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LEGAL ACTIONS AND THE ENVIRONMENT: NOTES ABOUT TRIGGERING THE JUDICIAL BRANCH

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Abstract

In Brazil, the ecologically balanced environment was raised to the level of fundamental rights with the 1988 Constitution, which was inspired, in part, by the environmental movements that emerged after the 1972 Stockholm Convention. At the same time, by turning the environment into a common good, the Constitution imposed on everyone the duty to protect and preserve it nowadays and for the generations to come. Thus, through case law research, this paper aims to analyze how the Superior Court of Justice and the State Court of Paraná are called upon to rule on environmental issues. It is concluded that the Judicial Branch has not been triggered in order to take the environment as a common good or as a basis for sustaining life, but rather as a resource available to humans.

Keywords: right in action; environmental citizenship; case law; legal realism; legal rationality.

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1. INTRODUCTION

From the transition between the 1960s and 1970s, the environment conquered a prominent position in the global scenario. In the early 1960s, when demonstrating positive correlations between the intensive use of agrochemicals and some types of cancer, Carson (2005) warned, for the first time, about the limits of economic growth. In the following decade, the famous report derived from the Club of Rome corroborated Carson's suspicions, but in a broader and more consistent perspective. The work “The limits to growth” (Meadows et al., 1972), using empirical data, makes the first objective, in-depth and global description showing the repercussions of the modern civilizing process, centered on the binomial production/consumption without limits, with predominance of individual interests over collective ones.

As a result of these questions about the logic of growth at any cost, all fields of knowledge were urged, directly or indirectly, to express their views on the environmental issue. This task has become a thorny challenge, however. And the reason for this is that the areas of knowledge realized that the complexity of the environmental issue could not be reduced to the specific look of each field.

Therefore, although the present research aims to analyze the ways in which the Judiciary is triggered to deal with issues related to the environment, the study does not intend to present, identify or ratify any existing concepts on the subject. On the contrary, once the forms of triggering the Judiciary are identified, it will be possible to reflect on the role that judicial decisions have played in the environmental scenario.

To avoid falling into reductionism[4], which would be harmful to the research, it is necessary to define what this study is considering as the environment. In this sense, the environment will be taken as a tangle (Ardoino, 2010), from which no material or immaterial element can be excluded, responsible for providing a healthy quality of human and non-human life. It is essential to bear in mind that

[4] Conceiving the environment in the light of a single field of knowledge.

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the positive norm is inscribed in this tangle as its founding and constitutive element (Fadul, 2013 and Fadul & Souza-Lima, 2016).

This line of reasoning moves away from the anthropocentric idea that the environment is a mere resource to be appropriated by humans. In turn, the notion adopted in the present research is close to the idea that judicial decisions are able to transform reality, once they can interfere directly (and indirectly) in the paths and detours of civilizing processes. Thus, it is then necessary to verify and question not about the decisions themselves, but rather about the ways in which the Judiciary has been triggered.

Therefore, in addition to the Introduction and Conclusion parts, this paper is divided into four more sections. The first one explains the methodological path of the research. In the second, the global context of the environmental issue is presented in a summarized way. The third part shows how the juridical field is part of the socio-environmental debate. In the fifth and last section the data are presented in the form of graphs, followed by the analysis of data and research findings.

2. METHODOLOGICAL PATH

The search for the terms “popular action” and “public civil action” was carried out through the website of the State Court of Paraná, used as a database. In the search, the filters were reduced in order to obtain accurate results. It was found that, from February 2018 to February 2019, only two appeals involving popular actions on the environment reached the State Court of Paraná. In the same period, 17 public civil actions reached the Court. In order to achieve this result, the website of the State Court of Paraná was accessed: https://www.tjpr.jus.br. In the "Consultations" tab, the option "Case Law Research" was selected. Next, the option "Advanced Search" was selected and the "Search Criteria" was filled in with the terms "action" and "popular" and "environment"[5]. In "Summary", the scope of

[5] Translator Note (TN): In Portuguese, the words used were: "ação", "popular", "meio" e "ambiente". The word *environment*, in Portuguese, is a term - *meio ambiente* -, and that is the reason why in Portuguese there were four words for consultation while in English it would be three.

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"Second Instance decisions" was chosen. The "Trial" field was filled in with the initial date of February 20, 2018 and the end date of February 20, 2019. For consultation on public civil actions the same process was used. In the latter case, the terms adopted in the "Search Criteria" field were "action" and "civil" and "public" and "environment".

Next, in the "Consultations" tab, the option "Case Law" was selected and then "Case Law Research". To refine the search, based on objective criteria, the "Advanced Search" tab was selected. The "Search Criteria" field was filled in with the keyword "environmental"[6]. The reason for choosing this keyword is the range of results it returns, which cover environmental damage, environmental disasters, as well as environmental law. The following options were also selected: "Court's ruling in full"[7] and "Second Instance decisions". To delimit the period of one year, the start date of February 1st, 2018 and the end date of February 1st, 2019 were inserted.

In the search, the purpose was to select only final decisions. This strategy avoids the analysis of duplicate lawsuits. In this sense, the selected options were the decisions issued in Appeals and in Mandatory Judicial Review[8]. Thereby, 120 decisions ruled by an Appellate Court were identified and read in full. Of this total, only 91 hold the attention of this research, since they concern the protection of the environment: 68 decisions came from claims for compensatory damages filed by individuals[9]; 4 came from repossession actions with request for demolition of improvements[10]; 7 came from actions for annulment of fines for environmental

[6] TN: The original word, in Portuguese, is "*ambiental*".

[7] TN: The original term, in Portuguese, is *"Na íntegra do acórdão"*.

[8] In Brazilian law, what has been translated here as Mandatory Judicial Review is called "*reexame necessário*". It consists of the mandatory analysis, by a second instance court, of decisions against the Union, States, Municipalities, Federal District, autarchies and foundations of public law. By provision of article 496 of the Brazilian Code of Civil Procedure, those decisions are mandatorily referred to an Appellate Court and must be analyzed regardless of whether the interested party chooses to appeal (Brasil, 2015).

[9] In Portuguese, "*ações indenizatórias por danos morais e materiais*".

[10] In Portuguese, "*ações de reintegração de posse com pedido de demolição de benfeitorias*".

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violations[11]; 9 decisions concerning public civil actions[12]; 1 decision came from injunction[13] and 1 decision comes from popular action[14].

Twenty nine decisions issued by an Appellate Court were no longer considered in the research, as they did not directly deal with private environmental matters. They dealt with criminal actions, tax execution procedures, expropriation and administrative improbity.

In subsection 5.1, all these data are presented in the form of graphs.

3. GLOBAL CONTEXT OF THE ENVIRONMENTAL ISSUE

The main idea of this section is to show that the literature on the environmental subject is currently directed towards the denunciation of exacerbated individualism and towards the proposition of collective solutions. In this sense, the central argument of this section is that the environmental challenge stimulates the different fields of knowledge to think in terms of collective solutions.

3.1 THE FIRST DENUNCIATION

From the Northern Hemisphere perspective, the environmental issue emerges as a possibility of accusing the Southern Hemisphere, due to the precarious stages of development of the latter, of being responsible for the planet's biophysical unsustainability. The environmental issue is part of a broad and deep repertoire of concerns, which have begun in the Northern Hemisphere after the Second World War. It is worth mentioning the analyses made by Estenssoro Saavedra (2014). In it, the author launches from the perspective of the Southern

[11] In Portuguese, "*ações anulatórias de autuações por infração ambiental*".

[12] In Portuguese, "*ações civis públicas*".

[13] In Portuguese, "*ação cominatória*".

