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Judicial Activism in Environmental Protection: An Overreach of Constitutional Powers or a Legitimate Defense of Inalienable Rights?

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Ativismo judicial na tutela do meio ambiente: excesso no exercício das competências constitucionais ou tutela legítima de bens indisponíveis?

RESUMO

Objetivo - investigar a crescente intervenção do Judiciário na proteção ambiental, buscando determinar se há uma defesa legítima do direito difuso ou um excesso de poder, e comprovar, ou refutar, a hipótese central, na qual se questiona se a aplicação do Direito pelo Judiciário, com foco na proteção ambiental, representa uma atuação legítima em defesa do meio ambiente como direito fundamental indisponível ou um excesso de poder, com ingerências indevidas na seara dos outros Poderes

Metodologia - conduziu-se a pesquisa sob o método hipotético-dedutivo, com base em pesquisa bibliográfica e documental, pondo à prova a hipótese principal.

Originalidade/relevância - a abordagem posiciona o ativismo judicial não como um evento anormal, uma anomalia, mas como um instrumento essencial para se enfrentar a crise ambiental diante da frequente inércia e da atuação insuficiente dos Poderes Executivo e Legislativo, enquanto a relevância acadêmica se embasa na necessidade de aprofundamento dos debates sobre os limites e as possibilidades do Jurisdição na tutela ambiental, superando a dicotomia pura e simples entre legalidade estrita e arbítrio judicial.

Resultados - conclui-se que, diante da necessidade de proteger o meio ambiente para as presentes e futuras gerações, a atuação ativista do Judiciário se justifica como instrumento apto e legítimo para garantir a efetividade dos direitos e princípios constitucionais, assegurando a preservação da vida e o desenvolvimento sustentável, tendo em vista que tal intervenção ocorre, principalmente, para suprir omissões dos outros Poderes e para garantir os direitos fundamentais ligados ao meio ambiente sadio.

Contribuições teóricas/metodológicas - a principal contribuição teórica do trabalho se escora na valorização da postura ativista do Judiciário em matéria ambiental, oferecendo uma ressignificação do ativismo judicial para defesa do meio ambiente ao caracterizá-lo como ferramenta jurisdicional e não como mera interferência política, vez que a natureza difusa e fundamental do direito ao meio ambiente exige uma postura judicial mais ativa, além da aplicação simplista do texto legal. Metodologicamente, o trabalho contribui com os debates ao integrar a análise de instrumentos processuais coletivos, como a Ação Civil Pública e a Ação Popular, à teoria do constitucionalismo democrático.

Contribuições sociais e ambientais – como contribuição social, o trabalho destaca a atuação judicial ativista como ferramenta de fortalecimento da cidadania e da dignidade humana por buscar assegurar que o direito difuso ao meio ambiente seja protegido mesmo contra interesses econômicos ou maiorias políticas circunstanciais, enquanto traz, como principal contribuição ambiental, a reafirmação do Judiciário como figura essencial à sustentabilidade, com poder para frear projetos e políticas com potencial de dano irreversível, assegurando a preservação dos ecossistemas para as presentes e futuras gerações.

PALAVRAS-CHAVE: Meio ambiente. Tutela ambiental. Ativismo judicial.

Judicial Activism in Environmental Protection: An Overreach of Constitutional Powers or a Legitimate Defense of Inalienable Rights?

ABSTRACT

Objective - To investigate the growing intervention of the Judiciary in environmental protection, seeking to determine whether it constitutes a legitimate defense of diffuse rights or an overreach of power. The central hypothesis to be tested is whether the Judiciary's application of law, when focused on environmental protection, represents a legitimate defense of the environment as a fundamental, inalienable right, or an abuse of power that improperly interferes with the other branches of government.

Methodology - The research was conducted using the hypothetical-deductive method, based on bibliographical and documentary research, to test the main hypothesis.

Originality/Relevance - The approach positions judicial activism not as an anomaly, but as an essential instrument for confronting the environmental crisis, given the frequent inertia and insufficient action from the Executive and Legislative branches. Its academic relevance is based on the need to deepen the debate on the limits and possibilities

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of jurisdiction in environmental protection, moving beyond the simple dichotomy between strict legality and judicial arbitrariness.

Results - The conclusion is that, given the need to protect the environment for present and future generations, the activist role of the Judiciary is justified as a suitable and legitimate instrument to guarantee the effectiveness of constitutional rights and principles, ensuring the preservation of life and sustainable development. This intervention occurs mainly to remedy omissions by the other branches and to guarantee the fundamental rights linked to a healthy environment.

Theoretical/Methodological Contributions - The main theoretical contribution of this work is the valorization of the Judiciary's activist stance on environmental matters, offering a redefinition of judicial activism for environmental defense by characterizing it as a jurisdictional tool rather than mere political interference. The diffuse and fundamental nature of the right to the environment demands a more proactive judicial posture that goes beyond a simplistic application of legal text. Methodologically, the work contributes to the debate by integrating the analysis of collective procedural instruments, such as the Ação Civil Pública (Public Civil Action) and the Ação Popular (Popular Action), with the theory of democratic constitutionalism.

Social and Environmental Contributions – As a social contribution, the work highlights activist judicial action as a tool for strengthening citizenship and human dignity by seeking to ensure that the diffuse right to the environment is protected even against economic interests or circumstantial political majorities. The main environmental contribution is the reaffirmation of the Judiciary as an essential figure for sustainability, with the power to halt projects and policies with the potential for irreversible damage, thus ensuring the preservation of ecosystems for present and future generations.

KEYWORDS: Environment. Environmental protection. Judicial activism.

Activismo judicial en la tutela del medio ambiente: ¿exceso en el ejercicio de las competencias constitucionales o tutela legítima de bienes indisponibles?

RESUMEN

Objetivo - investigar la creciente intervención del Poder Judicial en la protección ambiental, buscando determinar si existe una defensa legítima del derecho difuso o un exceso de poder, y comprobar, o refutar, la hipótesis central, en la cual se cuestiona si la aplicación del Derecho por parte del Poder Judicial, con enfoque en la protección ambiental, representa una actuación legítima en defensa del medio ambiente como derecho fundamental indisponible o un exceso de poder, con injerencias indebidas en la esfera de los otros Poderes.

