia Bertoldi and Ádria Tábita de Moraes Damasceno, 'O Princípio Da Solidariedade Intergeracional Como Fundamento Da Governança Transnacional Ambiental' (2018) 11 Revista Culturas Jurídicas.[9].

effects of your action are not destructive for the future possibility of such a life'.<sup>42</sup>

This highlights the pursuit of man for a continuation of life based on the ethics of respect for life that assumes the duty of protection of entirety, including the future generations, manifested in the 'communal values that contrast to the individual values and interests'.<sup>43</sup> In this aspect, it is worth mentioning the criticism by Ost<sup>44</sup> that qualifies<sup>45</sup> as asymmetrical Jonas's ethics. It explicitly rejects the idea of contractual balance, all the form of logic of giving to those who give, and the Herculeum as it places on modern man's shoulder the weight of the whole universe, of whom he is the main guardian of his own being.

### **Normative conditions for the effectiveness of the fundamental duty**

The duty set out in art 225, *caption*, of the CRFB is due by itself, as there is a lack of efficiency. Although it is written as a rule, it fits in the normative category of principle.<sup>46</sup> It is known who has the right to claim and who has the duty of complying with the demands, at least in a general way, but there is no textually outlined conduct to be carried out for the compliance of the duty of defending and protecting the environment, considering the ones directed to the Public Power (1<sup>st</sup> paragraph). However, it is not a norm that can be strengthened by the interpretation of the judiciary exclusively. There are several questions concerning an ecologically balanced environment. Then, we have a norm of low normative strength.<sup>47</sup>

As it is a constitutional norm of low normative strength, the infra-constitutional legislation shall regulate it, establishing what (ecologically balanced environment), how and when action should be taken to implement the right and comply with the duty, especially by the community, as for the Public Power the norms are more evident. Hence, the 1<sup>st</sup> paragraph, with its subparagraphs, of art 225 of the CRFB

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<sup>42</sup> Jonas (n 40).[47–48].

<sup>43</sup> Rammê (n 21).[10].

<sup>44</sup> François Ost, *A Natureza à Margem Da Lei* (Instituto Piaget 1995).[325].

<sup>45</sup> *ibid.*[329-344].

<sup>46</sup> Humberto Ávila, *Teoria Dos Princípios* (Malheiros 2012).[44].

<sup>47</sup> Ingo Wolfgang Sarlet *et.al*, *Curso de Direito Constitucional* (Saraiva 2019).[191-192].

strengthens, in terms of effectiveness, the provision of general duty present in the *caption*. Concerning the seven subparagraphs, the Public Power is the entity to take action to keep the environment ecologically balanced. Each of these subparagraphs is infra-constitutionally regulated.<sup>48</sup>

The duty is defending and protecting, that is, keeping and/or restoring the environment ecologically balanced. In this topic, it is worth presenting some delimitations of the matter of the duty of the State to the so-referred environment. However, it is highlighted that, materially, the one who determines what is and in which conditions one may have an ecologically balanced environment is not the legal expert/jurist. It is up to them to communicate with other fields of knowledge to translate through the law what is to be protected, kept and preserved so that the referred law, in specific the transdisciplinarity,<sup>49</sup> is unique to the areas of knowledge that have the environment as its object, such as environmental law.

Therefore, for instance, besides the laws that regulate art 225, Presidential Decree No 4.297, which regulates the 9<sup>th</sup> art, II, of Law No 6.938, sets the criteria for the Ecological-Economic Zoning of Brazil (ZEE). The 8<sup>th</sup> art (defines the technical assumptions for the ZEE executors), in combination with arts 12 and 13, requires technical information according to the respective requirements of ZEE. In the same direction, the 6<sup>th</sup> art of Resolution No 001 of CONAMA regulates the technical criteria that must be developed in the Environmental Impact Report (RIMA). IN/ICMBio/2008 regulates the administrative procedure for carrying out technical studies and public consultation to establish a federal Conservation Unit.

This information, studies and criteria comprise the technical counselling and provide the accomplishment of the constitutional duty carried out by economists, geographers, ecologists, anthropologists, engineers, etc who should be registered in the Federal Technical Register of Activities and Defense Instruments (CTF/AIDA). It is also important to recall the own transdisciplinarity of environmental law in

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<sup>48</sup> The laws are n. 9.985/2000 n 11.105/2005. And Lei 13.123/2015.

<sup>49</sup> Montaña Cortez., *Terceiro Setor e Questão Social: Crítica Ao Padrão Emergente de Intervenção Social São Paulo* (2002).[84].

public audiences of the judiciary for a decision on public affairs, such as the one that recently occurred in September 2020 in the ADPF 708 on the omission of the federal government in the application of the Fundo Clima, that also executes the right/duty studied here. Businesspeople, research institutes and professionals in several areas (economy, production engineering, rural producer, etc.) were called to discuss the topic, which the legal field could not single-handedly decide.

Consequently, the constitutional fundamental duty<sup>50</sup> strengthens itself in several other duties translated and interpreted in several legal rules (principles and rules). Thus, there is a series of infra-constitutional regulations that specify the more general duty expressed in the *caption* of the constitutional article studied. We will not list all the legal determinations that explain the constitutional fundamental duty under analysis, but we will bring examples related to the triple environmental responsibility.

Regarding this, we highlight some norms that strengthen art 225 of the CRFB concerning the fundamental duty of protecting and defending the environment, that, by being regulated, is apt to focus on specific cases according to the specific rules corresponding to the facts. It is worth mentioning that it is also a fundamental duty of the Public Power assuring the provision of information related to the environment. The Public Power might even be required to produce them in case of absence (art 225 of the CRFB c/c 9th art, XI, of the Law n. 6.938/81).<sup>51</sup> In turn, this duty of the Public Power to inform enhances the community's duty to defend and protect the environment.