[14] In Portuguese, "*ação popular*".

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Hemisphere, rather than that of the Northern Hemisphere. According to the Chilean researcher (among others), in the 1960s, while for the Northern Hemisphere the environmental issue is the arrival point, for the Southern Hemisphere, on the contrary, it is the starting point. The analyses carried out from the point of view of the Southern Hemisphere contrast with those from the Northern Hemisphere. Identifying the demographic growth of the Southern Hemisphere (Malthusian argument) as the main pivot of the socio-environmental crisis implies obliterating the impacts derived from the consumption and large-scale production of an affluent hemisphere. It is also worth remembering what is stipulated in the Constitution of Ecuador and in the Constitution of Bolivia. Both emphasize the principle that humans do not own *Pacha Mama* (Mother Earth), but are its inter-constituent parts.

> We women and men, the sovereign people of Ecuador, recognizing our age-old roots, wrought by women and men from various peoples, celebrating nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence, invoking the name of God and recognizing our diverse forms of religion and spirituality, calling upon the wisdom of all the cultures that enrich us as a society, as heirs to social liberation struggles against all forms of domination and colonialism and with a profound commitment to the present and to the future, hereby decide to build a new form of public coexistence, in diversity and harmony with nature, to achieve a good way of living, the *sumak kawsay*; A society that respects, in all its dimensions, the dignity of individuals and community groups; A democratic country, committed to Latin American integration [...], peace and solidarity with all peoples of the Earth. (Ecuador, 2008).

It is worth noting that the passage emphasizes not the ability of *Homo sapiens* to conquer the environment, but rather the coexistence of all living beings. The Constitution of Bolivia follows the same direction prescribed by Ecuador. The

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Bolivian constitutional text reinforces a lifestyle and a conception of the State centered on the ancestry of the native peoples of *Abya Yala*[15], the *Buen Vivir*.

> A State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for a good life predominates; based on respect for the economic, social, juridical, political and cultural pluralism of the inhabitants of this land; and on collective coexistence with access to water, work, education, health and housing for all. (Bolivia, 2009).

Anyway, the work of Carson (2005), published in 1962, will be used here as the ground zero of the environmental question, from the Northern Hemisphere. It is a documentation of the first denunciation of economic growth at any cost regarding the use of agrochemicals. This use is associated with the supposed need for large-scale food production and the purpose of eradicating hunger among vulnerable groups present in poor countries. However, although there are, in this kind of discourse, founding elements of collective practices aligned with the Green Revolution[16], the sector benefited from this is agro-industry, to the detriment of small-scale peasant agriculture. As demonstrated in the recent study by Silva et al (2015), there is a positive correlation between agricultural production based on agrochemicals and prostate cancer. This relation makes it visible that what was left for poor groups and for small-scale agriculture were leftovers from the environment, in the form of carcinogenic diseases.

[15] Abya Yala, in the language of the Kuna peoples, means “land in its full maturity”, “living land” or “flourishing land”. The Kuna peoples use the term to denominate the American continents in their entirety. It is synonymous with America. The Kuna peoples come from the Sierra Nevada, in northern Colombia, having inhabited the Gulf of Urabá region and the Darien mountains. They currently live on the Caribbean coast of Panama, in the Comarca de Kuna Yala (San Blas) (Porto-Gonçalves, 2021).

[16] "The 'green revolution' refers to the agricultural model devised by the North American Norman Ernest Bourlag (1914-2009), Nobel Peace Prize winner in 1970. It is characterized by the large number of agricultural inputs, selected seeds, fertilizers, machinery and huge water and energy input. Being highly capitalized, this model acted in order to marginalize small peasant agriculture and increase inequalities in rural areas, especially in the Third World" (Martínez-Alier, 2011, p. 184).

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3.2 FIRST DOUBTS REGARDING UNLIMITED GROWTH

Carson (2005), in his work, through data on the use of agrochemicals, used the unlimited growth model as the basis for his denunciations. The work done by Meadows *et al.* (1972/1978) followed a similar path, since it was also conceived from the perspective of the Northern Hemisphere. Meadows, however, in his warnings against development, relied on more consistent and broader data than those used by Carson[17]. The aim of the report[18] was to build a world model capable of investigating five major trends of global interest: the accelerated pace of industrialization; rapid population growth; widespread malnutrition; depletion of non-renewable natural resources; environmental deterioration.

The need to make a diagnosis of the state of the world arose from the realization that unsustainable civilization relies on the systematic destruction of those systems that sustain life (in a broad sense) on the planet. To produce the wealth that has been generated over the last three centuries, biophysical systems have been degraded. The following equation was designed: "producing wealth = deteriorating ecosystems". This has been the explanatory formula for the entire "development" process, with an emphasis on strictly economic aspects. The report admits that the greater responsibility lies with the richest countries, as they were responsible for spreading the "progress" syndrome across the planet. As a result, they are the ones who must take the greater part of responsibility in policies of balance rather than growth.

[17] The work done by Meadows *et al.* is a report presented in 1972 at the famous Club of Rome, a multidisciplinary group of scholars on environmental issues. The report can be characterized as one of the most important criticisms of the unsustainable development model. It points out the side effects of the "Green Revolution" (note n.16) in India, Pakistan and Mexico. According to the document, there was an intensification of the process of inequitable distribution of income. This means that "green" technology, in addition to not being able to solve a social problem, has also deepened socio-environmental problems.

[18] The report's motto: "Not blind opposition to progress, but opposition to blind progress" (Meadows *et al.*, 1972, p. 152).

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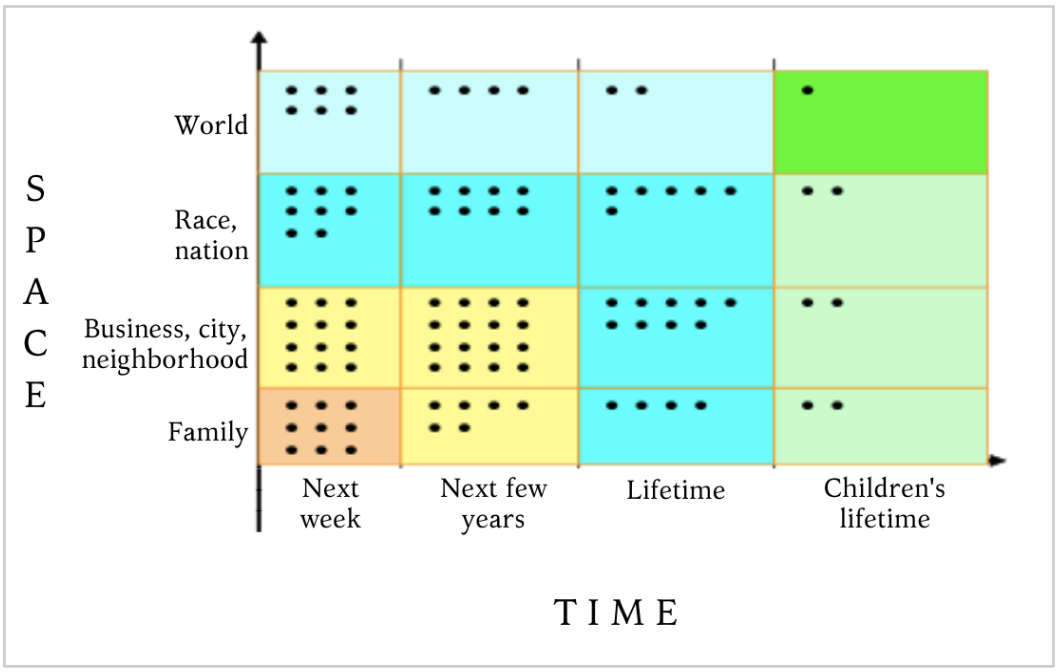
Figure 1

Human perspectives



Source: Meadows *et al.* (1972, p.19)

Here are the final words of the Meadows Report, stressing that "the crux of the matter is not only whether the human species will survive, but even more whether it can survive without falling into a state of worthless existence" (Meadows *et. al.*, 1972, p.197). The excerpt synthesizes human perspectives in terms of emancipation and care not only for the present, but also for the future of life's sustenance base, the environment. Figure 1 makes it clear that most human beings are concerned and interested in the short term: family, next week, immediate business, next years. Concerns about the state of the world and the life expectancy at birth are variables that appear at the bottom of the scale of interests.

