THE USE OF ASBESTOS IN BRAZIL: THE CLASH OF TWO RATIONALITIES IN THE SUPREME FEDERAL COURT

HELOÍSA BOT BORGES[1], **VALDIR FERNANDES**[2]

Introduction

Economic growth has become the bona fide obsession of our times, whereby increasing Gross Domestic Product - GDP, an indicator used to gauge the wealth produced in a country, is pursued by virtually all countries, generally from the standpoint that reaching a given status will bring quality of life to all. However, as different studies show, this quest produces consumption patterns that are incompatible with environmental resilience - the ability of an ecosystem to absorb impacts without compromising its basic structure and the ways in which it operates.

Despite the limitations of natural resources, the contemporary, predominantly capitalist, means of production does not include effects on the environment in its calculations, addressing them only as externalities. By doing so, it ignores the fact that nature is the basis for its own survival.

Against such a backdrop, the economy has ceased to be merely an activity as a means, the result of production from material conditions, but has become the end goal of human life - inverting the means and the ends (HORKMEIER, 2002). Yet environmental degradation means that nature's limits must be respected and results in the need for the development of a new rationality.

Rationality is a category of fundamental analysis for understanding and addressing the environmental crisis, insofar as negative human interference in the environment is the result of a social process. In this way, the proposal to construct an environmental rationality as a way of acting as a check and balance on the hegemony of economic rationality in contemporary society is clearly needed.

In this context, the objective of this article is to present an analysis of judicial rulings on the use of asbestos in the scope of the Supreme Federal Court. It will endeavour to understand whether their decisions contain any reflections on the consequences of unche-

[1] Mestre em Organizações e Desenvolvimento pelo Centro Universitário Franciscano do Paraná (FAE). E-mail: helo_bot@yahoo.com

[2] Professor do Programa de Pós-Graduação em Gestão Ambiental da Universidade Positivo (UP). E Governança e Sustentabilidade do ISAE/FGV. E-mail: valdir.fernandes@icloud.com

cked exploitation of environmental resources or if they follow the economic rationality of merely using nature. Our aim is thus to contribute to reflections on the institutionalisation of environmental issues in society and the construction of an environmental rationality within an interdisciplinary approach to relations between nature and society in a capitalist context. This takes into account the fact that in the Federal Constitution of 1988 the environment is a subjective fundamental right for all people, owned on a trans-individual and intergenerational basis, and which the economic order is meant to defend. If the Brazilian legal system features a Federal Constitution that is deemed sufficient to provide judicial decisions that protect the environment, the stance of the Supreme Federal Court - STF, the highest interpreter and custodian of the Constitution, must be also be verified.

In terms of methodology, the starting point adopted are the clashes in the national courts between the principles of economic order, free competition and freedom of initiative against the principle of defending the environment, all of which are recognised under the 1988 Federal Constitution

As it would be over-ambitious to tackle all the national courts, we have limited our approach to the rulings of the Supreme Federal Court as the focus of our analysis, seeing as how, by its very mandate, the Court has the final word in terms of interpreting the Constitution.

Corbetta observes the importance of judicial decisions as being revelatory in terms of social phenomena:

> Another source of judicial information is court decisions. They are generally detailed, they reproduce the facts, the different positions during the trial and the reasons behind the sentence. This is why they comprise an excellent documentation of society and its dominant values. (CORBETTA, 2007, p. 394, our translation)

Decisions related to the use of asbestos were chosen for analysis due to two main justifications: (i) they explicitly refer to the clash between economic interests and socio-environmental interests; (ii) they have a social impact, which has led to public hearings being held in the Supreme Federal Court.

Bearing in mind that criteria are considered in any decision-making process and therefore a rationality always exists, here, as a concept or a category of analysis it emerged as a way of casting light on the socio-environmental aspect and the contradictions it reveals. In this way, we needed to broaden the concept of rationality, particularly with regard to its typologies, economics and the construction of an environmental rationality.

