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From contamination to banning: the legality of asbestos mining in comparison with fundamental rights

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Abstract— *Beyond the theoretical formations concerning Environmental Constitutional Law, the issue that this work emphasizes is the importance of also analyzing the argumentative structure and the configuration of institutions, under the influence of the Fundamental Rights Theory. Thus, it is intended, based on the analysis of the case of the asbestos ban, to critically analyze the whole normative structure as well as the elements that motivated the Federal Supreme Court (STF) to dismiss the Direct Action for Constitutionality No. 4066. The discussion is then necessary to understand why there are limits on the use of this mineral, besides verifying that the absence of public policies contributes to the invisibility of asbestos-related problems in Brazil. Nowadays, the victims of asbestos do not have their illnesses recognized, and their rights are denied in various instances. It's conclude that the fight to end the use of this fiber and to reduce the diseases caused by it is a political movement, as well as a legal one, since it is faced with the need to guarantee and enforce fundamental rights.*

I. INTRODUCTION

The normative system is in continuous transformation, and it is up to it to ensure the process of social harmonization in view of the good life, as well as the continuity of the living conditions of the human species. Furthermore, it is charged with the potentiality of establishing measures that aim to ensure the prevention of anthropological actions that are unfavorable to the environmental balance, thus preventing them from being the main causes of environmental impasses and unbalance that often endanger the right to life and social coexistence, such as environmental catastrophes that are often announced in the media

On the other hand, the Law, an instrument that regulates human conduct, could not be lowered in relation to the environmental problems immersed in the daily reality of human life. Therefore, aiming to revalue its function as the most appropriate mechanism to normatize and regulate the conducts that harm the environment, it started to get involved in environmental issues. Such involvement is a novelty that also has a technical and scientific character and requires communication with various areas of science for its understanding, such as conflicts arising from mineral exploration that require knowledge that connects geology, biology, physics, chemistry, medicine, and many other areas of science.

In this scenario, the systematization of Environmental Constitutional Law demonstrates the need to positivize the relationship between human beings and the space in which they live, a hard-to-define space that, when conceived in its broad sense, gains dimensions that go beyond all the activities and interactions of individuals. This evident need for limit definitions is fundamental to its applicability, because, according to Antunes (2012, p. 04), the legal

delimitations will serve as an important instrument for delimiting the regulatory and normative frameworks of human activities in relation to the environment. Marked mainly in art. 225 of the CF/1988.

Morever, in order to present an answer to the multiple challenges posed by the so-called environmental crisis, Constitutional Law is invoked as a perspective to present ways out of the threats that may threaten the Democratic State of Law by violating fundamental rights, in order to make an accurate analysis of the exploitation of asbestos and also its use for the processing and production of a variety of products. This problem was the object of the Direct Unconstitutionality Action (ADI) 4066, which requested the invalidity of the provision of Law 9.055/1995, which provided for the possibility of using white asbestos as raw material in industrial elements, thus making its exploitation process and the economy surrounding it viable.

II. THE CONTAMINATION

The initial delimitation of the approach to this work requires an understanding of what exploitation means and the positive and negative impacts, which cross the legal, social, economic and environmental fields. We will retrace the history of chrysotile asbestos from the time it began to be exploited in Brazil, in the mine of São Félix, in the State of Bahia, until the peak of its extraction in the mine of São Félix and Cana Brava in the State of Goiás, with surplus economic balances being the representation of development and temporary progress in the places where it was accumulated. Asbestos and abestos are nomenclatures given to the fibrous ore, easy to extract with a plurality of colors, textures, and chemical compositions that was exploited for decades all over the world. In former times, this ore was classified as a magic mineral due to the quantity of possible uses, since it is the raw material for more than three thousand different types of derivatives or products that it is part of. The physical-chemical properties make possible a wide use that goes from the composition of civil construction materials (roof tiles, coatings, reservoirs, flooring, etc.) to the composition process of vehicular brake discs. For so many conditions, it is understandable that there is a constant dispute for its use, given the fact that:

When dealing with the banning of a mineral good and the artifacts produced with it, we know we are entering the terrain of industrial and commercial disputes that find, face to face, businessmen interested in the continuity of its extradition and transformation and those who count the gains from the production and commercialization of substitute materials (SCLIAR, 1998).

