The Ecological Function of Property in Brazil: Balancing Public and Private Interests

Nicholas S. Bryner

INTRODUCTION

Since the beginning of human history, people have interacted with and affected our planet’s ecosystems. With the organization of individuals and families into communities, societies, and civilizations, the human potential for altering the landscape changed profoundly. Division and specialization of labor, along with the constant development of new technology, have given us the ability to change forest to pasture and desert to farmland at an unprecedented scale and pace. We have changed our environment so much that it is now typical, at least in Western culture, to view “nature” as something that exists outside, apart from us. So prevalent is the artificial that we must distinguish from it the “wild.”

As societies developed, so, also, did traditions, rules, and laws designed to regulate human interactions with the land, water, and natural systems around us. We may think of the liberal concept of private property as an outgrowth of this. In the Lockean tradition, individuals acquire property by mixing their labor with that which exists in the state of nature.¹ Locke argued that without allocation of private property, people would starve, because there could be no use of the goods that existed in common.²

Claims of private property rights over land and other natural resources cannot, however, be absolute. Locke recognized a crucial limitation: after the person has “mixed his labour” with

---

¹ See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 27.
² See id. § 28.
something existing in nature, “no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.” Property law thus serves to guarantee private rights against interference both by government or other individuals, and also to guarantee public rights to access and enjoy public goods. In this vein, for example, common-law principles of nuisance place restrictions on conduct that unreasonably interferes with a “right common to the general public,” as well as conduct that unreasonably invades “another’s interest in the private use and enjoyment of land.”

These and other principles have been incorporated into modern notions of environmental law—the portion of a given country’s legal system that governs the relationship between humans in a society and the rest of the Earth around them, including flora, fauna, and ecological processes occurring in rural, urban, or uninhabited areas of the planet. Environmental regulations may be designed to protect nature in and of itself, or to protect associated public interests; for example, a system of liability for environmental damage protects the public interest against the socialization of costs to human and environmental health.

Environmental law, in regulating the enjoyment of environmental rights, will in some situations necessarily conflict with property law. When conflict arises, the legal system must provide a way to balance these public and private interests so as to achieve overall societal goals.

In Brazil, the Constitution of 1988 in Brazil clearly places the environment as a matter of public interest. The lead paragraph of Article 225 provides that “[a]ll 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

---

3 Id. § 27 (emphasis added).
5 Id. § 822.
preserve it for present and future generations.”

This constitutionalization of environmental rights, read together with other constitutional provisions on the environment and on property law, establishes a framework in which the public interests take precedence over the private.

Article 5 of the Constitution lists the terms upon which the fundamental rights of “life, liberty, equality, security, and property” are guaranteed in Brazil. While the right to property is explicitly guaranteed, Article 5 provides crucial limitations, including the principle that “property shall observe its social function.” The social function of property is a doctrine with a long history in Brazil, first included in the Constitution of 1934. The doctrine stands as a challenge to property law that developed in the early days of Brazilian independence, when large land concessions (sesmarias) issued by the Portuguese crown were converted into privately owned estates.

In the context of land reform, the Constitution of 1988 authorizes the State to expropriate “rural property that is not fulfilling its social function.” In defining the social function of property, however, the Constitution also incorporates the new paradigm of environmental rights, allowing for public interests to be prioritized over private property rights. In listing the criteria for fulfilling the social function, Article 186 requires the “adequate use of available natural resources and preservation of the environment.” In addition, Article 170 lists “defense of the

6 CONSTITUIÇÃO FEDERAL [CONSTITUTION] art. 225 (Georgetown University Political Database of the Americas trans., 1996) (emphasis added).
7 Id. art. 5, caput.
8 Id. art. 5, caput., inciso XXIII.
9 CONSTITUIÇÃO DE 1934 art.113(17), available at http://pdba.georgetown.edu/Constitutions/Brazil/brazil34.html; see also Alexandre dos Santos Cunha, The Social Function of Property in Brazilian Law, 80 FORDHAM L. REV. 1171, 1175 (2011).
10 See Cunha, supra note Error! Bookmark not defined., at 1173.
12 Id. art. 186, II (Georgetown University Political Database of the Americas trans., 1996).
environment” alongside “private property,” “social function of property,” and other principles upon which the economic order of Brazil is based.13

These provisions, taken together, suggest an ecological function of property within the social function. As such, the Constitution imposes on landowners a portion of the responsibility for environmental protection, shared by all members of society and the State under the terms of Article 225.