### **Criminal Duty**

The duties arising from Law No 9.605/98, regarding criminal and administrative penalties concerning conduct and activities considered harmful to the environment (Chapter V – Crimes against the environment), are a significant

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<sup>50</sup> Rammê (n 21).

<sup>51</sup> Guilherme Camargo Massaú, 'O Controle Das Decisões Do Presidente Da República Em Relação Aos Princípios Constitucionais Das Relações Internacionais' [2019] Revista Brasileira de Estudos Políticos.[119].



example of the infra-constitutional regulation of the application of the general duty of protecting the environment in the criminal scope.

This is justified by a specific effort to maintain an ecologically balanced environment that avoids harmful conduct to the legally protected asset. Therefore, it was up to the Public Power to regulate the harmful practices to the environment (along with the community)<sup>52</sup> and punish the ones liable for the damage. That way, it is up to the individuals to act (or not) in accordance with what is described in the environmental criminal categories, which represent the fulfilment of the fundamental duty to an ecologically balanced environment.

### **Administrative Duty**

The administrative-bureaucratic duties result from the demand of the fundamental duty of the State to protect and defend the ecologically balanced environment. Therefore, the role of administration that matches the accomplishment of studies of environmental impact, for instance, shows the central position of the Public Power in administrating the use of the environment to comply with the duty described in art 225, *caption*, of the CRFB. This time, higher or lower demand for environmental protection and higher or lower articulation of the Public Power with the community qualify the importance of the level of accomplishment of constitutional goals.

Besides establishing criminal sanctions, the Environmental Crimes Law sets a number of administrative sanctions (admonition, fine, apprehension, embargo of work or activity, etc) when a typified harmful act occurs, which will be applied by the Public Power in fulfilment of the constitutional duty studied. Another example is Law No 6.938, which provides the National Policy for the Environment. This law was widely welcomed by the CRFB/88. The 2<sup>nd</sup> art lists a series of principles that aim to preserve, improve, and recover the environmental quality that impact the right to life in the socio-economic development and protection of the dignity of

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<sup>52</sup> the Public Civil Action (Lei n. 7.347/85). And the Class Action (Law 4717/65).

human life.

To confirm such principles, the National Environmental System (SISNAMA) – 6<sup>th</sup> art – establishes agencies and entities in the states, organised in solidarity, to accomplish such Policy, whose implementation is structured in several instruments of application in the duties to be observed. Among these instruments, it is important to highlight the setting of standards of environmental quality, environmental zoning, the assessment of environmental impact and the setting of specially protected spaces.

### Civil Duty

While the criminal and administrative duties may set normative conditions for fulfilling the constitutional duty of defending and protecting the environment by the Public Power and the community. The civil duty is entitled to the community, individual or legal entity.

Regardless of the criminal and administrative sanctions, the one who causes some harm to the environment has the duty to repair them (art 225, s 3<sup>o</sup>). Environmental harm, which can be individual and collective, constitutes an ‘undesirable change in a set of elements called environment’ that substantiates ‘harm to the fundamental right that all have to benefit from and enjoy the appropriate environment’ and ‘comprises the effects that this modification causes in the health of people and their interests’.<sup>53</sup> The instrument of redress of the collective environmental damage, either the community (individual or corporate legal entity) or the Public Power (legal entity under public law), is the objective civil responsibility (1<sup>st</sup> paragraph Law 6938/81 and single paragraph, art 927 of the Civil Code) to be enforced in Public Civil Action (Law 7347/85).

When the responsibility is found, the individual or legal entity is responsible for damage remediation that can be achieved by natural restoration or ecological compensation. *In natura* restoration via recovery or recomposition is the best

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<sup>53</sup> José Rubens Morato Leite *et. al.*, *Do Individual Ao Coletivo Extrapatrimonial* (Revista dos Tribunais 2011).[94].

form to repair with the termination of activities. If that is not possible, ecological compensation shall be imposed; that is, the substitution of the harmed environmental asset for a similar one or the application of a financial penalty.<sup>54</sup>

## Conclusion

The text sought to highlight the development of the fundamental right of defending and preserving the environment for present and future generations, as associated with the fundamental right to a balanced environment provided in art 225 of the CFRB. The duty of caring for the environment complies with the principles-duties of solidarity and intergenerational equity that demand from the human being a behaviour linked to the ethics of life and responsibility, taking into consideration systemic thinking.

It is from the constitutional framework and the infra-constitutional regulation that a normative network of environment protection and defence is established in the Brazilian state. Therefore, it is not a government policy; the ecologically balanced environment is a state policy. Moreover, it is an international community policy despite the fact some States do not acknowledge or simply disregard it.

The duty provided in art 225, *caption*, of the CRFB is not due in itself as it lacks efficiency. There is an expressed delimitation of beneficiaries, the Public Power and the community. While the duty of the community is void in terms of materiality, the duty of the Public Power is in the first paragraph and its subsections that require strengthening and are regulated. From this perspective, we point out examples related to the triple responsibility for damage caused to the environment when there is no compliance with the duty to defend and preserve.

The right/duty to and with the environment are associated constitutional classes that are implemented in contrast; that is, the fundamental duty of protecting the environment may make effective the corresponding right to which the duty will influence and materialise.

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<sup>54</sup> *ibid.*[213-232].

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**HOW TO CITE:** Márcia Bertoldi and Guilherme Massaú, 'The Fundamental Right for a Balanced Environment' (2022) 37 *Yuridika*.