TVA vs. Hill, once again

Categories : Eco - Extras

On several occasions, when addressing issues relating to the complex relations between the environment, infrastructure, the Judiciary Branch and the Public Attorney's Office, I have referred to the ruling handed down in the case of TVA vs. Hill, which is the paradigm when dealing with the construction of dams and other large-scale projects, and their impact on the species listed as endangered of extinction. In the United States, the protection of species, as opposed to Brazil, is promoted by law, thereby expressing an unmistakable manifestation of Congress' will to preserve biological diversity. In the context of American Administrative Law, Congress delegates to the Executive Branch the authority to add species to the list of endangered animals; and the Fish and Wildlife Service is then responsible for enforcing the Endangered Species Act (ESA) and for keeping watch over the species protected by the list. The Environment Protection Agency (EPA) is in charge of enforcing other laws, such as the National Environment Policy Act, the Clear Water Act or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), for instance.

At the time of the judgment in the TVA vs. Hill case, section 7 of the ESA contained the following wording: "Federal departments and agencies shall...with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for the conservation of endangered species ….and by taking such action necessary to insure that actions authorized, funded or carried out by them **do not jeopardize** the continued existence of such endangered species…" Section 7, as noted above, prohibited any actions that might **jeopardize** the continued existence of any endangered species. If we set the issue of the environment aside and examine the judgment under the light of Constitutional Law – which is the current manner in which American legislators have been viewing the TVA vs. Hill case -, we will note that said ruling completes a lesson in separating the Branches and the exemption of the Judiciary in light of pressure exerted by the Executive Branch. Note, as well, that important works in Environmental Law no longer refer to TVA vs. Hill as essential study material , as they consider the issue to have been surpassed.

The constitutional key to the decision in TVA vs. Hill rests in the following excerpt from Chief Justice Burger's vote: "It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $ 100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the sail darter. We conclude however that the explicit provisions of the Endangered Species Act require precisely that result."

If we examine the decision a bit further, we will see in another passage of the vote that Justice

Burger clearly states that Congress' wish was: "to halt and reverse the trend toward species extinction whatever the cost." In view the Court's clearly stated position, there was, in fact, no other decision possible except that of ordering the cessation of all construction work. The Supreme Court held that, in view of the expressed legal order "do not jeopardize", there was no margin for interpretation by the Executive Branch, which would have to limit itself to complying with the command set forth by the Legislature. Note, however, that administrative discretion had already been exercised when the snail darter was added to the endangered species list. It is important to bear in mind that, in the Brazilian case, some judicial decisions handed down by Federal Regional Courts have been made in apparent conflict with the expressed terms of the constitutional regulations – in view of the fact that they lent the Constitution a quite broad interpretation, generally favoring the actions of the Executive Branch, in detriment to the wording of such law. I refer here to the case of paragraph 6 of article 225 of the Constitution, which determines that the Executive Branch must obtain authorization from the National Congress in order to decide upon locations for nuclear power plants, without which such plants cannot operate[2]. In TVA vs. Hill, the Supreme Court understood that the mere appropriation of funds to an activity did not indicate that Congress was revoking substantive legislation that clearly forbade the disturbance of species contained on a list established by the Executive.

The interpretation given to paragraph 6, article 225, by the Federal Regional Court for the 2nd Region, as demonstrated by the arrest transcribed below[3]:

INTERLOCUTORY APPEAL. JUDGMENT HANDED DOWN IN A PUBLIC CIVIL SUIT, WHICH GRANTED A PRELIMINARY INJUNCTION ORDERING THE SUSPENSION OF THE ENVIRONMENTAL LICENSING OF THE ANGRA III NUCLEAR POWER PLANT. I – The case in question is an Interlocutory Appeal, filed by ELETRONUCLEAR in response to the Judgment handed down in a Public Civil action, which denied its request to join the case as a necessary joint defendant, while granting the preliminary injunction requested by the Federal Public Attorney's Office, thereby determining the suspension of the environmental licensing proceedings for the Angra III Nuclear Power Plant. II – In the aforementioned Public Civil Suit, the intention of the Federal Public Attorney's Office was to declare the administrative acts that tended towards the environmental licensing of the nuclear project known as Angra III, in view of its alleged failure to comply with the constitutional regulations set forth in article. 21, XXIII, a; 49, XIV and 225, paragraph 6. III – With regard to ELETRONUCLEAR's standing to sue as joint defendant, it is known that it was authorized by the Public Authorities to build and operate nuclear power plants. To begin with, as the proceedings to obtain the preliminary environmental licensing for the Angra III Plant had already been initiated, and then had subsequently been suspended by court decision, this Court recognizes the necessity for the Appellant to join the suit as joint defendant due to the mere fact that the results of the original action that has given rise to the present Appeal will directly affect such party's activities. IV – In fact, the Brazilian Federal Constitution of 88 requires the authorization of the National Congress for the installation of nuclear power plants. It also stipulates that federal law must determine the location where such plants will be installed. V – It is important to point out, however, that planning for the Angra III enterprise began way before the current