It is certain that mineral exploration has contributed a lot to the building of the complex society in which we are inserted, ensuring from the technological development to the elementary ones that implied in the improvement of the quality of life. It is worth noting that it is a material with secular applicability, having been used since classical antiquity. However, when it comes to the exploitation of asbestos, the scenario changes due to the complexities originated in its extraction and processing processes. Many are the medical theorists who prove that the environmental pollution caused by asbestos causes diseases to human health. At first this impact was not perceptible. It was only after years that cancers and diseases acquired due to the use of asbestos became evident.

Well then, this development begins to be rescinded from the moment it becomes a risk, which, besides commercial disputes over raw material, becomes a collective threat, producing risks within society, as assured by the World Health Organization in resolution WHA60. 26. Therefore, we understand the complexity of this phenomenon, which advances compromising fundamental rights, above all by putting at risk all people exposed not only to the ore extraction process, but also those who have contact with its derivatives. Therefore, the process has gained imaginable contours taking into consideration the holistic phenomena at the ecological level.

The movement to ban the use of asbestos began with the organization of the workers who were most affected by the mine. In Brazil, the Brazilian Association of Workers Exposed to Asbestos (ABREA) and its extensions were created, and it has become an important social movement which has worked together with other socio-environmental movements in an attempt to ban asbestos exploitation. Inspired by the international movements for banning that emerged in Europe in the last decades of the 20th century, they were able to achieve the political strength needed to ban asbestos in some States, since this was not yet a constitutional provision and the competence of the States to legislate on the subject was limited.

III. HOW CONTEMPORARY CONSTITUTIONALISM AND ENVIRONMENTAL LAW ARE POSITIONED

To understand the historical construction process of the environmental law, as well as its insertion in the legal system, it is necessary to immerse ourselves in the evolution process of its normative bases, especially in the elaboration movements of the great constitutional charters. Taking into consideration that Constitutionalism has been subject to constant reinterpretations ever since its

inception. It is clear that the processes of legal positivization have always been related to political, philosophical, and sociological changes throughout history, and many of these have influenced the actions of the State, structuring a diversity of guidelines.

However, for a part of the doctrine, constitutionalism is linked to legal positivism, in which it is conceived as the initial mark in the 18th century. It is possible to counter argue by associating Constitutionalism as a form of popular expression independent of normatization, since these can be imposed merely to maintain power, that is, as a factor to guarantee it. The ancient constitutionalism that aimed to defend the sovereignty of laws linked to the concepts of citizenship and deliberate the emergence of regulatory institutions, being guided by a direct democracy that made the legislative processes a space of collective construction, having Greece and Rome as main examples. As clarified:[...] Athenian democracy consisted basically in the popular attribution of the power to elect the governors and to take directly in Assembly (the Ekklesia) the main political decisions, such as, v.g., the adoption of new laws, the declaration of war and the conclusion of peace or alliance treaties [...] The Roman Republic (V to II BC) was also an important stage for the maturation of constitutionalist ideas, especially because it has instituted a system of checks and balances to divide and limit political power [...]. (CUNHA, 2012, p.33)

Nevertheless, medieval constitutionalism, represented by the English Magna Carta (1215) had as its main intention the limitation of the Absolutist Power, which occurred from the laws that had influence on the environment of the rulers, once they were subordinated to them.

When invoked, modern constitutionalism carries with it a series of influences, the first being that of the Enlightenment, and the second that of positivism, both of which triggered social revolutions that influenced the formation of the Dualist (Liberal/Interventionist) State. The modifying action of the Law and legal relations were directed to the totality or to a considerable part of the social order, which can be vehemently observed in the principles of the French Revolution and American Independence and, consequently, influenced the formation of Social Democracies.