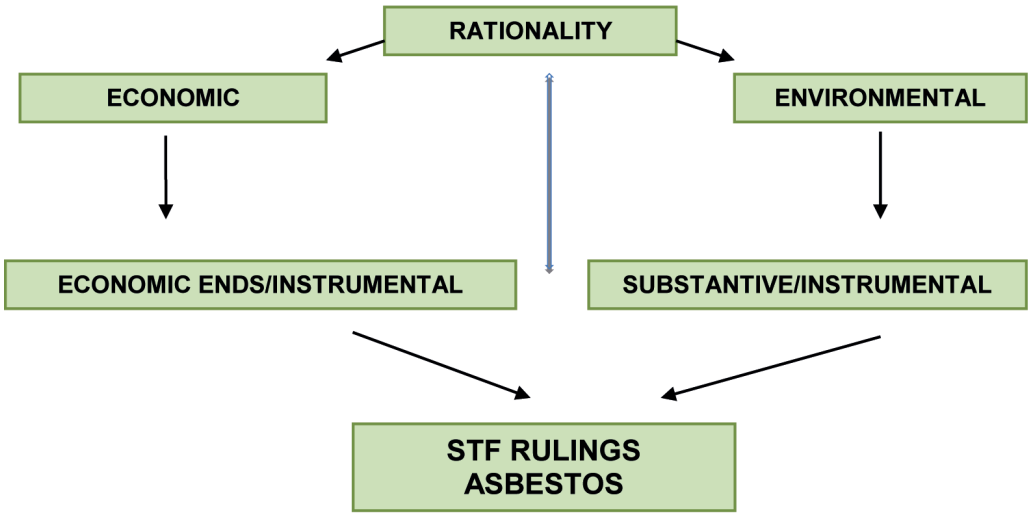
In order to answer the question behind this research - "What is the predominant rationality in the Supreme Federal Court's decisions in cases of asbestos use?" - we analysed decisions related to Directly Unconstitutional Actions 2396, 2656 and 3937.

The rulings were selected from the STF website – https://www.stf.jus.br, using the "jurisprudência/pesquisa" (case law/search) icon, where in the "free search" field we typed the word "asbestos". (in Portuguese).

In addition to the decisions, the Statements of Claims were studied in order to glean the allegations that had led to the cases being filed. The STF site was also used by means of the "processos/acompanhamento" (case/case monitoring) icon, where, by entering the case number, it was possible to obtain the initial documentation for the cases.

In our analysis, we tried to identify: the interests involved, the parties' arguments and the ruling criteria. These elements were then analysed, particularly the ruling criteria, to see if they matched a profile of substantive thought, as per the values stipulated by the Constitution, or if they pursued a utilitarian view of the environment.

The analytical model, which was based on the concept of rationality, and the way it mediates relations between the environment and the economy, can be summarised as follows:



Economic rationality versus environmental rationality

The Fourth Climate Change Evaluation Report (IPCC, 2007) by the Intergovernmental Panel on Climate Change highlighted the significant anthropogenic contribution to global warming and climate change.

While there may be controversy in academic circles surrounding the link between higher global temperatures and the increased concentration of greenhouse gases in the atmosphere due to human action, common sense recognises that human action is the cause behind the increasing degradation of ecosystems.

The relationship between humans and their *habitat* has always caused pollution. Nevertheless, the pressure on the environment from a global population of seven billion people presents a complex challenge. The United Nations Population Fund's State of World Population report from 2011 takes the line that the main culprit for environmental

degradation is not population growth but rather rich countries' standard of living (UNFPA, 2011).

The unsustainable pattern of production and consumption in rich countries stems from the dominant means of production, i.e. capitalism, where economic growth is an ongoing goal. China is also not far removed from this means of production, because, despite having a socialist political system, its economy is defined as a socialist market one.

For Cechin (2010), in the dominant paradigm of the 20th century, economic processes are based on the laws of mechanics, that is to say they are closed and circular, where the creation of waste that does not re-enter the productive system is not taken into account to a sufficient degree. According to the author, it was only in the 1960s that the Romanian economist Nicholas Georgescu-Roegen, in the article "Process in Farming Versus Process in Manufacturing: a Problem of Balanced Development", in 1965, and in the introduction to the collection "Analytical Economics", in 1966, carried out an in-depth critique of the mechanism and the idea of economic processes as being circular and isolated in nature.

Cavalcanti (2008, p. 200) praises the importance of the thinking of the Brazilian, Celso Furtado, as at a time when "the field with which we are now familiar, that of the environmental economy, was practically inexistent, much less that of the green economy", he was ahead of the game and raised in his work "The Myth Of Economic Development", the impact of the economic process on nature and the modern myth of economic development.

Veiga (2007) does not find it strange that in theoretical circles one finds the trends of human development (1990), post-development (1991) and sustainable development (1992) emerging at the same time. Using Marx's social metabolism and dialectic thinking as a basis, Veiga attributes the emergence of these responses to an "objective need": the dialectic relationship between culture and nature. In this regard, Veiga considers sustainable development the "synthesis of the *socio-environmental dialectic*, in reaction to the serious metabolic shortcoming of humankind's relationship with nature that grew entrenched with the industrial revolution" (Veiga, 2007, p. 89).

According to Polanyi, "the most important discovery in recent anthropological research is that the economy, as a rule, is immersed in its social relations" (2000, p. 65). Nevertheless, a new type of economy emerged from the 19th century, a market-controlled economy, where society is led "as if it were a market accessory" (2000, p. 77), where "mankind, under the name of the workforce, and nature, as land, were put up for sale" (2000, p. 162). The author highlights what he considers an economic fallacy, "which consists of the trend to identify the human economy with its market form" (1994, p. 93), where the falseness of the premise lies in the adoption of a concept in the purely formal sense, where the objective - human survival - is replaced by the means - accumulation of goods and assets.