It is in this sense that the Meadows Report corroborates Carson's findings, expanding them further to the founding elements of a new development model or, to be more precise, to a new *ecodevelopment* model (Sachs, 1986 and 2007). Here, the collective and local scales of production and life sustenance become much more relevant than the global ones, centered on large corporations located in rich countries.

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3.3 RESPONSIBILITY AS A FUNDAMENTAL PRINCIPLE

In this regard, the philosophical foundations of the critique of developmentalism are already present in the work of Jonas (2006). According to the German philosopher, nature is the Being and all forms of life are unique expressions of that Being. His thesis that the celebrated modern technology has become a threat directly denounces the exacerbation of the ego. The thesis also points out the limits of the ideology of progress, which began with the Enlightenment, and proposes collective solutions. It should be noted that these concerns are not necessarily with the Being, but with human life, threatened by its systems of abusive practices and little or no responsibility.

3.4 THE BET FOR LIFE

Leff's (2014) contribution is extremely important, as it presents denunciations and announcements not only from the European and American territories (as done by authors mentioned above), but from Latin America as a whole, such as the work of the Chilean researcher Estenssoro Saavedra (2015), also previously mentioned. The whole argument of the Mexican scholar is anchored not only in Eurocentric thought, but also in worldviews and systems of practices of the Latin American native peoples. At this point, there are some indications that it is necessary to think no more in terms of development alternatives, but in alternatives *to* development. And these alternatives to development are inspired by millenary and collective practices of the native peoples, who have inhabited their territories for more than fifteen thousand years. Modern civilization needs to pay attention to these millenary worldviews and be inspired by them to think about themes such as sustainability and other equivalents.

3.5 SYNTHESIS

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In this debate, some aspects catch an attentive observer's eyes. One of them is the inseparable existence of elements of denunciation of the individualistic rationality of developmentalism, centered on the economic aspect. The other is the existence of elements of proclamation and overcoming in search of collective solutions that take the environment not as a resource, but as a basis for sustaining life in a profound sense. The environmental theme shaped a real turn in cognitive terms (Santos, 2019), but also in normative terms, which will be seen below.

4. JURIDICAL FIELD[19]

The argument advocated in this section is that, in the light of the environmental debate, the normative systems that erupt tend to follow the same path as the wider literature. This path implies the search for solutions with collective inclinations.

4.1 GLOBAL PERSPECTIVE

As demonstrated in previous sections (specifically in section 3), environmental movements flourished between the 1960s and 1970s, notably after the United Nations Conference on the Environment (UNCED), held in Stockholm in July 1972. Since then, the environment gained the status of a fundamental right in the Constitutions enacted later, as happened in Brazil (Amaral, 2018). At least once in each of the decades that followed, nations met again for the purpose of gradually broadening environmental discussions. Over time, the topics of these debates shifted from protecting the natural environment alone, to the need to harmonize it with economic development and social aspirations for a decent life. It is worth remembering the concept of the environment as a tangle, which is being used in this paper (Ardoino, 2010).

[19] In this paper, the concept of *field* is borrowed from Bourdieu's work (1989/2006). Field is understood, therefore, as a scenario of disputes of meanings in the normative sphere.

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In 1988, the Brazilian Constitution raised the ecologically balanced environment to the level of fundamental rights. After that, in 1992, the country hosted the United Nations Conference on Environment and Development, also known as the "Earth Summit"[20]. The conference was unequivocally recognized as the largest meeting of nations on the theme ever held (Milaré, 2015). The declaration proclaimed by the United Nations in 1992, besides ratifying the principles of the Stockholm Convention, reinforced the need for sustainable development and expressed socio-economic and political concerns with a decent life, with the eradication of poverty and with the reduction of social inequalities (United Nations, 1992).

In 2002, United Nations countries met in Johannesburg, South Africa, specifically to discuss Sustainable Development. In 2012, they met again in Brazil. On the latter occasion, continuing the debates, greater emphasis was given to the fact that when development is focused on economic aspects, environmental preservation is seen as an obstacle. Since then, the attention given to the environment has focused mainly on the need to reconcile economic growth with human development, which, in turn, presupposes a triple perspective: economic, environmental and sociocultural. In this sense, it was recorded by international meetings, the ones that mobilized government and business leaders from around the world in order to address environmental issues, the imperative need to think and institute collective solutions in the face of socio-environmental challenges.

In essence, it is possible to characterize this repertoire of initiatives as evidence of the expansion of a formal rationality[21]. This rationality would be moving in order to become more focused and oriented towards collective solutions, rather than the individual *stricto sensu* ones.

4.2 NATIONAL PERSPECTIVE

[20] TN: In Portuguese, the conference is known as ECO-92.

[21] Weber's concept of rationality (2000) was used.

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"All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution" (Brazil, 1988). This is the content of the sole paragraph of the article that inaugurates the Constitution of the Federative Republic of Brazil 1988, commonly called the “Citizen Constitution” because of the historical moment in which it was promulgated, its participatory foundations and the rights it proposes to guarantee. Among these guarantees is the right of the whole community to an ecologically balanced environment, provided for in article 225. According to this article:

> All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations. (Brazil, 1988).

Alongside social participation, addressing the environmental issue is considered a huge step forward. For the first time, the theme was so important in Brazilian legislation to the point of deserving space in the Constitution and, more than that, receiving the status of being a fundamental right. Among the various authors and researchers in the juridical field, Freitas (2016) is one of those who understand “sustainability” as a constitutional principle capable of claiming new hermeneutical possibilities for the Brazilian Constitution itself. In addition, the theme of the environment launched an important discussion on trans-individual rights, also called diffuse and collective rights, whose holders are undetermined. Before the so-called Environmental State, whose formation took place with the 1988 Constitution, specifically in its article 225, it was perceived that an interaction between Public Power, society and the environment was necessary. The objective of this integration would be to ensure the preservation of the environment.

Therefore, in Brazil, the repertoire of laws consolidated from international meetings and from the Brazilian Constitution of 1988 (Brasil, 1988) cannot be disregarded when it comes to improving the aforementioned formal rationality. Among this repertoire, it is possible to highlight: the Law on Pesticides (n.7.802), published in 1989 (Brasil, 1989a); the Mining Law (n.7,805) published 1989 (Brasil, 1989b); the creation of the Brazilian Institute of Environment and Renewable

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Natural Resources (Ibama) (n.7,735), in 1989 (Brazil, 1989c); the Law on Agricultural Policy (n.8,171), published in 1991 (Brazil, 1991); the Law on Genetic Engineering (n.8.974), published in 1995 (Brazil, 1995); the Law on Environmental Crimes (n.9,605), published in 1998 (Brazil, 1998); the Law on Water Resources(n.9433), published in 1997 (Brazil, 1997). It is essential to bear in mind that this list of socio-environmental laws makes visible an undeniable expansion of a formal rationality centered on collective solutions for all environmental demands.

