http://dx.doi.org/10.18623/rvd.v15i33.1242

ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT: AN ANALYSIS OF THE JUDICIALIZATION OF SOCIAL RELATIONS

Serli Genz Bölter

PhD in Sociology from the Federal University of Rio Grande do Sul and Professor of the Master's Program in Public Policy and Development at Federal University of the Southern Frontier - UFFS.
Email: sgbolter@hotmail.com

Cristiane Derani

PhD in Law from the University of São Paulo (1996). PhD studies (CNpq scholarship) at J.W.Goethe Universitaet, Frankfurt. Post-doctorate at the Ecole des Hautes Etudes en Sciences Sociales, Paris. Professor at the Federal University of Santa Catarina.
Email: cristiane.derani@ufsc.br

ABSTRACT

This article treat about the judicialization of social relations, specifically on the judicialization of environmental conflicts and the treatment of the concepts of sustainable development and the relation with the rights of nature. The analysis carried out takes as reference decisions issued by the Federal Supreme Court of Brazil in the period after the Federal Constitution of 1988. Three decisions will be taken with reference: the first one treat of the implementation of the Brazilian Forest Code of 2001, judged in 2005; the second, a decision on the importation of recyclable tires judged in 2009; and the third, the decision on a Law of the State of Ceará on the vaquejada, judged in 2016. In all attempts to identify the changes that the decisions demonstrate in the treatment bias from a development and sustainability perspective. It is argued that the socio-environmental crisis requires the construction of a new paradigm in the treatment of environmental issues in which the notions of sustainable development and nature as a right are present.

Keywords: judicialization; development; sustainability; rights of nature.

DIREITO AMBIENTAL E DESENVOLVIMENTO SUSTENTÁVEL: UMA ANÁLISE DA JUDICIALIZAÇÃO DAS RELAÇÕES SOCIAIS

RESUMO

O presente artigo trata da judicialização das relações sociais, especificamente sobre a judicialização dos conflitos ambientais em sua relação com os conceitos de desenvolvimento sustentável e direitos da natureza. A análise realizada toma como referência decisões proferidas pelo Supremo Tribunal Federal do Brasil no período posterior a Constituição Federal de 1988. São estudadas três decisões: a primeira que trata da implementação do Código Florestal brasileiro de 2001, julgada em 2005; a segunda, uma decisão sobre a importação de pneus recicláveis julgada em 2009; e, a terceira, a decisão sobre uma Lei do Estado do Ceará sobre a vaquejada, julgada em 2016. Em todas busca-se identificar as alterações que as decisões demonstram no viés do desenvolvimento e da sustentabilidade. Argumenta-se que a crise socioambiental exige a construção de um novo paradigma no tratamento das questões ambientais no qual estejam presente as noções de desenvolvimento sustentável e da natureza como detentora de direitos.

Palavras-chaves: *judicialização; desenvolvimento; sustentabilidade; direitos da natureza.*

INTRODUCTION

We live in a time marked by complexity. A time of change, crisis and of great challenges. The promises of modernity were just that: promises. The expectations of postmodernity are discouraging. What stands in the face of contemporary uncertainties is the bet on diversity, on the plurality and the need for new parameters for the construction of answers.While the "new" is not defined, we seek answers in the old ways and rehearsed attempts at new contours, new values and, therefore, new perspectives on the models that surround us.

The study of Environmental Law in a Rule of Law is, to some extent, this essay for answers. What we have in the field of Environmental Law in Brazil is the result of a process of redemocratization of the Brazilian State in the context of Latin America: limited, copied, formal, dogmatic and, above all, linked to the old promises of effective rights. Promises that the Law can be guaranteed, be enforced, through formalization. It is due to the complexity of this matter, due to the implications it poses for the organization of life in society, that it is opted to analyze it on the perspective of sustainable development, that is, on how to establish the relationship between sustainable development and Environmental Law after the 1988 Constitution, in Brazil.

The processes of judicialization of the environmental conflicts have evidenced an intervention of the Judiciary Power in the social relations. In this paper, we seek to identify the extent to which such mechanisms of implementation of legal norms allow advances or setbacks in the conceptual perspective in the field of Environmental Law. It is also one of the objectives of the present study to understand which are the subjects that can appear as propellers or mediators of the phenomena of the judicialization.

As a research procedure, a jurisprudential search was conducted on the website of the Federal Supreme Court with three filters: terminology (sustainable development), availability of information (judgment in full) and temporal (post-1988). 43 full judgments have been found with the term 'sustainable development'. The purpose of the analysis is to prove the phenomenon of the judicialization of environmental conflicts and at the same time identify the treatment of sustainable development and the

relation with the right of nature, which requires a detailed study of the selected decisions. To account for the second objective, it is justified to choose only three decisions that temporarily show different understandings of this topic by the Supreme Court in Brazil: 2005, 2009 and 2016. It seeks to identify the conceptual dimension of the normative text in the application in the concrete case.

Considering the current socio-environmental crisis, some alternatives are pointed out that need to be built in the field of Environmental Law and that are in tune with the Latin American reality. It is essential, therefore, to thematize the relationship between human beings and nature, which refers to the need to build a new paradigm in this field of study. Such a paradigm contains at least two seemingly contradictory challenges: first to historically consider the relationship between humans and nature, identifying the perspectives of both development and the preservation of nature; and second, the recognition that nature may be the holder of rights. Approaching this debate, problematizing the terms through which it is placed from the analysis of empirical situations, in the decisions of the superior courts, is the purpose of the present work.

1. THE LEGAL CONSTRUCTION OF NEW PARADIGMS FOR ENVIRONMENTAL LAW IN THE DEMOCRATIC STATE OF LAW IN BRAZIL AND THE IMPLICATIONS FOR SUSTAINABLE DEVELOPMENT

For the analysis of the relationship between environmental law and sustainable development, specifically in this article, we start with the study of the phenomena of the judicialization of social conflicts.It is appropriate to make an initial reading of how environmental issues are positively assessed and how Brazil's constitutionally defined sustainable development after the 1988 Federal Constitution, especially in relation to procedures and strategies for the realization of the rights that are built in this area. It is acknowledged that in the field of positivation of rights, the period after the 1988 Federal Constitution is marked by the formal extension of rights. The constitutional text is the result of a period of social disputes and indicates the resumption of the re-democratization of political relations and, consequently, of the guarantee of rights, if not in the field of

realization, at least in the field of formalization.

The Federal Constitution allowed for significant advances in the perspective of positivation of environmental legal norms and normatization on development. The constitutional text is expressly a text guarantor of rights from a perspective of protection and environmental preservation. Two elements indicate these advances: first, ensuring an ecologically balanced environment guaranteed for present and future generations (art.225 CF/88); and, second, the principle that development must be understood from the point of view of sustainable development and protection of the environment (art. 170 of CF/88). These foundations allow us to affirm that the models of Environmental Law in Brazil have interpretations beyond the old anthropocentric perspective of the relationship between man and nature.It requires, moreover, a model of economic perspective that goes beyond the reductionist outlines of development restricted to economic growth.

The constitutional provisions pointed out are two significant foundations that need to be developed conceptually because they require different perspectives for the creation and enforcement of legal norms. They directly focus on the implementation of policies that guarantee the consolidation of a new look on the Brazilian Environmental Law and the development modeling to be built.

The Brazilian Environmental Law, however, is still produced from the perspective of a balanced environment with legal frameworks strongly influenced by a model of the rational use of natural assets. There is a prevalence of a view that separates the human being from nature and reaffirms a vision of nature as a natural resource, a utilitarian relationship in which the human being appropriates these goods and turns them into resources for economic production. Here the prevailing view is that "nature is natural (matter to be appropriated), and man - *human being* - subject apart from the object to be appropriated, is no longer nature.Subject and object live two worlds: the social world and the natural world. "(DERANI, 2008, p. 52) This perspective, however, is not presented, for example, in Law 6.938/81, article 3, item I: "set of conditions, laws, physical influences, chemical and biological, which allows, shelters and governs life in all its forms", which already points to a broader view of Environmental Law.