constitutional order. It is also noted that according to the Brazilian Constitution of 67, amended in 1969, authorization for nuclear power plants was given in the form of Presidential Decrees. Thus, in 1975, in the exact terms of the Constitution, the then President of the Republic, through Decree no. 75,870, authorized the creation of a third nuclear power plant (page 85). VI – It is therefore evident that the project in question was started when the previous Constitution was in effect, and said legislation dispensed with the need for the National Congress' authorization to build nuclear power plants, or to establish the site for their construction. VII – We must therefore conclude that one cannot assert that the precepts of the new constitutional order lead to the caducity of Decree no. 75,870/75. The reason for this is that, when analyzing jurisprudence relating to the Constitution, when the constitutional text calls for retroactive effect, it must explicitly state such intention. VIII - Moreover, even if we were to admit the indispensability of complying with such requirements, it is understood that the initiation of environmental licensing proceedings must not be conditional upon such requirements. Because it is in such proceedings that all the studies required in order to implement potentially pollutant projects will be performed, and such studies are essential to the National Congress in order for it to assess whether or not it should authorize the operation of such an undertaking. IX - Otherwise, the National Congress would have nothing on which to base its decision, be it with regard to approving the construction of the plant or its location. X – Appeal of interlocutory decision lacking in grounds. XI – Interlocutory Appeal granted."

Without wanting to create a polemic regarding the decision, which was nevertheless given in Interlocutory Appeal proceedings, it appears evident that a interpretation of the Constitution was made that exceeds any reasonable interpretation, particularly in light of the magnitude of such decision. In revoking the previous Constitution, the legislators of 1988 addressed the issue of nuclear power in a completely different manner. If they had recognized any acquired right to be upheld by the new Constitution, with regard to the installation of nuclear power plants, they would certainly have explicitly stated such exception, as they did in relation to various other issues in the transitory constitutional provisions. TVA vs. Hill, in particular, is a lesson in judicial independence and non-intervention in the will of Congress to the point of altering it, as was the case in the aforementioned Brazilian decision. One must not confuse planning with installation, nor confuse authorization to plan with authorization to install. Furthermore, in actual fact, in light of the failure to implement the authorization, as nothing was built, it does not seem reasonable that such an interpretation could persist against the expressed constitutional provision. There is an indisputable cost involved; however, following a preliminary analysis, it appears that the Brazilian Congress, as in the case of the American Congress, did not concern itself with the costs, as it judged that other values were priority over the mere financial cost.

It is my understanding that in the Brazilian case, there are only two valid legal alternatives: (i) either the Brazilian Congress approves a law to establishing the location of Angra III or (ii) it amends the Constitution, which has, in practice, been the most chosen course of action whenever it has met with disapproval.

The power of the American Executive Branch to establish the lists of endangered species, under

the Chevron doctrine (Chevron USA vs. Natural Resources Defense Council, 467 U.S. 837 (1984)), has been widely recognized and the Judiciary must accept it in deference to the Executive Branch's discretionary power, provided that executive action is reasonable. Thus, the Supreme Court acknowledges that Congress delegated the authority to establish the list to the Executive Branch (Chevron Step 1) and that the choice was reasonable and not excessive (Chevron Step 2). According to the Chevron doctrine, it is the responsibility of the Executive Branch to define the public policy issues to be applied, as determined by Congress, in the manner stipulated by law.

One of the consequences of TVA vs. Hill was the amendment of the wording of section 7 of the ESA, substituting the expression ***"do not jeopardize"*** with ***"is not likely to jeopardize"***. As a result, the rule became much more abstract and increased the Executive Branch' discretionary power to assess the action to be taken and which, according to the Chevron doctrine, must be respected by the courts as long as such actions are reasonable.

TVA vs. Hill is a landmark case and clearly demonstrates what an independent Court is, while simultaneously providing a lesson in the separation of powers. There is no doubt, however, that the judgment, when analyzed from the perspective of concrete environmental damage, cost and effect, investments made and to be made, is exaggerated and absurd. On the other hand, if the Court had opted to "legislate" and provide an interpretation to the rule, which clearly wasn't possible, it would have allowed the Executive Branch the possibility to simply disobey the determinations of the Legislators, which, although undoubtedly exaggerated, were exactly that. It is safe to say that the entire species protection system would have been placed under the Executive Branch's absolute discretion, which wasn't what Congress wanted.

In a country such as ours, which is in need of more structured administration , TVA vs. Hill should be taught in every Constitutional Law course as an example to be followed by all powers, by Congress so it may create reasonable laws, by the Executive Branch so it does not attempt to exercise powers it does not have, and by the Judiciary so it does not "create" regulations through ad hoc interpretation.

[1] Craig Johnston, William Funk and Victor Flatt – *Legal Protection of the Environment*, St Paul, Thomson/West.

[2] **Article 225.** All have the right to an ecologically balanced environment. which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.
Paragraph 1 - In order to ensure the effectiveness of this right, it is incumbent upon the Government to:……..Paragraph 6 - *Power plants operated by nuclear reactor shall have their location defined in federal law and may not otherwise be installed.*

[3] Federal Regional Court for the 2nd Region. INTERLOCUTORY APPEAL – 151046. DJU DATE:APRIL 24, 2007