This Article examines the jurisprudence of the Superior Tribunal de Justiça (High Court of Brazil, or STJ), in applying constitutional environmental norms and the ecological function of property to resolve conflicts between public and private interests. The STJ, as Brazil’s court of last resort for questions of infra-constitutional federal law, lacks jurisdiction to interpret the Constitution; however, many of its key decisions in this area of law arise as the STJ is called on to apply new constitutional principles in the interpretation of statutes. Here, three subthemes among the STJ’s cases are represented: first, the notion of whether environmental regulations may truly restrict private property rights, whether those regulations are found in statutes or in environmental covenants and easements, and regardless of whether such regulations predate the 1988 Constitution; second, how interpretation of the Constitution’s provisions on water and property changes the previously existing legal system; and third, the placing of public over private interests in cases involving natural and cultural heritage.

13 Id. art. 170 (author translation).
[Before discussing the STJ’s jurisprudence on environmental law and property rights, the following excerpt is presented from Nicholas S. Bryner, Brazil’s Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil), 29 PACE ENVTL. L. REV. ___ (forthcoming 2012). The excerpt provides an short overview of the development of environmental law in Brazil, as well as a description of the STJ. Additional excerpts from Brazil’s Green Court that discuss environmental law in light of the Constitution of 1988 are also attached to the end of this work.]

I. THE DEVELOPMENT OF ENVIRONMENTAL LAW IN BRAZIL

Brazilian environmental law faces a strong challenge: it must be able to effectively address threats to biodiversity in critical ecosystems from the Amazon to the Atlantic Forest and the Pantanal to the Cerrado, as well as the tremendous human environmental impact of overcrowding, poor sanitation, and industrial pollution in urban areas.

A. Phases of Environmental Law in Brazil

These environmental problems eventually gave rise to a movement to establish environmental laws, norms, and regulations. Brazilian scholars identify three phases of environmental law in the country’s history. The first phase, while quite limited in scope, dates from the colonial era into the beginning of the twentieth century. The elements of law that we would consider today to be within the realm of environmental law were at that time homocentric, focusing primarily on the economic need to maintain some controls on the exploitation of natural resources used and commercialized by the colonial population.

The second phase, which occurred during the middle of the twentieth century, was also homocentric, but shifted the focus to preserving the health of the population, recognizing that certain industrial activities that altered the environment also had negative consequences for

---

14 [internal citation omitted]
15 Antônio Herman V. Benjamin, Introdução ao Direito Ambiental Brasileiro, 14 REVISTA DE DIREITO AMBIENTAL 48, 50–52 (1999); see also MARCELO ABELHA RODRIGUES, PROCESSO CIVIL AMBIENTAL 19-26 (2010).
people living nearby. During this second phase, however, Brazil did put in place a crucial piece of its environmental management regime. Brazil had first enacted a Forest Code (Código Florestal) to manage areas with vegetation in 1934; in 1965, it was replaced by the current Forest Code, which declares that forests are “goods of common interest” and places requirements on landowners to set aside portions of their lands to be preserved with natural vegetation. As Crawford and Pignataro have described, the Forest Code is a product of its era—enacted under the military dictatorship that governed the country from 1964 to 1985—as it is characterized by strong, coercive state authority. Despite repeated efforts to amend the Forest Code over the past decade—the Brazilian Chamber of Deputies approved legislation in 2011 that would significantly weaken it—it remains today as the foundation of Brazilian law governing the protection of flora.