The use of the infraconstitutional law article above serves

to exemplify the existence of constitutional and infraconstitutional devices that evidence the predominance of anthropocentric vision in the normalization of Brazilian Environmental Law, living with numerous devices and concepts that point to a new paradigm of Environmental Law: a vision that seeks to modify the human-nature relationship. It is this vision that begins to recognize the rights of nature. It is presented the dimension of an Environmental Right that is elevated to a classification of fundamental right of the human person, based on a material and not only formal conception (DERANI, 1997). It is a conception that allows us to point out some resistance to the collapse that is perceived by the use and uncontrolled appropriation of 'environmental goods'.

A challenge for this change in theoretical perspective is the involvement of all the subjects and institutions responsible for the production of the legal order in a Democratic State of Law and, in addition, responsible for the implementation of these devices. A perspective that goes beyond anthropocentrism can be understood as the way of establishing the rules for the relationship between human being and nature. It requires subjects who recognize the condition of the existence of the right of nature. It is a challenge, especially due to the existence of this duality in constitutional and infra-institutional devices. That is, the study of new paradigms requires the apprehension that to produce the Right is to modify the perspective that underlies the norms and the molds of its production and implementation. What is posed as a question is precisely how the judicialization of social conflicts can build one of the strategies to broaden the conception of Environmental Law in Brazil, and especially, to consolidate a perspective of sustainable development as a condition for a differentiated relationship between human beings and nature.

The phenomenon of the judicialization of social relations reveals a time when it is recognized that the State is sued beyond the exercise of its classic attributions of legislating, supervising and ensuring compliance with the norms. There is in normative productions the need to identify a dimension of principles, of attribution of meanings and definition of foundations in its application that are revealing of a time that points to the complexity of social relations and, more than that, of a time in that the meanings of legal norms need to account for a society that demands a new state action. A time when the gardening State (BITTAR, 2004), which only

acts on the surface of relations, can not silence ever more complex social demands. It is from this perspective that the normative prescriptions about Environmental Law must be analyzed and, therefore, the analysis must consider the norms on sustainable development in its intimate relationship with Environmental Law.

To justify this perspective, one must first characterize what time is being treated. For Bittar (2009, p. 104) postmodernity designates "a particular socio-historical context, marked by transition, [which] does not generate unanimity, and its use is not only contested but is also associated with diverse reactions or divergent conceptions".The author emphasizes that

> even among those who accept the use of the term to designate a current state of things, a process of modifications projecting onto the various dimensions of contemporary world experience (values, habits, group actions, collective needs, conceptions, social rules, modes of institutional organization), there is no unanimity in determining the date that would be the starting point for this process (BITTAR, 2009, p. 105).

Postmodernity is related to a period of paradigmatic transition, to the recognition of a crisis of values, to a period of uncertainty and lack of answers to the problems that arise daily in a society that is in crisis (SANTOS, 2002).There is a time when the answers offered by modernity are not enough, but there are no new answers.It is a time in which "modernist feelings may have been undermined, deconstructed, superseded or outdated, but there is little certainty as to the occurrence or meaning of thought systems that may have replaced them. This uncertainty makes it peculiarly difficult to assess, interpret, and explain the change that everyone agrees to have occurred" (HARVEY, 2001, p. 47).

For the reflection proposed in this article, from the adoption of a perspective of natural rights to the reading of Environmental Law in Brazil and especially the need for a sustainable development concept as the possibility authorized in the current legal system, it is appropriate to identify a postmodern time, since it allows to justify the need for new answers to the problems of the crisis and the harmful effects that the uncontrolled use and a perspective of appropriation of the natural goods has generated. Bittar (2009, p. 176) states that "the first perception of the

advent of postmodernity and its projection in the legal sphere is that of crisis" and continues: "the crisis of the state itself" (2009, p. 177). And this crisis is, above all, a structural crisis, in which

> the conflicts are no longer proportionate and the perspective of individual conflicts become conjunctural, collective, associative, diffuse, transindividual conflicts, motivating the collapse of traditional ways of meeting demands for which only typical mechanisms of liberal state, structured on the categories of the individual and the bourgeois (BITTAR, 2009, p. 178).

According to Bittar (2009, p. 179-180), "an experience of a legalistic state, which is based on a myriad of normative texts, bureaucratic acts, expensive expedients, has been conceived in this sense, but once it faces contemporary crisis, is incapable of containing the most banal crimes, or even of giving effectiveness to norms of recognized social importance." In other words, in addition to modifying the fundamentals of Environmental Law based on principles and concepts that can attack the challenges of contemporary society in a central way, the adoption of a postmodern concept allows addressing the question of the lack of effectiveness of Environmental Law in relation to sustainable development. There is no shortage of normative devices, there is no lack of theoretical foundations that support a new perspective of Environmental Law, the lacking is related to effective answers, lack of answers that ensure rights. There is a lack of awareness that a change in relations with nature is urgently needed as a condition for survival for all human beings. It is not the purpose here to rescue all the criticisms about the processes of implementation of State models in Latin America, since this reflection would question the foundations of social, political and economic relations that underpin this social pact, or even question whether there are such relations. The aim here is to advance two aspects related to Environmental Law: sustainable development and the relationship between humans and nature.

Regarding the relationship between human beings and nature, one can affirm that responses from the perspective of a risk society (BECK, 2010) are no longer sufficient, since repair and prevention in some situations are impossible. Here we can use the catastrophe that occurred in Mariana

(MG), as an example. It recognizes the existence of normative devices that can hold the subjects involved in damages to nature. The challenge, however, is to develop public policies that are based on principles of new development perspectives and the establishment of new relationships with nature.

One possibility for developmental analysis is to identify sustainability as a care in the relationship between humans and nature. In this perspective, a development concept that can help is to identify the extent to which development indices are related to human development indices (SEN, 2010).Amartya Sen (2010, p. 22) states that: "We live a world of unprecedented opulence, but also extraordinary deprivation and oppression. Development consists in the elimination of deprivations of liberty that limit the choices and opportunities of persons to exercise their citizenship in a thoughtful manner." The author emphasizes that the idea of development must be related to an improvement in life and indicates that it is closely related to the increase of freedom. Dealing with development requires considering freedom as a value.

Bittar (2004) states about a time of postmodernity, still characterized by the existence of a Modern but complex state, in which freedom is an indispensable value. Boaventura (2016) also indicates the intensification of models in which participation is emancipatory.To develop is, therefore, an increase in freedoms, an increase in the expression of plurality, diversity and, in particular, development is an indicator of increased democratic participation, effective and interference in the direction of public policy models. It is understood that this perspective requires a model of sustainable relations, of planning rules in which nature is relevant to this improvement of the quality of human development indicators: a healthy environment is a condition for the improvement of the quality of life.

When Sen (2010) deals with development, he affirms the need to consider a large number of variables: income, education, health, freedom, assets, women empowerment, manager transparency, indicators that point to a concept of development as freedom. For the construction of the theoretical perspective, the author points out some limitations of development models based on the traditional "grow to divide". The author denounces this model of absurd distortions when, using as an example the United States, by far

the richest nation in the world, shows that an American black man has a life expectancy less than a Chinese man, or Costa Rican, or even an inhabitant of the state of Kerala, India (SEN, 2010). Wealth is not shared by all in the same way, when freedoms are not secured. Development based on merely economic development may not reflect improvements in living conditions for all people, leading to questioning: what is the use of it? (SEN, 2010). The development model therefore needs to consider improvement in the quality of life. It is understood that one of the indicators of quality of life is related to a model of sustainable development in a healthy environment, with income, housing, health and freedoms.

