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TO THE RULE OF ENVIRONMENTAL LAW: WAYS TO OVERCOME THE EFFECTIVENESS CRISIS IN THE BRAZILIAN CONSTITUTIONAL ENVIRONMENTAL LAW

AO ESTADO DE DIREITO AMBIENTAL: CAMINHOS PARA SUPERAÇÃO DA CRISE DE EFETIVIDADE NO DIREITO CONSTITUCIONAL DO MEIO AMBIENTE BRASILEIRO

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Abstract
In the 1988 Charter, environmental protection expresses constituent commands that are not optional and compel all governmentstructures, as well as society, to assume postures in accordance with the dictates of environmental protection, belonging to the core of constitutional identity. The competition of political, social and economic interests, also safeguarded by the constitutional text, with the protection of natural resources aimed at a dignified existence and the development of present and future generations, contextualizes deficiencies and omissions in the provision of environmental policies that require a reaction from the constituted powers so that the unconstitutional fault is not perpetuated. Jurisdiction represents one of the ways to implement the Environmental Constitution, formally and substantially legitimized by the principles of judicial review, as illustrated by recent Brazilian courts' approaches to the

Resumo
Na Carta de 1988, a tutela ambiental expressa comandos constituintes que não são facultativos e que compelem todas as estruturas do poder público, como também da sociedade, a assumir posturas em conformidade com os ditames de proteção ambiental, pertencentes ao núcleo de identidade constitucional. A concorrência de interesses políticos, sociais e econômicos, também salvaguardados pelo texto constitucional, com a proteção dos recursos naturais voltados à existência digna e ao desenvolvimento de gerações presentes e futuras, contextualiza deficiências e omissões na prestação de políticas ambientais que exigem reação dos poderes constituídos para que não se perpetue a mora inconstitucional. A jurisdição representa um dos caminhos para a efetivação da Constituição Ambiental, legitimada formalmente e materialmente pelas balizas do controle judicial, como ilustram recentes abordagens dos tribunais brasileiros face ao silêncio ou inércia do legislador ou do Pod-

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silence or default by the Brazilian legislator or Executive Power. The change in traditional paradigms, however, affects legal relationships and is not immune to criticism, which requires reflection and analysis by the legal community. The study uses the deductive method, proposing to examine the problem in the light of the neoconstitutional guidelines of environmental protection, and carries out exploratory, bibliographical and documental research to appreciate recent jurisdictional constructions based on the effectiveness of environmental protection in Brazil.
Keywords: environmental rule of law; effectiveness; judicial review.

er Executivo brasileiro. A mudança de paradigmas tradicionais, contudo, afeta relações jurídicas e não deixa de provocar críticas que exigem reflexão e análise pela comunidade jurídica. O estudo utiliza o método dedutivo, propondo-se a examinar a problemática à luz dos vetores neoconstitucionais de proteção ambiental, utilizando-se da pesquisa exploratória, bibliográfica e documental para apreciar recentes construções jurisdicionais fundamentadas na efetivação da tutela do meio ambiente no Brasil.
Palavras-chave: *estado de direito ambiental; efetividade; controle judicial.*

Introduction

The challenge of talking about environmental constitutionalism in contemporary Brazil is great. The crisis of constitutional effectiveness, familiar to the various spheres of social rights, is made explicit in the face of the contradiction between the duty to be normative, idealized by the original constituent, and the factual reality experienced in the homeland. After three decades of the citizen constitution in force, with numerous advances and additions of social achievements, as well as individual freedoms, the protection of the environment reflects a tortuous path with signs of normative and, above all, political setbacks.

The constitutionalization of Law – or of rights, in order to better understand the scope of its effects in the most diverse legal ramifications – carries with it the attributes of imperativeness, to link the State's actions through its constituted powers and also private parties in their legal relations; it implies obligatory observance of its commands. The discretion offered to the political and administrative construction of environmental protection does not concentrate the ability to carry it out, but only how to carry it out, through choices of procedures and specific protection mechanisms to better serve its peculiarities. The manager, the legislator and the law enforcer cannot do without environmental protection, under penalty of setting up the explicit violation of the duty assigned by the Major Law, either by commissive conduct or by omission.

The complexity of the environmental issue profiles interests of an economic, political and social nature, with historical issues that transcend time and space. It is a subject related to several areas of study and, for law scholars, it represents a multifaceted phenomenon that requires thorough investigation, based on its constitutional status and the consequences that are natural to it. Henceforth, one starts with its framing and contextualization as a political choice of the original constituent for understanding its scope and binding power, configuring itself as an identity element in the Brazilian 1988 Constitution, associated, like so many other legal goods, to the ideal of dignified and prosperous existence, enabling each and every individual to realize their potential, in line with the satisfaction of a common interest: the well-being of the community. Despite the existence of flaws in the implementation of constituent commands, as well as political postures that go against environmental protection guidelines, the Brazilian legal system has mechanisms to guarantee constitutional supremacy and must receive from academia and legal practice continuous attention and understanding, bringing the scope of the norm closer to the world of facts.

Through exploratory research, of a bibliographical and documental nature, making use of contributions from foreign experiences and using a deductive method, a reflection is presented – perhaps a provocation – to scholars and constitutional environmental law enforcers. It seeks to deepen the discussion on the (in) effectiveness of constitutional norms of environmental protection in Brazil and to glimpse possible ways to overcome the lack of normative adherence to the reality to which it turns, appreciating the mechanism of judicial review as an instrument for the realization of the constitutional environmental law.

1 Preliminary lines: on the consequences of the constitutionalization of environmental law and the scope of its commandments

Contemporary constitutions are the result of major changes in the 20th century, especially after the two world wars and dictatorial regimes, resulting in a new allocation for the Charter of fundamental rights, moved to a prominent position and differentiated hierarchy in relation to norms of a political-organizational nature. The State is assigned the duty of being not only the provider, but also the means of satisfying the demands necessary for the interest of the common good, linked to the conception of the inviolability of the human person and to the ideal of dignity already consolidated in the national and international law. Therefore, by assuming the format of the "Rule of Law", constituted powers, even if endorsed by

normative procedures, are not allowed to directly attack or denote the disregard for the minimum parameter of dignified existence for the current standard of civilization.

The ontological core of fundamental rights includes the protection of each and every human being and the instrumental link with the ideal of dignity, and it is this link that will endow a fundamental right with differentiated normative force. Its constitutional treatment offers attributes of direct applicability – dispensing with the mediation of the legislator to regulate legal-material relations – and constitutional effectiveness, here understood as effects that transcend a legal potential to be applied and observed in legal-material relations, whether they are carried out by the State in a position of hierarchy and verticality or developed within the scope of individuals in a position of horizontality – linking the performance of constituted powers and private relationships (CANOTILHO, 2003).

Since the first major constitutional cycle, fundamental rights translate conquests of their time that are incorporated into the axiological core of the normative system of each State, and each one, in its time, represents a sphere of legal protection that does not become obsolete, just short of the sociopolitical demand that responds to ulterior events and phenomena. As an example, the autonomy of the will founded the libertarian ideal of classical constitutionalism, accompanied by political rights; social rights, in turn, meet the assumption of offering opportunities for the exercise of freedoms and propose the construction of a basic level for each and every individual to enjoy a dignified existence and be able to exercise other rights (FARIAS, 2009). Diffuse rights even go further and transcend to offer future generations access to indivisible and, in essence, unavailable legal assets, so as to safeguard the potential for a dignified existence *for the future*, as understood in this brief summary:

> The right to a healthy and balanced environment, in order to offer adequate conditions for a dignified life and the development of human potential, is a categorical example of this dimension of rights. It brings a multifaceted guardianship: immediately, it operates on material or intangible assets that integrate the broad, complex and multidisciplinary concept of "environment" and, indirectly, it has a clear anthropocentric purpose of safeguarding a set of essential elements for the maintenance of the habitat for posterity (DANTAS, 2015, p. 273).

The justifiability of the right to a healthy and balanced environment could dispense with further explanation as it is a *conditio sine qua non* for human life and subsistence, as would be the character of its inalienability in the light of dignity as a normative guideline, since no human being can be arbitrarily deprived

of the right to life, charging the State with positive performances to protect and ensure human life (TRINDADE, 1993). It should, however, be emphasized that it has repercussions on the prerogative of full individual or collective development and that, since the Stockholm Declaration (Sweden) of 1972 (UN, 1972), it has emerged as an autonomous fundamental right and an essential condition for the exercise of other prerogatives considered inherent to the person, imputing to States, individuals and society the duty and responsibility for their protection and effectiveness.

From 1988 – not with the mere inclusion in the constitutional text, but in view of the formatting offered by the original constituent –, the fundamental right to the environment allows for an Environmental Rule of Law (SARLET; FENTERSEIFER, 2010), since it foresees that each individual is subject of law and creditor of environmental conditions favorable to the existence, health, well-being and development that can be enforced against the State and/or society, under the terms of art. 225, *caput*; thus, one makes a claim: preservation, healthfulness, balance of the environment in which one lives, works or even that which may affect a sphere of interests (ROCA, 1995).