Metodología - la investigación se llevó a cabo bajo el método hipotético-deductivo, con base en investigación bibliográfica y documental, poniendo a prueba la hipótesis principal.

Originalidad/Relevancia - el enfoque posiciona el activismo judicial no como un evento anómalo, una anomalía, sino como un instrumento esencial para enfrentar la crisis ambiental ante la frecuente inercia y la actuación insuficiente de los Poderes Ejecutivo y Legislativo, mientras que la relevancia académica se basa en la necesidad de profundizar los debates sobre los límites y las posibilidades de la Jurisdicción en la tutela ambiental, superando la dicotomía simplista entre legalidad estricta y arbitrariedad judicial.

Resultados - se concluye que, ante la necesidad de proteger el medio ambiente para las presentes y futuras generaciones, la actuación activista del Poder Judicial se justifica como un instrumento apto y legítimo para garantizar la efectividad de los derechos y principios constitucionales, asegurando la preservación de la vida y el desarrollo sostenible, teniendo en cuenta que dicha intervención ocurre, principalmente, para suplir omisiones de los otros Poderes y para garantizar los derechos fundamentales vinculados a un medio ambiente sano.

Contribuciones Teóricas/Metodológicas - la principal contribución teórica del trabajo se basa en la valorización de la postura activista del Poder Judicial en materia ambiental, ofreciendo una resignificación del activismo judicial para la defensa del medio ambiente al caracterizarlo como una herramienta jurisdiccional y no como una mera interferencia política, ya que la naturaleza difusa y fundamental del derecho al medio ambiente exige una postura judicial más activa, que vaya más allá de la aplicación simplista del texto legal. Metodológicamente, el trabajo contribuye a los debates al integrar el análisis de instrumentos procesales colectivos, como la Ação Civil Pública (Acción Civil Pública) y la Ação Popular (Acción Popular), a la teoría del constitucionalismo democrático.

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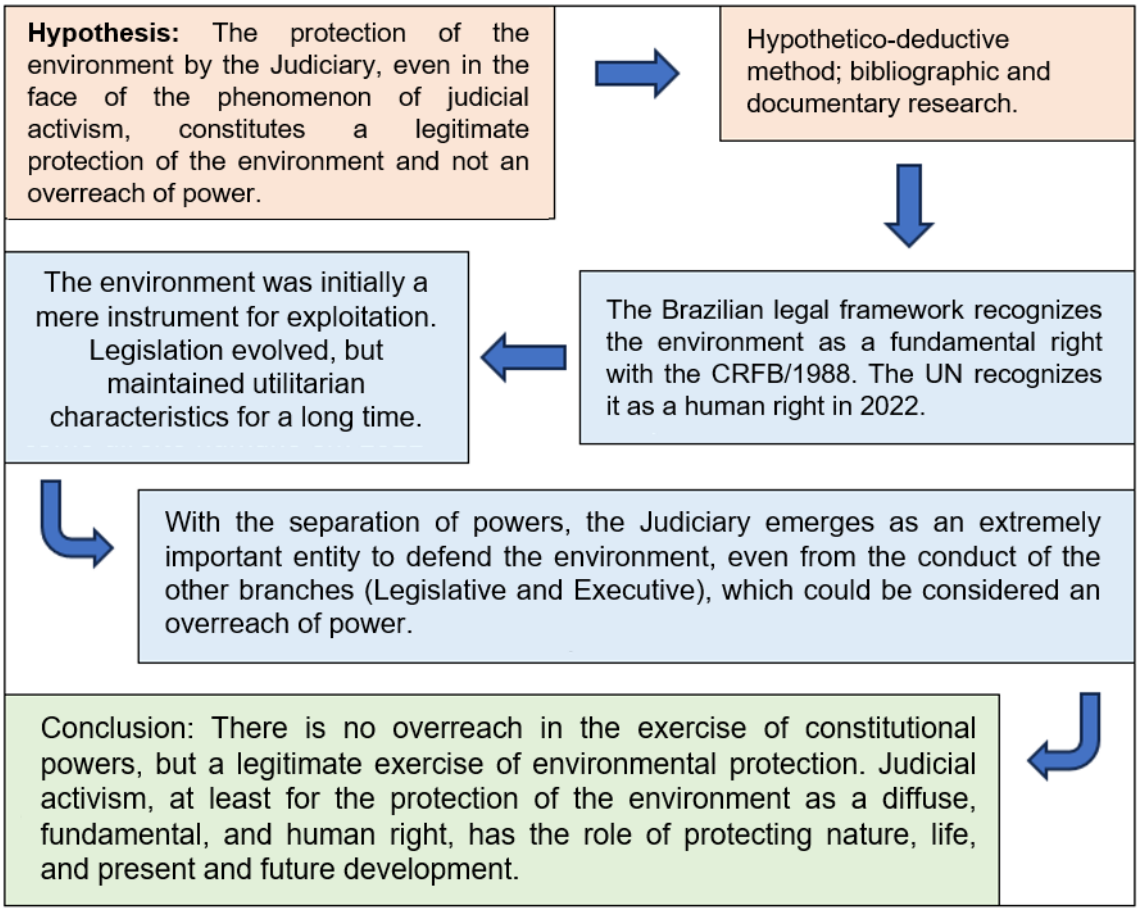
Contribuciones Sociales y Ambientales – como contribución social, el trabajo destaca la actuación judicial activista como una herramienta de fortalecimiento de la ciudadanía y de la dignidad humana al buscar asegurar que el derecho difuso al medio ambiente sea protegido incluso frente a intereses económicos o mayorías políticas circunstanciales, mientras que aporta, como principal contribución ambiental, la reafirmación del Poder Judicial como una figura esencial para la sostenibilidad, con poder para frenar proyectos y políticas con potencial de daño irreversible, asegurando la preservación de los ecosistemas para las presentes y futuras generaciones.