The emphasis on a development with freedom presented by Sen (2010) considers five major axes, which emphasize the dimension of freedom in modern democracies and that must be ensured to guarantee a sustainable development perspective: 1) Political freedoms: civil rights related to the freedom of choice on the part of the people over whom they must govern and why, in addition to rights related to supervision and criticism of rulers through a free press; 2) Economic facilities: - Opportunities for people to use economic resources for consumption, production or exchange. The market has a fundamental value, since it allows the free movement of people and products in the economy, dimensions that must be linked to principles of sustainability since the theoretical perspective points to indices of human development; 3) Social opportunities: - Maintenance of health services, education, safety, leisure, which allows the individual not only to live better in their private life (escaping misery through better qualified work, for example), but also to participate public life (the ability to receive information to strengthen their political activity, for example); 4) Guarantees of transparency: - They refer to the need of the subjects to expect sincerity in the relationship with other subjects, institutions and with the State itself. In addition to being essential for social cohesion, it can play an important role in preventing corruption, for example; and, finally, 5) Protective security: - It protects the vulnerable from falling into extreme poverty through a social safety net and other measures aimed at ensuring the minimum guarantees of survival for the people. This set offers indications that development should have as references values that indicate a better quality of life for all subjects of law.

The concept of sustainable development adopted in the Brazilian

Constitution of 1988, which is in conformity with the 1987 Brundtland Report, known as "Our Common Future", indicates that development is: "one that meets the needs of the present without compromising the possibility of future generations to meet their own needs" (PÁDUA, 2009). There is a scope of this concept that should extend over all decisions that involve environmental issues. The legal perspective is to consolidate a harmonious relationship between human beings and nature in all aspects: ecological, environmental, social, political, economic, demographic, cultural, institutional and spatial.That is, a relation of enlargement of the freedoms constructed in a perspective of respect to nature.

When dealing with the judicialisation of environmental conflicts, it is necessary to consider that the demands as a rule start from a conflict between economic development and care with nature. There is a preexistence of a conflict, in this environmental case, that initiates the judicial process, for the demand presented to the State. What is expected is that the answers are produced in order to meet a conception of sustainable development in each factual situation. It is the case under judice that will allow the application of theoretical precepts that glimpse sustainability. It is said that the answers need to consider an interdisciplinary analysis, a trend that allows the "incorporation of sociological and anthropological aspects to the strong tendency to face sustainability through technical procedures, combined with economic analysis." (SILVA JUNIOR and FERREIRA, 2013, p. 8).

One way out of this perspective of sustainable development is to recognize that nature can have rights. Rachel Carson (1962), in the text Silent Spring, already stated that it is necessary to reach an agreement with nature. For her, humanity was challenged to prove the dominion not of nature, but of the control that human beings must have when living with other living beings. This ground is still a challenge for the legal order.

Modernity seeks to resolve the recognition of a harmonious relationship with nature in seeking to rationalize all relationships. "There are few who correctly see that anthropocentric reductionism has been reinforced in modernity because individuals have become subjects of law by being considered all relatively equal, and it is impossible then to ascribe the same right to those who, of course, are not "as" equal to us" (LEIS, 1999, p. 214). That is, there is the prior knowledge of the domain of human beings over others.And the author goes on to say that "The increase in

separation with the natural world is therefore due to the fact that modernity tends to obscure (or assume as transgression) any non-rational relationship between human beings" (LEIS, 1999, p. 214).This reductionist view has produced detrimental consequences for humans' relationship with the environment. The debate, therefore, on a right of nature is central to building the foundations of sustainable development.As has already been demonstrated, Brazilian legal norms are based on premises that allow us to move towards a perspective of justice that seeks harmony between human beings and nature.

2. THE PHENOMENON OF THE JUDICIALIZATION OF ENVIRONMENTAL CONFLICTS AS ONE OF THE STRATEGIES TO GIVE VISIBILITY TO THE SOCIO-ENVIRONMENTAL CRISIS IN MODERN DEMOCRACIES

As already stated, the phenomenon of the judicialization of social relations reveals one of the ways of resolving conflicts in modernity that has in the Judiciary one of the institutions legitimized to respond to the conflicts arising from social demands. Judicialisation happens when a conflict is not resolved between the interested parties and the State, through the Judiciary, is called to resolve it. The claims may have individual or collective interests and the decision reaches only the plaintiffs.The decision does not have the scope for generalization. In the case of environmental conflicts, the phenomenon of judicialization has served especially to give visibility to conflicts, present social situations in which legislation is not fulfilled, or, in the limit, when there are differences on the interpretation or procedures of application of laws, reveal the rights that can be formally ensured but lack effectiveness. Another aspect that the judicialization has made possible is the construction and affirmation of certain concepts, revealing the theoretical perspectives of the members of the Judiciary. In the case of the present study, it is important to identify how decisions have been made involving environmental conflicts in aspects of sustainable development and the established relationship between humans and nature, especially as these are considered to be central issues in the treatment of environmental conflicts.

With the intensification of the phenomenon of the judicialization

of social relations, the Judiciary takes on the role of protagonist because the "judge" becomes law and assumes the status of a guarantor of the promises of modern democracy (Garapon, 2001). What is expected in democratic and organized societies from the legitimately established powers is that the legal order is ensured. The constant search for the Judiciary, if on the one hand reveals the possibility of claiming the rights, on the other reveals that formally assured rights end up not being fulfilled. As already stated, the phenomenon of judicialization leads to the individualization of conflicts, that is, to the production of responses only to the individuals involved in the demand.In the case of environmental conflicts, even if the demands are of collective interest and involve a plurality of subjects, often whole communities, the answers are for the case, for the specific demand. It is important to point out that this phenomenon of judicialization can therefore be analyzed by the bias of the contributions it presents to modern democracy, but it can be an indicator of the limitations of this model of organizating life in society. In this article specifically, what is intended is to identify how this phenomenon can contribute to strengthen or define perspectives of the concept of sustainable development and how the courts have manifested in the understanding of the relationship between human beings and the rights of nature when deciding on development.

One task for the analysis is to understand how the Judiciary presents itself with these attributions. The judiciary legitimately possesses the power of guardian of the rights, with two functions foreseen in the Brazilian Constitution of 1988: one, of state power and another, of service provider institution (SADEK, 2004a, p. 79).The role of this power "is not only to limit absolute power and secure rights, but to be an instrument for the realization of social justice and for the promotion of rights, incorporating values of social, economic and cultural equality." (SADEK, 2004a, p. 79).Although the legal and political model of the Democratic State of Rights in Brazil broadens the scope of the Legislative Branch as well as that of the responsibility of the Executive Branch, including allowing the power to legislate through provisional measures, "these potentialities have increased the responsibility of the Judiciary to exercise political mediation between the two other powers and in the constitutional control of legislative and governmental acts" (SADEK, 2004, p. 80). What is being affirmed is that Brazil's model of democracy attributes to the Judiciary the role of protagonism "representing a substantial change

in the profile of the Judiciary, elevating it to the center of public life and giving it a leading role of greatness" (SADEK, 2004a, p. 81).According to Boaventura de Souza Santos (2005, p. 97) "This new judicial role translates into a confrontation with the political class and other organs of sovereignty, namely the executive power. We are facing a judicialisation of political conflicts that can not but be translated into the politicization of judicial conflicts."The author's reflection therefore points to one of the risks of the phenomenon of judicialization, which is the politicization of judicial decisions or the judicialization of politics. These are consequences that the Brazilian reality has evidenced in judicial decisions involving, for example, the Impediment Process of President Dilma Roussef in 2016. Many of the positions of the Brazilian Supreme Court were more political than stated in the legal precepts that involved the issues being debated in the specific case, although many jurists affirm on the legality of the process. The Minister Barroso[1] (2017) states that there are 30 years of stability of institutions and that the 2016 process indicates the maintenance of this same stability. It all occurred, he said, in the procedures established in Constitution of 1988.