Contemporary times, however, are marked by being a period of global conflicts, in which economic issues are heated, marked by a high value-added burden, the foundations of constitutions, and the failure of Legislative States under the Rule of Law. A complex society needs an analysis of its multiple structures and systems. Understanding this diversity of spaces and fields of action, we will seek the influence of the sociological Niklas Luhmaan in an attempt to understand the normative legal system that is continuously confronted with other systems that are also constituted by their codes, languages, and validation plans, and that in many moments confront and need each other in order to be constituted.

In the same way that we observe the moment the legal and political systems are connected, analogically it can also occur between the legal and ecological system system, so they will always be in dialogue, each one of them established by its own autonomy, being politics, economy, sciences, ecology, religion, etc.

To the exact extent of this understanding, that the 1988 Constitution of the Federative Republic of Brazil is included, because not only in its Title II, but also in several other points of its text ensures a series of fundamental rights based on these principles. Pioneerism that will bring its due prominence by bringing the environmental theme addressed directly, that is, specifically, without linking it to another theme. Debating environmental issues in a broad way and dialoguing with several principles.

IV. PRINCIPLES AND FUNDAMENTAL RIGHTS

Conceiving the structure of a Fundamental Rights Theory for the time being requires a deep reflection of the constitutionalist movements already previously presented in order to justify the whole contribution of the Legal System as the main justifying element for the existence of the state's limits and obligations. The emerging norms of the fundamental rights reach the condition of legitimating the whole legal System in force, therefore thinking democratic state of law from **this** evolution.

When expressing the process of dogmatic construction on the bases that delineate fundamental rights as a practical subject, Alexy (2006) refers that these aim, in its last sense, at the rational substantiation of concrete "should-be" judgments within the scope of fundamental rights. The rationality of the reasoning requires that the path between the fundamental rights provisions and the "ought-to-be" judgments be accessible, to the greatest extent possible, to intersubjective controls, that is, they are the structuring pillars of whatever legal system it is under.

The word principle is multi-conceptual, which makes it a complex word to define. For the legal environment, since this is our focus, a principle is a designating and structuring element of a complex system of ideas that

will culminate in the development of norms, turning them into perfect axioms. Forming a theory of fundamental rights therefore requires the construction of a solid analysis of the process of conformation of the principles that emerge from it. Thinking about a Democratic State of Law makes it necessary to understand that: In terms of justification, the Constitution plays a special role regarding principles in the Democratic State of Law. Although it cannot be conceived as the only repository of them, it is its task, par excellence, to indicate (and preserve) those principles deemed most important by the citizens through the sensitive constituent representative of society. The competition between constitutional principles reveals a fundamental characteristic of the society in which a Democratic State of Law exists: it is not possible to hierarchize constitutional principles because they are all equally valuable for the self-identification of a pluralist society. It is the set of them, and not one or the other, that reveals who we are and who we want to be. (GALUPPO, 1999)

In Brazil, the principles became more effective after the 1988 Constitution, which was based on human dignity. In the legal system, the constitutional principles are at the apex of the legal system, since they will support the normative system and its guidelines, in addition to structuring a series of guarantees.

Understanding these phenomena of concomitance among the principles, we can visualize their effectiveness in the correlation with fundamental rights. Therefore, we analyze that its origin is associated to the English Magna Carta of 1215. However, in this document, there is only the agreement made between the sovereign and the other classes (Nobility and Church), with the purpose of delimiting the sovereign's powers.

The origin of the positivization of the Fundamental Rights can be actually associated to the French Revolution, from the Declaration of the Rights of Man and Citizen (1789) and to the American States' Declarations of Rights through the Bill of Rights of 1776, whose texts served as a reflex for the Constitutional Letters of the 18th and 19th centuries.