PALABRAS CLAVE: Medio ambiente. Tutela ambiental. Activismo judicial.

RESUMO GRÁFICO



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INTRODUCTION

Despite its classification as an autonomous legal interest and a diffuse and fundamental right, the environment was once considered a mere source of resources or a feature to guarantee public health. This extractivist notion has been modified with societal evolutions to ensure fair environmental protection and preservation, in order to guarantee the continuity of present and future generations.

The protection of the environment has undergone a significant transformation, granting the Judiciary the power to analyze and judge, modifying or annulling public policies and decisions of the other branches of government in favor of environmental protection. At the same time, this has exposed it to criticism for allegedly violating the principle of the separation of powers or for lacking legitimacy due to the absence of popular representation.

Such criticisms are also based on the fact that judges, when issuing their judicial decisions, can be influenced by subjective characteristics, such as ideologies and individual values, which is why they are accused of practicing judicial activism, a phenomenon that raises debates about the legitimacy of the Judiciary's interference in the functions of the Legislative and Executive branches.

In this context, the problem comes down to defining whether the protection of the environment by the Judiciary, taking into account judicial activism, would be an undue interference by this branch in the field of action of the other branches or an act legitimized by the constitutional legal order. Thus, in this paper, in order to address this supposed problem, we will briefly discuss the evolution of the legal nature of the environment and its protection within the Brazilian legal framework, as well as the phenomenon of judicial activism and the protection of the environment by the Judiciary, taking into account these interferences and the apparent breach of the separation of powers with judicial activism, without, however, exhausting the topic.

This discussion is justified by the fact that judicial activism, in the protection of the environment, can play a profoundly important role in environmental preservation, insofar as the actions of the other branches of government may, in a broader perspective, infringe upon the right to a healthy and balanced environment.

Considering the general theme, the initial objectives, and the field of study in question, we will employ the hypothetical-deductive method to test the hypothesis that the Judiciary's protection of the environment, even in the context of judicial activism, constitutes a legitimate exercise of environmental protection rather than an overreach of power. We will utilize bibliographic and documentary research based on materials previously published on the topics under discussion, including books, academic journals, dissertations, theses, as well as legislation, case law, and other relevant informational sources.

1 ENVIRONMENT: FROM A MERE INSTRUMENT TO A PROTECTED LEGAL ASSET

The Universal Declaration of Human Rights (1948), drafted after the Second World War, brought to the international legal community several rights considered basic for all human beings, without any distinction, providing, among others, the right to life, liberty, and property.

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However, the environment, at the time, did not figure as one of the autonomous legal interests considered human rights, not receiving protection from most legal norms unless there were economic interests involved.

The concern for the environment is not entirely recent. Without delving deeper into history, precisely to maintain a certain objectivity in our work, Aldo Leopold, as early as 1949, in A Sand County Almanac, and sketches here and there, explored the relationship between human beings and the environment. With environmental ethics, Leopold included in the concept of community, in addition to human beings, the soil, water, plants, animals—in short, the entire environment, stating, for example, that "We abuse land because we regard it as a commodity belonging to us" (Leopold, 1949, p. 8).

In Brazil, although there was already a certain concern with environmental protection in the 1930s, with the creation of some regulations such as the Forest Code (Decree No. 23.793/1934), the Water Code (Decree No. 24.634/1934), and the Animal Protection Law (Decree No. 24.645/1934), the legal protection of natural resources before the 1970s was motivated mainly by economic interests or, in some cases, by the protection of public health. This statement is supported by Ingo Wolfgang Sarlet and Tiago Fernsterseifer (2021) who, citing Michael Kloepfer (2004) and Erasmo Ramos (2009), affirm that the environment, in general, was not seen as an autonomous legal interest, but as an instrument for purposes such as resource exploitation or guaranteeing the population's health.

The intense exploitation of resources, the use of pesticides, deforestation, and the destruction of biodiversity led, in the 1960s, to international debates on human responsibility towards nature, resulting in the establishment, in the United States of America, of regulations that sought to protect the environment, such as the National Environmental Policy Act (1970), the Clean Air Act (1970), and the law creating the Environmental Protection Agency (1970) (Sarlet; Fernsterseifer, 2021).

Silent Spring, a book released by Rachel Carson in 1962, is an example of a work considered a landmark of environmental awareness, having issued a global warning about the effects of synthetic pesticides on the environment by exposing the bioaccumulation of toxic substances in the food chain, the threat to biodiversity, and the risks to human health.

The debates of the environmentalist movement and the North American environmental legislation itself influenced the change of the then-prevailing paradigm, causing the environment to gradually cease being a simple object of resource extraction and to become, indeed, a legal interest subject to international protection. This occurred with the Stockholm Declaration on the Human Environment (1972), considered a normative landmark of international ecological protection, which established principles and actions for environmental protection and recognized, in addition to the need for joint action by States to ensure a healthy environment for present and future generations, the interdependence between the environment and human beings (Sarlet; Fernsterseifer, 2021).

Internationally, several other regulations continued to be established, examples being the World Charter for Nature (1982) and the Vienna Convention for the Protection of the Ozone Layer (1985). In Brazil, however, according to Sarlet and Fernsterseifer (2021), little progress was made regarding the change of the paradigm at the time: the environment continued to be viewed from an exploitative and instrumental perspective, and not as an object of protection,

as exemplified by the Land Statute (Law No. 4.504/1964), whose priority was agricultural production, leading to an excessive exploitation of natural resources.

For Sarlet and Fernsterseifer (2021), the National Environmental Policy (LPNMA — Law No. 6.938/1981), considered the initial landmark of Brazilian Environmental Law for systematizing the legal protection of ecological values in Brazil, enshrined the environment as an autonomous legal interest deserving of special protection in the national legal framework. It did so by providing, among others, objectives such as preserving, recovering, and improving the environmental quality conducive to life, and providing the country with conditions for socioeconomic development and human dignity (Brazil, 1981, art. 2, caput), ensuring the protection of the environment as a public property for collective use (Brazil, 1981, art. 2, item I).