Capitalist mercantile logic, based on profit and unlimited growth, leads to exhaustion of natural resources. This relationship with nature means the role of the economy in society has to be revised, as "the economy, which should only be a subsystem of the biosphere, has become its greatest determining factor" (FERNANDES; SAMPAIO, 2008, p. 88).

The social construct that led to the economy assuming a size that relegated nature, and consequently humankind itself, to a secondary role is backed up by the predominant notion of rationality.

Ramos refers to a "behaviouralist syndrome", according to which "the general obfuscation of the personal sense of appropriate criteria for human behaviour has become a basic characteristic of contemporary industrial societies" (1989, p. 52). As a counterpoint to the behaviour is action "belonging to a stakeholder who deliberates about things because he is aware of their intrinsic purposes" and which "constitutes an ethical form of conduct" (1989, p. 51). Therefore, in a criticism of market-centred rationality, Ramos suggests a substantive, emancipating rationality that offers a healthier life for humans.

For Gorz, the predominance of the concept of the economy in its formal sense "provided a slate cleaned of all values and ends that were irrational from an economic point of view, merely retaining monetary relations between individuals, relations of strength between classes and an instrumental relationship between mankind and nature" (2003, p. 28).

Instrumental rationality on its own does not merit a negative label insofar as it is necessary for achieving substantive aspects. As Souto-Maior states, "instrumental rationality merely requires that the action be based on a calculation of the appropriate means to achieve the individual's purposes, be they selfish or altruistic" (1998, p. 971), meaning it would be a mistake to identify instrumental rationality with economic rationality.

Following the same line, Fernandes clarifies that "economic rationality can be defined as the application of instrumental rationality to the purposes of predominantly economic content" (2008, p. 15).

Leff stresses the need to develop a new social rationality, an environmental one, incorporating "new principles and values that prevent its strategies from being evaluated in terms of the capitalist-generated rationality model" (2007, p. 129). This proposal does not overlook the need for targets and ends to be set, yet it advocates respect for values and concepts such as ecologically sustainable development, quality of life, social and cultural diversity and knowledge dialogues.

Fernandes and Ponchirolli (p. 621-622) see in Leff an "attempt to marry the formal aspects of society (the state apparatus and the economy) with substantive aspects developed through environmentalism", constituting a "criticism and alternative to the rationalisation of modern society, based on the shift in socially-constructed criteria, whereby concerns about the environment become inherent to the development process".

The transition towards an environmental rationality, according to Leff (2006, p. 262), goes beyond the confrontation between two opposing "logics" - the economic and the environmental - insofar as it requires transformations in ideologies, institutions, legal norms, cultural values, technological structures and social behaviours, a network involving the interests of classes, groups and individuals.

From this point of view, where the construction of an environmental rationality requires institutional and normative structures to be reviewed, judicial power takes on a central role as it is a key player in the social dialectic through its interpretation and implementation of laws.

Sustainable development in the Federal Constitution of 1988 and judicial power

The environment in the 1988 Federal Constitution is a fundamental subjective right for all people owned on a trans-individual and intergenerational basis. It is the duty of the government and society as a whole to protect and preserve it. This is what Article 225 stipulates, *caput*, by which "All have the right to an environment that is ecologically in equilibrium and that is available for shared use by the people, essential to a healthy quality of life, which imposes on both the government and society as a whole the duty of protecting it and preserving it for both the present and future generations". This should be interpreted in accordance with Article 1, Paragraph III, which conveys the principle of the dignity of the human person.

Protecting the environment is of such relevance in the Constitution that it is deemed a central principle of the economic order (GRAU, 2012, p. 251) pursuant to Article 170, Paragraph VI.

Joint interpretation of Articles 170 and 225 leads to the conclusion that national development, one of the fundamental targets of the Federative Republic of Brazil, which is referred to in Article 3, Paragraph II of the Federal Constitution, is not a synonym for mere economic growth but coincides with the notion of sustainable development.

The Federal Constitution lies at the summit of the Brazilian judicial order, which is why it enjoys supremacy over other norms of the legal system for which it acts as the yardstick for validity and as an interpretative force (BARROSO, 2011, p. 199). Due to this superior position, the other norms of the system are subject to what is called constitutionality control, which can be diffuse or concentrated. Whereas in the former, any judge or court is competent to declare a norm unconstitutional through analysing the specific case, in the latter checks on the compatibility of the rule against the constitution (state or federal) are carried out by means of filing individual lawsuits where the law is questioned in theoretical terms. With diffuse control, which applies to the parties involved and in relation to the lawsuit in question, the Supreme Federal Court - STF is the ultimate appeals body. Even for concentrated control it is the only body with the competence to rule on the constitutionality or otherwise of a particular law, or federal or state legislative measures vis-à-vis the Federal Constitution, and its rulings apply to all parties and are binding.