The diffuse nature of environmental law does not prevent the connotation of subjective law. In fact, it is an indivisible legal asset: its integrality does not allow fractions of individual fruition and is potentially intended for everyone, reaching present and supervening generations, in order to ensure the means of existence and development; also, it appeals to the responsibility towards future generations that is based on a natural right of "protection of posterity", legitimizing restrictive measures if hazard to the conditions inherent to life is observed (SCHULZE-FIELITZ, 2001). For the same reasons, each and every individual bears their ownership, even though, procedurally, Brazilian law opts for the extraordinary legitimization of entities so that they offer adequate protection and a greater scope of their effectiveness – safeguarding instruments for individual initiative with the same aim, as exemplified by the *Ação Popular* (MAZZILI, 2009).

Factual elements and the contextualization of the fundamental right to the environment can allow its characterization as a collective right, in the strict sense, whenever particular, or even indeterminable, subjects are bound by a legal relationship and have the same – indivisible – interest in environmental protection. Environmental damage, on the other hand, can bring with it homogeneous individual rights, with diverse indemnity responses, even if they are the product of the same causal link, varying in the face of the individually suffered, proven and/or presumed damage (DANTAS, 2015).

The community is responsible for the duty of environmental protection, of monitoring respect for the environment and proactive conduct in the preservation and proper use of natural resources. In addition to the State, there is an obligation to regulate, implement and manage public policies that ensure the enjoyment of a healthy and suitable environment for development. In Brazil, it does so through limitations on property and economic relations, environmental education policies and codes of environmental postures with responsibility for infractions, even reaching the legal entity in the criminal sphere. It is the figure of the State that best represents the role of recipient of environmental protection commands, through its role of ensuring the satisfaction of fundamental rights and of guardian of human dignity, alongside its function of overseeing and regulating the activity carried out by private individuals in their private interests. It is also up to the State to adjust and reconfigure its institutes to be compatible with the commands of protection duties that the 1988 Constitution adds throughout its historical process (FENSTERSEIFER, 2008).

It should be emphasized that the elevation of the environment to the list of fundamental rights does not reflect the downgrading of classic fundamental rights of freedom. The Brazilian constitutional system, in fact, demonstrates the adoption of a general right of freedom, a generic clause conditioned by values and ideologies, to grant a priori authorization to human actions, subject to restrictions established by the norm immediately or indirectly, in the light of the principle of unity of the juridical system. The registration of the constituent option is in art. 5, II, according to which no one is obliged to do or not do something, except by virtue of the law, and it is also possible to identify it throughout the Major Law, as exemplified by freedom of craft or conscience (PEREIRA, 2006). In this step, fundamental individual rights remain in the essential and unavoidable ideological core of the 1988 Constitution, anointed by the intangibility clause offered by art. 60, § 4, and by the status of indelible clause (BRASIL, 1988).

Economic activity is nourished by the libertarian primacy and, alongside the ideals of protecting life, security, freedom and property, it is allied to the fundamental principles of the Brazilian Federative Republic. The State is protected with space and legitimacy for intervention, defining a legal order of the economy with the aim of harmonizing the common interests of free enterprise with those of a social order (TAVARES, 2003), adapting the search for prosperity – individual – to a social function that meets, indirectly, the interest of the community. It reflects a socioeconomic structuring with a solidarity bias, using state intervention as a means of ensuring access to essential legal goods and the redefinition of property

to be compatible with the protection of all, including the socially marginalized (FACHIN; GONÇALVES, 2008). Hence emerge the fundamental rights of a social nature, elementary rights to a dignified existence, and assumptions for the exercise of individual rights of freedom.

Henceforth, the environment is not in a presumed position of axiological supremacy and is worked in conjunction with other constitutional agendas, especially economic development (VARELLA, 2003), as explained in art. 170 of the Constitution of the Republic. The symbiosis between the economy and the environment, already originally envisaged, underwent a constitutional review so that it was adequate to each specific case and its harmful potential, which is denoted by the wording offered by Constitutional Amendment no. 42 of 2003 and the premise of differentiated treatment according to the environmental impact of the production or provision of goods or services. This reveals that the rational management of natural resources is a pillar for economic development and that political choices must be made in order to minimize – read: not necessarily prevent – the environmental impact, considering that the fight against poverty and social inequality is also the engine of the Brazilian Federative Republic, drawing upon free initiative, the use of private property, and the production of wealth in a manner compatible with the ideals of solidarity that nurture the social function, committing itself, also, with future generations in the search for the common good (NAZAR, 2009, p. 64).

Grau (2002) points out that environmental protection as a principle of the Brazilian economic order assumes the function of an imposing constitutional principle alongside the objective-norm profile, with a conforming character, claiming the implementation of public policies to satisfy its immediate purpose: to ensure everyone a dignified existence. It brings with it the contribution to the realization of other bearings of the Brazilian State, such as social justice – whether in access to and enjoyment of a healthy and balanced environment, or in the enjoyment of the right to health and development, or even for the potential for exploitation economic use of natural resources, valuing the self-sustaining economy. It translates, in short, the core of the paradigm of sustainable development as a channel for achieving state purposes and the balance between individual and collective interests that shape the relationship between state, society and economy.

State intervention in the economy and, as a natural consequence, in private property is legitimized by the need to combine the exercise of freedom and autonomy of will with the simultaneous observance of the collective interest. As Pamplona Filho (2019) explains, fulfilling a social function – an indeterminate

concept – requires a relational approach, contextualized to society and the environment in which it operates, based on the assumption that private rights also have a social mission and have their exercise limited by the State in order to meet this purpose. In his words: "it is, therefore, an unequivocal characteristic of the current capitalist system, the respect for the social function, as a means of legitimizing the right to property" (PAMPLONA FILHO, 2019, p. 44). Even traditional libertarian currents maintain that the "preservation of the environment and the avoidance of undue pollution are real problems and they are problems concerning which the government has an important role to play" (FRIEDMAN; FRIEDMAN, 2015, p. 310), considering intervention necessary for the inevitable – but rational – use of natural resources to minimize costs and optimize benefits in the exploration of environmental goods that are indispensable to the human condition, departing from a Manichean approach to preach an equation of balance between losses and gains, including not to concentrate each of these poles in specific social sectors (FRIEDMAN; FRIEDMAN, 2015).

Thus, the approach explicitly offered by the Brazilian constituent to the protection of the environment brings important elements for the understanding of its status and normative force: it reflects a fundamental, multifaceted subjective right, which transcends the sphere of individual interest, comprising diversified features (art. 225) and opposable in individual, collective and diffuse spheres (article 5, LXXII). Environmental protection is a duty assigned to the State – with competences distributed to all federative spheres (such as articles 23, VI, and 24, VI and VII, in addition to thematic forecasts for specific environmental goods) – and to the community as a whole (art. 225), assuming the guise of a guideline for the action of the State and the regulation of economic activity (art. 170, VI; art. 174, paragraph 3), for the exercise of the right to property (art. 186, II) and for the provision of health services (art. 200, VIII) and social communication (art. 220, § 3, II). Obliquely, the 1988 Constitution also incorporates environmental law in its structuring axis by being based on human dignity (art. 1, III), by establishing the defense of the right to the environment – diffuse and collective – as a prerogative of essential function to the justice represented by the Public Prosecutor's Office (art. 129, II) and, above all, with the intensity of the regulations present in a specific thematic chapter that innovates to offer to environmental protection the sphere of greatest possible state intervention – criminal responsibility, inaugurating the possibility of liability of the legal entity (art. 225, § 3) – indicating a clear choice of the constituent power for the allocation of the environment in the core of identity of the Citizen Charter of 1988 (BRASIL, 1988).

Understanding the legal order as a unit, made up of systems that coordinate and support each other, the various interests protected by the 1988 Constitution do not overlap, and possible contradictions are harmonized by the fundamental principles, whether general or related to specific areas, identifying values that form an irreducible core and that served as the basis for the apparent conflict of interests to take shape. With the intermediary of the constitutional legal system guideline, the points of tension are recognized to delimit the binding force of the constitutional norm and in such systems as the fatherland, as well as the possibility of an axiological hierarchy of legal assets essential to constitutional stability and continuity (BARROSO, 2006). In the analysis of the apparent conflict in kind, the tensioned values can be examined under the filter of the guiding constitutional principles.

In sequence, the admissibility of intangibility clauses implicit in the Major Law and which express values inseparable from the constitutional identity is envisaged. Innovations of derived constituent power must protect them, even if there is no explicit prohibition in art. 60, § 4, of the 1988 Charter, whenever they appear as a prerequisite for the realization of the legal assets raised by the original constituent power as an indelible clause – such as human dignity, which underlies and directs the entire catalog of fundamental rights. In the open list of inalienable legal interests of the 1988 Charter, there is the right to a healthy and balanced environment as a fundamental, subjective and transindividual right and the apparatus of tools originally made available for its protection and effectiveness, under penalty of offending the constituent intent (DANTAS, 2015).