Following this line of reasoning, regarding the available tools, the following deserve to be highlighted: the judicial protection and the measures through which the preservation and repair of the environment can be obtained - namely, individual action, popular action and public civil action. Each of them will be discussed in detail in the next topics.

4.2.1 INDIVIDUAL ACTIONS

The Brazilian Constitution, in its article 225 (Brasil, 1988), explains that an ecologically balanced environment is a right through which other fundamental rights are guaranteed, such as the rights to life, health and human dignity. According to Carvalho (2006), a healthy environment cannot be dissociated from dignity.

> It can be said that the relationship between the existence of an ecologically balanced environment and human dignity is an umbilical one. The existence of a suitable environment was essential for the beginning of life millions of years ago and remains, today and in the future, essential for its maintenance and perpetuation. [...] It is not possible to conceive a decent life where one breathes polluted air, where one eats poisoned food, drinks contaminated water and where one is subject to the action of substances that pose risks to life and health. (Carvalho, 2006, p. 78).[22]

[22] TN: Free translation based on the Portuguese reference consulted in this work.

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When the right to a healthy environment is being guaranteed, the limit to this right is extrapolated. What happens is that by ensuring this right, other fundamental guarantees of collectivity are also guaranteed. The Judiciary must be constantly aware of this. Finally, from the caput of article 225 of the 1988 Brazilian Constitution, it is still possible to extract that the ecologically balanced environment is, at the same time, a common good for all people and a good whose preservation is a responsibility of all, individually (Brasil, 1988). Thus, an individual action in defense of the environment is directly linked with individual rights, that is,

> those rights that concern the individual singularly, not covering group contexts in which the person is inserted. The individual right has, as a fundamental characteristic, the fact that it allows its individual enjoyment with exclusivity. It means that its holder does not share with anyone else the benefit and pleasure provided by the right. (Carvalho, 2006, p.49).[23]

What is meant, therefore, is that there are situations in which an individual, a group of individuals, an entity or the Public Power itself - holders of diffuse and collective rights - seek, through a legal demand, a right that comes from the environment. In these cases, inseparably, there is the exercise of environmental citizenship, since the subjective right of the individual is also a subjective right of the environment, after all, individual and environment are inseparable.

4.2.2 POPULAR ACTION

Popular action is a constitutional remedy granted to any citizen with the aim of annulling an act harmful to the environment. This subsection intends to delineate the particularities of popular action, as well as its use before the courts.

[23] TN: Free translation based on the Portuguese reference consulted in this work.

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In Brazil, Law 4,717, published in 1965, regulates popular action (Brasil, 1965). In addition to it, article 5, item LXXIII, of the Constitution, provides that "any citizen is a legitimate party to file a people's legal action[24]" (Brasil, 1988).

This connection with the Brazilian Constitution may explain the fact that popular action is repeatedly taken as

> the broadest procedural instrument. Through popular action it is possible to pursue the annulment or declaration of nullity of administrative acts harmful to the environment. It is also possible to pursue civil liability for environmental damage from those who degrade the environment, whether this degrader is an individual or legal entity, governed by public or private law. It is also possible, through popular action, to seek the prevention of damage to the environment. (Mirra, 2009).[25]

However, according to the data that will be presented in section 5 on the scope of the institute, popular action has been considerably less used than public civil action. The latter, according to the legal provision, is limited by the number of legitimate parties able to file it.

Popular action has been present in the Brazilian legal system since 1965, even before public civil action. However, only from 1988 onwards its use for annulment or declaration of certain acts as harmful to the environment became possible. And that's because only in 1988 was included the hypothesis of using the remedy for this purpose. In this sense,

> [...] it should be noted that the 1988 Constitution had as one of its objectives to structure popular action in order to make citizenship effective, increasing

[24] TN: In the official translation of the Brazilian Constitution, the term used for *popular action* is *people's legal action*. Nevertheless, this paper chooses to keep the term *popular action*, since in English it seems to be the most used one to deal with the subject. See article 5, item LXXIII:

https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11.

[25] TN: Free translation based on the Portuguese reference consulted in this work.

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> the objects subject to protection through this action. Hence, the Environmental Popular Action emerged, due to the fact that the environment was expressly included among the harmful acts committed by the public administration. (Santin; Dalla Corte, 2011, p. 250).[26]

Law 4,717 and the Constitution differ, therefore, because the latter expands the list of assets that can be protected by popular action. Before the 1988 Constitution, the action could be filed in face of acts harmful to public property, but not against acts harmful to administrative morality, the environment and historical heritage. This expansion has been provided for in article 5, LXXII (Brasil, 1988). According to Ferraresi (2009), it is a significant positivism for the protection of the environment:

> The reference to the environment in the 1988 Constitution extends the simple allusion of Law No. 4,717/65 to goods with economic, artistic, aesthetic, historical or tourist value. The environment, in all its ramifications, was not included in Law No. 4,717/65. It is in this sense that there was an important expansion of the theme with the Constitution. (Ferraresi, 2009, p. 174).[27]

The popular action, as mentioned before, can be filed by any citizen. For this purpose, a citizen is any born or naturalized Brazilian, bearer of a voter registration card and up to date with his/her electoral obligations.

In order to file a popular action, it is not necessary for the author to have a direct relationship with the subject of the dispute. And this is because "the fundamental tonic of popular action is the political participation of citizens as guardians of community interests" (Ferraresi, 2009, p. 176). In this sense, the author of the action will not be the holder of the right, but a substitute party, as he/she will file a lawsuit in order to protect the public patrimony - in the case of this research,

[26] TN: Free translation based on the Portuguese reference consulted in this work.

[27] TN: Free translation based on the Portuguese reference consulted in this work.

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the environment. This does not mean, however, that the author will not be individually benefited.

> A citizen protects the environment when he/she files a constitutional popular action. In this case he/she acts *uti civis*, that is, for the benefit of the whole community. The benefits achieved will reach everyone indistinctly. This does not mean, however, that there are no people singularly benefited or affected, *uti singulis*. In fact, the author of the action is one of these people. (Ferraresi, 2009, p.49).[28]

Filing a popular action does not mean, therefore, the exercise of a right for the author's own benefit. When one triggers the Judicial Branch on diffuse and collective rights, the exercise of these rights means an active participation of the citizen in the political life, within a democracy that is not only representative, but also participatory.

As already mentioned, in Brazil, popular action is regulated by Law 4,717, published in 1965, which was accepted by the 1988 Constitution. In the 1965 law, however, the possibility of filing a lawsuit is limited to cases in which what is wanted is the annulment or declaration of certain acts as harmful to the State's patrimony[29]. And that was not changed with the Constitution.

4.2.3 PUBLIC CIVIL ACTION

In Brazil, public civil action is regulated by Law 7,347, published in 1985 (Brasil, 1985). This action is an instrument available to the Public Prosecutor's Office to take legal action in favor of collective rights. The action may be preceded by an administrative procedure, the civil inquiry, which may exhaust itself or culminate in

[28] TN: Free translation based on the Portuguese reference consulted in this work.

[29] In this paper, the State is understood in a broad sense, that is, referring to the Union, the Federal District, the States and the Municipalities.

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the filing of an action to stop the damages resulting from a certain illegal conduct or to repair them. The civil inquiry can be initiated by complaint, by representation or *ex officio* by the Public Prosecutor's Office. In the latter case, the Public Prosecutor's Office acts as *custos legis*, ensuring that justice is indeed delivered. In cases like these, when becoming aware of the situation, the Public Prosecutor's Office has the duty to act in defense of supra-individual rights, diffuse and collective rights and homogeneous individual rights.