Even though development in the Federal Constitution is synonymous with sustainable development, in reality socio-economic inequalities reveal the hegemony of economic power and its logic of exploiting environmental goods. The contrast between the constitutional model and reality has led to conflicts of interest which have ended up before the judiciary.

The upshot of this is the resulting need to check which criteria drive the decisions of the Supreme Federal Court, the maximum interpretative body for the Federal Constitution: whether they are instrumental and economic or whether they are the environmental terms that permeate the entire Federal Constitution.

The rulings involving the use of asbestos explicitly deal with the clash between economic and socio-environmental logics. The data they offer reveal the players, arguments and domination strategies involved.

Asbestos and conflict of interests before the Supreme Federal Court

Asbestos is a general term or commercial name for a range of fibrous minerals belonging to two groups: the amphiboles, consisting of the varieties amosite, antophyllite, actinolite, crocidolyte and tremolite; and the serpentine, where chrysotile (or white asbestos) is the only variety.

Asbestos has properties which give it a commercial value, chiefly among which are its high tensile strength when compared to steel together with its non-flammability (SCLIAR, 1998). However, when viewed from a human health standpoint, asbestos is malignant as exposure to its fibres is linked to diseases which vary from the occupational - particularly those that depend on the level of exposure (asbestosis and lung cancer) - to those that are less heavily dependent on exposure levels (pleurisy and mesothelioma) and which can occur through environmental and/or occupational exposure. (WUNSCH FILHO; NEVES; MONCAU, 2001).

Despite the scientific evidence on the public health risks, in Brazil the extraction, industrialisation, use and marketing of the chrysotile variety (or white asbestos) are allowed by Federal Law 9.055/1995, as Article 1 and 2 thereof stipulate:

> Article 1 The following are banned nationwide:
> I – extraction, production, industrialisation, use and marketing of actinolite, amosite (brown asbestos), antophyllite, crocidolyte (blue asbestos) and tremolite, which are varieties of minerals belonging to the amphiboles group, as well as products that may contain these mineral substances;
> II – spraying of all types of fibre, both asbestos of the chrysotile variety and the natural and artificial types referred to in Article 2 of this Law.
> III – sale in bulk of all powder fibre, both asbestos of the chrysotile variety and the natural and artificial types referred to in Article 2 of this Law.
> Article 2 Asbestos of the chrysotile variety (white asbestos), of the serpentine mineral group, and other natural and artificial fibres of any origin used for the same purpose, shall be extracted, industrialised, used and marketed in accordance with this Law. Single paragraph. For the effects of this Law, natural and artificial fibres are deemed to be those that have been proven to be harmful to human health. (BRAZIL, Senate, 1995)

In the Ministry of Labour and Employment's Regulatory Norm 15, which regulates hazardous activities and operations, Annex 12 deals with the "tolerance limits for mineral dusts". Items 1.1 and 1.2 set out the definition of asbestos and exposure to asbestos respectively:

> 1.1. "Asbestos" shall mean the fibrous form of the mineral silicates belonging to the metamorphic rock groups of the serpentines, i.e. chrysotile (white asbestos) and the amphiboles, i.e. actinolite, amosite (brown asbestos), antophyllite, crocidolyte (blue asbestos) and tremolite or any mixture that contains one or more of these minerals;
> 1.2. "Exposure to asbestos" shall mean exposure in the workplace to breathable asbestos fibres or asbestos dust in suspension in the air from asbestos or minerals, materials or products containing asbestos. (BRAZIL, Ministry of Labour and Employment, 1991)

The Chamber of Deputies' Environment and Sustainable Development Commission stresses that while the economic benefits of asbestos mining in Brazil are concentrated in the hands of one economic group with an annual turnover of millions of dollars, the health risks are felt by society, and usually by the most deprived group of the population, which commonly use fibre cement tiles. Also according to the same Commission, the richest countries no longer allow mining and consumption of asbestos in their territories, whereas the tolerance in peripheral countries should be credited to the lack of information on the harmful effects to health and precarious working conditions.

The Brazilian Association of Workers Exposed to Asbestos – ABREA has denounced the servile status imposed on southern countries by those of the north, insofar as they transfer production to the former, along with the risks and harmful effects to health and the environment, while themselves seeking alternatives to asbestos (ABREA, 2012).

A number of federal states have published more restrictive laws than Federal Law 9.055/1995, which allowed the economic exploitation of asbestos in chrysotile form. This has led to the filing of Direct Unconstitutionality Actions before the Supreme Federal Court. In this article, we analyse the decisions regarding Direct Unconstitutionality Actions 2396, 2656, 3937 and 3357.

Direct Unconstitutionality Actions 2396 and 2656

Direct Unconstitutionality Action 2396 was filed in January 2001 by the Governor of the State of Goiás in reaction to Law 2.210/2001 of the State of Mato Grosso do Sul, which banned the manufacture, entry, marketing and storage of asbestos or asbestos-based products intended for civil construction in the territory of the State of Mato Grosso do Sul.