Meanwhile, the international environmental movement began to make significant progress, culminating in the first major international conference (and declaration) on the environment in Stockholm in 1972. The Stockholm Declaration calls repeatedly on States to take action toward environmental protection, including, for example, the injunction in Principle 13:

---

17 Id. at 21-22.
States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.\textsuperscript{21}

Coinciding with growth in the international movement, the third (and current) phase of environmental law in Brazil began in the 1980s, with three crucial events. Important in this transition to the current phase was another shift in the objectives of environmental law; in this third phase, the law becomes less homocentric and more ecocentric, concerned with protecting and preserving ecosystems and the environment as an end unto itself, rather than solely as a means for economic activity or an ingredient to human health.\textsuperscript{22}

In 1981, Brazil’s Congress took a major step in this direction by passing the National Environmental Policy Act (\textit{Lei da Política Nacional do Meio Ambiente}, or LPNMA).\textsuperscript{23} The LPNMA organizes a system of government entities responsible for environmental protection, known as the National Environment System (SISNAMA), and led by the newly created National Environment Council (CONAMA), which was given strong regulatory powers.\textsuperscript{24} Drawing on the experience of the United States’ National Environmental Policy Act (NEPA), the LPNMA creates a system of environmental permits, which was fleshed out in CONAMA’s Resolution No. 1 to include procedures for environmental impact assessments and reports.\textsuperscript{25} In addition, the LPNMA institutes strict liability for environmental harms.\textsuperscript{26}


\textsuperscript{22} See, e.g., Rodrigues, \textit{supra} note 15, at 22-26.

\textsuperscript{23} Lei da Política Nacional do Meio Ambiente (National Environmental Policy Act), Lei No. 6.938, de 31 de Agosto de 1981 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L6938.htm.

\textsuperscript{24} \textit{Id.} arts. 6, 8.


\textsuperscript{26} Lei No. 6.938/81, art. 14, § 1.
The next key piece of legislation that followed in 1980s was the Public Civil Action Act, signed in 1985 by José Sarney, the first civilian president following the military dictatorship. Although it was not specifically limited to environmental concerns, the Act created a cause of action under which prosecutors and civil society organizations could bring civil suits for injunctive relief and damages in cases involving collective and diffuse interests, greatly expanding the ability of both the public and prosecutors to demand that private parties and government agencies comply with existing environmental laws.

The third crucial piece to the transition to a more ecocentric approach in Brazil was the drafting of the new civilian Constitution of 1988, discussed below.

B. The Environment and the Constitution of 1988

The development and adoption of Brazil’s new Constitution in 1988 marked a significant step in the transition from military rule to a democratic government. The Constitution of 1988 included (as noted above), for the first time in Brazil’s history, a constitutional right related to the environment—declaring both a right for all and a duty to protect the environment. The text of the heading to Article 225 reads:

[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.]

---

28 Id. art. 1, cls. I, IV.
29 Other important pieces of environmental legislation post-date the Constitution but are not discussed at length in this Article. One such example is the Crimes Against the Environment Act of 1998, which imposes criminal liability both on natural persons as well as agents of corporate persons. Lei No. 9.605, de 12 de Fevereiro de 1998, art. 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.02.1998 (Braz.).
30 CONSTITUIÇÃO FEDERAL [C.F.] art. 225 (Braz.); see also supra note Error! Bookmark not defined. and accompanying text.
31 CONSTITUIÇÃO FEDERAL [C.F.] art. 225, caput (Braz.).
As such, the Constitution requires Brazil’s government to act in the realm of environmental protection. Paragraph 1 of Article 225 imposes several specific duties on the government, for example, constitutionalizing the need for an environmental impact study “for the installation of works and activities which may potentially cause significant degradation of the environment,” as well as a requirement to preserve “essential ecological processes” and to demarcate appropriate areas for special environmental protection.32

Several other provisions in the Constitution mention the environment. For example, Article 170 includes environmental protection as one of the principles upon which the country’s economic order is based, specifically allowing for differential treatment of goods and services based on their environmental impact.33 Article 186, in its list of conditions that rural property must meet in order to fulfill its “social function” (a concept related to agrarian land reform), requires the “adequate use of available natural resources and preservation of the environment.”34 This ecological function of property lays the foundation for the STJ’s important trend in emphasizing the preeminence of public rights, such as environmental rights, when they conflict with private property interests.