When we invoke the right to an ecologically balanced environment, it is salutary to point out that this right is part of the list of fundamental rights of the third generation, which consists of a catalog of rights that are transversal in the scope of the dimensions of rights.

They are subdivided into three dimensions, in which one generation does not exclude the other. The first generation refers to negative liberties, or individual rights and guarantees, such as life, freedom, and property. The second generation rights are related to state intervention, refering to social, economical, and cultural rights in the sense of guaranteeing equality in the material sense between men. Finally, the third generation are the rights of solidarity or fraternity, which are evidenced as follows: These latter rights, which include the right to development and the right to the common heritage of mankind, presuppose the duty of collaboration of all states and not only the active action of each one, and carry a collective dimension that justifies another name for the rights in question: the rights of peoples. (CANOTILHO, 1997, p.386)

As a first perspective, it is about the understanding of diffuse rights or diffuse ownership, once it has the perception of collectivity in face of individuality, in which the legal perception surpasses even the relations between human subjects, but all its complexity and the universe that surrounds it. The object becomes the experience of the collective and its future construction, that is, the need to revisit the founding principles of the collective human experience itself. Other authors also bring two more dimensions in addition to the others mentioned above; the fourth presents subjects about new rights such as euthanasia, bioethics, assisted reproduction, and the fifth generation deals with virtual rights.

V. THE POSITIVIZATION OF ENVIRONMENTAL LAW IN THE CRFB/88

The 1988 Constitution of the Federative Republic of Brazil was avant-garde in dedicating its Chapter VI, Title VIII, to environmental issues as the normative structuring basis for a broad understanding of Brazilian Environmental Law. It dedicates an entire Title to all these rights, in addition to other provisions such as, for example, Article 225, which deals with environmental issues.

In this device, it is possible to verify its degree of comprehension, which confers its scope to all social actors. It becomes an element of integration and comprehensiveness with the rest of the normative system. Gutier (2010) calls them as fraternity or solidarity rights that will culminate in the constituent meaning. In understanding it as a principle rule, it is necessary to broaden the understanding of its spectrum of applicability and the interconnection with other principles.

However, it can be seen that the influences of this fundamental right can radiate its effects throughout the entire legal system, not limited to the strict or conceptual sense, but may encompass other rights, such as: the preservation of health, well-being, safety of the population.

It can even reach the principle of conformity of the economic order that grants it the attribution of a fundamental right, once it involves several public and private activities.

Another point worth mentioning is the broad conception that the environment is essential to the quality of life. Therefore, it will be up to the State to protect this right, a mark that gains credit as a duty and no longer as a mere faculty. Soon this matter leaves the field of administrative discretion and adheres to a country/nation project, and it is up to the State to call upon itself the responsibilities in conducting the guidelines linked to this theme, which ceases to be a merely political agenda, entering the responsibilities of those who constitute the State.

Remember that such responsibility extends to other citizens when legal tools are also available to them that are able to protect and ensure this collective good, such as the plurality of procedural means for its defense, such as the possibility of criminal action, the ordinary civil process, the popular action, the public civil action, among others.

VI. INFRA-CONSTITUTIONAL LEGAL EFFECTS

One of the most relevant topics established as one of the goals for the millennium is undoubtedly linked to the "environmental issue". The concerns surrounding it have approached that go beyond movements and environmental activist groups, reaching the debates between leaders and heads of state and, obviously, in the international community's discussion forums around a collective resolution with the objective of finding an "environmental balance".

To prove such reflections we must understand that the demand for a healthy and balanced environment is, at the same time, a way to highlight the other fundamental rights of human beings, a right whose preservation is recognized as a common interest of Brazilian society since the country has stood out throughout history as an important signatory of multiple international treaties and agreements.

This reflects that by crediting the need for a constitutional amendment, an instrument whose purpose as Silva (2011) considers as a formal process of changing rigid constitutions, through the action of certain bodies, through certain formalities, established in the constitutions themselves to exercise the reforming power. By gaining the attributes of a constitutional device, it reaffirms the normative importance of treaties for the Brazilian legal system.