There were two interests that were put forward in the Statement of Claim to justify the aforementioned lawsuit, or in other words who could be affected by the law that the unconstitutionality claim targeted: the dependence of the economy of the municipality of Minaçu in Goiás on the chrysotile asbestos mine located in its territory, one of the three biggest in the world and the collection of significant amounts in tax revenue by the State of Goiás from levies on mining and other related activities.

In turn, the legal basis outlined in the Statement of Claim to support the claim of declaring the legislation unconstitutional was as follows: infringement of the Union's exclusive competence to legislate on occupational health and safety (Art. 22, I, FC [Federal Constitution] /88) and deposits, mines and other mineral resources and metallurgy (Art.

22, XII, FC/88); infringement of the principles of free enterprise (Art. 170, II, FC/88), free competition (Art. 170, *caput* and IV, FC/88) and private property (Art. 170, *caput*, FC/88); breach of the federal principle (Arts. 1 and 18, *caput*, FC/88); infringement of the principle of proportionality (Art. 5, *caput*, II and LIV, FC/88).

In defence of the State Law, in accordance with the data gleaned from the decision that we will analyse hereafter, the Governor of the State of Mato Grosso do Sul maintained that the state law was based on additional and concurrent competence in the area of protection of the environment (Art. 24, VI, FC/88) and protection of health (Art. 24, XII, FC/88). With this, he tried to ward off the allegation of infringement of the Union's exclusive competence to legislate on occupational safety (Art. 22, I, FC/88) and deposits, mines and other mineral resources and metallurgy (Art. 22, XII, FC/88).

On 26 September 2001, in a preliminary and unanimous decision, the request to provisionally stay the effects of the State of Mato Grosso's law was partially deferred (BRAZIL, Supreme Federal Court, 2001). The allegations of the potential risk of damage to the economy of the municipality of Minaçu and the tax revenue of the State of Goiás were accepted, as was the fact that Federal Law 9.095/1995 already sufficiently regulated the matter with the State of Mato Grosso do Sul having exceeded its additional constitutional competence to legislate on production and consumption (Art. 24, V, FC/88), protection of the environment and pollution control (Art. 24, VI, FC/88), and protection of health (Art. 24, XII, FC/88).

The economic interests defended in the lawsuit by the State of Goiás enjoy constitutional protection insofar as the principles of free initiative and free competition are stipulated in Art. 170. Nevertheless, the same provision stipulates that the purpose of the economic order is to ensure a dignified existence for all, in accordance with the precepts of social justice and in respect of principles such as the social role of the ownership and protection of the environment. Therefore, acceptance of the economic order reasons presented by the plaintiff meant partially ignoring reality and sticking to a line of economic rationality.

The absence of any concern about the harmful consequences from the manufacturing process for people and their environment is inherent to capitalism, which, as Cechin (2010) observes, adopts a closed and circular economic process, ignoring anything on the outside, or simply conferring on it the status of an externality.

The Court ruled on the basis of different legal grounds to those put forward by the plaintiff - the breach of Article 24, paragraphs V, VI and XII was not raised in the Statement of Claim - under the understanding that as a Direct Unconstitutionality Action the so-called cause of the suit is *open*. This detail begs a question: if the Direct Unconstitutionality Action allows for a broad analysis of all the constitutional aspects involved, why did the decision bypass having a substantive discussion on sustainable development?

On 08 May 2003, the Court handed down its final ruling (Brazil, Supreme Federal Court, 2003), declaring by majority the State of Mato Grosso do Sul's Law unconstitutional in part. The discussion skirted around the risks to health and the environment with the justification that the Court's remit was limited to checking "the incidence of an inadmissible disparity between the law under analysis and the provisions of the constitu-

tion" and not "to have the last word as regards the technical-scientific properties of the element in question and the risks of its use to the population's health" (Supreme Federal Court, 2003, p.72244). Albeit not explicitly, the findings were based on the constitutional principle of the separation of powers, which is characteristic of liberal thinking. This therefore curbed any substantive discussion.

Another aspect that emerges from analysis is that there was no reference to the precautionary principle, which should be taken into consideration in discussions involving suspected danger. For Leite and Ayla, "the absence of absolute scientific certainty should not be used as a reason to postpone the adoption of effective measures to prevent environmental degradation" (2010, p. 51). In the case of asbestos, its use has still not been totally banned in Brazil because there are those who maintain that the mineral and its products are not harmful if handled properly. There was no place for this facet of the issue in the ruling.

The claim of unconstitutionality was accepted as the Court deemed that the State of Mato Grosso do Sul exceeded its concurrent competence to legislate on production and consumption (Art. 24, V, FC/88), protection of the environment and pollution control (Art. 24, VI, FC/88), and protection of health (Art. 24, XII, FC/88).