The mere normative note of interactions between the environment and vectors of sociopolitical and economic interest, equally protected by the Brazilian Charter of 1988, already corroborates the indispensability of the systematic interpretation of its commands: the assumption that "constitutional interpretation is a process, at the same time topical and systematic, averse to automatisms and pure binding" (FREITAS, 2005, p. 323). Admitting it as inherent to the evaluative and legal core of the Constitution conditions it to an interpretative vector that demands appreciation and effectiveness, making it possible to sustain the political choice for an Environmental Rule of Law in which not only the material right to balance and preservation of inherent resources to life and human development and well-being is present, but also the qualification of the State whose task is to satisfy subjective rights and places environmental protection as a guide for decision-making and procedures (KLOEPFER, 2010).

Furthermore, the environment as a fundamental right exhibits a democratic

bias and guides republican management. Covering itself with the legitimacy ordinarily attributed to the rights of participation in the political conduct of the State and, with ballast in the access to information, transparency and environmental education, the openness to popular participation in environmental protection – as occurs in the holding of public hearings – encourages the effectiveness of citizenship ideals and supports economic, social and cultural rights. That said, it conforms in the context of a constitutional democracy to value public deliberation as essential for the political community, whose organs of representation and democratic management are limited by "fundamental rights whose objective is to pre-commit the State to guarantee a dignified existence to all people and political justice to the community" (HAYWARD, 2005, p. 143).

2 Gaps in the normative and civilizing framework offered by the Brazilian Environmental Constitution: in search of effectiveness in protecting the environment

Although the 1988 Constitution is seen as avant-garde and comprehensive in the constitutional consolidation of the environment, since its inception it represents a program for structuring and consolidating environmental protection that undergoes a continuous process in all spheres of the government and private initiative, demanding conjugation with similar rights, be they social, economic or cultural. It should be understood: the programmatic nature does not appease the imperative and binding nature of the treatment offered by the constituent, it only imposes activities, materially directs the implementation of constitutional commands, goes beyond a declaration of rights to bind the exercise of powers constituted in all their spheres and competences (CANOTILHO, 2003), in addition to, naturally, also limiting the exercise of autonomy of will and individual freedom, traditionally assigned to the scope of private interest, but subject to the limitations of public order.

From the *caput* of art. 225, the environment conducive to a dignified life and human well-being is understood as a right of private and collective enjoyment, which can be investigated by the individual in their private sphere of interests and also directed to the satisfaction of present and supervening collective interests. The quality of a fundamental right derives from the conditions necessary for life itself and the conception of human dignity: the existential minimum inherent in valuing each and every person as an end for the State and society to act, allowing to defend as an environmental existential minimum the basic natural and artificial

structures for the achievement and satisfaction of essential legal goods to the contemporary civilization framework, as exemplified by access to drinking water, the basic sanitation system, subsistence activities that depend directly on the use and enjoyment of natural resources (SARLET; FENSTERSEIFER, 2010), among others; and because it is configured as a fundamental right, it is endowed with the attributes of inalienability, unavailability, indivisibility and imprescriptibility (PIOVESAN, 2004).

These are norms endowed with effectiveness – ability to produce legal effects –, even though they may depend on legislative intervention for their implementation. The timeless lesson of Silva (2000) reveals that the effectiveness and applicability of fundamental rights – whether exercised individually, socially or collectively – is a summary norm that establishes an order for law enforcers: "[…] only in a situation of absolute impossibility must one decide on the need for further normativity of application", emphasizing the general principle of full effectiveness as "[…] political guarantee of defense of the legal and social effectiveness of the Constitution" (SILVA, 2000, p. 469). Its potential for legal effects must adhere to reality, and, for that, the legal-constitutional system has integrating mechanisms in order to ensure its real production of effects and its effectiveness or social efficacy.

As a subjective fundamental right, the right to the environment presumes the immediate applicability guaranteed by art. 5, § 1, of the 1988 Charter; in its trans-individuality, it addresses the organization and definition of public policies, as well as the systematic interpretation of the Brazilian legal order, "subjecting interpreters to make decisions always with an objective dimension in mind" (MELLO, 2017, p. 151). It supports, therefore, a principled aspect in the interpretation and application of the Constitution in all the most diverse scopes. The Government is responsible for most of the environmental obligations: it has the duty of normative regulation, creation and implementation of environmental public policies, inspection and accountability for environmental damage, among others (SARLET, FENSTERSEIFER, 2013), in spite of the registration of the division of responsibility also with the community, transferring individuals from the position of mere beneficiaries to also debtors of environmental protection, leaving them to assume positive behaviors in this regard; thus, socio-environmental responsibility is consolidated as a power-duty (CUNHA JÚNIOR, 2009).

The principle of solidarity is the engine that binds each and every individual to behavior conditioned to legal obligations and responsibilities, not being restricted only to the scope of axiological choice and ethical conduct. This principle

implies duties and reflects the change of paradigms and the reinterpretation of private law considering the spaces of individual self-determination in the light of (neo)constitutional parameters. In addition, the principle of solidarity refers to the treatment given to the person and the heritage from the perspective of human dignity and solidarity – which, in the world of facts, boils down to the indispensability of coexistence between individuals and, on the normative level, operates by serving and satisfying common interests (EHRHARDT JÚNIOR, 2017).

In the exercise of the attributions imputed to the Brazilian Federative Republic, the constitutional allocation of environmental competences, whether legislative or material, with the execution of environmental policies, includes powers and attributions that must be understood as duties of the government in all spheres of the federative entities, guided by the principles of progressive guardianship and the greatest possible environmental protection (BOYD, 2012) and demanding proactivity from the Government to carry out its commands. The material competence provided for in art. 23 of the Citizen Charter assigned to all entities of the federation duties and common objectives, being responsible for the development of public policies ranging from zeal and positive policies to inspection and sanctions for environmental damage. Although the bearings of cooperation between Federal Government, State, Federal District and Municipalities is foreseen in the sole paragraph of the article, decades of competence conflicts have produced problems in the (in)efficiency of the environmental administration and the judicial review for defining the competence for environmental protection, without mitigation of the political and legal controversy, nor the crisis of (in)effectiveness of environment protection, making use of guidelines such as the predominance of local interest or, even, the incidence of the most protective norm for conflict resolution (KRELL, 2005).

With the advent of Complementary Law no. 140, of 2011 (BRASIL, 2011), regulating the duty of cooperation in the exercise of administrative competence in environmental matters by federative entities, solidarity as a precept of political organization took shape to determine the articulation of efforts, presenting instruments in a non-exhaustive list (art. 4) and areas for action of each legal-political person, representing "[…] normative framework with a clear character of rationalization of the system of administrative competences in environmental matters" (SARLET; FENSTERSEIFER, 2013, p. 191). The presumption that common competence would authorize the three administrative spheres to act concurrently was overcome, using the single environmental licensing guideline and removing criteria such as scope of impact for defining competence (BIM; FARIAS, 2015).

The environmental normative system is strengthened to carry out the powers-duties assigned to the public administration, without removing the solidary responsibility of the State, even in the face of degradation committed by a private individual, given the omission and/or inefficiency in its duty of inspection and care, admitting the possibility of attributing objective responsibility to the State for environmental damage arising from inaction or insufficient performance of environmental management, despite being a controversial topic in view of the financial burden that will affect, indirectly, on society, directing the government to avoid damage to the treasury and seek compensation for any degraders (BRASIL, 2009).

Although the omission is understood without obstacles by common sense, it is emphasized that, legally, it translates a negative behavior of inertia of any of the State Powers that fails to take the measures foreseen in broad law so that its norms are fulfilled and reach their purpose. In theory, contemporary constitutionalism, by providing its system with control and protection tools, already has mechanisms to combat omitted conduct that offends its precepts: if it comes from political-administrative action, it is subject to party demands or even the claims of civil society (BULOS, 2009). In this sense, one cannot forget the potential scope of the crime of responsibility when present requirements of art. 85 of the Constitution of the Republic, still regulated by Law no. 1.079/1950, approved by the 1988 Charter – highlighting the act that violates the free exercise of political, individual and social rights (item III) –, and registering the processing of Bill no. 1.043/2020 – authored by Senator Fabiano Contarato (REDE/ES) (BRASIL, 2020) –, which proposes to typify the non-implementation of public policies aimed at prevention in the list of crimes for which the President of the Republic and Ministers of State are responsible and/or to respond to situations of public calamity or natural disaster (BRASIL, 2020a). At present, this is still a dry and challenging subject for legal dogmatics, which points to obstacles in the relevance of the Chief Executive as a guarantor for criminal purposes in order to characterize improper omission, presumed by the non-execution of a predetermined and legally required activity of the agent (SALVADOR NETTO, 2016).