The LPNMA also stood out, for example, for establishing the strict liability of the polluter (Brazil, 1981, art. 14, §1) and the requirement of an environmental impact assessment for works and activities that are harmful or potentially harmful to the environment (Brazil, 1981, art. 10), features that are still in force in our legal system.

In addition to the possibility of the polluter's strict liability and governmental actions to control and inspect activities that could impact the environment, environmental protection also came to rely on another important instrument: the public civil action, governed by Law No. 7,347/1985 (Public Civil Action Law - LACP), which established that actions for liability for moral and material damages to the environment would be guided by it.

When the year 1988 arrived, the current Brazilian Federal Constitution (CF) was enacted, encompassing several fundamental rights, for example, by ensuring everyone the right to an ecologically balanced environment, a common interest of the people and essential for a healthy life, making its defense and preservation an obligation of the State and the community for present and future generations (Brazil, 1988, art. 225, caput).

Besides elevating the right to the environment to a constitutional level, granting the responsibility for its defense and preservation not only to the State but also to the community, the CF also enabled individuals, by themselves, to judicially seek environmental protection through another instrument, the popular action. It did so by providing, among the individual and collective rights in Chapter I of Title II, on Fundamental Rights and Guarantees, that any citizen would have the right to file a popular action with the objective of invalidating any acts that cause damage to public, historical, and cultural heritage, the environment, and administrative morality, exempting the plaintiff from court costs and the opposing party's attorney fees, unless bad faith is proven (Brazil, 1988, art. 5, LXXIII).

Thus, in addition to the public civil action, for which standing is granted to the Public Prosecutor's Office, the Public Defender's Office, entities of the Direct and Indirect Administration, and associations that have been in existence for one year or more and have a relevant institutional purpose for environmental protection, the popular action (regulated by Law No. 4,717/1965, known as the Popular Action Law - LAP) also received explicit legal support to serve as an instrument for environmental protection, granting standing to any citizen who wishes to annul or void acts that harm the environment.

Like the LACP, the LPNMA, and the LAP, as integral parts of the microsystem of collective redress—the set of norms that protect collective rights or interests in a broad sense—

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they began to protect the environment as an autonomous legal interest and as a diffuse right. This concept would be defined by the Consumer Defense Code, which, despite dealing with consumer relations, contributed to the microsystem by defining diffuse rights or interests as those that are transindividual and indivisible, held by indeterminate persons linked by factual circumstances.

Thus, the environment transitioned from a mere instrument for exploitation to an autonomous legal interest and a fundamental and diffuse right, belonging to an indeterminate group of people, such as the community in general, and which cannot be individualized.

The paradigm shift was further strengthened by several subsequent laws, such as the National Water Resources Policy Law (Law No. 9,433/1997), the National Basic Sanitation Policy Law (Law No. 11,445/2007), and the National Solid Waste Policy Law (Law No. 12,305/2010), in addition to other state and municipal normative acts to combat pollution and protect the environment (see the common competence to protect and legislate on environmental protection — art. 23, item VI, and art. 24, VI, CF).

With all the growing national and international attention to the environment, driven by the increasing understanding of its status as a human right, it was only in July 2022 that the General Assembly of the United Nations (UN) declared a clean, healthy, and sustainable environment to be a human right, through the approval of Resolution 76/300. This document not only affirmed the international importance of the environment for the enjoyment of human rights but also reiterated the duty of all States to safeguard and promote human rights (UN, 2022).

The trajectory of the environment, with its evolution from an object of exploitation to an autonomous legal interest and a diffuse right, demonstrates the growing public awareness of the importance of its preservation. However, this evolution has not been without challenges, with the State playing a major role in the effectiveness of environmental protection, and the Judiciary acting as an important agent in protecting the environment, assuming a central role in the enforcement of rights and in holding actors accountable for harmful conduct.

This increasing role of the Judiciary in environmental matters, however, has raised questions about the limits of its action and the legitimacy of judicial activism in this context. After all, would the action of the Judiciary, with a focus on the phenomenon of judicial activism, be a legitimate protection of inalienable rights, or would there be, with activism, an overreach in the exercise of constitutional competence? To answer this question, we will analyze, in the next chapter, part of the Judiciary's role in environmental protection, focusing on judicial activism, seeking to discuss its influence on the protection of the environment to confirm the initial hypothesis.

2 JUDICIAL ACTIVISM FOR ENVIRONMENTAL PROTECTION

2.1 The phenomenon of judicial activism

The CF provides that the Executive, the Legislative, and the Judiciary are the branches of the Union (Brazil, 1988, art. 2), with the latter having the typical jurisdictional function, that is, the power, the authority to state the applicable law to the specific case, to enforce it to resolve conflicts, and to administer justice. The Judiciary, therefore, has the duty to exercise the

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State's jurisdictional power to judge and decide on legal matters, an implication of the principle of universal access to justice, which guarantees that no injury or threat to a right shall be excluded from judicial review (Brazil, 1988, art. 5, XXXV).

Judicial activity, however, cannot be understood as a neutral operation: in the application of the law, there is an influence of psychic factors, conscience, preferences, values, and interests of the judges, who not only apply the law formulated by the State but also, at times, apply it to the specific case with the influence of their subjective characteristics, such as ideologies and beliefs (Leite, 2022).

This apparent “diverse application of the law” by judges orbits the phenomenon of judicial activism, the idea of which is linked to a “(...) broader and more intense participation of the Judiciary in the materialization of constitutional values and purposes, with greater interference in the sphere of action of the other two branches” (Barroso, 2012, pp. 25-26).

The concept of this phenomenon, in a broad sense, was employed by Arthur Schlesinger Jr. (1947) to define as activist the judge who sees the law as malleable, intended to do the greatest possible social good, not separating Law and Politics because they understand that political choice would be inevitable, even if this implied disregarding the limits of the Judiciary's role, thus invading the core functions of the other branches.