Although the cause of the Direct Unconstitutionality Action was open, it did not lead to a debate on the risks arising from asbestos use to health and the environment. Just as in the injunction judgment in ruling on the merits of the lawsuit, the different constitutional provisions to those in the Statement of Claim which were under analysis referred to the division of competences.

Adherence to competition rules and therefore to a formalist view prevented a substantive detailed discussion, given that the approach behind the decision did not broach fundamental rights to health and the environment.

The guidance that it is only the Supreme Federal Court's responsibility to check if the state law that is the subject of the Direct Unconstitutionality Action meets the constitutional rules on the division of legislative competences was maintained in the ruling on Direct Unconstitutionality Action 2656, also filed by the Governor of the State of Goiás, in reaction to Law 10.813/2001 of the State of São Paulo, which banned the import, extraction, processing, marketing, manufacture and installation in that State's territory of products containing any type of asbestos.

The approach taken by the Supreme Federal Court when ruling on Direct Unconstitutionality Actions 2396 and 2656 saw the economic interests that brought the lawsuits emerge victorious. It was, therefore, far removed from the construction of an environmental rationality, which, as part of its epistemological principles, features the recognition of nature's limits and the complexity of the real world, as well as the need to rethink the existing paradigm (LEFF, 2007). It was not able to question the predominant social dynamic, where the economy has become the single greatest determining factor (FERNANDES; SAMPAIO, 2008). The upshot of this is that in the relationship between economic and socio-environmental forces, capital has overshadowed nature and mankind in a display of the dominance of the logic of the market, even permeating the public institutions that legitimise it in this case.

Direct Unconstitutionality Actions 3937 and 3357

Direct Unconstitutionality Action 3937 was filed in August 2007 by the National Confederation of Industry Workers against a new State of São Paulo law, Law 12.684/2007, which banned in the State of São Paulo the use of products, materials or artefacts containing any type of asbestos or other minerals that inadvertently have asbestos fibres in their composition.

The state law was published after the Supreme Federal Court declared Law 2.210/2001 unconstitutional, also a State of São Paulo law, in Direct Unconstitutionality Action 2396.

In the Statement of Claim for Direct Unconstitutionality Action 3937, one of the grounds for filing the action was that of defending the full employment of workers in the industries that use asbestos as a raw material. In fact, the suit was filed by a workers' confederation, which in theory should concern itself not just with workers' jobs but also their health.

A number of bodies asked to be involved in the legal proceedings with the status of *amicus curiae*. The following were accepted: The Brazilian Association of Workers Exposed to Asbestos – ABREA, representing workers whose health has been affected; the Brazilian Industry and Distributors of Fibre Cement – AFIBRO, representing the industry segment; the Brazilian Chrysotile Institute – IBC, the body that defends the use of chrysotile asbestos; Minaçu-GO Trade Union for Workers in the Extraction of Non-Metallic Minerals Industry, representing the workers in the Brazilian municipality where the largest operating asbestos mine is located.

At the 29 August 2007 session when judgment of the Preliminary Injunction began, the reporting judge voted to suspend the legal effect of the law until the final ruling on the suit, based on the argument that the State in question had infringed upon the Union's competence to legislate on external and interstate trade (Art. 22, VIII of the FC/88). In the meantime, one of the Chief Justices disagreed with the draft decision, finding that the content of the Federal Law breached the right to health (Art. 196, FC/88), noting that he would wait for an opportunity to abandon the essentially formalistic position adopted previously, and that analysis of the constitutionality should be broadened, which led to a more extensive debate between the judges on more than just the aspects that were strictly linked to the division of legislative competences.

The judgment session was adjourned and in December 2007 - during the holiday period and faced with a claim in which the plaintiff indicated economic damages due to the delay in the judgment of the suit and the fact that the State Law would come into force on 1 January 2008 - the reporting judge deferred the injunction, thus suspending the state law until the final ruling on the suit. Economic order reasons were therefore deemed enough to suspend the legal force of the law.

The preliminary injunction was taken to the collegiate body on 04 June 2008 for approval. The Supreme Federal Court Plenary did not approve the injunction handed down by the reporting judge, thus dismissing it. The judges were split, with some sticking to the line that the state law would have exceeded additional legislative competence,

while others adhered to the understanding that the risk to people and the environment through exposure to chrysotile asbestos ought to be analysed.

The ruling on the injunction - as it meant opening the door to a substantive environmental rationality - raised expectations that the court would, in its final ruling, drop the formalistic findings previously adopted in direct unconstitutionality actions 2396 and 2656.

A public hearing was held in the SFC on 24 and 31 August 2012 in order to collect feedback on the merits of the lawsuit. A number of authorities and professionals took part with experience in related fields to the subject, such as medicine, chemistry, economics, occupational safety and the environment. Representatives of the parties and from the different sectors interested in the outcome of the lawsuit were also able to voice their opinions.