Quoting Bulos (2009, p. 75-76), it is "transgressive silence" and normative insincerity or any other term attributed to unconstitutional omission that "must be repudiated, as they produce the syndrome of ineffectiveness of constitutions, responsible for the erosion of constitutional conscience; it represents a "failure to do something concrete" prescribed by the Constituent, without being able to reach open or implicit constitutional provisions – which, *data venia*, does not apply to the commands of art. 225, § 1, which impose obligations of doing on

public authorities, even if the programmatic and progressive consolidation nature is present, and are interpreted systematically with the provisions of thematic pertinence, such as art. 23, VI and VII, and 24, VI, VII and VIII, of the Constitution.

The unconstitutional omission is usually associated with the normative field, carried out by the Legislative Branch, for which the constituent directed a Direct Action of Constitutionality by Omission, provided for in art. 103, § 2, and procedurally disciplined by the enactment of Law no. 12,063/2009, which added Chapter II-A to Law no. 9,868/99, to discipline concentrated control actions. It may also be repealed by the constitutional remedy provided for in art. 5, LXXI, of the 1988 Constitution – the Writ of Injunction –, with process and judgment dealt with by Law no. 13,300/2016 (BRASIL, 2016) and procedural frameworks consolidated by the jurisprudential construction of MI 670, 708 and 712 by the STF – giving it a concrete effect to ensure the exercise of the right to constitutional freedom or prerogative inherent to citizenship, nationality and/or sovereignty, given the normative omission of public authorities that deprives the individual or the community of access and fulfillment of their claim. The constitutional remedy aims to produce in the world of facts the effects that should be offered by the absent regulatory norm, enabling the exercise of the right or prerogative and remedying the threat or effective injury caused by the inertia of the competent regulatory body.

The constitutional action is intended to protect fundamental rights that is not restricted to the individual scope, applying to the spheres of diffuse and collective rights, as traditionally defended by the doctrine and recently stipulated by the infraconstitutional legislator in Law no. 13,300/2016 (MALHEIRO; BENATTO, 2018). Since the adoption of the concretist current by the Brazilian Judiciary and subsequent legal discipline in the sense of establishing the conditions for the exercise of fundamental rights while the normative delay lasts (BRASIL, 2016, art. 8, II), it is the Writ of Injunction that, in fact, best represents an effective reaction to the normative inertia of the legislator or whoever is responsible for the function, boasting, still, the usefulness of being accessible to any interested individual, to *stricto sensu* communities in what concerns their interests inherent to the basic legal relationship that unites them in the same pole or to extraordinary party with standing in the defense of transindividual interests (BRASIL, 2016, art. 12).

It is a skillful instrument to combat constitutional omission and consequent offense to the effectiveness of constitutional norms of environmental protection, presuming their indispensability to fundamental rights concerning life and dignity, whether in their individual or collective aspect (ALVES; SILVA, 2013). Linking

the environment to areas of diverse fundamental interests may even be the basis for the instrument's suitability in implementing the principle of sustainable development, sustainable free initiative and compliance with the corporate socio-environmental function required for the commercialization of goods and provision of services, as illustrated by the Writ of Injunction no. 197-DF (2006/0162080-0) appreciated by the Superior Court of Justice (STJ) back in 2010 and before the specific legal regulation to the constitutional remedy. The case refers to the Legal Entity that claims to have requested from Ibama (Brazilian Institute for the Environment and Renewable Natural Resources – federal agency) information on environmental licensing, obtaining the agency's manifestation about the lack of normative discipline and analysis of the necessary procedures to proceed with the licensing of activities not yet supervised by the Institute. In spite of having declined the procedural competence due to the fact that the party is a agency of the Federal Government, forwarding to the first degree judgment in the Federal Court, the judgment handed down by Minister Ari Pargendler highlighted the binding content of art. 225, § 1, IV, of the Constitution that:

> Thus, it remains evident that the Constitution of the Republic of 1988 determined that it is incumbent on the Government to demand, as required by the law, a prior study of environmental impact. Bearing in mind that the referred body informed that it does not have a legal rule that regulates the obtaining of the EIA/RIMA in the present case and, since it is responsible for regulating said matter, as determined in the mandamus obtained in the preliminary injunction, the filing of this measure is justified. The fact that IBAMA does not inform which procedures to be adopted to obtain the EIA/RIMA, based on the fact that said procedure does not have a regulating rule, is contrary to our Major Law […] (BRASIL, 2005).

The Direct Action of Unconstitutionality by Omission (ADO), in turn, takes advantage of its production of *erga omnes* effects as merits, but responds only to the restricted legitimacy for the concentrated control of constitutionality provided for in art. 103 of the 1988 Constitution. Also, with the option of the Brazilian legislator for the declaratory nature of the ADO decision for matters of legal reserve – and it is up to the STF only to inform the competent Power to take the necessary measures (art. 12-H of Law no. 9.868/99) (BRASIL, 1999) – falls short of its potential for promoting constitutional effectiveness. It is possible to observe the prevalence of a stagnant and dogmatic vision of the separation of powers, more focused on satisfying the ideal of independence than exactly on harmony in the exercise of the constitutional role inherent to each function and maintained by the delicate system of checks and balances. Thus, the treatment given to the ADO in the aforementioned law, which restricts the scope of the effects,

retains the scope of the constitutional jurisdiction in promoting the democratic process, the fulfillment of the set of powers-duties assigned by the constituent and the respect for fair play by all constituted powers (ELY, 1980).

Two Direct Actions are pending before the Brazilian Constitutional Court, which aim to overcome constitutional omissions harmful to the environment. Proposed by the political parties PSB (Brazilian Socialist Party), PSOL (Socialism and Liberty Party), PT (Workers' Party) and Sustainability Network, ADO no. 59, presented on June 5, 2020 and distributed to the Rapporteurship of Minister Rosa Weber, turns to the Amazon Fund, more specifically to the regulation of its bodies and the transfer of financial resources to projects already approved, identified as essential for the Legal Amazon's conservation the sustainable development (BRASIL, 2022a).

ADO no. 60, with the same author and rapporteur by Minister Luís Roberto Barroso, refers to the Climate Fund, a financing mechanism to mitigate climate change whose management would not have been organized by the Federal Government, finding itself inoperative, which is why the authors require that the Supreme Court recognize the unconstitutionality by omission of the head of the Federal Executive, determining the Federal Government the obligation to take the necessary administrative measures to restore its functioning (BRASIL, 2020b). In a decision dated June 29, 2020, published on July 1 of the same year, Minister Roberto Barroso admitted the action as an Action Against the Violation of a Constitutional Fundamental Right (ADPF), highlighting the relevance of the matter in light of the Constitution and international commitments of Brazil, calling for a public hearing to be held to assess the matter, emphasizing that, in addition to being a fundamental right in itself, a healthy environment is a prerequisite for access to other rights that make up the minimum human existential, and that the social and economic consequences arising from policies that fail to comply with international commitments assumed by Brazil are serious. The Minister also notes that, once the factual situation described has been confirmed, there is an "unconstitutional state of affairs in environmental matters, requiring measures of a structural nature. It is worth reiterating: environmental protection is not a political option, but a constitutional duty" (BRASIL, 2020b).

On September 21, 2020, the rapporteur opened a public hearing to analyze fundraising for the National Fund on Climate Change and its allocation to preservationist policies in Brazil, now the object of ADPF no. 708, addressing the main environmental problems and sustainable development and emphasizing that the hearing is an instrument for plural debate and for obtaining adequate information

about the factual reality (BRASIL, 2022). The discussions, made available in the media and social networks, would include representatives of the Legislative Power, Ministers of State, climate experts, academics, civil society organizations and originary peoples and would continue the following day due to the complexity of the topic and the number of participants (BRASIL, 2020c). A similar means can be seen in the aforementioned ADO no. 59, with a public hearing held in October 2020 and judgment delivered in November 2022 (BRASIL, 2022c).

The experience corroborates Mirra's position (2019, p. 20) in the sense that the 1988 Charter outlines the

> State of participatory democracy in which popular participation, driven by the direct intervention of individuals and citizens or entities, institutions and representative bodies other than political parties and elected politicians, takes place broadly and routinely in public decision-making processes and in control of public and private actions and omissions that affect society as a whole.

The author deepens to demonstrate that popular participation in the environmental decision-making process is part of the legal-evaluative core of the fundamental right to the environment, providing adequate information on related matters, in addition to the opportunity to listen to interested and/or affected groups or sectors, enabling access to justice for environmental defense and the construction of the effectiveness of the material right to the environment through procedural means that are inherent to it (MIRRA, 2019, p. 23).

