

We, the Judges, and the Environment

by Justice Antônio Herman Benjamin¹

It is an honour to open this *International Symposium on Environmental Courts & Tribunals*. Let me first thank the symposium's organizers, especially Pace University School of Law, the International Judicial Institute for Environmental Adjudication, the Environmental Law Institute, and other institutions involved, for putting forward this timely and important initiative.

I attribute my invitation to speak here today to the fact that my country, Brazil, notwithstanding the serious environmental degradation and enormous deforestation of the past fifty years, continues to be both our planet's richest reserve of biodiversity and, simultaneously, an experimental laboratory with new and creative models of environmental legislation, both in terms of policy design as well as compliance and enforcement. I will illustrate some of the propositions I make with precedents from the High Court of Brazil (*Superior Tribunal de Justiça*, or STJ), which has issued dozens of decisions that in the past twenty years have changed the face of environmental law in the country. In doing so, I will limit my citations to opinions that I wrote for the Court, since a more comprehensive analysis of the STJ's environmental role can be found in the article written by Nick Bryner and included in the present issue of the law review.

I will begin with the obvious—the common ground: we live in an era of rapidly disappearing species and ecosystems, a scenario made more worrisome by the uncertainties associated with climate change. The *very basis of life* is under threat. This observation has repercussions for the theme that I have been asked to analyse: *judges and the environment*. Judges have had the final word on how social interactions affect our lives—the beginning and the termination of life, family life, life in the marketplace, emotional life, and so on. We have never questioned the intervention of courts in these diverse fields of social interaction.

The intellectual task here, then, is to investigate the role of judges in the protection of the basis of life itself—the judicial concern with the *a priori*, with the natural planetary systems that precede and sustain our everyday existence. Logical reasoning suggests that if it is the judge's responsibility to preserve human life, then it must also be up to the judiciary to ensure whatever is necessary to maintain all living beings, ourselves and all others—the foundations of life. Nevertheless, we know that judicial intervention in environmental matters, despite some success stories around the world, still does not exist in many countries. In some legal systems, courts have merely rhetorical or symbolic participation in the implementation of environmental laws; in others, their role is questioned; in still others, courts are incapable of reducing, much less stopping, the extinction of species and the irreversible loss of precious ecosystems and biomes.

¹ Justice, High Court of Brazil (*Superior Tribunal de Justiça*); Professor, Catholic University of Brasília. Translation by Nicholas S. Bryner.

It is within this context that I intend to analyse: a) two different models of judicial participation of courts in environmental governance; b) two concrete forms of judicial action in resolving environmental conflicts; c) the challenges to judicial practice in this area; and d) the prospects for the near future, a reflection that, of course, will stem from my experience as a Brazilian.

MODELS OF JUDICIAL PROTECTION OF THE ENVIRONMENT

Although it is somewhat of an oversimplification, I believe it is possible to identify two broad basic models of judicial protection of the environment, based on the types of roles courts play in governance of natural resources. On one side is the *spectator judiciary*, an institutional “non-actor” or peripheral actor in responding to the environmental crisis. This is the environmental *laissez-faire* approach, in which law and judges continue to be seen as tools of the State, used primarily for the protection and enforcement of property, contracts, and family relationships. The rest—including the protection of the environment—is reserved for public policy and administrative discretion, a prohibited territory for judicial exploration, except in very limited situations (like nuisance), which are, by definition, exceptional. Of course, we will find no law that says expressly or openly that judges must keep away from environmental conflicts. The judicial system reaches this result indirectly by maintaining the same legal patterns, both substantive and procedural, that have guided judges’ practice for centuries.

There are various arguments—political and technical—put forward to suggest that courts should employ this hands-off approach in dealing with the environmental crisis. It can be said that environmental conflicts raise legal issues that are too complex (take, for example, industrial pollution, groundwater contamination, or the difficulty of establishing causation in a specific case of species extinction). The judiciary, goes the argument, does not have the necessary resources nor the experience to deal with such a high level of scientific and technical complexity.

Proponents of the *spectator judiciary* may further point out that environmental disputes do not always present themselves in a crystallized manner so as to fit perfectly in existing legal moulds. This, it could be argued, would force judges to enter into the murky and judicially prohibited waters of political confrontation and policymaking, which are the exclusive provinces of other state actors—namely, those elected directly by the people—which cannot be labelled (as judges can) as democratically illegitimate. Finally, environmental conflicts require quick action or response, which is incompatible with the slow pace of the court system, which, due to its bureaucracy and technical rituals, eventually becomes an obstacle to effective protection of the environment and to economic progress.

In my view, none of these arguments in defence of the *spectator judiciary* hold water. Judges, in the course of their traditional duties, often deal with complex social and technical questions, such as family conflicts, or uncertainties regarding the protection of minors, the elderly, the sick, or those in a coma, who may lack the capacity to fully and freely express their consent. Judges today are confronted with all sorts of technological difficulties while resolving intellectual property disputes. Yet to decide well, a judge need not transform her chambers into a university or specialized research institute. It is precisely for this reason that judges have the power to appoint experts or special masters to conduct studies, even the most sophisticated ones requiring cooperation among various academic fields.