Recognizing that climate change represents an urgent and potentially irreversible threat to human societies and to the planet, and therefore requires the broadest possible cooperation of all countries and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions. The last agreement signed by Brazil regarding this issue was the Paris Agreement, a treaty within the United Nations Framework Convention on Climate Change (UNFCCC), which governs measures to reduce carbon dioxide emissions from 2020 onwards. The agreement was negotiated during COP-21 in Paris and was approved on December 12, 2015.

The normative power of the Constitution allows us to analyze the context in which the environmental principles derived from it are inserted. The subject of public policies on the matter cannot be immune to the principle of the universality of jurisdiction, as a means of realizing the value of environmental justice.

The irradiation of its effects is notorious throughout the legal system, causing it to be restructured in light of the values enshrined in the constitutional text. These effects will be noticeable mainly in the state constitutions that, despite not having sovereignty to draw their guidelines, have autonomy in the conduction of their constituent processes, being able to expand the guidelines as long as they preserve the fundamental rights guaranteed by the Constitution.

VII. CONCLUSION

The complementary legislation presents Law 9,055 of June 1, 1995, which regulates extraction, industrialization, use, sales and transport of asbestos/asbestos-containing products, as well as natural and artificial fibers, of any origin, used for the same purpose, and makes other provisions.

Another condition that makes this situation different is the plurality of impacted subjects, as we intend to study. Either because they are directly exposed to the phenomenon originating from the impact, or because of the indirect exposure of the agents that caused the environmental contamination process. Therefore, there is a legal difficulty in identifying third parties that have received the impact beyond the environmental impact generated by mineral exploration.

The availability of legal tools before the court, thus, national, regional and local interests must be harmonized in the legal treatment of these issues, leaving aside hermetic or isolationist legal constructions, contrary to the integration of private interests in the social interest. The precautionary principle means not procrastinating on preventive measures, even if these measures require the

immediate investment of financial resources to avoid pollution and deforestation and to effect recovery.

In fact, as the author states, the precautionary principle should be invoked even before polluters cause damage. Thus, it is important to understand the procedural legal aspects and their availability to impacted societies, so that they can use subsidiary legislation to repair damage, or even foresee possible impacts through precaution with a view to eradication - even if they are often considered impossible - so that the legal system can pay due attention to these problems.

Thus, it is necessary to understand that the duty to recover the environment degraded by the exploitation of mineral resources is under the normative guidance of the CRFB/88 in art. 225 §2. The constitutional text allows us to understand that the recovery procedure must be conducted by technical guidance. This in turn should be carried out in conjunction with the exploratory procedure, a requirement not in the analysis of the case at hand. This allows us to reflect and understand how the restoration should proceed after the exploration.

Seeking to understand the involvement of third parties who were affected only by inhaling waste without having direct contact with the exploratory process since there are particles in suspension, directly affecting the health of people who live and develop their activities in the district, which have similar clinical pictures as pointed out by ABREA asbestosis, mesothelioma and lung cancer.

Understanding the particularity of this case, especially with regard to the obligation to repair environmental damage environmental damage and even identify which phenomena and legal instruments are involved in these cases, it is necessary a theoretical legal immersion in the field of Civil Law, especially in the issues that outline the obligation to repair the damage caused. It is also necessary to invoke the Law of National Environmental Policy (Law no. 6.938, of August 31, 1981) in consonance with art. 225, §3 of the Constitution.

It is necessary, therefore, to investigate the legal tradition, from a critical and in-depth analysis regarding the understanding of the liability process, having as basis of applicability in the concrete case that makes it possible to elucidate the scope of environmental liability. In this way, we will contribute not only to the elucidation, but also to the understanding of possible future problems, ensuring in turn, the protection of an environment that is indeed protected for other generations and a legal system that reaches its goals.

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