The openness to popular participation – in addition to meeting the democratic principles and the effectiveness of environmental protection – also promotes the function of legitimizing the jurisdictional action in which the conduct of public management is called into question, notably political choices that preclude the environmental agenda and the duty to act in the execution of normative commands. Despite deriving from the democratic constituent power and, therefore, enjoying democratic legitimacy from a formal point of view as interpreter and guardian of constitutional supremacy (MIRANDA, 2002), the opportunity to extract from representatives of the powers and society, as well as specialists on the subject, information and manifestations gives the Constitutional Court the support of transparency, plural and heterogeneous discussion, jurisdictional construction in dialogue with the society to which it is addressed, satisfaction of the ideal of substantial democracy and democratic participation also in the exercise of the judging function (DANTAS, 2015). Caution helps to repel the countermajoritarian difficulty that serves as the basis for criticism of the jurisdictional control of acts of the other powers: in essence, the fact that magistrates are not elected by the

people and that the judicial debate does not take place in the political spaces suitable for hearing the represented majorities and minorities (WALDRON, 2010).

Antagonism to the effectiveness of constitutional commands does not require the complete abstention of the competent power. The unconstitutional omission may be absolute, with no provision or conduct imputed by the Magna Carta, or relative, when the conduct is commissive, but partial and unsatisfactory for the purpose of the obligation imposed by the constituent. Total omissions can be identified as omissions by the constituted power, while partial omissions reflect the silence or insufficiency of the act of the Government – like the law – on the case (or cases) to which it would be directed (ROSA, 2006). Jobim (2013, p. 156) argues that "due to the ineffectiveness of the Constitution, the omission of the Government must be seen as a serious situation of injustice", especially with regard to rights of a social dimension; whether attributed to the Legislative Power or to the Executive Power, it calls for judicial review and the use of concrete measures aimed at the exercise of due competences by the Powers.

The environmental principle of prohibiting insufficient or deficient protection is in line with the above reasoning, connecting the duty of protection – satisfactory and effective –, since the State is not conferred the power not to act in the preservation of the environment and in the satisfaction of the fundamental rights that derive from it, nor the possibility of acting in partial fractions, since "such a state attitude would result, by itself, in an unconstitutional practice, subject to judicial review" (SARLET; FENSTERSEIFER, 2019, p. 57). The command even justifies the most severe State intervention in the space of freedoms, the *ultima ratio* of criminal protection, provided for by the Constituent and disciplined by the Law of Nature or Environmental Crimes (Law no. 9.605/98), expressing the double dimension of proportionality in criminal law: limiting State intervention in the scope of individual freedom by the parameters of legality and guaranteeing the legal good in a necessary and adequate measure for its purpose. The environmental principle also verbalizes the possibility of Environmental Criminal Action, even if a Consent Decree is carried out between the defendant party and the competent supervisory body, given the constituent intent expressed in art. 225, § 3, of the Magna Carta, for the independence of instances and spheres of environmental responsibility (SILVA; ARAÚJO; COSTA, 2019), in order to enable the greatest possible protection of the environment (and/or mechanisms to remedy any deficiencies).

The Judiciary Power is assigned the role of guarantor of environmental protection in the analysis of compliance with the constitutional attributions

pertinent to the other centers of power, thus exercising its democratic role. Sarlet and Fensterseifer (2019) argue that, in the homeland configuration of a Democratic, Social and Ecological State of law, the condition of guardian of fundamental rights binds all spheres of power, including the Judiciary, in the promotion of environmental protection, being responsible for often act in a subsidiary way, operating via judicial review, to assess the fulfillment of the duties imposed on the other powers. This is what is called ecological judicial governance, legitimized by the guarantee of non-removability of the jurisdiction in the examination of injury or threat of injury to law (art. 5, XXXV) and by procedural environmental rights, such as the rights of public participation in decision-making decisions (Principle 10 of the Rio de Janeiro Declaration of 1992) including actions aimed at contesting acts or omissions by individuals or public agents that harm the environment (CONFERÊNCIA DAS NAÇÕES UNIDAS SOBRE MEIO AMBIENTE E DESENVOLVIMENTO, 1992).

Administratively, in the exercise of its atypical role justified by institutional independence, the Judiciary submits itself to the same guidelines of public administration (FREITAS, 2005b) regarding the observance and implementation of norms aimed at protecting the environment and sustainable development. In the exercise of jurisdiction, any omission attributable to its decisions regarding the protection of the environment is equipped with the system of appeals as a natural procedural expedient in the search for effective protection and adequate judicial provision, also included in the power-duty to offer the constitutional norms the scope of their purpose. Lunelli and Marin (2019, p. 119) are emphatic: "The crisis of the State sets the stage for the crisis of jurisdiction, which, driven by the need for enormous speed, has grown to gigantic proportions", indicating the many challenges of jurisdiction in the faithful performance of its constitutional function of enacting environmental protection commands. Such difficulties include the inadequacy of procedures and the very conception of classic procedural institutes that need to be adapted to abandon the uncritical application of norms, as well as the stagnant vision of environmental legal interests, embracing the construction of a democratic environmental decision, without underestimating the difficulties and shortcomings of the Brazilian judicial system that affect the most diverse areas and compromise the social effectiveness of the precepts associated with the jurisdiction effectiveness.

As already observed in the scope of essential public policies, with emphasis on access to health services and medicines, the intervention of the State-judge in ontologically political areas and qualified by the space of discretion is present in

Brazilian Law and, mostly, recognized as legitimate when moderately and formally motivated by the interpretation and application of normative regulations – including constitutional commands (MOREIRA, 2015).

This does not mean that it is immune to criticism when it can assume a leading role in the decision-making process that flows between areas of law, politics, economics and/or related fields, such as environmental issues. Brito (2018, p. 3) employs as judicial activism the "disregard of the current legality in favor of the decision according to the conscience of the judge", believing that the expansion of judicial discretion does not meet democratic ideals when the parameters of legality are disregarded. The author understands that the figure of the judge does not have the role of rectifier of the legislative production so that it adapts to their paradigms of justice, nor to create restrictions or obligations that the law does not stipulate. And he offers as a critical reference STJ judgments in which the Court decides to maintain the reversal of the burden of proof to the detriment of the defendant (RE 1060.753/SP) – analogously applying the treatment conferred by the Consumer Protection Code (CDC, art. 6, VIII) – and the understanding of the imprescriptibility of the action to repair environmental damage, based on art. 37, § 5, of the 1988 Constitution (Special Appeal no. 1.120.117/AC), attributing the quality of creative innovation of the judiciary by absence of anointed prediction validated by the production and procedure of parliament (BRITO, 2018).

Sarlet and Fensterseifer (2019) make a counterpoint by consolidating the understanding favorable to the reversal of the burden of proof in public civil actions of an environmental nature, whose apex occurs with the publication of Precedent 618 of the STJ (the reversal of the burden of proof applies to actions involving environmental degradation), identifying in the ruling position the expansion of access to environmental justice, stimulating the principles of information and the participation of civil society, relying on the principles of systematic interpretation and dialogue of the sources and promoting the initiative for environmental defense. The possibility of applying the CDC to the environmental sphere refers to the transindividual nature, especially in its diffuse feature, shared by legal assets in kind, as well as the nature of the collective process – notably in light of the principles of neo-proceduralism, that is, of the process conformed to the constitutionalization of rights –, using the theory of the dialogue of sources or the microsystem principle, to authorize the integrated application of laws, serving as a conceptual basis for others (DIDIER JÚNIOR; ZANETI JÚNIOR, 2009).

As regards the (im)prescriptibility of the action to reimburse the treasury for environmental damages, in 2018 the STF recognized the general repercussion in

the examination of Extraordinary Appeal 654.833 – which questions the previously mentioned STJ precedent – and, despite the extinction of the case without examining its merits, based on art. 487, III, b of CPC/2015, established the thesis that the claim of civil reparation for environmental damage is non-prescriptive in mid-2020 (BRASIL, 2020d). On that occasion, the principle of legal certainty was discussed, favoring those who are accused of causing environmental damage in the face of governmental inertia, and the apparent conflict between constitutional principles of protection, preservation and repair of the environment to benefit the community; it was considered that in the Brazilian legal system, imprescriptibility is an exception in the reparation claim and that there is no explicit provision on the statute of limitations for repairing environmental civil damage. It was decided, however, for the relevance and unavailability of repairing environmental damage and for the full protection of the right to the environment, leaving it to the government to take all its conduct in this direction (BRASIL, 2020d).

Far from pacifying the discussion on the subject, the decision of the Constitutional Court causes numerous problems. Antunes (2020) dissects the precedent to criticize it regarding its generic basis in the protection of the fundamental right to life, in the rule of prescriptibility in force in Brazilian law based on the dictates of stability, predictability, legal certainty and the State's duty to act in investigation and accountability of illicit acts, and in the extremely exceptional nature of the imprescriptibility to be expressed, considering it to be an exception. He goes beyond – given the concrete case, the Public Civil Action, whose object was the deforestation in an indigenous area located in Acre for the purpose of commercializing wood in the 1980s – to justify the incidence of the imprescriptibility of public goods and the incidence of art. 231, § 4, of the Constitution dictating that indigenous lands are unavailable and the rights over them, imprescriptible, in the case of a special legal regime, which would not have been the target of jurisdictional attention. The author still opines contrary to the innovative jurisprudence, recalling that the jurisprudential construction incident on the case in the STJ (REsp 1120117/AC) highlights that there is no legal rule that expressly provides for the scope of the imprescriptibility of actions for compensation for environmental damage and that the grounds in the unavailable right to life, sustaining a generic imprescriptibility based on future developments, does not enjoy a legal basis (ANTUNES, 2020).