Reference reports, such as the World Justice Project's Rule of Law Index 2024, expose the great relevance of judicial activism in the contemporary global scenario, as they document the continuous global weakening of the Rule of Law, with the majority of countries experiencing a regression (backsliding). This trend is marked, mainly, by an increase in "executive overreach," a decline in human rights, and justice systems that fail to meet the needs of the population. In this scenario of weakening institutional checks and balances, the proactive role of courts stands out both for offering a potential response to safeguard rights and for exposing a point of tension regarding democratic legitimacy (World Justice Project, 2024).

Driven by complex realities such as this, studies on judicial activism have also advanced, causing the phenomenon to acquire new facets and conceptual currents. The approximation between Law and Politics, already mentioned by Schlesinger Jr. (1947), was one of these ideas that evolved and deepened, as we will see next.

For Barroso (2012), although the separation between Law and Politics is undeniable, this border, this separation, is often imprecise and mutable, because Law can be confused with the very core of what we understand as politics:

> Direito é política no sentido de que: a) sua criação é produto da vontade da maioria, que se manifesta na Constituição e nas leis; b) sua aplicação não é dissociada da realidade política, dos efeitos que produz no meio social e dos sentimentos e expectativas dos cidadãos; c) juízes não são seres sem memória e sem desejos, libertos do próprio inconsciente e de qualquer ideologia e, consequentemente, sua subjetividade há de interferir com os juízos de valor que formula. A Constituição faz a interface entre o universo político e o jurídico, em um esforço para submeter o poder às categorias que mobilizam o Direito, como a justiça, a segurança e o bem-estar social. Sua interpretação, portanto, sempre terá uma dimensão política, ainda que balizada pelas possibilidades e limites oferecidos pelo ordenamento vigente (Barroso, 2012, p. 29).

Thus, the law would, in a way, assume the facet of politics to the extent that: judges, in the exercise of jurisdiction, apply the Law, understood as a fruit of the manifestation of the

majority's will; political and social reality influences legal decisions; and the ideologies, interests, and wills of judges interfere in the grounds of judicial decisions. In this dimension, the interferences cannot be unlimited: they must be guided by the most correct norms for the specific case. The office of judging, in its essence, operates on a plane distinct from the political, which is moved by freedom of preference and unrestricted discretion. Even when a legal scenario presents a range of possible and equally defensible outcomes, the magistrate's task is not one of simple choice, but of a careful search for the most just and appropriate solution, a decision that must be grounded in the concrete realities of each case. This requirement to substantiate their judgments, their choices—the construction of a logical and convincing justification—is what distinguishes the jurisdictional function and its specific legitimacy (Barroso, 2012).

The political dimension would, therefore, be one of the faces that judicial activism assumes. However, even in the face of this political facet, the separation of powers could not be forgotten, with the Judiciary having its own typical functions and its own limitations, since the judge should be guided only by the legal norm and not by their private opinions, while at the same time respecting the considered deliberations of the Legislature and seeking harmony with collective aspirations, as much as possible (Barroso, 2012).

Despite the need to harmonize with the community, the magistrate's function is not that of a mere “spokesperson” for the population, as they must, at times, act against the will of political majorities, guaranteeing the democratic regime and the protection of fundamental rights, especially when they are threatened by the will of the majority. Thus, by correcting a legislative omission or invalidating an unconstitutional law, even though these are acts derived from the Legislature and with a presumption of legitimacy, the Judiciary does not act against democracy, but rather as a mechanism in its favor (Barroso, 2012).

The role of a judge, then, would require a delicate balance between the application of what is established by the legal norm, respect for the popular will, and the protection of the interests and rights protected by the Constituent Assembly. The judge must act in the name of positive law, being deferential to the legislator, but also attentive to social sentiment, without becoming populist and invading the political sphere of action. The counter-majoritarian action, in defense of fundamental rights, would thus be essential for democracy, as it would ensure that the Judiciary acts as a guardian of the Constitution and the principles it carries, even in the face of the majority's will.

However, this view on judicial protagonism is not without criticism, and Conrado Hübner Mendes (2021) warns of the need to distinguish between the judicialization of politics, a descriptive phenomenon of the shifting of themes to the courts, and the politicization of justice, a serious pathology in which decisions are based on party-political motivations and not on legal hermeneutics. According to the author, the risk lies in judicial activism crossing the fine line of constitutional interpretation to become an instrument of power, where the judge, under the pretext of achieving material justice, abandons legality in favor of their own convictions. This politicization, therefore, would threaten the very legitimacy of the Judiciary and the separation of powers, transforming the judge into a political actor who is not subject to the rules and limits they should impose on others.

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Another facet of judicial activism relates to the possible risk to democratic legitimacy. This is because members of the Judiciary, despite not being brought to their positions by democratic elections like the members of the Legislature and the Executive, can, in exercising state jurisdiction, override the decisions—or non-decisions, or omissions—of the members of these other branches, enforcing, in the specific case, certain rules or understandings not provided for in positive law. These are, thus, activist decisions, made within the scope of the inalienability of judicial review and other constitutional rights, such as access to justice and human dignity. Barroso (2012) supports two justifications that legitimize the rendering of activist decisions in the face of the apparent "popular will" expressed by elected representatives. The first is found in the CF itself, which explicitly confers such a prerogative on the Judiciary, with emphasis on the Supreme Federal Court (STF), as magistrates would not be mere mechanical appliers of the legislative will, but rather co-participants in the continuous task of creating Law, also exercising a portion of political power (Barroso, 2012).

Thus, judges would therefore hold a share of political power to materialize the constituent will itself, participating in the development of Law by, for example, filling the gaps in legal norms, which would legitimize their decisions even in the absence of popular suffrage.