In spite of these limitations arising from the relations of power and interests at play in the phenomenon of judicialization, in this study it is appropriate to reaffirm an understanding of the legal phenomenon produced in modernity that systematically resorts to the concept of rationality (WEBER, 1999) in which judicialization is taken as a legitimate form of conflict resolution. In the study of the law in Economics and Society, when discussing the relation of the production of "fixed rules and forms" as the way of establishing the instruments of power control, the author affirms that law is a form of limitation of the power of domination and at the same time an instrument of division of power (WEBER, 1999, p. 506). He further states that:"Sólo el Occidente ha elaborado una doctrina científica del derecho público, porque únicamente en él ha asumido la asociación política el carácter de un instituto con división racional de poderes y competencias" (WEBER, 1999, p. 507). The division of power is rational, so it is hoped that the phenomenon of judicialization can also be based on the foundations of this rational production of the legal order. Formally

1 Lecture delivered by Minister Luís Roberto Barroso in Event: Repensando o Brasil: ideias para um novo país, on December 1, 2017, at 8:00 p.m.Auditorium of OAB/SC. http://www.oab-sc.com.br/noticias/oabsc-traz-florianopolis-ministro-do-stf-luis-roberto-barroso/14760

this is the model of legal order that is presented for the performance of the magistrates, therefore also with mechanisms of control and consequent guarantee of Law.

The analysis of the phenomenon of judicialization as a process of social order production comes from a theoretical construction that understands the legal system as a complete system that can, from the rationality, produce general, abstract and impersonal rules that organize the life of the subjects, guaranteeing a harmonious coexistence closest to the values of justice that each time presents. Weber (1999) indicates some ways in which these conceptions of rational legal order can be based: 1) the whole legal decision is the application of an abstract concept to a concrete case; 2) by legal logic it is possible to find a solution to the concrete case that relies on abstract concepts in force; 3) the current legal system is a system without gaps; 4) cases that can not be resolved rationally are not important to the law and 5) the conduct of men or are the application or enforcement of legal precepts or constitute an infraction of these precepts. These grounds indicate that the starting point of law in modernity constitute, despite the complexity, the same points of reference in the period already indicated by its specificities as postmodernity. This rationality must dialogue with the weaknesses of an instrumental and therefore limited rationality, but which may have in the work of the judiciary a mechanism for the performance of democratic and legitimate institutions.There are many aspects that indicate the limitations of this perspective, including the gaps that can be indicated in the relations that establish the contours of the Brazilian State. These limitations do not prevent the phenomenon of judicialization from being a relevant fact in the context of social and political relations in Brazil. Analyzing them is to some extent to highlight these limitations: what legal order? Produced by whom? Who are the legal operators who deal with these relations? How do they treat? What interests do they represent?

In order to identify theoretically how the judicialization phenomenon can update the law and produce new rules that incorporate the defense of a new model of sustainable development in the environmental area, we use Weber's (1999, p. 518) reflection: it may be the revelation of an individual decision on what in a particular case is just, (...) the inspiration of new norms can come to the person charismatically qualified with independence, real or apparent, of a certain concrete occasion, without

any change in the external conditions". That is, the demands can make the judge, from the concrete case, to reaffirm interpretations and produce answers that interfere in the creation of new legal norms, or to reaffirm certain legal concepts.In the Weberian perspective appropriate to the Modern State model, there is authority in the Judiciary for this production.

In this sense Weber (1999, p. 531) states:

> a right can be rationalized in various forms, not necessarily in the direction that involves the unfolding of its properly 'legal' qualities. But the direction in which these formal qualities unfold is directly conditioned by circumstances we might call 'intrajuridic', namely the peculiarity of the circle of persons who can *professionally* influence the formation of law and only indirectly by the economic and rational conditions of general nature. The first is the type of 'legal doctrine', an expression which here means education or school formation of practical jurists.

The recognition of this place of production of the legal order can present as a challenge for the study to think about who these technical jurists are, how they are formed and what legal perspectives they work with. In this respect, it is understood that the phenomenon of the judicialization of modern democracies, especially in the Brazilian experience, has revealed a legalistic judiciary. In the case of Environmental Law, the Brazilian constitutional text may allow interpretations that broaden and define greater protection of the environment and the search for a balanced environment for present and future generations, which is possible in a context of sustainable development. Adherence to the law, however, leads to significant portions of decisions delaying jurisdictional provision: "suffocated by the disorder of legal mandates, resources, instruments, and formal expedients to be served by the state bureaucracy" (BITTAR, 2009, p. 443). The negative aspects, in this case, are related to the formalization and maintenance of a dogmatic positivism.

The importance that the Judiciary now occupies in this phenomenon justifies recognizing the criticisms that exists about the performance of this power in Brazil. As Tereza Sadek (2004a, p.85) states, "criticisms are often made that we live in a "legal asylum "; the judiciary acts "ideologically and irresponsibly", as if public resources were inexhaustible, or alien to the consequences of their decisions in the

economy or the administrative machine; judges consider themselves the "true representatives of the interest of the people". Or, "in a country with a broad reform agenda and adopting an institutional model that combines the judicialization of politics and the politicization of the Judiciary, as is the case in Brazil, the problems stemming from the political dimension of the Judiciary are more than than expected, become inevitable" (Sadek, 2004b, p. 8). In this aspect, the production of the legal order by the Legislative Branch presents, at the first moment, a Power that would have greater legitimacy, elected by the people, with the representativeness that democracy demands and, above all, with the reach of generality. Decisions on a case-by-case basis, such as those produced by the Judiciary, as well as the immediate scope, of rule of law between the parties, have the aspect of personality, of the particular situation that can generate small or large 'injustices'.

Decision-making, on the other hand, can be an appeal to denounce the limits of the formal scope of the law. It is possible to see the visibility of the consequences, in certain situations, of the distance between what prescribes the legal norm and the reality of social relations. Here the Judiciary is "called to discover the law of the concrete case, not simply through the formal subsumption of fact to the norm, but through valuations and the adaptation of the norm to the dynamics of social reality. In this sense, the judge strongly linked to the law is replaced by a judge who shapes social life, with sensitivity to capture and meet the multiple social needs" (VERBICARO, 2008, p. 395).There is, therefore, an affirmation that expects of the Judiciary Power the externalization of a model of justice, of common good that is present in the juridical order and that the phenomenon of the judicialization can make external.

One element that assists in this reflection is the perception that there is a place of power to say the right or that there is a "relation of authority between the one who commands and the one who obeys, that is based neither on the common reason nor on the power that commands; what they have in common is the hierarchy itself, whose right and legitimacy they both recognize and in which both have a predetermined stable place" (ARENDT, 2011, p. 129). There is recognition for the existence of power and authority and their acceptance in the formation of social relations. The law is the instrument that allows to relate power and domination.

This equation appears in the authority that is represented by judges in the processes of judicialization of environmental conflicts.

Magistrates take a place in the production of law that allows us to speak less of 'rationalization' or 'regulation' and more of 'civilization' or 'humanity'.Justice then appears as a symbolic means of pacifying and eliminating conflict "(Allard and Garapon, 2006, p. 39).

> The power of the judges comes from two functions that constitute the magistrates' doing, which is the "*imperium,* that is, the power to impose a solution on the parties" and "the *jurisdiction,* that is, the ability to say the right, the foundation", thus, *imperium* is related to the power that the magistrates have, and the *jurisdiction* is related to the need to convince that the decision was correct.It is the relation of power and authority present in the exercise of the functions of magistrates (Allard and Garapon, 2006, p. 44).

All decisions made by magistrates must reach this status of power and conviction. Recognizing that it was a wise decision. It is formally the search for a rational decision, that is, of a judge who has the concern for impartiality.For Ricoeur (2008, p. 9) "the institution is incarnated in the character of the judge, who placed in a third party between the parties in the process, plays the role of third in the second degree; it is the operator of the fair distance that the process establishes between the parties". The author reveals the importance that the magistrate starts to occupy, for "the judge stands for the legal as well as the master of justice stands for morality and for the prince, or like any other custom figure of sovereign power stands for politics. But it is only in the figure of the judge that justice is recognized as 'the first virtue of social institutions' (RICOEUR, 2008, p. 9). It is to do justice to the concrete case, "of the here and now". The decision handed down by the judge has a role of putting an end to the uncertainties.Give the conflict a final decision. That is, it has the role of revealing that the formally constituted powers take place and occupy the almost systematic defense of some well-defined interests, in this case of parcels of society that sustain the present relations of power.