The “greening” of Brazil’s Constitution certainly prioritizes and raises awareness of environmental issues in the country and provides a framework under which effective environmental conservation and natural resource management can take place, but as Justice Antonio Herman Benjamin has written, regulation is not a “mere theoretical exercise.”35 What has been done in Brazil to put this constitutional framework into effect? Professor McAllister’s

32 *Id.* art. 225, para. 1, cls. I, IV.
33 *Id.* art. 170, cl. VI.
34 *Id.* art. 186, cl. II. Other provisions related to environmental protection include art. 5, cl. LXXIII; art. 20; art. 24, cl. VI–VIII; art. 129, *caput*, cl. III; art. 174, para. 3; art. 200, cl. VIII; art. 216, *caput*, cl. V; art. 220, para. 3, cl. II; art. 231, para. 1. *See also* BELTRÃO, supra note 25, at 60–61.
book describes how the Ministério Público, Brazil’s public prosecutors (federal and state), have inserted themselves in the system of environmental protection. Article 129 of the Constitution lists bringing civil actions “to protect public and social property, the environment and other diffuse and collective interests” as one of the prosecutors’ functions. Prosecutors largely act independently from the three main branches of government in Brazil, and have authority to bring both criminal and civil actions before the courts. They can play and have played a significant role by helping the public bring lawsuits against government agencies for failures in regulation or against private party polluters themselves. But the judicialization of environmental protection—taking the cases to the courts—cannot happen without judges and courts that are capable and willing to take on environmental questions and disputes.

II. AN INTRODUCTION TO THE HIGH COURT OF BRAZIL (SUPERIOR TRIBUNAL DE JUSTIÇA)

The STJ is one of a number of new institutions created in 1988 by the new Brazilian Constitution. The process of democratization and transition from over two decades of military government required reorganization to make the judicial branch more independent, effective, and accessible to Brazil’s citizens. At the same time, the immense backlog of cases before Brazil’s Supreme Federal Court (Supremo Tribunal Federal, or STF), which had built up over decades, created a major obstacle to effective resolution of judicial disputes in the country.

As a solution to these concerns, the STJ was created as a national court of last resort for infraconstitutional questions of federal law. The goal of the Court is to standardize interpretation

37 CONSTITUIÇÃO FEDERAL [C.F.] art. 129, caput, cl. III (Braz.).
of federal law\textsuperscript{38} in order to reduce the caseload of the STF and reserve that court to deal primarily with constitutional questions. The STJ has general jurisdiction, except in specialized subject areas of electoral, labor, and military law, which are reserved for their own respective Superior Courts. It replaced (but with expanded jurisdiction) the pre-1988 Federal Court of Appeals (\textit{Tribunal Federal de Recursos}), which had been established by the last civilian constitution in 1947.

The STJ’s composition and jurisdiction are laid out in the Constitution of 1988 in Articles 104 and 105, respectively.\textsuperscript{39} The court is composed of thirty-three Justices (\textit{ministros}) and is specifically designed to represent different portions of the Brazilian legal community. One-third is selected from judges of the five Federal Circuit Courts of Appeals (\textit{Tribunais Federais Regionais}, or TRFs); one-third from state supreme courts; and one-third from among lawyers and public prosecutors (state and federal).\textsuperscript{40} When a vacancy occurs, the remaining STJ members vote to create a list of three names for each vacancy from which the President of Brazil must choose to make the appointment, which also requires a confirming majority vote in the Federal Senate.\textsuperscript{41} The STJ is presided over by a President and a Vice President, elected by the full body for two-year terms, rotating by seniority.\textsuperscript{42}

The STJ has several different types of jurisdiction, including original jurisdiction over specific cases as defined in Article 105. Most cases, however, come before the court as appeals—either from the Federal Circuit Courts of Appeals (TRFs) or from state supreme courts (\textit{Tribunais de Justiça}). So-called “special appeals” (\textit{recursos especiais})—a common procedural