The other justification is also supported by the Judiciary's role as an interpreter and protector of fundamental rights and principles, a role granted by the original constituent assembly in the CF. This protection is based on the tension inherent in the very structure of a democratic state. Constitutionalism operates under the logic of limiting power and safeguarding rights, while democracy is driven by popular sovereignty. To harmonize this duality, the Constitution assumes at least two roles. First, it establishes the architecture of the democratic process, guaranteeing political competition and majority rule. On the other hand, and crucially, it serves as a shield for non-negotiable, fundamental values and rights, protecting them from the transient, fluid will of majorities—after all, numerical supremacy does not grant a group the right to oppress a minority. Thus, the STF acts as a final guardian of these constitutional roles, functioning as a space for deliberation guided by principles and public reason, not by political agendas or particular dogmas (Barroso, 2012).

However, this view that legitimizes judicial action finds strong opposition in Brazilian legal scholarship and is criticized by jurists like Lenio Streck, for whom judicial activism is not a tool of justice but a symptom of decisionism—a concept associated with subjectivity and discretion. From this perspective, the activist judge first chooses the outcome they consider morally correct and only then seeks a legal basis to justify their will. This ultimately replaces the authority of the law with the judge's subjectivity, creating a "government of judges" that threatens legal certainty and the autonomy of the democratically elected legislature (Streck, 2020).

Under this line of reasoning, this decisionism is based on the so-called "theoretical common sense of jurists," a set of pre-judgments, dogmas, and concepts accepted uncritically and often unconsciously. This leads judges to justify their protagonism without the need for rigorous debate, thereby preventing a critical understanding of the law. Instead of a legal interpretation bound to the norm, the judge relies, for example, on vague notions and generic principles to legitimize decisions that are, in essence, acts of discretionary power. Consequently, judicial activism is not an isolated act of a "well-intentioned" judge but the result of a fragile

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theoretical foundation that, by promoting decisionism and avoiding critical questioning, erodes the predictability and integrity of the Law (Streck, 2020).

Although Streck's critique exposes the risks of judicial action untethered from textual and procedural limits, its application to environmental protection requires specific reflection. When the Judiciary acts to protect the environment, it generally does not do so to impose a subjective moral preference but to enforce an explicit constitutional command and an inalienable fundamental right (art. 225 of the CRFB/1988), whose protection extends to present and future human generations and, indeed, to all life on Earth. Thus, judicial intervention is not to be confused with decisionism; rather, it approaches a duty of protection in the face of omission by the other branches of government or actions that irreversibly threaten the protected legal interest. It is, therefore, a counter-majoritarian action justified by the very supremacy of the Constitution in a field where inaction can lead to irreparable damage.

In this way, the Judiciary would act, through judicial activism, within constitutional limits, this not being a case of an excess of its jurisdictional competence, but rather an interpretation in favor of democracy and human and fundamental rights. It would thus be the effectuation of the foundations of the Republic (such as citizenship and dignity — art. 1, II and III, CF), of the objectives (such as the pursuit of a society with freedom, solidarity, and justice, the eradication of marginalization and poverty, the reduction of inequalities, and the well-being of all — art. 3, I, III, IV, CF), and of the fundamental rights and guarantees, both individual and collective, of the national legal framework. Under this conceptualization, activism would be legitimized not by popular support, but by the values of the constitutional text expressed by the constituent assembly.

With such an interpretation in favor of democracy and fundamental rights, the Judiciary itself would prevent abuses by political actors who, using constitutional, apparently democratic mechanisms, could undermine democracy by practicing the phenomenon of “abusive constitutional borrowing,” described by Rosalind Dixon and David Landau (2021), acting with an air of democracy and legitimacy to, in fact, undermine democracy itself and other values dear to society. Judicial activism, thus, serves as an important instrument to prevent fundamental rights from being instrumentalized, for example, to silence minorities and political opponents, always in favor of constitutional principles.

2.2 Judicial activism in the protection of the environment

An example of a decision that can be considered activist, in favor of fundamental rights, was the one made in Extraordinary Appeal (RE) 654833, judged on April 20, 2020, by the Supreme Federal Court (STF), originating STF Theme 999 with the thesis of the imprescriptibility of the claim for civil reparation due to ecological damage. As will be seen in the summary, there was a balancing between legal certainty, the lack of rules — and, therefore, the omission, or non-action, of the legislator — regarding the statute of limitations for the reparation of civil environmental damages, and the protection of the environment as a human and fundamental right:

> RECURSO EXTRAORDINÁRIO. REPERCUSSÃO GERAL. TEMA 999. CONSTITUCIONAL. DANO AMBIENTAL. REPARAÇÃO. IMPRESCRITIBILIDADE. 1. Debate-se nestes autos se

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> deve prevalecer o princípio da segurança jurídica, que beneficia o autor do dano ambiental diante da inércia do Poder Público; ou se devem prevalecer os princípios constitucionais de proteção, preservação e reparação do meio ambiente, que beneficiam toda a coletividade. 2. Em nosso ordenamento jurídico, a regra é a prescrição da pretensão reparatória. A imprescritibilidade, por sua vez, é exceção. Depende, portanto, de fatores externos, que o ordenamento jurídico reputa inderrogáveis pelo tempo. 3. Embora a Constituição e as leis ordinárias não disponham acerca do prazo prescricional para a reparação de danos civis ambientais, sendo regra a estipulação de prazo para pretensão ressarcitória, a tutela constitucional a determinados valores impõe o reconhecimento de pretensões imprescritíveis. 4. O meio ambiente deve ser considerado patrimônio comum de toda humanidade, para a garantia de sua integral proteção, especialmente em relação às gerações futuras. Todas as condutas do Poder Público estatal devem ser direcionadas no sentido de integral proteção legislativa interna e de adesão aos pactos e tratados internacionais protetivos desse direito humano fundamental de 3ª geração, para evitar prejuízo da coletividade em face de uma afetação de certo bem (recurso natural) a uma finalidade individual. 5. A reparação do dano ao meio ambiente é direito fundamental indisponível, sendo imperativo o reconhecimento da imprescritibilidade no que toca à recomposição dos danos ambientais. (...) Afirmação de tese segundo a qual É imprescritível a pretensão de reparação civil de dano ambiental (Brasil, Supremo Tribunal Federal, RE 654833/AC, Rel. Min. Alexandre de Moraes, j. 20 abr. 2020).