In the perspective of the production of the juridical order, another limit that appears for the judicialization of social conflicts is the diversity of the members that compose this Power. Sadek (2004a, p. 89) states that

"as regards to the mentality, the Judiciary does not differ from other equally closed institutions with aristocratic features.The costumes of the institution have proved to be a problematic point, since, far from encouraging the noun, it refers to form; instead of rewarding the commitment to the real, encourages abstract knowledge. (...) It should be emphasized, however, that in recent years the internal reactions to this model have grown. So much so that, today, it can hardly be said that the magistracy constitutes a homogeneous body ". The text by Maria Tereza Sadek (2004a, p. 89) points out that "many judges have been critical of the institution and sensitive to proposals for change, even if they directly affect corporate and traditional interests.Although these groups are not majority, there is a significant internal renewal towards greater pluralism and a consequent break in the traditional mentality model." Therefore, they can be subjects who judge without the detachment that is formally expected or may interest a way of judging compromised with environmental issues. In any situation, there are limits, because the phenomenon of judicialization is the 'individualization' of conflicts. Consequently, differentiated responses are another way of complexifying this form of social order production.

One of the greatest challenges of the judiciary is the training of magistrates who have the task of saying the right to environmental conflicts that reach the Judiciary. In addition to environmental law being a relatively recent branch in the Brazilian legal system, it is a field that requires a multidisciplinary training, which besides matters of material and procedural law involves the environmental theme and its related areas. And perhaps the most complex also involves a knowledge that identifies the interests that are at stake when it comes to, for example, a dispute between sustainable economic development and protection of 'natural assets'. "Thus, the problem of *expertise* goes beyond the question of pure information because it includes a discussion about what is acceptable, blurring the transparency of the reports with disparate interests and values" (SILVA, 2009, p. 798).

In addition to this training challenge, one can perceive that the judicialization of social conflicts brings to the legal world scenario a greater participation of individuals who claim their rights and defend specific conceptions about the look that the law must carry out in each case in dispute (ROJO, 2004). They are "new social forces represented by important movements, organizations and social groups that began to

mobilize and to resort to the Judiciary to seek recognition and realization of their rights, which demonstrates the broader political participation of social actors and engagement of organized civil society, especially after the democratization of the country" (VERBICARO, 2008, p. 400).Here it is possible to identify the emergence of subjects who historically were at the margin of the process of production of the pacts that construct the Brazilian State and, more than that, a closer look at the phenomenon of the judicialization will indicate the subjects of Brazilian society that remain completely excluded of any mechanism of access to the use of the tools that sustain democracies, among them access to the possibility of claiming rights.

Participants are encouraged to act especially as a result of an environmental crisis that has repercussions on life, culture, social and political dynamics on a global scale (MUNIZ, 2009). Or yet,

> the environmental issue has reached a global problem dimension, mobilizing organized civil society, the media and the governments of various countries.This movement brought an eminently sociological approach to the environmental issue, contributing to the discussion about the processes of constitution of conflicts between social groups in the struggle for the use of natural resources, so-called distributive conflicts, or simply socio-environmental conflicts (MUNIZ, 2009, p. 183).

Judicialisation is one of the strategies of the social movements involved with environmental issues because they find in this resource a way of giving visibility to conflicts (LOSEKANN, BISSOLI, 2017). In the study of the environmental movement it is evident that the judicialization does not always mean the search for victory, but a way of seeking the 'authority' that can say the Law. Matthew M. Taylor and Luciano Da Ros (2008, p. 827) acknowledge that "judicial tactics, in other words, are not necessarily based on the expectation of a judicial victory." It is often sought to delay, prevent, demean or declare an expected response. Judicial decision is, therefore, one of the strategies.From this perspective, it is understood that

> the Judiciary can not be conceived as a totalizing and revolutionary structure capable of provoking, on its own, emancipatory transformations in society and the national development of the country. The access route to the Judiciary is an important channel and instrument for the transmission of individual and collective claims in order to guarantee the fundamental rights of citizens, which can not be treated as simple ethical recommendations to the State or appendices to democracy (VERBICARO, 2008, p. 404).

The last aspect that needs to be analyzed about judicialization is the importance that each of the powers occupy in the process of consolidating democracy in Brazil. A certain stability of the institutions is assured as the independence and autonomy of the powers is ensured, in the model of validity of the Federal Constitution of 1988. The role of the Judiciary Power, despite the limits pointed out so far, can be evaluated as the indicator of a democracy that strengthened its bases in the years of redemocratization of the Brazilian State. Thus:

> Judiciary power provides conditions of possibility for a dynamization of democracy by making feasible the full realization of individual and social fundamental rights. In this way, the political powers of the State are encouraged to act in the effective realization of public policies capable of socially improving the life of society, in order to rescue the representativeness of political powers and their importance in the conduct of the State and the governmental policies of inclusion and social justice" (VERBICARO, 2008, p. 404).

The search for the Judiciary can be an indication of the exercise of citizenship, represented by a feeling of belonging. Both individuals and different social groups claim their rights because they perceive themselves as holders of these rights. Rojo (2004) says that belonging to a community and the recognition of a political authority introduces the issue of the political order, which includes the notion of the citizen as an individual with a "right to have rights" of political change and for the formation of a community that recognizes freedom and equality.{ 0}Democracy should broaden the scope of equality, especially for the rights dispute. And the Judiciary has

been constituted in this space to ensure rights. The "[...] Judiciary, rather a peripheral Power, encapsulated in a logic with autopoietic pretensions inaccessible to the laity, far from public concerns and social actors, shows itself to be a central institution to Brazilian democracy, both in terms of its proper political expression and in its relation to intervention in the social sphere" (VIANA et al., 1999, p. 9).It is reaffirmed here the perception that this analysis affects portions of Brazilian society. It is acknowledged that the construction of the pact that creates the Brazilian State is strongly based on a process of not recognizing very significant portions of Brazilian society. Some of these subjects begin to appear as policy subjects who want to minimally start bailing out a historical debt.

The strengthening and formal stability of institutions in a Democratic State of Law therefore presents challenges for the Judiciary as well. There is a need to occupy a position-related role in the defense of fundamental rights. "Some of these rights are intimate and related to the administration of justice, such as equality before the law, access to an impartial and independent judiciary, protection against arbitrary detention and torture, anti-corruption control mechanisms" (AZEVEDO, 2005, p. 215). The judicialization of social conflicts deals with the guarantee of rights, both those formally assured and those that need re-reading or to be included in the social order.

3. THE JUDICIALIZATION OF ENVIRONMENTAL CONFLICTS AND THE CONCEPTION OF SUSTAINABLE DEVELOPMENT IN THE DECISIONS OF THE SUPREME FEDERAL COURT

In the face of social and environmental crises, environmental catastrophes and the recognition that environmental law is a right that must be guaranteed for all while a fundamental right, we sought to analyze how the Judiciary has been positioned and applied the principle of development in the Federal Constitution of 1988. It is important to emphasize that there are at least two new legal instruments for the filing of actions with environmental demands: the Civil and Criminal Liability Action for damages to the environment and the Public Civil Action. Both can be proposed by the Public Ministry. The second can also be carried out by the Federal Government, the Public Defender's Office of the member

states or other representatives of the states and municipalities, public companies, foundations and mixed-economy companies, associations with more than one year of existence and which encompass the protection of the environment, the consumer and/or historical and cultural heritage among its purposes.Such devices demonstrate a legal order that aims at protecting the environment and an opening for the judicialization.

Nonetheless, the prevalence of an anthropocentric view of environmental rights remains largely the same. The phenomenon of judicialization can highlight the need for recognition of a Nature Law and the construction of a sustainable development model that allows its protection. That is, the intensification of the phenomenon of the judicialization of environmental conflicts and the growth of problems in this area have led to manifestations of the Judiciary.