\textsuperscript{39} \textit{Constituição Federal} [C.F.] arts. 104, 105.
\textsuperscript{40} \textit{Id.} art. 104, para. 1.
\textsuperscript{41} \textit{Id.}
mechanism in the court—come before the STJ when other courts differ in interpretation of a specific legal question, or when a state or federal court has rendered a decision or upheld a state/local law that allegedly conflicts with federal law.43

As Brazil’s “Citizens’ Court”—a self-given nickname—the STJ is an important component of the country’s system that prioritizes access to justice. All deliberations and decisions of the various organs with the STJ are video-recorded and available to the public either via television or Internet.44 But as a consequence of this ease of access, the STJ also handles and processes an enormous caseload. Since the court began operations in 1989, it has reported over 3.7 million decisions; in 2010 alone, the total was 330,283.45 To handle this docket, the STJ is administratively divided into sub-groups. Five Justices make up a Panel (Turma), and two Panels (ten Justices) make up a Section (Seção).46 The three Sections have specific subject matter responsibilities: the First Section (which includes the First and Second Panels) deals with issues of public law, including taxation, education, urban planning, indigenous rights, agrarian reform, takings, social welfare law, and most matters of environmental law (excluding environmental crimes); the Second Section (Third and Fourth Panels) hears questions of private law, including matters of contracts, property, and family law, for example; and the Third Section (Fifth and Sixth Panels) is responsible for criminal law.47

Each proceeding before the court is randomly assigned by an electronic system to an individual Justice (within the appropriate Section), who acts as the rapporteur (relator) for the

46 STJ Internal Regulations, supra note 42, art. 2, § 4.
47 Id. art. 9. The six Panels represent a total of thirty of the STJ’s Justices. The remaining three (who do not serve on Panels or in Sections) are the President, Vice President, and the General Coordinator of the Federal Judiciary, who has administrative responsibilities regarding the two lower levels of federal courts. Id. art. 3.
case and prepares both a summary of issues presented in the case and a decision. The decision, along with an abstract (ementa)—which becomes an official part of the decision—is then circulated to the other Justices in the Panel. In practice, the rapporteur can take responsibility to adjudicate less complex matters unilaterally (decisões monocráticas), subject to potential review by the Panel. If the case is complex, of particular importance, the rapporteur will submit the case to be discussed by the five Justices in a session of the Panel. If necessary to ensure uniformity in deciding similar matters, the rapporteur may propose that the case be heard before the entire Section (a procedure known as afetação), or before the Special Court (Corte Especial), which is made up of the fifteen most senior Justices. Alternatively, parties may appeal to the full Section or the Special Court, as appropriate, when judgments issued by the Panels diverge from judgments of other Panels or Sections.

The nature of Brazilian federalism is partially responsible for the STJ’s caseload, as well as its significant responsibility in adjudicating issues of environmental law. The Constitution of 1988 formally allows for cooperative federalism, giving states overlapping authority to legislate in some subject areas, including environmental protection. In practice, however, the body of state legislation is quite small in comparison to federal law; there is, for example only one criminal code, one civil code, and one code of civil procedure used throughout the country. Environmental law is overwhelmingly federal law. As a result, the role of the STJ in standardizing the interpretation of federal law in the country is critical in many fields of law, including environmental law.

48 Id. arts. 34, 68, 80.
49 See id. arts. 148–68.
50 Id. art. 34, cl. XII.
51 Id. art. 266 (this is known as appealing for Embargos de Divergência).
52 CONSTITUIÇÃO FEDERAL [C.F.] art. 24 (Braz.).
53 See CÓDIGO PENAL [C.P.] Decreto-Lei No. 2.848, de 7 de dezembro de 1940 (Braz.); CÓDIGO CIVIL [C.C.] Lei No. 10.406, de 10 de janeiro de 2002 (Braz.); CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, de 11 de janeiro de 1973 (Braz.).
III. THE ECOLOGICAL FUNCTION OF PROPERTY IN THE STJ

As described above, the notion of an ecological function of property rights is derived from the Constitution of 1988’s description of the social function of property and the organizing principles upon which the economic order of Brazil is based.\(^{54}\) The following section quotes extensively from the jurisprudence of the STJ, analyzing the evolution and application of the ecological function of property in the past several years.