Another example that sparked debates about judicial activism was the decision made in case No. 1021269-13.2023.4.01.3200, from the 7th Federal Environmental and Agrarian Court of the Judicial Section of Amazonas. In this Public Civil Action, the legality of the project's environmental licensing was questioned, and several flaws were alleged, such as the incompetence of the licensing body (IPAAM), the absence of a complete environmental impact assessment, and the failure to obtain prior and informed consent from the affected traditional communities.

In this case, an urgent injunction was granted to suspend the environmental licenses issued by IPAAM, an autonomous entity of the state of Amazonas, given the alleged risk of environmental damage:

> [...] riscos de danos ambientais (principalmente aqueles que não tiverem sido adequadamente considerados e dimensionados no processo de licenciamento ambiental) justificam a suspensão das licenças. Isso porque, antes de remediar danos, danos ambientais devem ser evitados, prevenidos e mitigados. Esta precaução (suspensão de licenças e atividades) se mostra ainda mais necessária quando tantos e tão importantes questionamentos colocam em dúvida a higidez do licenciamento ambiental, sobretudo quanto aos estudos, identificação de impactos e de comunidades afetadas, circunstâncias que só reforçam a constatação de *periculum in mora.* Em termos práticos, ainda que a suspensão das licenças interrompa a atividade de exploração de gás, trazendo prejuízo econômicos para a empresa ré; por outro lado, o prosseguimento da atividade traz riscos reais à vida e saúde das comunidades afetadas, bem como ao meio ambiente, tanto na área de impacto, como na área de influência – aqui incluindo corpos hídricos (lençol freático e reservatórios d'água) que estariam sujeitos à contaminações e riscos próprios da exploração de gás e petróleo, na Bacia Amazônica. A despeito de deficiências no licenciamento ambiental, o prosseguimento de atividades efetivamente poluentes com riscos de danos à saúde e ao meio ambiente de suporte de comunidades indígenas – que não teriam sido contempladas no estudo de impacto e que não teriam sido consultadas – é fundamento o bastante para suspender as licenças ambientais respectivas, até que vícios sejam sanados. No caso dos autos, tais riscos se agravam na hipótese em que tais impactos e danos sequer tenham adequadamente contemplados, dimensionados e registrados em processo regular de licenciamento ambiental. Ou seja, vícios no licenciamento e insuficiências nos estudos e relatórios de impacto aumentam os riscos

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> de dano a que ficam expostos tanto os seres humanos, quanto o meio ambiente natural. Assim, o desconhecimento de danos e riscos de uma atividade (seja ele deliberado ou não) e a falta de registros destes em processo de licenciamento ambiental, consubstancia o risco de dano ambiental irreversível ou de difícil reparação, justamente por impedir a adoção de medidas mitigadoras/compensatórias para tanto, em diálogo publico com aqueles que são afetados por tais decisões administrativas (Brasil, 7ª Vara Federal Ambiental e Agrária da SJAM. Processo nº 1021269-13.2023.4.01.3200. Julgador: Mara Elisa Andrade, j. 19 maio 2023).

The decision, thus, can be interpreted as an interference by the Judiciary in decisions that, in principle, would fall to the Executive—as is the case with the license issued by the state autarchy—compromising local economic progress while reinforcing the need for environmental preservation, with the application of principles such as prevention, for example.

But we must recognize that the Judiciary's actions are not immutable nor uniformly beneficial and should not be viewed through an idealized lens, as the celebration of paradigmatic decisions must also occur with a critical analysis of the justice system's selectivity. UN reports highlight the existence of "sacrifice zones," areas where marginalized communities, such as indigenous peoples and low-income populations, are disproportionately exposed to pollution and environmental degradation, facing systemic barriers to obtaining judicial redress (Boyd, 2022).

The existence of these "sacrifice zones" and the selectivity of environmental justice can be understood from the patterns of judicial behavior that, according to Conrado Hübner Mendes (2021), are an "escape from legality." The apparent benevolence of a decision can mask "judicial partiality," where the Judiciary, a non-neutral actor, acts in a way that benefits specific economic and political interests to the detriment of vulnerable communities, for example.

Similarly, the risk of the "pragmatic judge" manifests when environmental protection is based on calculations of political convenience, for example, and not on a faithful application of constitutional principles, making environmental protection unstable and susceptible to external pressures and showing that the legitimacy of environmental judicial activism depends not only on the outcome but on the integrity, the conformity of the decision-making process, and the judge's ability to resist external pressures (Mendes, 2021).

High-profile cases, such as those of climate litigation, show that judicial intervention can have ambiguous results because, although courts are consolidating as an important stage for holding states and companies accountable, a favorable sentence does not guarantee its effective implementation. The practical impact of favorable decisions depends heavily on "political will" and the existing legal infrastructure, and it is common for governments to respond with "symbolic compliance" or even "political resistance," accusing the Judiciary of overstepping its functions, which demonstrates that victory in court is only the beginning, not the end of a complex battle (Setzer; Higham, 2025).

Thus, the main strength of judicial action often lies less in its direct coercive power and more in its ability to catalyze social and political change, as so-called "strategic litigation" uses the courts not only to win a case but to influence public debate and shape competing narratives about responsibility and justice. The Judiciary, by giving legitimacy to a cause, can boost social mobilization and increase pressure on political actors, making inaction more costly. This shows that its action is not isolated; on the contrary, it is a fundamental but interdependent piece in a

broader governance "ecosystem," highlighting the clear limits of the Judiciary to promote, on its own, transformative environmental justice (Setzer; Higham, 2025).

It should not be forgotten, moreover, that environmental education practices may, in the future, reshape the scope of judicial activism, since the need for the Judiciary to override the decisions of the other branches of government to protect the environment tends, in theory, to decrease as the community as a whole, duly educated and aware, assumes a more defensive and preservative stance towards the environment (Rossi et al., 2023).