Between the civil inquiry and the public civil action there is, however, the possibility of achieving the desired purpose through a Conduct Adjustment Agreement[30]. This alternative is provided for in article 5, paragraph 6th, of Law 7,347. The device provides that the party that is harming the environment may, in cases where it is sufficient and more effective for it, sign a commitment to adjust its conduct to the legal requirements. In case of non-compliance, the party must pay a fine, which will be provided on a case-by-case basis (Brasil, 1985). According to Dantas (2017, p. 315), in the interest of the community, although there is a legal provision only on “adjustment of conduct to legal requirements”, which suggests that it is an obligation to do or not to do, “it is perfectly admissible that Conduct Adjustment Agreement deals with mitigating or compensatory measures for the environmental damage caused”[31].

Once the inquisitorial stage is over, it may be necessary to file a public civil action. This will happen if, during the civil inquiry, the non-existence of illegal conduct has not been verified - if it exists, it will culminate in the closure of the inquiry - or if the offender has not signed a Conduct Adjustment Agreement.

In this sense, it is clear that the public civil action erupted from the need to protect collective interests. The civil process, by itself, did not have the proper tools to ensure it. Hence the emergence of public civil action.

> The social dimension of supra-individual rights required the State to create procedural mechanisms capable of providing an effective solution to what is

[30] The original name of the institute, in Portuguese, is "*Termo de Ajustamento de Conduta (TAC)*".

[31] TN: Free translation based on the Portuguese reference consulted in this work.

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> conventionally called mass disputes. At the same time that society woke up to the need to solve mass conflicts, especially those involving the protection of the environment and the consumer, it was up to procedural law to provide instruments for this purpose. (Ferraresi, 2009, p.55).[32]

Even before the publication of Law 7,347/1985, Brazilian legislation already had Law 6,938/1981, which deals with the National Environmental Policy, its purposes and the mechanisms of formulation and application. This law brought the possibility of filing civil and criminal liability actions for damages caused to the environment (Brasil, 1981). Since the interest in question is eminently collective, the literature on the subject does not question the use of public civil action to protect the environment.

> In fact, in all possible hypotheses about homogeneous individual environmental rights, the protection sought in the demand will have, in theory, relevant social repercussions. To understand this point, one need only to think about cases of water pollution, in which fishermen who carry out livelihood activities are affected. Another example is to think about the installation of a hydroelectric plant that affects the residents of the region. In these and similar hypotheses, the social interest capable of justifying the active legal standing of the Public Prosecutor's Office for the cause is flagrant. (Dantas, 2017, p.75).[33]

Regarding passive legal standing, that is, the ones who are able to be a defendant in a public civil action, the concept of polluter introduced by article 3, item IV, of Law 6,938 is used. In the provision, a polluter is “an individual or legal entity, governed by public or private law, directly or indirectly responsible for an activity that causes environmental degradation” (Brasil, 1981)[34]. It means that

[32] TN: Free translation based on the Portuguese reference consulted in this work.

[33] TN: Free translation based on the Portuguese reference consulted in this work.

[34] TN: Free translation based on the Portuguese reference consulted in this work.

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anyone can be sued in a public civil action motivated by an injury or threat of injury to the environment. This is one of the reasons why public civil action is a measure so used with the objective of protecting the environment. The current interpretation of the above concept deserves attention when referring to individuals and legal entities, which are not limited to private ones. In this sense, "[...] article 225, caput, of the 1988 Constitution, by mentioning the imposition on the Public Power and the collectivity to preserve the environmental good, makes it possible for both of them to have passive legal standing in the class action" (Dantas, 2017, p.102)[35].

Public entities, however, have dual responsibility, since they can harm/threaten to harm the environment in at least two different ways. The first way is by acting (by commission). The second is by failing to act (by omission), when they are competent to exercise police power and do not supervise third-party activities. Despite this, it is commonly chosen to trigger and penalize public entities only exceptionally and in the case of commissive conducts that directly implies damage. This option is usually the chosen one because in many cases it is considered that punishing the State is also punishing the taxpayer who, as a rule, in case of trans-individual damages, is also the same subject who suffered the damage (Milaré, 2015). Thus, in cases where there is no negligence in control and monitoring, it has been preferred not to hold the Government responsible for actions whose purpose is to repair environmental damage. As in individual actions, in this type of class action, compensation for damages to diffuse rights and, therefore, to indeterminate subjects, may also be claimed. This is the reason why the compensation, in these cases, will be destined to the Fund for the Reconstitution of Injured Assets[36].

When damages are suffered by specific individuals, the situation is about homogeneous individual rights. In any event, the parameters for fixing moral damages will be the same. According to Dantas,

[35] TN: Free translation based on the Portuguese reference consulted in this work.

[36] TN: In the original term, in Portuguese, *Fundo para a Reconstituição dos Bens Lesados*.

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> [...] the doctrine establishes some criteria for setting the *quantum* of moral damage, namely: a) severity and repercussion of the offense; b) intensity of the offending intention; c) degree of guilt; d) social position of the offended; e) prevention of new illicit acts. (2017, p. 237)[37].

When there is a conviction for homogeneous individual damages, it will be up to each of the citizens, individually, to prove that they were part of the injured group. It will also be up to each individual to prove the proportion of the damage suffered. From that point onwards, that individual will be able to postulate the payment of the compensation that fits him/her, and only that. The right, however, will already be pre-constituted (Brasil, 1990).

It is possible that both collective and individual actions cover the protection of individual and homogeneous rights in relation to moral and material compensation resulting from the same damage to the environment. There are, however, reasons why class actions are recommended compared to individual actions.

Procedurally, it is possible to mention, in particular, the reduction of the Judiciary's overload. With each class action filed, the Judiciary ceases to receive, process and instruct hundreds, or even thousands, of demands from different authors. A single class action can lead the Judicial Branch to (possibly) make a more careful assessment of the case and give it greater relevance, due to its collective character:

> Collective defense is a necessary measure to relieve the Judicial Branch, so that it can fulfill its functions in a timely and quality manner. In addition, collective defense expands and allows access to justice, especially for conflicts in which the small value of the intended benefit discourages filing a lawsuit. It also applies the principle of equality before the law when solving

[37] TN: Free translation based on the Portuguese reference consulted in this work.

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> in a molecular way the so-called repetitive causes, which could be judged in a contradictory form if assessed individually. (Mendes, 2012, p. 220-221).[38]

The positive points of class actions are not limited to procedural celerity. There is a procedural advantage as well. In relation to the technical aspects, class action is advantageous because it necessarily involves the presence of the Public Prosecutor's Office.

4.3 SYNTHESIS

What can be seen from sections 2, in broader terms, and 3, in stricter terms of the normative field, is that the concern with collective solutions for socio-environmental issues has gained greater emphasis. In terms of the expanding formal rationality, it is possible to see that the advances are undeniable and significant. However, it is still necessary to check to what extent the system of socio-legal practices is more or less close to the present and founding principles of formal rationality. In this sense, through the collected data, it will be verified how the Judicial Branch has been triggered to solve environmental problems. This is what will be seen next.

5. TRIGGERING THE JUDICIAL BRANCH

5.1 DATA PRESENTATION

In this subsection, through graphs, data on the ways in which the Judiciary has been triggered will be presented.

[38] TN: Free translation based on the Portuguese reference consulted in this work.