On the other hand, the slow pace of the judicial process, while undeniable, can be corrected or improved with legal and management innovations and should not be taken as an argument to distance courts from just one single type of conflict—environmental. Finally, undoubtedly, we expect judges, especially civil law judges, to respect the fine line between the legal and the political. But this again presents no obstacle for the courts. Here we should distinguish between the *application of legislated* public policy and the *judicial creation* of public policy. This distinction was highlighted in a decision of the High Court of Brazil:

In Brazil, unlike other countries, courts do not create obligations for environmental protection. They spring forth from the law, after having passed through Parliamentary analysis. Therefore, we do not need activist judges, for the activism is done by the law and by the constitutional text. . . . [Fortunately,] our Judiciary is not confounded by a sea of gaps or a festival of legislative half-words. If a gap exists, it is not due to the lack of a law, nor even a defect in the law; it is because of the absence of or a deficiency in administrative and judicial implementation of the unequivocal environmental duties established by the legislator.²

As I look around, I believe that, in environmental governance, we are increasingly living in the era of the *protagonist judiciary* (something quite different from an *activist judiciary*), or at least moving toward it. This is the result of a series of political and legal developments beginning with the Stockholm Conference in 1972. First, treaties and international documents began requiring States to legislate—and legislate effectively—on environmental protection. As we know well, laws are enacted so that they may be enforced—including judicially—when violated. In addition, many countries in the world have “greened” their constitutions, raising the stature of environmental protection and transforming it from a legal into a constitutional paradigm. This is not, and should not be, a merely a cosmetic legal change. Lastly, since the Rio Conference in 1992, the international community’s emphasis has moved in the direction of compliance and enforcement of environmental policies and law.

Currently, many national constitutions expressly recognize a right to a clean and safe environment (the specific terminology and language varies significantly among different constitutional texts), some going further to attribute an *ecological function* to property rights (as in the case of Brazil and Colombia, for example). Even in countries that only recently embraced democracy and the rule of law, after decades of military or civil dictatorship, it is considered unacceptable to recognize rights without connected duties and, more importantly, without agreeing, at least in theory, to the legitimacy of judicial intervention in guaranteeing those rights. Furthermore, in the modern world, it is impossible to separate the environment from the protection of traditional rights and goods, such as health and property. Nor can we forget that, in the new constitutionalism, the rule of law occupies a central place. And the true rule of law cannot exist without ecological sustainability and an independent judiciary.

All this to stress the fact that an environmental hands-off court system not only contradicts the needs of our time, but fundamentally plays against—a sort of judicial disobedience or

² S.T.J., REsp 650.728/SC (2d Panel), Relator: Min. Antonio Herman Benjamin, 23.10.2007, at 15–16.

“negative judicial activism”—the constitutional and legal framework put in place. It becomes clear then that the critique of the judicialisation of environmental conflicts should have other, deeper roots that are perhaps unspoken or less transparent.

I should begin with possibly the most fundamental and controversial aspect of this debate: environmental protection redistributes ecological value; and by so doing, redistributes economic value as well and reorganizes property rights. This is the *redistributive function* of environmental law. Think about how the equation of negative environmental externalities is reversed when statutes and courts begin to require a polluter to install emissions control equipment; or when environmental law, as in Brazil, prohibits rural landowners in the Amazon from clearing eighty percent of the area of their property. Basically, what the legal system is stating here is that there is an ecological function to property rights. In that respect, the High Court of Brazil held that:

In contemporary legal regimes, parcels of real property—rural or urban—serve *multiple ends* (private and public, including ecological), which means that their economic utility is not exhausted on *one single use* or the *best use*, let alone the *most lucrative* use. The Brazilian constitutional-legal order does not guarantee property and business owners the *maximum possible financial return* on private goods and on activities undertaken.

Requirements of ecological sustainability in the pursuit and utilization of private economic goods are insufficient to show a “taking” or an unjustified public intervention. Mandating that individuals comply with certain environmental measures in the use of their property is not discriminatory, nor does it interfere with the principle of equal protection under the law, principally because nothing can be confiscated from a person if she does not properly own or hold title to it.

If landowners and occupiers are subject to the *social and ecological functions of property*, it makes no sense to claim as unjust the loss of something that, under the constitutional and legal regime in effect, they never had, that is, the possibility of complete, absolute use, in scorched-earth style, of the land and its natural resources. Rather, making such claim would be an illegal takeover . . . of the *public attributes* of private property (essential ecological processes and services), which are “assets of common use” in the terms of the heading to Article 225 of the Constitution of 1988.³

There is an additional change occurring that affects traditional judicial practice—the growth of collective access to justice, which implies procedural recognition of new actors that, by their nature, diversity or quantity, are less susceptible to manipulation or embarrassment by the environmentally degrading State or powerful vested economic interests. Furthermore, in federal States, such as Brazil, environmental protection is often undertaken by federal courts, which weakens and dilutes the power of local elites—and the pernicious proximity to, and relationship with the state judiciary to which those elites have become accustomed. In sum, collective adjudication reconfigures the individuality of environmental harms,

³ S.T.J., REsp 1.109.778/SC (2d Panel), Relator: Min. Antonio Herman Benjamin, 10.11.2009, at 1.

bringing not only the diffuse and intergenerational components of degradation into play but also making sure that Nature itself will not rest without protection.