In order to survey lawsuits dealing with environmental conflicts and in which the theme of sustainable development appears, use was made of the search tool for jurisprudence on the website of the Federal Supreme Court. The objective in this text is not the quantification of actions, data that are available in the reports of the National Justice Council (CNJ, 2010), but to identify emblematic decisions in the debate on environmental development after the Federal Constitution of 1988, which included the principle of sustainable development and environmental protection as standards to be met. In the page of the Federal Supreme Court, in the consultation of jurisprudence, using two filters: 'sustainable development' and selecting 'judgments in full' are 43 decisions, on 11/15/2017. The purpose is a detailed analysis of the position of the Court and for this were selected only three judgments that are exemplary of the understanding of sustainable development that the Federal Supreme Court has produced in the period of validity of the current Federal Constitution of Brazil: the first is the decision rendered in the Direct Action of Unconstitutionality (ADIN) 3540-1[2] a discussion on the Law establishing the Forest Code; the second decision is rendered in the Arrangement of Non-compliance with Fundamental Precept (ADPF) 101[3] and deals with the importation

2 The first is the decision given in ADIN 3540-1 with a preliminary injunction filed in 2001, by the Attorney General of the Republic seeking the Declaration of Unconstitutionality of arts.1º. of Constitutional Amendment no.2.166-67 of 2001, which amends arts. 4th caput and paragraphs 1st, 2nd, 3rd, 4th, 5th, 6th. and 7th. of Law 4771/65 that establishes the Forest Code. The decision was rendered on September 1, 2005.

3 The second decision is in ADPF 101, with a request for preliminary injunction, filed by the President of the Republic, based on "articles 102, § 1, and 103, of the Constitution of the Republic, and in article

of recyclable tires into Brazil; and the third is the decision of ADIN 4983[4] which regulates the vaquejada as a sporting and cultural practice in the State of Ceará.The choices were defined after the analysis of the concept of sustainable development that appears in the other decisions. It is important to note here that not all the decisions found by the search filter deal with sustainable development issues, but they appear in the search carried out because one of the STF Ministers was part of a Sustainable Development Commission, and that indicative followed its name in the trial guidelines.

In the first decision under analysis, the concept of sustainable development is related to the possibility of using natural resources. It predominates an anthropocentric view because it recognizes the need for permanent preservation areas as a way of preserving and conserving biodiversity, but allows for such areas to be used by law. ADIN 3540-1 deals with the request of the Attorney General of the Republic on the unconstitutionality of Constitutional Amendment 2.166-67 of 2001 that amended the Forest Code in force at the time, Law of 2001 and ADIN judged in 2005. The amendment to the proposed alterations allows permanent preservation areas to have their vegetation altered, to be used as long as a permit from the public administration defines.From the text of the previous legislation, this possibility was only allowed by law, a general rule, abstract and approved by the Legislature. The unconstitutionality was preliminarily recognized, based on the risk presented by the state attorney general of a meeting of the National Environmental Council that would authorize the use of a permanent preservation area for mineral extractivism. The impact of such actions on the environment is, as a rule, irreparable. According to the prosecutor, the control of local authorities on the issue brings more vulnerability to environmental protection than if such authorizations continued to emanate from the Legislative Branch. In the analysis of merit, the rapporteur, Minister Celso de Mello, modifies the decision granted on the grounds that ensuring a balanced environment is necessary because it is "human rights, qualified as fundamental values,

2, inc.I, of Law no. 9.882, of [12/03/99], (...) in order to avoid and remedy injury to a fundamental precept resulting from an act of the Public Power, represented by judicial decisions that violate the constitutional mandate set forth in art. 225 of the Constitution" of the Republic, deals with numerous decisions authorizing the importation of recyclable tires to Brazil, contrary to decisions already handed down, judged in 2009.

4 The third is the decision of ADIN 4983 filed by the Prosecutor of the Republic requesting a precautionary measure to declare the Unconstitutionality of Law No. 15.299, of January 8, 2013, of the State of Ceará, which regulates the vaquejada as a sport and cultural practice, judged in 2016.

as prerogatives impregnated with a nature essentially inexhaustible" (BRASIL, 2005, judgment in Integra, p. 13 and 14). In recognizing the status of human rights for environmental law, it also recognizes the need to protect the environment by virtue of its intergenerational character and international commitments on environmental issues assumed by Brazil. It understands, however, that there is no injury law in allowing the government to undertake use of concessions in permanent preservation areas supported by two main arguments: the damage must be repaired (the polluter pays character) and that this provision is clear in the legislation, prevailing here the economic development; and the second argument is that the recognition of the unconstitutionality of this Constitutional Amendment would cause more damage to the economic development of the different regions of Brazil. The Minister here assumes the presumption that the local administrative authority will be the one best placed to assess the balance between the principles of economic development and the principles of ecological protection, as these principles, according to the rapporteur, are expressed in the Constitutional text and, therefore, must be ensured.

The vote of the STF president, then Minister Nelson Jobim, also reformulated his preliminary decision and the ground is turned to the aspect that the concession of use of the permanent areas must be authorized by the Public Administration, by definition of the Federal Constitution, and states that: "preserving the ecologically balanced environment does not mean stagnation; it does mean that the acts of its exploitation will not be those permitted in the form of ordinary law, but rather through a series of preservation measures" (BRASIL, 2005, Integra, p. 43 and 44). In the same vein, also were the votes of Minister Eros Grau and Minister Ellen Gracie.

Minister Carlos Brito, Minister Sepúlveda Pertence and Minister Cesar Peluso question in the manifestos of the decision about the risks of allowing the administrative authority to authorize the suppression of the vegetation in areas of permanent preservation. However, of the three ministers, only the Minister Carlos Brito understood by the declaration of unconstitutionality of the Constitutional Amendment and by to remit the decision preliminarily granted.

Despite the formal disagreement with the proposed demand, Minister Celso Mello affirms that the decisions made, except by Carlos Brito, are of "economic interest" and not directed towards the protection

of the environment. In order to base its vote on the unconstitutionality of the Constitutional amendment under debate, he states: "Poor Mother Earth, poor present and future generations in what has just been forgotten the parameters of the Charter of the Republic, the parameters aimed at the preservation of the environment as much as possible, aimed at the respect for the environment, and what is indispensable for the well-being of man himself. " (BRASIL, 2005, Judgment in Integra, p. 65) Indicating in its vote that the decision to maintain the validity of the Constitutional Amendment is substantially protection against the economic exploitation of natural assets.

The decision of the majority of the members of the STF in the judgment of ADIN 3540-1 was for the dismissal of the request of unconstitutionality and the prompt restoration of the validity of the Law.

In the second case, ADPF 101, judged in 2009, has the request of the President of the Republic to standardize the understanding on the import of tires used by Brazil. The claim is against numerous court decisions allowing the importation of used tires despite the current legislation prohibiting such practice[5]. In the lawsuit, it isrecognized the exception of legislation to the Mercosul countries arising from the arbitration award decision handed down by the Arbitral Tribune of Mercossul - requested by Uruguay and regulated internally. In the initial section, the President's reasons are stated, which justify that such decisions violate the aforementioned provisions, existing constitutional provisions and international agreements in force, and mainly because they cause environmental damages and injure the right to health of the Brazilian population.The rapporteur, Carmem Lúcia, in her long vow, acknowledges the damage that such practices cause.Therefore, she recognizes the duty of the Brazilian State to protect the environment for present and future generations and, in relation to the free initiative that is used with one of the arguments of the defense, invokes the principle of sustainable development as a basis for affirming that there are economic limits when it comes to environmental issues, and that protecting life and ensuring a balanced environment must override economic development in these situations. She expressly states: "Thus, by the risk of harm to the

5 DECEX no. 08/1991, of the Department of Foreign Trade; by the Brazilian Convention on the Control of Transboundary Movements of Hazardous Wastes and their Deposit, dated 03/22/1989; By the Resolutions 23/1996, 235/1998 and 258/1999 of the National Council of the Environment; by SECEX 08/2000 of the Secretariat of Foreign Trade and Decree 3919/2001 in addition to the commitments with the environment assumed by the Brazilian State

environment or public health, the constitutional principle of environmental precaution is fully applied, guaranteeing the supremacy of the public interest over the particular, in the protection of life as a greater good to which the Constitution gave special attention" (BRASIL, 2009, Acórdão na Íntegra, p. 119).