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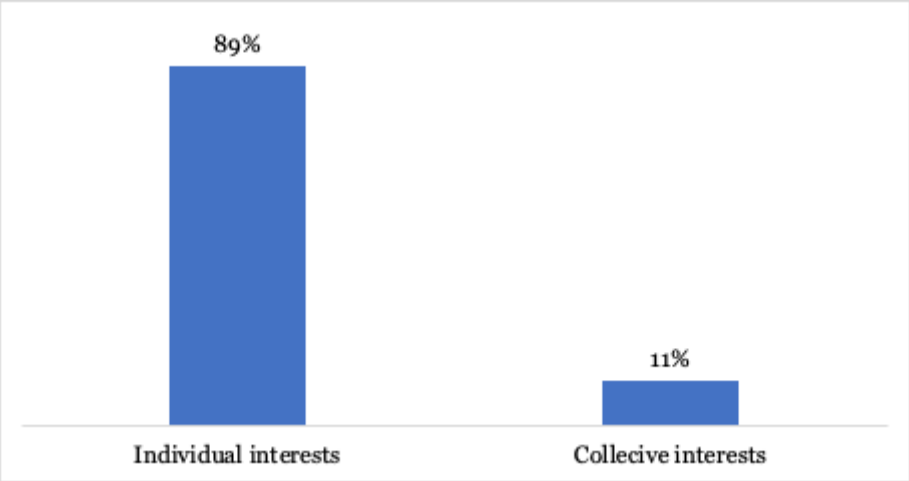
Graph 1

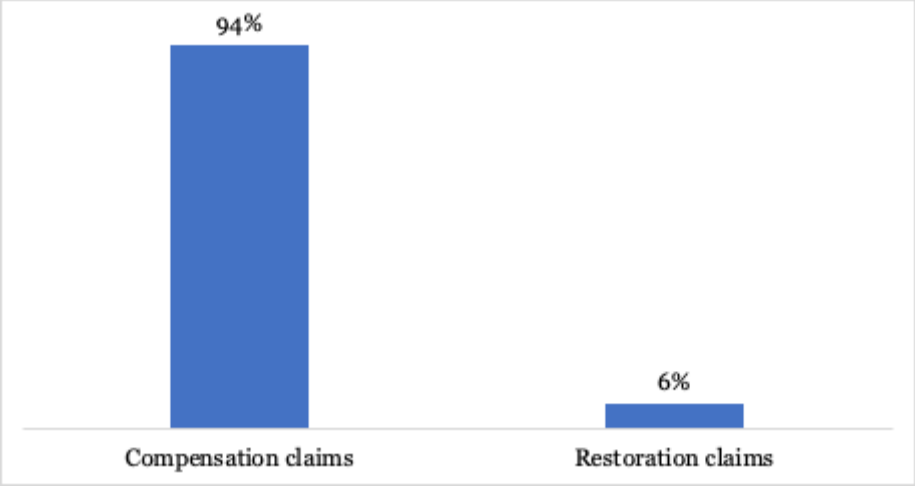
Interests involved in the actions filed



Source: State Court of Paraná (TJPR). Elaborated by the authors.

Graph 2

Requests formulated in the actions



Source: State Court of Paraná (TJPR). Elaborated by the authors.

Graph 3

Cause of action

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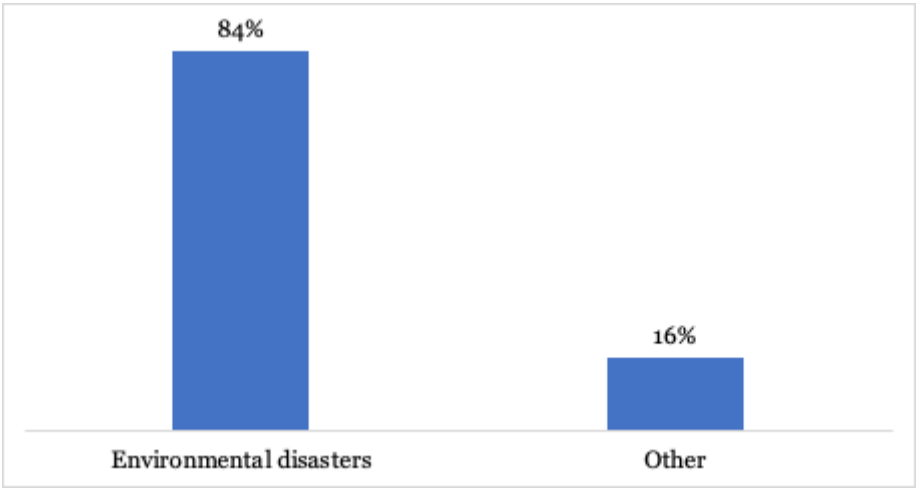
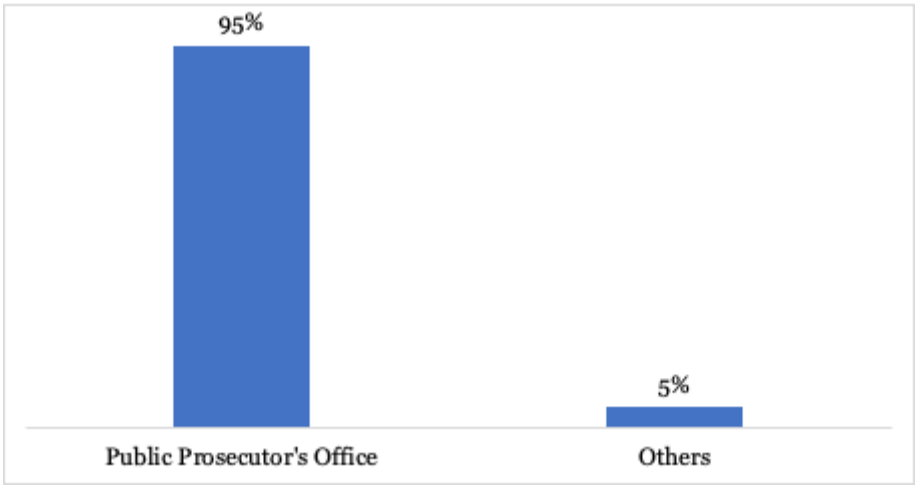


Source: State Court of Paraná (TJPR). Elaborated by the authors.

Graph 4

Public civil action initiated by...



Source: Superior Court of Justice (STJ). Elaborated by the authors.

Graph 5

Authors of public civil actions with appeals judged by the Superior Court of Justice (STJ)