Bringing in scientific knowledge helped deconstruct the disciplinary thinking, and collecting the interpretations of those involved on opposing sides of the case amounts to recognition of the complexity of the reality, thus contributing towards building an environmental rationality.

Judgment of the merits of Direct Unconstitutionality Action 3937 began on 31 October 2012. Bearing in mind that the Supreme Federal Court intends to judge Direct Unconstitutionality Actions 3957 and 3357 together, the session saw the reporting judges for the two lawsuits read out the votes. In Direct Unconstitutionality Action 3357, the Confederation of Industry Workers raised the unconstitutionality of Law 11.643/2001 of the State of Rio Grande do Sul, which banned the production and marketing of asbestos-based products in the state's territory.

The judgment of the lawsuits was adjourned, which allows the judges to amend their votes before the end of the judgment. In the meantime, the Supreme Federal Court made the votes available on its website, which allows the stances taken by the reporting judges in the two cases to be analysed.

The reporting judge for Direct Unconstitutionality Action 3957 voted in favour of the constitutionality of Article 2 of Federal Law 9.055/1995 and the unconstitutionality of the São Paulo law, Law No 12.684/2007, as it breaches Article 24, Paragraphs V, VI and XII, as well as Section 3, of the Federal Constitution. This adheres to the line that the Court took with Direct Unconstitutionality Actions 2396 and 2656. The position can be summarised as follows: Convention 162 of the International Labour Organisation - ILO does not ban asbestos, but is aimed at regulating its safe use, avoiding outright prohibition; the Federal Union has the option of legislating on the matter; at the public hearing it was not demonstrated that regulated use of asbestos poses a risk to the public, it being up to the executive branch to control improper use of asbestos, as this is harmful; as regards occupational health and safety, the health risks should be offset by financial compensation; the precautionary principle cannot be used to paralyse any economic activity, it being up to the state legislation to manage risks to the public; banning asbestos would increase civil construction costs, which would worsen the housing shortage in Brazil and would engender job losses in the fibre-cement sector; it is not the Supreme Court's responsibility but that of the law, pursuant to the sole paragraph of Article 170 of the Federal Constitution, to allow or ban certain products, services or activities. The

finding that the risks from asbestos are manageable tallies with a world dominated by the logic of the production of risks, which led Beck (2010) to state that the "future is colonising the present" in a context dominated by uncertainty. Moreover, the view that the damaging effects of economic activity on humankind and the environment should be treated as mere externalities is inherent to an economic rationality.

The stance taken by the reporting judge on the distribution of risk, mainly when he states that the more economically disadvantaged sectors of the population will bear the brunt of the burden arising from job losses and higher civil construction prices, definitely garners criticism as the countries of Western Europe banned asbestos and their economies were able to absorb the economic impacts of such a decision. Furthermore, the economic data are generally produced by the stakeholders with an interest in continuing to mine asbestos, which raises doubts as to their credibility. Despite this, it is worth stressing that the discussion was extensive with a positive attitude open to substantive debate. Moving on to judgment of Direct Unconstitutionality Action 3357, the reporting judge voted against the request for the state law to be declared unconstitutional. He found that: the general scope of Federal Law 9.055/99 is to ban the use of asbestos due to its harmfulness; Convention 162 of the International Labour Organisation - ILO enjoys the status of a supralegal norm and, despite tolerating the use of asbestos, foresees a total ban on its use when the measure is proven to be technically viable and necessary in order to protect workers' health; the Rio Grande do Sul State law is closer to Art. 7, Paragraph XXII of the Federal Constitution, according to which workers have the right to "reduction of employment related risks by means of health, hygiene and safety rules", and the ILO Convention; the principle of freedom of initiative, laid down in Article 170 *caput* of the Federal Constitution should dovetail with the principles of defending consumers (Para. V) and protecting the environment (Paragraph VI); Federal Union health and monitoring bodies have already taken a stance against asbestos.

In the reporting judge's vote, the discussion is not centred on economic damage, but rather on human health. In this regard, there is no denial of the existence of the risks, rather an affirmation that they must be reduced in accordance with the Constitution.

Thus, at the beginning of the judgment of Direct Unconstitutionality Actions 3937 and 3357, the "score" reads 1-1. Whatever result is reached when the judgment resumes, one needs to recognise that the Supreme Federal Court is not trying to evade exposure to public opinion, as the reporting judges entered the debate on the harmful effects of asbestos, each having to shoulder the fallout arising from the position they took.

There has not been a high-profile discussion of the risks of asbestos in Brazilian society, where debate has been limited to academic circles or to the specialist public health and environmental press. In this regard, the public hearing and the beginning of the judgment, both of which were in October 2012, received scant or zero attention in the mass media and met with social apathy - the origins of which are not within our remit to research here.