An indication of the complexity of this decision and the impact it produces because it points to a development bias that is more focused on a balance between economic development and sustainable development is the fact that only the Rapporteur's vote with the annexes make up 179 pages. The judgment with all votes contains 278 pages. The vote of Minister Menezes Direito accompanies the rapporteur's vote for the merits of the action and highlights the "preservation of the environment in its connotation as a good of mankind" (BRASIL, 2009, Acórdão na Íntegra, 195), the environment still poses as a good, but as a good to be preserved. Minister Ricardo Lewandowski also followed the rapporteur's vote. The Minister Marco Aurélio in his vote bases the questions raised by the dismissal of the request.

Ministers Eros Grau, Gilmar Mendes, Ellen Gracie and Joaquim Barbosa vote in the light of the rapporteur's decision. There is in the judgment a debate on the decision to partially approve the argument because Minister Carmem Lúcia, in her vote, makes reservations to guarantee the cases of importation already defined in court, with judged transit and already executed.In relation to other cases, this decision shall take effect. It is an understanding that reaffirms the constitutional foundations that protect a prospect of sustainable development and protection of the environment for present and future generations.

The third case is ADIN 4983 filed by the Prosecutor of the Republic with a request for a precautionary measure to declare the Unconstitutionality of Law No. 15.299, of January 8, 2013, of the State of Ceará, which defines the vaquejada as a cultural patrimony, judged in 2016. This is the decision that brings in its votes a position that seeks to be in tune with a new paradigm of Environmental Law and highlights the need for a new relationship between humans and nature.

Minister Marco Aurélio, the rapporteur, considered the request to be well-founded considering that the Law authorizing the vaquejada in the state of Ceará is unconstitutional. It does not recognize the right to

subject animals to cruel treatment, and that a cultural patrimony should not be recognized in this practice. Ministers Edson Fachin and Gilmar Mendes dismissed the application, recognizing the constitutionality of state law.

The decision of the Minister Roberto Barroso for the unconstitutionality of the law is based on a perspective of respect and protection of animal rights, since part of the analysis of the vaquejada, the description of "sport" and the necessary fall of the ox and its raising by the tail, which by studies, has proven to cause damage to the animal. Such a practice is not admissible because it is based on a relationship of human beings with animals in a perspective of "domination, control and exploitation" (Brazil, 2016, Summary of the Judgment, p.35).Barroso, in his vote, rescues the historical construction of chains that defend the rights of animals, which recognize them as 'subjects-of-a-life', identifies that this is the Brazilian Constitutional perspective when determining that it is the State's duty to protect environment for present and future generations. Minister Rosa Weber and Minister Celso Mello followed the rapporteur's vote in the sense of unconstitutionality of the Law. Ministers Teori Zavascki, Luiz Fux and Dias Toffoli voted for the constitutionality of the law. With these manifestations, it is declared by majority, the Unconstitutionality of Law no. 15.299/2013, of the State of Ceará.

The manifestations of the upper courts are important for the strengthening of conceptions that can bring confirmation of the need to establish a new relationship between humans and nature as a condition for facing this time of social and environmental crisis. Another case that demonstrates how the STF has responded on the issues surrounding the environment and the guarantee of a sustainable development is the judgment of ADIN 3470 that, finally, by majority declared the unconstitutionality of art. 2 of Law 9.055/95, with binding effect and *erga omnes*[6]. ADIN 3470, ADIN 3937 and ADIN 4066 are some of the actions that dealt with the unconstitutionality of the permission to use asbestos in Brazil under the terms of art. 2 of Law 9.055/95. On this subject, the analysis of the vote of Minister Celso de Mello, ADIN 4066, judgment of 08/24/2017, in which he rescues the need for decisions that ensure the rights inscribed in the Constitution of 1988, of a balanced environment for present and future generations. Minister Celso de Mello affirms that decisions that involve Environmental Law must "not only protect the environment, but also

6 Latin: against all, concerning all or in relation to all.

protect the health and life of people."(BRASIL, 2017, Voto Ministro Celso de Mello, p. 30) The minister continues to indicate the need for a:

> new paradigm that emerges from the observation that scientific evolution brings with it unforeseeable risks, which are demanding a reformulation of the practices and procedures traditionally adopted in this field. This is because, as Cristiane Derani writes, it is necessary to 'consider not only the risk of a certain activity but also the future risks arising from human endeavors, which our understanding and the present stage of development of science can never capture in any density' (BRASIL, 2017, Voto Ministro Celso de Mello, p. 30).

The discussion of this topic involves the need to prevent the continuity of the use of asbestos due to damages to health and, consequently, to the environment, which are already proven. The vote also mentions that the prohibition of the use of this material already occurs in more than 50 countries and that Brazil, in addition to providing in its Constitution the basic principle of promoting sustainable development, is a signatory of treaties that aim at sustainable development as basic premise for the survival of all living beings.

Still to illustrate the implications of the phenomenon of judicization and its impact on social relations, we can mention the defeated vote in the International Court of Justice on the case of the Gabcikovo-Nagymaros project, a vote given by the Vice-President of the Court, Judge Christopher Gregory Weeramantry, judged in 1997, in which he invokes the need to consolidate a sustainable development perspective as a condition to protect the environment for future generations (COUR INTERNATIONALE DE JUSTICE, 1997). In the vote, Weeramanty draws attention to the relations that primitive peoples established with nature and which were relations of respect, care for preservation, and are the only values that could make nature assured for future generations. The relationship of use and predatory makes the survival of any life on planet earth unfeasible.

Finally, the phenomenon of judicialization has pointed to a resource that emerges as an alternative in Latin America, an acknowledgment that nature is the holder of Rights. There is a diversity of actions in which

nature itself proceeds to claim its rights. In addition to actions that have been the subject of studies in Latin America, two cases may be cited in Brazil, as an example. The first is the origin of a public civil action filed by the Public Prosecutor's Office in detriment of Damiani Agrícola LTDA., Based on Civil Inquiry No. 01337.00004/2016 in which the Rio Gravataí, Rio Grande do Sul, in an injunction was recognized as subject of rights and, therefore, with rights of reparation for the preservation and reimbursement of damages suffered (BRASIL, TJRS, 2017). And the second is an initial one sent in 2017 in which the Rio Doce, from the well-known and unfortunate catastrophe of Mariana, MG, enters as subject of Rights, claiming the conditions of environmental protection (BRAZIL, TJMG, 2017).

It is necessary to have sensitivity for the construction of these new looks that can allow the survival of human beings and of nature, or make life conditions unfeasible in the spaces that surround us. The challenge is to advance in the establishment of new principles of coexistence, new values in the processes of production and especially, to construct new models of consumption, considering all living beings as beings with rights.

CONCLUSION

It is evident that the prospect of sustainable development requires a new conception of the relation between human beings and nature. The old anthropocentric conception of Environmental Law points to a notion of domination and exploitation of nature and therefore unfeasible for the survival of all species in the current model of production and consumption.

The use of the judicialization of environmental conflicts, as well as a strategic resource for the publicizing of conflicts and the demand for evaded rights, has revealed the limitations of law in postmodernity. What you have is a formal, positive right, but one that moves away from a more effective process of guaranteeing rights.