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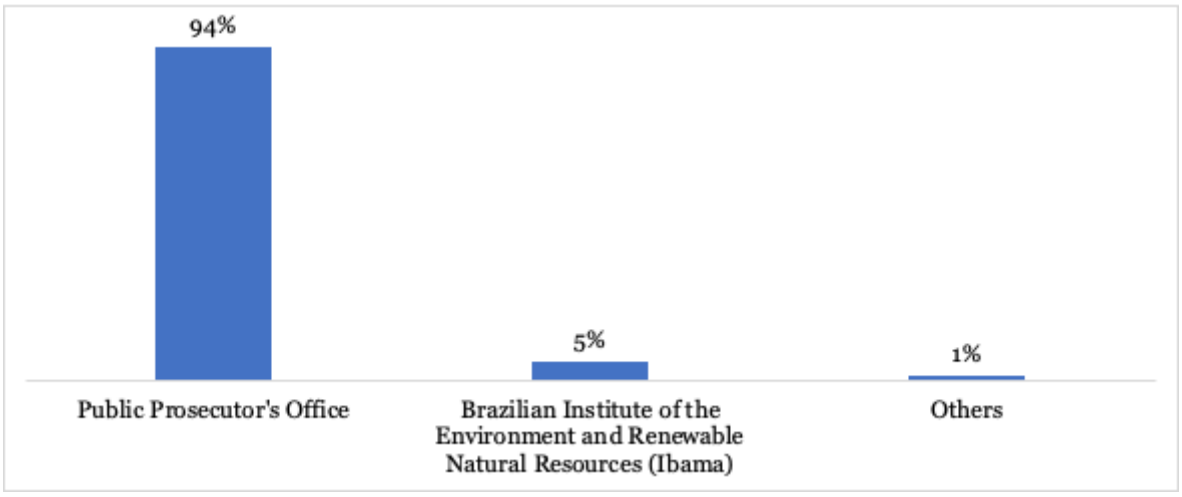
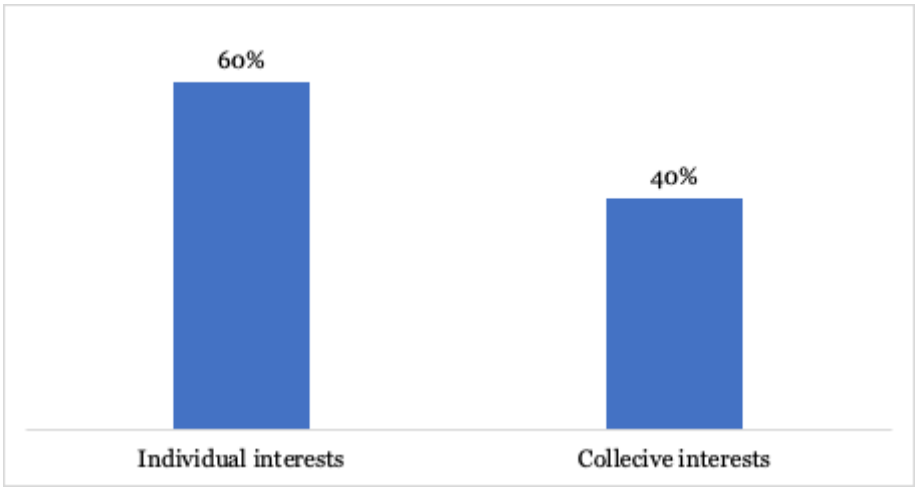


Source: Superior Court of Justice (STJ). Elaborated by the authors.

Graph 6

Predominance of individual interests before the Superior Court of Justice (STJ)



Source: Superior Court of Justice (STJ). Elaborated by the authors.

Graph 7

Social Trust Index[39] *(measured in points)*

[39] TN: Free translation based on the Portuguese reference consulted in this work. The index, in the original term in Portuguese, is *Índice de Confiança Social (ICS)*.

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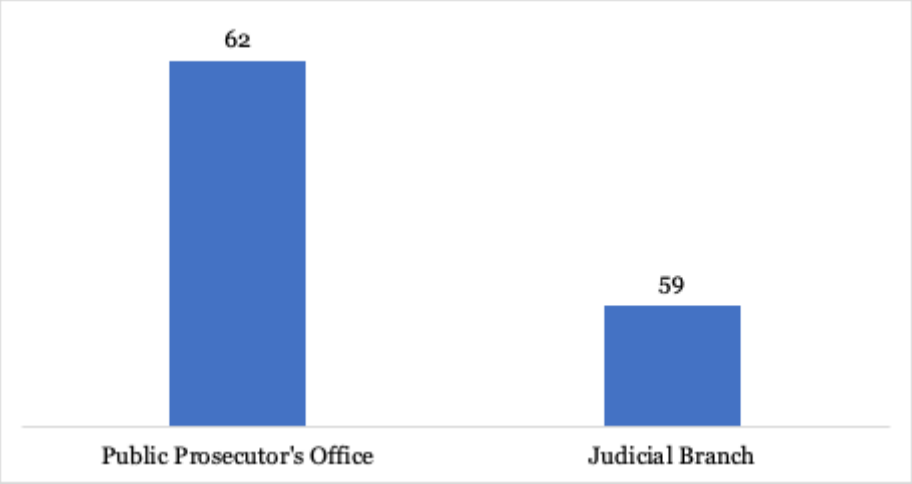

Source: Brazilian Institute of Public Opinion and Statistics (IBOPE) (2020). Elaborated by the authors.

In subsection 5.2, the data analysis will be performed.

5.2 ANALYSIS OF DECISIONS

Based on the theoretical discussions of sections 3 and 4, this subsection presents the analysis of decisions. The aim is to verify to what extent the triggering of the Judicial Branch has approached more or less the collectivist foundations demanded by the environmental discussion.

In Graph 1, it is important to highlight the predominance of individual interests – 81 actions – over collective interests – 10 actions[40]. From the data collected, the primacy of compensation claims was also verified (graph 2), to the detriment of requests for restoration of the environment damage. This is evidenced by the fact that only the repossession actions and the injunction actions had a request containing an obligation to do, in this case, requesting the restoration of the environmental damage by the offender.

[40] On this topic, it is worth mentioning a difference between the data from the State Court of Paraná and the Superior Court of Justice. In the State Court of Paraná, 89% of the legal actions are of individual interests (graph 1). At the Superior Court of Justice, in turn, individual interests correspond to 60% of the lawsuits (graph 6).

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Figure 1 (subsection 3.2), whose title is “Human perspectives”, can help analytically in the inferences of the analyzed decisions (graph 1). What can be seen is that, when seeking the Judiciary, citizens are still motivated by the prospect of obtaining, with legal action, individual benefit or short-range benefits. It turns out that this option for isolated rights tends to move away from the main collective foundations present in the Federal Constitution and in the documents formulated from the Global Meetings. In this paper, this predominance of isolated rights is characterized as ego exacerbation. And, apparently, this tends to be an obstacle to a possible exercise of environmental citizenship (Martini, 2015). To corroborate this analysis, it is shown in graph 2 that 94% of the claims are about compensation (with an emphasis on individual interests), against only 6% of requests for restoration (with a focus on the common good).

The data also shows that a substantial fraction of the legal actions filed stemmed from environmental disasters that occurred in the port region of the city of Paranaguá (Paraná). In the 68 claims for compensatory damages, without exception, the fishermen who were harmed by the impossibility of fishing in the region aim to receive compensation for moral and material damages. It is common that there is no reference to the environment as the basis for sustaining these people's lives (Leff, 2014). Graph 3 shows that 84% of the causes of action correspond to environmental disasters and 16% are classified as “others”. The data in graph 3 confirm the findings already brought by Gurski, Caldeira and Souza-Lima (2016). The authors indicate a significant number of environmental disasters in the city of Paranaguá and justify these occurrences due to the characteristics of the region, where a port and an oil refinery of Petrobras operate. It is imperative to emphasize that in these examples of triggering the Judiciary there are no references to preventive legal actions, but always to actions filed after the occurrence of disasters. This is one more sign that goes in the opposite direction of the precautionary and prevention principles, to name just two of them.

Regarding the possibilities of exercising environmental citizenship, both Law 4,717 (Brasil, 1965), which regulates popular action, and article 5, item LXXIII, of the Federal Constitution, provide that "any citizen is a legitimate party to file a people’s legal action"(Brasil, 1988). However, what graphs 4 and 5 reveal – in the Court of Justice of Paraná and in the Superior Court of Justice – is that the Public Prosecutor's Office emerges as the legitimate party that has most actively acted in

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the defense of trans-individual rights before the Judiciary. This is evidenced by the fact that, among the total of 73 decisions analyzed, 69 come from lawsuits filed by this institution. Despite some questions about this preference for the Public Prosecutor's Office, the data in graphs 4 and 5 corroborate the affirmative perception of Brazilian society regarding the performance of this important public agent. In turn, graph 7, which compares the performances of the Public Prosecutor's Office and the Judiciary, refers to another question of fundamental importance. The Social Trust Index[41], collected annually by the Brazilian Institute of Public Opinion and Statistics (Ibope) (2020) and measured on a scale from 0 to 100 points, records that Brazilians' trust in the Public Prosecutor's Office increased from 49 in 2018 to 62 points in 2020[42].