TWO TYPES OF JUDICIAL ADJUDICATION OF ENVIRONMENTAL DISPUTES

When we speak of judicial action in environmental protection, we in fact have two things in mind, which should be clearly identified and separated. The more common and less controversial function of the courts in environmental law is to decide questions of respect, particularly from the State, for the *formal procedures* provided by law. Here, the judge's mission is fundamentally to ensure a form of environmental due process, which includes, for example, reviewing the appropriateness of environmental licenses, the completeness of environmental impact statements, the holdings of public hearings, and the various steps and formalities in the procedure of creating protected areas. This is *formal judicial control* and, as such, is shallow from an ecological perspective.

More difficult, one could say, is when a court is called on to undertake *substantive environmental judicial control* of development projects, in which the judge is expected to—within the background of the constitution and the law—weigh options and internalize environmental costs. Here, the judge is called upon to intervene in the murky waters in which decisions made by administrative authorities and private property owners overlap and interact. The danger is twofold: the judge must be careful, on one hand, not to step into territory reserved for elected officials; on the other, not to invade the fundamental core of private property rights. Of course, in countries with vast and detailed constitutional and regulatory environmental frameworks (as Brazil), the judicial task is less challenging than in jurisdictions in which the judge has in front of her only a basket of old precedents, completely unable to deal with issues that go much beyond the protection of the traditional health and property rights of individuals.

What are the challenges for us judges in the near future? One clear difficulty is handling the weight of legislative sources—international, national, and, increasingly, municipal—that are progressively complex, heterogeneous, and fluid. Furthermore, environmental law is comprised of a number of concepts that challenge the very tradition of Western law, based on certainty and security, to begin anew with the term “environment.” In addition to this conceptual uncertainty, judges must adapt the static character of law to the always-evolving nature of science. Take one example: in the context of climate change, is it acceptable and reasonable to look at legal rules for environmental licensing in the usual way?

Another aspect to be considered is the still embryonic *principle of non-regression*, a response to the fact that environmental legislation in many countries is now waning. There is a global struggle to maintain the gains of forty years of legislative development. I see the principle of non-regression as an emerging *general principle of environmental law*, which looks ahead, to the future. Yet courts are often confronted with what happened in the past, and not just the near past, especially in countries that enacted environmental legislation as far back as the 1960s but lacked the political will or human and financial capacity to implement it. Such is the case of the Brazilian Forest Code of 1965. The question here is what to do with those that have been violating the law for decades, an issue that was brought to the High Court of Brazil, which held:

There exists no acquired right to pollute or degrade the environment. The passage of time cannot cure environmental violations of a permanent nature, because some parties affected by such actions—future generations—have neither a voice nor representatives authorized to speak or remain silent in their name.

Decades of illicit use of the rural property do not provide safe harbour for the landowner or occupant to continue prohibited acts; nor do they legalize acts prohibited by statute, above all in the area of inalienable rights, which all enjoy, including future generations, as is the case of environmental protection.⁴

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The courts, however, will not be able to protect the environment unless there is a strong cultural desire to do so as well. Changing the law is one thing, but transforming centuries-old, deeply-rooted cultural traditions would be challenging for any judicial regime or nation. This point did not go unnoticed in a precedent issued by the High Court of Brazil:

In Brazil, “knocking down” and “replacing the old with the new” have always been the order of the day, in the city and in the fields. In the spirit of the Brazilian, carved out over 500 years of historical conquest of the natural and of the old, progress becomes synonymous with denying the value and legitimacy of the past and the future, such that our “immediatism” only allows us to recognize the identity, legitimacy, and necessities of the present. As such, the natural tendency is to reject, disbelieve, or obstruct any legal regime that stands in the way of tractors, cranes, dynamite, chainsaws...

I conclude my intervention today by citing another precedent of the High Court of Brazil (Recurso Especial 302.906, State of São Paulo). The main issue was the validity of the private conservation easement clauses put in building contracts at the beginning of the twentieth century, an urban planning case whose wording fits perfectly within the realm of nature conservation:

Although courts do not design, build or administer cities, that does not mean they cannot do anything for them. No judge, no matter how great her interest in, knowledge of, or ability in the art of urban planning, architecture and landscape, will take upon herself anything beyond the simple role of engineering the legal discourse. And, as we know, cities will not rise or evolve with words alone. But words spoken by judges can indeed encourage destruction or legitimize conservation, endorse speculation or guarantee urban environmental quality, consolidate the errors of the past, repeat them in the present, or enable a sustainable future.⁵

Thank you very much.

⁴ S.T.J., REsp 948.921/SP (2d Panel), Relator: Min. Antonio Herman Benjamin, 23.10.2007, at 1.

⁵ S.T.J., REsp 302.906/SP (2d Panel), Relator: Min. Antonio Herman Benjamin, 26.08.2010, at 4.