Not underestimating the need for constant critical analysis regarding the interpretation and application of the law, as well as the general principle of caution in appreciation of legal certainty and the values it protects – predictability

in legal relations and protection of freedoms –, the thesis consolidated by the Supreme Federal Court (STF) does not differ from the evolutionary interpretation that it has been constructing regarding the hermeneutic scope of constitutional provisions and necessary developments to ensure its purpose, balancing the original intention of the constituent with the adaptation required by the dynamics of social and legal relations (BALKIN, 2001). For the subject, the leading case of Extraordinary Appeal 852,475 serves as an example, which produced the thesis of the imprescriptibility of actions for reimbursement to the treasury based on the practice of a malicious act typified in the Law of Administrative Improbity (BRASIL, 2018). It is worth reaffirming that the problem of the legitimacy of constitutional jurisdiction and its limits is a highly complex subject that permeates the most diverse legal branches, making it impossible to finish the possible consequences of its analysis.

In favor of its legitimation, it militates the position that the exercise of constitutional jurisdiction that advances in environmental protection to ensure its effectiveness finds shelter in overcoming formalism to achieve a substantial purpose, legitimizing itself by the motivation of judicial constructions – of adequate justification as validity criterion (JORGE NETO, 2017) –, meeting the ideals of neo-proceduralism to "build procedural techniques aimed at promoting the fundamental right to adequate, effective and swift jurisdictional protection" (CAMBI, 2011, p. 116) and balancing guarantees from the process to the effectiveness of the protection, as proposed by the evaluative formalism. This is also how the systematic interpretation operates to reveal the scope of the existing norm to govern a hypothesis not made explicit by the legislator, arming itself with the analogy to fill, via integration, possible gaps (BARROSO, 2006), and, once again, the dialogue of the sources which focuses on legal microsystems aimed at protecting and safeguarding transindividual and unavailable rights.

As Krell (2013, p. 114) teaches, the defense of environmental interests, figured as diffuse rights, "assigns to the judge the definition of *public interest* in the concrete situation, this function not being passive, limited to the analysis of legal norms, but active, with responsibility not only for assessing the facts, but for ensuring a fair and workable outcome". Jurisdictional action cannot be attributed to interference or usurpation of the competence of others, remembering that, by the principle of inertia of jurisdiction, it was the State-judge provoked to manifest itself on the action or omission of the government in the exercise of the constituted powers and, by prohibiting *non liquet*, it cannot fail to appreciate the demand: when it controls acts of the other powers, in the way that the legal order authorizes

it, it operates with legitimacy within the scope of its constitutional competences (KOATZ, 2015).

It is assumed that the constitutional commands demand from all spheres of exercise of the government the conformation to its precepts and to act actively for its effectiveness, asking for the greatest possible production of the effects pointed out in the constituent intent; thus, by offering procedural guarantees for the observance and enforcement of environmental protection, the Judiciary is responsible for controlling the fulfillment of the duties imposed by the 1888Charter, that is, the mission of ensuring the legal and social effectiveness of protecting the environment as a fundamental right. The jurisdictional pronouncement is configured as the last stage of environmental policy and, thus, as a consolidator of the fundamental right safeguarded therein (FREITAS, 2005a). Finally, in the complex balance of the separation of state functions, the reciprocal control of the Powers serves the democratic interest and corroborates the guidelines for combining the sovereignty of the popular will with the protection of fundamental rights. In this context, the decisions handed down by the highest courts also need to be formally and materially legitimized – either through the rules that validate their procedure, through openness to democratic participation or, fundamentally, through the principle of motivation of decisions to bind all the right Brazilian –, under penalty of being subject, equally, to a crisis of effectiveness and/or to the adversary reaction of the other constituted powers.

Final considerations

The constitutional treatment offered to environmental protection has repercussions throughout the legal system to adapt it to the attributes of supremacy and constitutional imperative, binding the government, in all spheres in the exercise of constituted powers – as well as private ones –, to conducts in promotion of the environmental preservation. It bears the foundation of inherence to life and human well-being, essential to a dignified existence and development, nourishing itself on the ideals of fraternity to ensure the protection of present and future generations to the enjoyment of its legal interest.

The fundamental right to a healthy and balanced environment is multifaceted. Its diffuse nature does not contradict the condition of subjective right. Likewise, the programmatic bias that impels the State to act for the progressive construction of effective environmental protection in all its spaces of power and fields of action does not prevent the full effectiveness and applicability of constitutional

commands of environmental relevance. Even so, more than three decades after the elevation of the environment to the normative set that represents the values most dear to the State and Brazilian society – after continuous consolidation at the international level –, the adoption of a socio-environmental model as a political-normative identity could suffer in the field of constituent intent, serving only a symbolic purpose without real production of effects, were it not for the mechanisms of (neo)constitutionalism to ensure the effectiveness of the Major Law. Among them, constitutionality control stands out, especially in its repressive facet via judicial review, to delimit the exercise of environmental attributions by the government and society, repelling excesses and/or seeking to overcome the effects of omissions.

The inertia of the Legislator cannot serve as an obstacle to the enjoyment of the fundamental right to the environment, either by the individual or by the community; society is assisted by unique defense instruments, such as the Environmental Injunction and the ADO, without prejudice to other paths offered by the checks and balances system that sustains the country's political organization – in constant and essential improvement. For the public administration, the set of attributions in environmental matters does not dispense with the discretionary space of policy choices; however, the judgment of convenience and opportunity does not allow the public agent not to act in favor of environmental preservation, both in the field of the execution of public policies for the protection of nature and its elements and in the inspection of individuals for the exercise of freedoms to comply with the environmental normative dictates, since they share with the State the duty of guardianship and safeguard, coined by the principle of solidarity present in the Brazilian Rule of Law.

In the role of interpreter and ultimate enforcer of the Constitution, constitutional jurisdiction – branched out throughout the judicial structure in Brazilian law, under the modalities of diffuse constitutionality control and concentrated constitutionality control, and concentrated in the STF through direct actions – is presented as a major expedient in the search for the effectiveness of constitutional norms, with a sensitive emphasis on those that protect fundamental rights. It faces, however, historical censures in the actions that intervene in political spaces: from the offense to the separation of powers to the illegitimacy of judges for demonstrations ordinarily carried out by managers or by parliament, directly elected by the people to conduct political debates and public interests. Among the most powerful criticisms are the innovative actions of the Brazilian Judiciary, with the STF playing a leading role, and the impact of its decisions on the entire

legal system, filling spaces silenced by the law in the strict sense, which also gains the scope of environmental law and binds legal relationships arising therefrom.

The 1988 Constitution of the Republic, like the other Charters of its (neo) constitutional generation, must be understood as a unified and harmonious system of values that coexist, aggregating individual, collective and diffuse interests in a set of fundamental rights that is constantly expanding. The apparent conflict between legal assets endowed with the status of fundamental right requires careful appreciation and contextualization in order to investigate the possibility of axiological and/or normative hierarchy to justify the prevalence of one of the interests in the legal relationship in question. Constitutional jurisdiction is assigned a distinct mission due to the precept of non-removability of jurisdiction as a fundamental procedural right, as well as the democratic function of arbitrating the faithful exercise of constituted powers, also legitimizing itself by the openness conferred to popular participation in the construction of decisions of social interest.

In the scenario of environmental protection, notwithstanding the relevance of critical analyses of the judiciary's performance and the reasonableness in adopting a general principle of caution to guide the constitutional jurisdiction that explores the vacuum of the political field, it is in line with the guiding principles of constitutional law – notably focused on social effectiveness and greater protection –, which demand to repel the deficiencies in the provision of environmental policies or even to overcome omission in the fulfillment of constitutional duties, equating and resizing traditional institutes of positive law to the scope of the constitutionalization of the rights in which the core of human dignity protection prevails.

The fundamental right to a healthy and balanced environment as a prerequisite for achieving the existential minimum and the effectiveness of the primacy of dignity is denoted as an element of constitutional identity in the 1988 Charter, receiving a unique constituent treatment to qualify the State of Environmental Law in force and binding the actions of the State and of society. There are still many obstacles to the consolidation of the constituent ideals, mainly due to the concurrence of the different interests that interact and perhaps antagonize with the protection and preservation of natural resources. Nevertheless, bringing the world of facts closer to the ends stipulated by the Environmental Constitution is a commitment imposed on individuals, the community and public authorities in all their attributions and also requires law enforcers to search for ways for its effectiveness.