Regarding public civil action for the protection of diffuse rights, the literature emphasizes that in environmental demands, the expectation of a convicting sentencing determining reparation or compensation for damage should be an exception. This is justified because, as a rule, when thinking from the perspective of the benefit of the community, what is expected is that the damage will cease and that the degraded environment will be reconstituted. What is expected, therefore, is that the environment returns, as close as possible, to what it was before the damage. This is the ideal scenario. However, with mere pecuniary compensation, this is not the case. Compensation, as a form of condemnation, occurs precisely in cases where the degradation cannot be overcome. Thus,

> [...] the payment of compensation for the silting up of the rivers or for the death of the fish that inhabit them is useless. What benefits does the community have with the payment of money due to the conviction that comes from the landfill of mangroves or the suppression of specially protected vegetation, for example? Virtually none. For this reason, it will be

[41] The Social Trust Index is obtained through interviews, in which the interviewee evaluates the institution that is presented to him. The evaluation criteria are: high confidence, which is equivalent to 100 points; some confidence, which is equivalent to 66 points; almost no confidence, which is equivalent to 33 points; and no confidence, which is equivalent to 0 points (Ibope, 2020).

[42] Among the public civil actions that were not filed by the Public Ministry, one was filed by a municipality and the other three were filed by the Brazilian Institute for the Environment and Renewable Natural Resources (Ibama) (Graph 5).

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> necessary, whenever possible, to prevent the damage from materializing or, once caused, to return to the state prior to the damage. As a rule, when it comes to environmental protection, the conviction should never be regarded as something positive. (Dantas, 2017, p.237).[43]

From the pecuniary point of view, together with moral or material damages, or both, it can be said that collective compensation would be more effective if used for pedagogical purposes. Compensation would have the sense of curbing future conduct, since sparse individual actions do not have the same parameter on the extent of damage when compared to a cllass action.

Article 13 of Law 7,347/1985 provides that, in cases of irreversible environmental damage or in cases of conviction due to collective moral damages, "if there is a conviction in money, the compensation for the damage caused will be reverted to a fund managed by a Federal Council or by State Councils"[44]. This fund is called the Fund for Reconstitution of Injured Assets (Brasil, 1985). However, it seems that this fund was not treated as recommended by the legislator. The attempt to fill this gap takes place with the provision of mandatory participation of the Public Prosecutor's Office and community representatives.

Another attempt by the legislator to remedy a possible failure in the class action related to compensation for homogeneous individual damages was the sole paragraph of article 100 of Law 8078, on the Consumer Protection Code, published in 1990. It contains the following provision: after a year has passed without individual executions - or, if applicable, if these are not compatible with the seriousness of the damage - there will be reversion of the compensation to the Fund for Reconstitution of Injured Assets (Brasil, 1990). In this regard, Dantas states:

> [...] in the event of a decision condemning the defendant to pay money, there is a serious risk that the respective revenues will be applied to another legal asset. Thus, according to the legislation on the subject, the resources that

[43] TN: Free translation based on the Portuguese reference consulted in this work.

[44] TN: Free translation based on the Portuguese law consulted in this work.

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> come from a conviction for environmental damage, for example, can perfectly be applied in the repair of injuries to the consumer or cultural heritage. These recipes can also be used to repair damage that has occurred elsewhere. These possibilities, however, are obviously not the most appropriate way to deal with this money. (Dantas, 2017, p. 265).

The author observes that the solution found by the law may not be the most adequate, since it does not allow the fund to be divided. Thus, it is possible that the injured property or the injured community are not the main beneficiaries of the money obtained through the conviction. This means that, considering the fund to which the compensation will be allocated, there is the possibility that the value, although directed to the community, may be used in areas other than the environmental one.

Regarding the significant increase in public civil actions in the Superior Court of Justice, it was possible to verify that individual interests predominate, compared to collective ones. Among the 159 decisions analyzed, only 64 aimed to protect the environment as a diffuse good (graph 6).

6. CONCLUSION

This paper achieved its objective as it made it possible to verify that the demands brought to the Judiciary do not correspond to the principles that emerged with the environmental debate. In summary, considering all the documents mentioned (from international meetings and their derivations in normative terms), it is possible to infer the existence of principles associated with solidarity, care, preservation and, above all, collective solutions in the face of socio-environmental challenges (sections 3 and 4). However, the Judicial Branch has not necessarily been triggered to meet and defend collective, medium and long-term, intergenerational demands, among others. The claims brought to the courts (within the limits of the present research), as shown in section 5, have moved in the opposite direction to these principles. This scenario reveals that Brazil, despite having raised the environment to the level of a fundamental right, is still not

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reaping the expected fruits of this choice. On the one hand, article 225 of the Constitution considers the environment a "common good". On the other hand, the ways of triggering the Judicial Branch analyzed here, by understanding the environment as a resource available to humans, are far from these principles. In this sense, instead of anthropocentrism being overcome or minimized, it is reinforced.

Regarding public civil action, what can be seen is the prevalence, in the social imaginary, of an excessive trust not in solutions built from the bottom-up, starting from organized sectors of civil society, but on a state agent. This trust in a supposedly superior entity contrasts with all the founding principles of documents derived from international meetings. Such documents encourage solutions that come from civil society, without neglecting, however, the support of state agents.

This confident dependence on a state agent tends to function, however, not as an ally, but as an obstacle to the free exercise of environmental citizenship. In a similar way, it is projected as an obstacle to what could be a much more adequate instrument for popular participation, namely, popular action, which is, however, practically non-existent, according to the data. This result highlights the effect, already noted, of a democratic semblance. In this case, the individual chooses to relegate the protection of a collective right to an entity that supposedly represents the citizen.

The 1988 Constitution considers any citizen[45] a legitimate party to file a popular action, an adequate means of protecting the environment against harmful acts[46]. Despite this, in 91 decisions, this situation appeared only once among the analyzed judgments. This data leads to some reflections on the factors that limit the exercise of environmental citizenship.

The environment can only be protected through popular action if the environmental damage is caused by an activity authorized by a member of the

[45] It would be useful to broaden the concept of citizen, overcoming the limits of the individual level and entering the domain of the collective subject.

[46] "Article 5. [...] LXXIII – any citizen is a legitimate party to file a people's legal action with a view to nulli- fying an act injurious to the public property or to the property of an entity in which the State participates, to the administrative morality, to the environment, and to the historic and cultural heritage, and the author shall, save in the case of proven bad faith, be exempt from judicial costs and from the burden of defeat; [...]". (Brasil, 1988).

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public administration. It means admitting that, although there is broad legitimacy to propose the action, the subject is considerably restricted. In addition, filing a popular action entails expenses for the citizen who is willing to do so. Thus, the use of popular action is hampered by the fact that the citizen, despite being exempt from the payment of costs (except in cases of bad faith), has to pay the lawyer who will conduct the action. This need for altruistic behavior by the citizen ends up impairing the use of popular action.

Therefore, the main finding of this research is that, although the 1988 Brazilian Constitution has a democratic and participatory ideal, with mechanisms such as popular action, this is not enough. The low percentage of actions with collective interest, compared to the claims for reparation of individual rights, shows that the protection of supra-individual rights still does not have the desired adhesion on the part of the citizens. As a result, such protection must be constantly not hindered, but encouraged by the State itself.

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