Another aspect that the study of judicial decisions reveals is that the promises of a possible fair, neutral right that could be guaranteed to everyone under conditions of equality, freedom and opportunity is in fact more a fallacy of the legal order than the conditions of guarantee of rights. What we have are judges committed to a development model that

has the economic issue as the central mote. This perspective is evidenced in the analysis of ADIN 3540-1 in which the ministers understand that it is necessary to ensure the model of economic development that authorizes the suppression of vegetation in areas of permanent preservation, with the authorization of the public administration, but with a high discretion, without considering the interest of environmental protection.

Despite the intensification of judicialization as one of the ways to resolve environmental conflicts, it is stated that significant changes will only be achieved as more individuals and institutions are mobilized by changes in the field of Environmental Law.The maxim of the 1988 Constitution is still the current challenge: it is the duty of the state and civil society to broaden spaces for the construction of a model of development based on the indicators of sustainable economic development pointed out by Amartya Sen (2010), and that can represent the diversity, plurality and complexity that make up Brazilian society and, above all, that it is based on a new paradigmatic model of the relationship between human beings and nature.

BIBLIOGRAPHIC REFERENCES

ALLARD, Julie e GARAPON, Antoine. *Os juízes na mundialização:* a nova revolução do direito. Tradução Rogério Alves. Lisboa: Instituto Piaget, 2006.

ARENDT, Hannah. *Entre o passado e o Futuro.* 7ª. ed. Tradução Mauro W. Barbosa. São Paulo: Perspectiva, 2011.

AZEVEDO, Rodrigo Ghiringhelli de. Criminalidade e justiça penal na América Latina. *Sociologias***,** Porto Alegre: UFRGS, Programa de Pós Graduação em Sociologia no.13, jan./jun2005, p.212-241.

BECK, U. *Sociedade de Risco:* rumo a uma outra modernidade. São Paulo: Editora 34, 2010.

BITTAR, Eduardo. Homem globalizado, com que direito? Eduardo Bittar from cpfl cultura on Vimeo. Disponível em: https://www.youtube.com/watch?v=L74yuOdtWUI - Gravado em: 12/8/2004.

BITTAR, Eduardo. Carlos Bianca. *O direito na pós-modernidade e*

reflexões frankfurtianas. 2ª. ed. rev., atual. e ampliada. Rio de Janeiro: Forense Universitária, 2009.

BRASIL. Supremo Tribunal Federal. ADIN 3540-1, julgado em 2005.

BRASIL. Supremo Tribunal Federal. ADPF 101, julgado em 2009.

BRASIL. Supremo Tribunal Federal. ADIN 4983, julgado em 2016.

BRASIL. Supremo Tribunal Federal. ADIN 4066, Voto Ministro Celso e Melo, julgado em 2017.

BRASIL. Tribunal de Justiça do Rio Grande do Sul. Inquérito Civil nº 01337.00004/2016, decisão de 2017.

BRASIL. Tribunal de Justiça de Minas Gerais. Belo Horizonte, inicial Rio Doce - proposta por Lafayette Novaes, em 2017.

CARSON, Rachel. Primavera Silenciosa. 2. ed. São Paulo: Portico, 1962.

CONSELHO NACIONAL DE JUSTIÇA. Relatório do Conselho Nacional de Justiça, 2010. Disponível em: http://www.cnj.jus.br/publicacoes/relatorios-publicacoes, Acesso em: 01/08/2017.

COUR INTERNATIONALE DE JUSTICE. *Case Concerning The Gabcikovo-Nagymaros Project,* voto do vice-presidente da Corte, o juiz Christopher Gregory Weeramantry, 1997.

DERANI, Cristiane. *Direito ambiental econômico.* São Paulo: Max Limonad, 1997.

DERANI, Cristiane. *Direito ambiental econômico.* 3ª. Edição. São Paulo: Max Limonad, 2008.

GARAPON, Antoine. *O juiz e a democracia:* o guardião das promessas. Tradução: Maria Luiza de Carvalho. Rio de Janeiro: Revan, 2001.

HARVEY, David. *Condição pós-moderna:* uma pesquisa sobre as origens da mudança cultural. Tradução Adail Ubirajara Sobral e Maria Stela Gonçalves. 10. ed. Edições Loyola: São Paulo, 2001.

LEIS, Héctor Ricardo. *A modernidade insustentável:* as críticas do ambientalismo à sociedade contemporânea. Petrópolis, RJ: Vozes; Santa Catarina: UFSC, 1999.

LOSEKANN, Cristiana e BISSOLI, Luiza Duarte. Direito, Mobilização Social

e Mudança Institucional. *Revista Brasileira Ciências Sociais* [online]. 2017, vol.32, n.94, e329403. Epub 15-Maio-2017. ISSN 1806-9053. Disponível em: http://dx.doi.org/10.17666/329403/2017.

MUNIZ, Lenir Moraes. Ecologia Política: o campo de estudo dos conflitos sócio-ambientais. *Revista Pós Ciências Sociais,* v.6, n.12, 2009, p. 181-196.

PÁDUA, José Augusto (org). *Desenvolvimento, Justiça e meio ambiente.* Belo Horizonte: Editora UFMG; São Paulo: Peirópolis, 2009.

RICOEUR, Paul. *O justo 1: a justiça como regra moral e como instituição.* Tradução Ivone C. Benedetti. São Paulo: WMF Martins Fontes, 2008.

ROJO, Raul Enrique. Por una sociologia jurídica del poder y la dominación. *Sociologias.* Porto Alegre: IFCH/UFRGS, ano 6, n 13, p. 36-81, jan/jun. 2005.

SANTOS, Boaventura de Sousa. Para uma sociologia das ausências e uma sociologia das emergências. *Revista Crítica de Ciências Sociais*, n. 63, p. 237-280, Out 2002.

SANTOS, Boaventura de Sousa. Os tribunais e as novas tecnologias de comunicação e informação. *Sociologias.* Porto Alegre**:** UFRGS, Programa de Pós Graduação em Sociologia, no. 13, jan./jun, p. 82-108. 2005.

SANTOS, Boaventura de Sousa. *A difícil democracia:* reinventar as esquerdas. São Paulo: Boitempo, 2016.

SEN, Amartya. *Desenvolvimento como liberdade.* Tradução: Laura teixeira Motta; revisão técnica: Ricardo Doninelli Mendes. São Paulo: Companhia das Letras, 2010.

SADEK, Maria Tereza. Judiciário: mudanças e reformas. *Estudos Avançados,* n. 18 (51), p 79 – 101. 2004a.

SADEK, Maria Tereza. Poder Judiciário: Perspectivas de Reforma. *Opinião Pública*, Campinas, Vol. X, nº 1, Maio, p. 01-62. 2004b.

SILVA, Gláucia. Expertise e Participação da população em contexto de risco nuclear: democracia e licenciamento ambiental de Angra 3**.** *DADOS – Revista de Ciências Sociais*, Rio de Janeiro, Vol. 52, n. 3, 2009, p. 771 a 805.

SILVA JÚNIOR, Roberto Donato, FERREIRA, Leila da Costa. Sustentabilidade na era das conferências sobre meio ambiente e desenvolvimento – um olhar para a ecologia e economia. *Ambiente e Sociedade***.** São Paulo, v. XVI, número 1. p. 1-18. jan/mar, 2013.

TAYLOR, Matthew M. e DA ROS, Luciano. Os Partidos Dentro e Fora do Poder: A Judicialização como Resultado Contingente da Estratégia Política. *DADOS – Revista de Ciências Sociais,* Rio de Janeiro, Vol. 51, n. 4, , p. 825 - 864. 2008.

VERBICARO, Loiane Prado. Um estudo sobre as condições facilitadoras da judicialização da política no Brasil. *Revista Direito GV*, São Paulo 4(2), p. 389-406, jul/dez, 2008 .

VIANNA, Luiz Werneck [et al.]. *A Judicialização da Política e das Relações Sociais no Brasil.* Rio de Janeiro: Revan, 1999.

WEBER, Max. *Economia y Sociedad.* Esbozo de sociologia compreensiva. México: Fondo de Cultura Económica, 1999.