It is emphasized that this phenomenon of activist judicial action is not restricted to the environmental sphere. It manifests itself with equal force in guaranteeing other fundamental rights, as demonstrated by the decision in Extraordinary Appeal 1,008,166/SC. In that case, the STF rejected the thesis that the right to basic education was a mere programmatic norm, obliging the State to guarantee access to preschools and daycare centers. Such a precedent reinforces the argument that judicial intervention becomes an essential instrument for the enforcement of inalienable constitutional commands, especially in the face of state inaction (Bonifácio; Vieira, 2024).

In view of the foregoing, we understand that the legitimacy of judicial activism in the environmental sphere is deepened when it is understood that environmental protection is linked to human dignity. This is justified not only as a check on state omission but also as a defense against decisions that may result from the manipulation of the masses by economic or political interests. The Judiciary thus assumes the role of protecting the fundamental right to a healthy environment—and, ultimately, to life—against circumstantial wills. This becomes even more pressing in an era of technological advancement that makes economic development possible without the need for massive environmental degradation, undermining arguments that have historically opposed progress and preservation.

CONCLUSION

We began this work with the hypothesis that judicial activism in the protection of the environment would not constitute an overreach of power, with the Judiciary overriding the other branches, but rather a legitimate protection of the environment as a fundamental diffuse right.

In the quest to prove or refute this hypothesis, it was demonstrated that the protection of the environment, once seen as a mere tool for economic and public health purposes, has evolved into an autonomous legal interest and a human and fundamental right. This evolution stemmed from the debates of the environmentalist movement and North American legislation, culminating in the 1972 Stockholm Declaration, which recognized the interdependence between human beings and the environment and the need for joint action by States to ensure a sustainable future for present and future generations.

Subsequently, it was clarified that, in Brazil, the National Environmental Policy Law consolidated the environment as an autonomous legal interest, imposing strict liability on the polluter and the necessity of an environmental impact assessment. The CRFB/1988 elevated the right to a healthy and balanced environment to a constitutional level, recognizing it as a collective heritage vital for the quality of life, also granting the community the power to protect

the environment, as a diffuse right, through instruments such as the popular action and the public civil action.

These actions, components of the microsystem of collective redress, are brought before the Judiciary, which holds the State's typical jurisdictional function of applying the law and resolving conflicts. The members of the Judiciary, however, are not mere reproducers of the legal text: they interpret the norms, at times, under the influence of subjective, individual characteristics, such as ideologies and values, which lies at the core of the phenomenon of judicial activism. This involves a more intense participation of the Judiciary in the materialization of the Constitution, also reflecting on the sphere of competence of the other branches.

Judicial activism has several dimensions, manifesting itself, for example, in the interpretation of Law as an externalization of majority desires; in the influence of politics on judicial decisions; in the interference of judges' subjectivity in decisions; and in the protection of fundamental rights and guarantees against decisions of the Legislative and Executive branches that could put them at risk, with the Judiciary acting as a shield for the ideas enshrined in the CRFB/1988 by the constituent assembly. Through this last facet of activism, the Judiciary, as the guardian of the Constitution, has the role of protecting fundamental rights, even against the will of the majority, being legitimized not by direct popular support, but by the values and principles of the constitutional text, ensuring the effectuation of the Republic's foundations and of fundamental rights and guarantees.

The debate on judicial activism, however, is complex. If, on one hand, it emerges as a fundamental instrument of protection, serving as a shield for the rights provided for in the Constitution against the will of circumstantial majorities, on the other hand, it is not immune to flaws or to criticisms that warn, for example, of the risks of an "escape from legality," where judicial protagonism deteriorates into decisionism, partiality, or a "judicial populism" that, even if it may seem well-intentioned, diminishes legal certainty and democratic legitimacy.

It is in this complex scenario, aware of both the potential for protection and the risk of arbitrariness, that it is understood that the judicial protection of the environment transcends the discussion of a mere excess of competence, establishing itself as a legitimate and indispensable guardianship. This is justified not by a supposed superiority of the Judiciary, but by the nature of the protected interest — the environment, the very condition for life and, consequently, for the existence of any other right, norm, or economic activity.

Thus, judicial intervention in the environmental sphere, especially in the face of omission or harmful action by the political branches, does not represent an overreach of power or a usurpation of politics, but an action that guarantees the continuity of human and non-human life and ensures justice for future generations. Therefore, using instruments like collective actions for the protection of the environment is a duty of society and an essential mechanism that the Judiciary has the responsibility to enforce, reaffirming the strength of the Constitution against destructive inertia.

Confirming our initial hypothesis, therefore, judicial activism in the protection of the environment would not occur as an overreach by the Judiciary over other branches, given its purpose of protecting fundamental values and rights, even against the circumstantial will of the majority. This acquires even more significance in scenarios of mass manipulation. We know that a large number of people can be led to make decisions in accordance with the power groups

that influence them. In the event of manipulation leading to environmental harm, the Judiciary must intervene, insofar as guaranteeing the right to a healthy and balanced environment is also to guarantee the right to life, to human dignity, and many other corollaries that stem from the environment's survival.

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DECLARATIONS

3.1 Author Contributions

- **Conception and Study Design**: Gabriel Soares Malta Victal
- **Data Curation**: Gabriel Soares Malta Victal
- **Formal Analysis**: Gabriel Soares Malta Victal
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- **Investigation**: Gabriel Soares Malta Victal
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- **Writing - Original Draft**: Gabriel Soares Malta Victal
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- **Final Review and Editing**: Gabriel Soares Malta Victal
- **Supervision**: Flávia de Almeida Montingeli Zanferdini

3.2 Declaration of Conflicts of Interest

We, Gabriel Soares Malta Victal and Flávia de Almeida Montingeli Zanferdini, declare that the manuscript titled "**Judicial activism in the protection of the environment: an overreach in the exercise of constitutional powers or a legitimate protection of inalienable rights?**":

1. **Financial Ties:** Has no financial ties that could influence the results or interpretation of the work. No funding institution or entity was involved in the development of this study.
2. **Professional Relationships:** No relevant professional relationships to the content of this manuscript have been established.
3. **Personal Conflicts:** Has no personal conflicts of interest related to the content of the manuscript.