References

ALVES, D. D.; SILVA, C. V. M. Problemas exegéticos do mandado de injunção. *Revista Científica Semana Acadêmica*, Fortaleza, v. 1, n. 30, 2013. Available from: https://semanaacademica.org.br/system/files/artigos/artigo-problemasexegeticosdomandadodeinjuncao.pdf. Access on: Sep. 04, 2020.

ANTUNES, P. B. *Meio ambiente e prescrição*: de volta para o passado. *GenJurídico*, 27 abr. 2020. Available from: http://genjuridico.com.br/2020/04/27/meio-ambiente-e-prescricao/. Access on: Sep. 05, 2020.

BALKIN, J. M. *Living originalism*. Cambridge: Harvard University Press, 2001.

BARROSO, L. R. *Interpretação e aplicação da Constituição*. 6. ed. São Paulo: Saraiva, 2006.

BIM, E. F.; FARIAS, T. Competência ambiental legislativa e administrativa. *Revista de Informação Legislativa*, Brasília, DF, ano 52, n. 208, p. 203-245, out./dez. 2015. Available from: https://www2.senado.leg.br/bdsf/bitstream/handle/id/517705/001055894.pdf?sequence=1&isAllowed=y. Access on: Sep. 15, 2020.

BOYD, D. R. *The environmental rights revolution*: a global study of constitutions, human rights and the environment. Vancouver: UBC Press, 2012.

BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília, DF: Presidência da República, 1988. Available from: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access on: Sep. 15, 2022.

BRASIL. Lei Complementar n. 140, de 8 de dezembro de 2011. Fixa normas, nos termos dos incisos III, VI e VII do *caput* e do parágrafo único do art. 23 da Constituição Federal, para a cooperação entre a União, os Estados, o Distrito Federal e os Municípios […] e altera a Lei n. 6.938, de 31 de agosto de 1981. *Diário Oficial da União:* seção 1, Brasília, DF, p. 1, 12 dez. 2011. Available from: http://www.planalto.gov.br/ccivil_03/LEIS/LCP/Lcp140.htm. Access on: Sep. 15, 2022.

BRASIL. Lei n. 13.300, de 23 de junho de 2016. Disciplina o processo e o julgamento dos mandados de injunção individual e coletivo e dá outras providências. *Diário Oficial da União:* seção 1, Brasília, DF, p. 1, 24 jun. 2016. Available from: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13300.htm. Access on: Sep. 02, 2022.

BRASIL. Lei n. 9.868, de 10 de novembro de 1999. Dispõe sobre o processo e julgamento da ação direta de inconstitucionalidade e da ação declaratória de constitucionalidade perante o Supremo Tribunal Federal. *Diário Oficial da União:* seção 1, Brasília, DF, p. 9, 11 nov. 1999. Available from: http://www.planalto.gov.br/ccivil_03/leis/l9868.htm. Access on: Sep. 12, 2022.

BRASIL. Senado Federal. *Projeto de Lei n. 1.043*. Altera a Lei nº 1.079, de 10 de abril de 1950, para incluir no rol dos crimes de responsabilidade a não implementação das políticas públicas voltadas para a prevenção ou para a resposta a situações de calamidade pública ou de desastre natural. Autor: Sen. Fabiano Contarato, 22 dez. 2020a. Available from: https://www25.senado.leg.br/web/atividade/materias/-/materia/141242. Access on: Sep. 14. 2022.

BRASIL. Superior Tribunal de Justiça (2. Turma). *Recurso Especial 1.071.741/SP*. Ambiental. Unidade de conservação de proteção integral (Lei 9.985/00). Ocupação e construção ilegal por particular no parque estadual de Jacupiranga. Turbação e esbulho de bem público. dever-poder de controle e fiscalização ambiental do estado. Omissão. ART. 70, § 1º, da Lei 9.605/1998. Desforço imediato. art. 1.210, § 1º, do Código Civil. Artigos 2º, I E V, 3º, IV, 6º e 14, § 1º, da Lei 6.938/1981 (lei

da política nacional do meio ambiente). conceito de poluidor. responsabilidade civil do estado de natureza solidária, objetiva, ilimitada e de execução subsidiária. litisconsórcio facultativo. Recorrente: Ministério Público do Estado de São Paulo. Recorrido: Fazenda do Estado de São Paulo. Relator: Ministro Herman Benjamim, 24 mar. 2009. Available from: https://ww2.stj.jus.br/jurisprudencia/externo/informativo/?aplicacao=informativo&acao=pesquisar&livre=%40cod%3D%27388%27&refinar=S.DISP.&&b=INFJ&p=true&t=JURIDICO&l=10&i=11. Access on: Sep. 15, 2020.

BRASIL. Superior Tribunal de Justiça. Mandado de Injunção n. 197/DF. Impetrante: Cervejaria Belco S/A. Impetrado: Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – Ibama. Relator: Ministro Ari Pargendler. *Diário de Justiça*, Brasília, DF, 21 mar. 2005. Available from: https://stj.jusbrasil.com.br/jurisprudencia/15515306/mandado-de-injuncao-mi-197?ref=juris-tabs. Access on: Sep. 02, 2020.

BRASIL. Supremo Tribunal Federal (Plenário). Recurso Extraordinário n. 852.475. Relator: Ministro Alexandre de Moraes. *Diário de Justiça eletrônico*, 8 ago. 2018. Available from: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=749427786. Access on: Sep. 29, 2020.

BRASIL. Supremo Tribunal Federal (Tribunal Pleno). Ação Direta de Inconstitucionalidade por Omissão n. 59. Relatora: Ministra Rosa Weber. Julgamento em 3 nov. 2022a. Available from: http://portal.stf.jus.br/processos/detalhe.asp?incidente=5930766. Access on: Nov. 22, 2022.

BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade por Omissão n. 60. Relator: Ministro Roberto Barroso. *Diário de Justiça eletrônico*, 1 jul. 2020b. Available from: http://portal.stf.jus.br/processos/downloadPeca.asp?id=15343625717&ext=.pdf. Access on: Nov. 04, 2022.

BRASIL. Supremo Tribunal Federal. Arguição de Descumprimento de Preceito Fundamental n. 708. Relator: Ministro Roberto Barroso. *Diário de Justiça eletrônico*, 27 set. 2022b. Available from: http://www.stf.jus.br/portal/peticaoInicial/verPeticaoInicial.asp?base=ADPF&documento=&s1=708&numProcesso=708. Access on: Nov. 30, 2022.

BRASIL. Supremo Tribunal Federal. *Confira a pauta de julgamentos do STF para esta quinta-feira (6)*. Brasília, DF: STF, 6 out. 2022c. Available from: https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=495379&ori=1. Access on: Jun. 08, 2023.

BRASIL. Supremo Tribunal Federal. *Ministro Barroso abre audiência pública para debater investimentos para o Fundo do Clima*. Brasília, DF: STF, 21 set. 2020c. Available from: https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=451974&ori=1. Access on: Sep. 29, 2022.

BRASIL. Supremo Tribunal Federal. Recurso Extraordinário n. 654.833. Relator: Ministro Alexandre de Moraes. *Diário de Justiça eletrônico*, 24 jun. 2020d. Available from: http://portal.stf.jus.br/processos/detalhe.asp?incidente=4130104. Access on: Sep. 30, 2022.

BRITO, L. A. G. S. M. Direito ambiental versus justiça ambiental: crítica ao ativismo judicial em matéria de meio ambiente. *Revista de Direito Ambiental*, São Paulo, v. 89, p. 133-156, jan./mar. 2018.

BULOS, U. L. *Curso de Direito Constitucional*. 4. ed. São Paulo: Saraiva, 2009.

CAMBI, E. *Neoconstitucionalismo e neoprocessualismo*: direitos fundamentais, políticas públicas e protagonismo judiciário. 2. ed. São Paulo: RT, 2011.

CANOTILHO, J. J. G. *Direito Constitucional e teoria da constituição*. 7. ed. Coimbra: Almedina, 2003.

CONFERÊNCIA DAS NAÇÕES UNIDAS SOBRE MEIO AMBIENTE E DESENVOLVIMENTO. *Declaração do Rio sobre Meio Ambiente e Desenvolvimento*. Rio de Janeiro, jun. 1992. Available from: https://www.mpf.mp.br/sc/municipios/itajai/gerco/volume-v. Access on: Jun. 08, 2023.

CUNHA JÚNIOR, D. *Curso de Direito Constitucional*. 3. ed. Salvador: JusPodivm, 2009.

DANTAS, J. de O. J. *Controle de constitucionalidade e cláusulas pétreas implícitas*: a irredutibilidade do direito fundamental ao meio ambiente. São Paulo: Verbatim, 2015.

DIDIER JÚNIOR, F.; ZANETI JÚNIOR, H. *Curso de processo civil*: processo coletivo. v. 4. 4. ed. Salvador: JusPodivm, 2009.