It is also worth highlighting the fact that the Federal Executive has diverging policies as regards the use of asbestos, insofar as the Ministries presented different point of views at the public hearing, meaning it is now the responsibility of the judiciary to

decide, based on the legislation and the Federal Constitution. Also of note is the fact the judiciary remained divided between two logics when interpreting the Law: the substantive, as written in the Constitution, which defends the collective wellbeing and that of future generations, and the economic, the predominant social paradigm advocated by the stakeholders involved.

Conclusion

Even though in the 1988 Federal Constitution development is synonymous with sustainable development, the construction of a sustainability approach remains a challenge. This is because there is a permanent tension in the contemporary civilisation model between the environment and the economy.

There has been shown to be a predominant economic rationality behind environmental degradation, driven by the principles of immediate profitability, efficiency and productivity, which are inherent to capitalism and its logic of exploiting nature.

The construction of a new rationality, an environmental one based on marrying instrumental and substantive criteria and where nature's limits are respected, emerges as a proposal to counter the current *status quo*.

From a rationality point of view, it is relevant to show how the conflict between economic interests and socio-environmental interests has been dealt with in judicial decisions in Brazil, more specifically in the Supreme Federal Court, whose main mission is to safeguard the Constitution.

The use of asbestos is a controversial topic that the SFC is facing at present. While the scientific world stresses the dangers to health and the environment caused by mining the mineral, the businesses involved in its use insist on denying them.

When ruling on Direct Unconstitutionality Actions 2396 and 2656, the SFC took an essentially formalistic stance, limiting the discussion to the constitutional division of legislative competences, which leans towards an economic rationality where the means are worth more than the ends. The absence of any thought to the effects of the use of asbestos on people and the environment is a departure from the fundamental values set out in the Federal Constitution. A ruling of this kind ends up legitimising economic interests and, therefore, an economic rationality.

However, with the judgment of the Preliminary Injunction of Direct Unconstitutionality Action 3937, the Court carried out an analysis, albeit incipient, of the effects of asbestos use on health and the environment. This has raised expectations - rightly or wrongly as remains to be seen - that the future decision on the merits of the case will see the discussion of legislative competences make way for a substantive analysis in keeping with the complexity of the inherent socio-environmental implications of the issue.

The inevitable conclusion is that although the Constitution defends an ideal balance between economic growth and environmental protection, the predominance of economic forces in society poses a major challenge to the judiciary: that of contributing towards building and consolidating an environmental rationality that marries substantive aspects and instrumental aspects.

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THE USE OF ASBESTOS IN BRAZIL: THE CLASH OF TWO RATIONALITIES IN THE SUPREME FEDERAL COURT

HELOÍSA BOT BORGES,
VALDIR FERNANDES

Abstract: The aim of this article is to discuss sustainable development, more specifically in the process of institutionalization of environmental issues in Brazil. The relationship between the environment and the economy taken in the Federal Supreme Court due to the use of asbestos is analyzed. The analysis is based on the concept of rationality and its mediation between the environment and the economy. Among the results, it can be observed that when formalism is separated from reality concerning environmental issues, substantial discussions become difficult, and thus favouring economical interests and the dynamic capital, which are inherent to the economic rationality.

Keywords: Asbestos; Sustainable development; Economic rationality; Environmental rationality; Federal Supreme Court.

Resumo: O tema deste artigo se insere nas discussões sobre desenvolvimento sustentável, especificamente no processo de institucionalização das questões ambientais no Brasil. Nesse contexto, aborda a relação entre meio ambiente e economia em julgados sobre o uso do amianto em âmbito do Supremo Tribunal Federal. O modelo de análise é fundamentado no conceito de racionalidade e sua mediação nas relações entre meio ambiente e economia. Dentre os resultados, identifica-se que o apego a uma postura formalista, desassociada da realidade no que concerne aos aspectos socioambientais, dificulta uma discussão substantiva e privilegia os interesses econômicos e a dinâmica do capital, inerentes à racionalidade econômica.

Palavras-chaves: Amianto; Desenvolvimento sustentável; Racionalidade econômica; Racionalidade ambiental; Supremo Tribunal Federal.

Resumen: El tema de este artículo encaja en los debates sobre el desarrollo sostenible, en particular en el proceso de institucionalización de las cuestiones ambientales en Brasil. En este contexto, centrándose en la relación entre medio ambiente y economía juzgado en el uso de amianto en el contexto de la Corte Suprema de Justicia. El modelo de análisis se basa

en el concepto de racionalidad y su mediación en la relación entre el medio ambiente y la economía. Entre los resultados, se identifica que el apego a un enfoque formalista, disociada de la realidad en lo que se refiere a los aspectos medioambientales, hace un debate de fondo y favorece los intereses económicos del capital y las dinámicas inherentes a la racionalidad económica. Por otra parte, la apertura de la STF a la noción de desarrollo sostenible y la comprensión de la complejidad de los problemas ambientales contribuye a la construcción de una racionalidad ambiental.

Palabras clave: Amianto; Desarrollo sostenible; La racionalidad económica; La racionalidad ambiental; Suprema Corte.