EHRHARDT JÚNIOR, M. *Responsabilidade civil pelo inadimplemento da boa-fé*. Belo Horizonte: Fórum, 2017.

ELY, J. H. *Democracy and distrust*: a theory of judicial review. Cambridge: Harvard University Press, 1980.

FACHIN, L. E.; GONÇALVES, M. A. R. Aspectos da funcionalização da propriedade no direito brasileiro. *In:* ALENCAR, R. A. R. C. (org.) *Direitos fundamentais na Constituição de 1988*. Porto Alegre: Núria Fabris, 2008. p. 124-147.

FARIAS, E. O meio ambiente ecologicamente equilibrado como direito fundamental. *In*: LIMA, F. M. M.; PESSOA, R. S. (coord.). *Constitucionalismo, Direito e democracia*. Rio de Janeiro: GZ, 2009. p. 95-111.

FENTERSEIFER, T. *Direitos fundamentais e proteção do ambiente*: a dimensão ecológica da dignidade humana no marco jurídico-constitucional do estado sócio-ambiental de direito. Porto Alegre: Livraria do Advogado, 2008.

FREITAS, J. A melhor interpretação constitucional "versus" a única resposta correta. *In*: SILVA, V. A. *Interpretação Constitucional*. São Paulo: Malheiros, 2005. p. 317-356.

FREITAS, V. P. *A Constituição Federal e a efetividade das normas ambientais*. 3. ed. São Paulo: Editora RT, 2005a.

FREITAS, V. P. *Justiça federal*: histórico e evolução no Brasil. Curitiba: Juruá, 2005b.

FRIEDMAN, M.; FRIEDMAN, R. *Livre para escolher*. 2. ed. Tradução: Ligia Filgueiras. Rio de Janeiro: Record, 2015.

GRAU, E. R. *A ordem econômica na Constituição de 1988*. 7. ed. São Paulo: Malheiros, 2002.

HAYWARD, T. *Constitutional environmental rights*. Oxford: Oxford University Press, 2005.

JOBIM, M. B. *Existem omissões constitucionais*? Um ensaio crítico sobre a relevância da função jurisdicional em face das omissões do poder público. Maceió: Viva, 2013.

JORGE NETO, N. M. J. *Uma teoria da decisão judicial*: fundamentação, legitimidade e justiça. Salvador: JusPodivm, 2017.

KLOEPFER, M. A caminho do Estado Ambiental? A transformação do sistema político e econômico da República Federal da Alemanha através da proteção ambiental especialmente desde a perspectiva da ciência jurídica. Tradução: Carlos Alberto Molinaro. *In:* SARLET, I. W. (org.). *Estado socioambiental e direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2010. p. 39-72.

KOATZ, R. L.-F. A Proibição do non liquet e o princípio da inafastabilidade do controle jurisdicional. *Revista de Direito Administrativo*, Rio de Janeiro, v. 270, p. 171-205, set./dez. 2015.

KRELL, A. J. *Discricionariedade administrativa e conceitos legais indeterminados*: limites do controle judicial no âmbito dos interesses difusos. 2. ed. Porto Alegre: Livraria do Advogado, 2013.

KRELL, A. J.; MAIA, A. da (org.). *A aplicação do direito ambiental no estado federativo.* Rio de Janeiro: Lúmen Juris, 2005.

LUNELLI, C. A.; MARIN, J. D. *Jurisdição ambiental*: a influência da jurisdição italiana e do sistema inglês no processo ambiental brasileiro. Rio Grande: Editora da Furg, 2019. (Coleção Direito e Justiça Social, v. 7). Available from: https://www.ucs.br/site/midia/arquivos/jurisdicao-ambiental.pdf. Access on: Sep. 04, 2020.

MALHEIRO, E. P.; BENATTO, P. H. A. Mandado de Injunção Ambiental para a proteção de direitos fundamentais na sociedade da informação. *Revista de Direito Ambiental*, São Paulo, v. 89, p. 289-309, jan./mar. 2018.

MAZZILI, H. N. *A defesa dos interesses difusos em juízo*. 22. ed. São Paulo: Saraiva, 2009.

MELLO, M. A. A Vaquejada, a intepretação constitucional e o direito fundamental ao meio ambiente. *In*: PINTO, H. P. *et al.* (coord.) *Constituição, direitos fundamentais e política*. Belo Horizonte: Fórum, 2017. p. 149-162.

MIRANDA, J. *Teoria do Estado e da Constituição*. Rio de Janeiro: Forense, 2002.

MIRRA, Á. L. V. Acesso participativo à justiça em matéria ambiental e o princípio da proibição do retrocesso. *Revista de Direito Ambiental*, São Paulo, v. 94, p. 19-48, abr./jun. 2019.

MOREIRA, D. A. G. C. M. *Direito à saúde e acesso a medicamentos*: em busca de parâmetros adequados para a tutela judicial. Rio de Janeiro: Lumen Juris, 2015.

NAZAR, N. *Direito econômico*. 2. ed. Bauru: Edipro, 2009.

ONU. *Declaração da Conferência das Nações Unidas sobre o Meio Ambiente Humano.* Estocolmo: ONU, 16 jun. 1972. Available from: http://www.direitoshumanos.usp.br/index.php/Meio-Ambiente/declaracao-de-estocolmo-sobre-o-ambiente-humano.html. Access on: Jul. 02, 2020.

PAMPLONA FILHO, R. Breves Reflexões sobre o Princípio da Função Social. *In*: EHRHARDT JÚNIOR, M.; LÔBO, F. A. (coord.) *A função social nas relações privadas*. Belo Horizonte: Fórum, 2019. p. 37-62.

PEREIRA, J. R. G. *Interpretação constitucional e direitos fundamentais*. Rio de Janeiro: Renovar, 2006.

PIOVESAN, F. A universalidade e a indivisibilidade dos direitos humanos: desafios e perspectivas. *In*: BALDI, C. A. (org.). *Direitos humanos na sociedade cosmopolita*. Rio de Janeiro: Renovar, 2004. p. 45-71.

ROCA, G. E. *La ordenación constitucional del médio ambiente*. Madrid: Dykinson, 1995.

ROSA, A. V. P. *Las omisiones legislativas y su control constitucional*. Rio de Janeiro: Renovar, 2006.

SALVADOR NETTO, A. V. Perspectivas dogmáticas do impeachment. *Revista Brasileira da Advocacia*, São Paulo, jan./mar. 2016. Available from: http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RBA_n.0.10.PDF. Access on: Sep. 04, 2020.

SARLET, I. W.; FENSTERSEIFER, T. *Direito Constitucional Ambiental*: constituição, direitos fundamentais e proteção do ambiente. 3. ed. São Paulo: RT, 2013.

SARLET, I. W.; FENSTERSEIFER, T. Estado Socioambiental e mínimo existencial (ecológico?): algumas aproximações. *In*: SARLET, I. W. (org.). *Estado Socioambiental e Direitos Fundamentais*. Porto Alegre: Livraria do Advogado, 2010. p. 11-38.

SARLET, I. W.; FENSTERSEIFER, T. O direito constitucional brasileiro e a governança judicial ecológica: estudo à luz da jurisprudência do Superior Tribunal de Justiça e do Supremo Tribunal Federal. *Revista Eletrônica da Academia Brasileira de Direito Constitucional*, Curitiba, v. 11, n. 20, p. 42-110, jan./jul. 2019. Available from: https://abdconstojs.com.br/index.php/revista/article/view/209. Access on: Sep. 12, 2020.

SARLET, I. W. (org.). *Estado socioambiental e direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2010.

SCHULZE-FIELITZ, H. La protezione dellámbiente nel diritto constituzionale tedesco. *In:* AMIRANTE, D. (a cura di). *Diritto Ambientale e Costituzione*: eperienze europee. Milano: FrancoAngeli, 2001. p. 69-85.

SILVA, J. A. *Curso de Direito Constitucional Positivo*. 18. ed. São Paulo: Malheiros, 2000.

SILVA, T. T. A.; ARAÚJO, F. R.; COSTA, B. C. B. A tutela penal do meio ambiente fundada no princípio da vedação à proteção insuficiente no Brasil. *Revista de Direito Ambiental*, São Paulo, v. 96, p. 221-245, out./dez. 2019.

TAVARES, A. R. *Direito Constitucional Econômico*. São Paulo: Método, 2003.

TRINDADE, A. A. C. *Direitos humanos e meio ambiente*: paralelo dos sistemas de proteção internacional. Porto Alegre: Sergio Antonio Fabris, 1993.

VARELLA, M. D. *Direito Internacional Econômico Ambiental.* Belo Horizonte: Del Rey, 2003.

WALDRON, J. A essência da oposição ao judicial review. *In*: BIGONHA, A. C. A.; MOREIRA, L. (org.). *Legitimidade da jurisdição constitucional*. Rio de Janeiro: Lúmen Júris, 2010. p. 93-157.

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