A. *The Ecological Function of Property as a Restriction on Property Rights*

Justice Benjamin’s opinion for the STJ’s Second Panel in a case involving a regulatory takings claim against the federal government exemplifies how the STJ employs the ecological function of property as a restriction on the constitutional right to property.\(^{55}\) The case dealt with an executive decree from 1993 that prohibited, except in limited, approved cases of public interest, the cutting or suppression of Atlantic Forest vegetation.\(^{56}\) The appellant in the case, an owner of land covered by Atlantic Forest, brought an action against the federal government seeking compensation, characterizing the decree as an indirect taking.\(^{57}\)

The case itself turned on which statute of limitations to apply. If the decree caused an indirect taking, then the appellant’s claim was timely within the 20-year limit; however, if the decree was simply a generally applicable, administrative limit on use of the land, the 5-year limit

\(^{54}\) *See supra* notes 11–13 and accompanying text.


\(^{57}\) REsp No. 1.109.778/SC at 4.
in which to make such a claim had passed. While the landowner in the case claimed that the decree interfered with basic property rights, such as control over how to use and dispose of the land, the Second Panel responded:

[C]ontemporary judicial regimes require that real properties—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.

In truth, the Brazilian constitutional-legal order does not guarantee property and business owners the *maximum possible financial return* on private goods and on activities undertaken [on real property].

Requirements of ecological sustainability in the pursuit and utilization of economic goods are insufficient to show a “taking” or an unjustified public intervention into the private domain. Requiring individuals to comply with certain environmental precautions 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.

In short, property rights, while guaranteed to individuals in Brazil, are not absolute; the constitutionalization of environmental rights in Brazil places them on the same foothold as traditional property rights. Further, the inclusion of an *ecological* dimension to the social function of property rights prevents property owners from forcing negative externalities on society through unsustainable use or destruction of natural resources. This is what Justice Benjamin has called the “redistributive function” of environmental law: if ecosystem services benefit and are shared by all people, the concept of the ecological function of property rights

---

58 Id. at 3–4.
59 Id. at 5.
empowers the Government (and courts) with the authority to prohibit and punish attempts to appropriate these public goods for private use. In the conclusion of the case, Justice Benjamin summarized the legal rule regarding regulatory takings as follows:

[I]n Brazilian law, if the administrative regulation [on property] is general (applicable to all real property similarly situated or sharing a particular characteristic) and does not absolutely prevent economic use of the property or possession, compensation is inappropriate, for if it were otherwise, the very constitutional duty imposed on the State and on property owners to protect the environment would be nullified.\(^61\)

Regulatory takings law in the United States provides an interesting comparison. In *Lucas v. South Carolina Coastal Council*, the Supreme Court considered the validity of a takings claim by a beachfront property owner against a state regulation, designed to prevent damage to the coastal ecosystem, that prevented him from building houses on his property.\(^62\) The Court held that any regulation that “prohibit[ed] all economically beneficial use of land” is equivalent to a physical taking, compensable under the Takings Clause of the U.S. Constitution.\(^63\) In the Court’s opinion, Justice Scalia admitted exceptions to this rule, but wrote that “[a]ny limitation [on property rights] so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”\(^64\) Herein lies the potential importance of constitutional environmental rights and an explicit ecological function of property. With the construction in Brazil’s Constitution, as well as the Civil Code of 2002,\(^65\) such “background principles” could be articulated; in the United States, however, Justice Scalia

\(^{61}\) Id. at 11.


\(^{63}\) Id. at 1028–29; U.S. CONST. amend. V.

\(^{64}\) *Lucas*, 505 U.S. at 1029.

\(^{65}\) Article 1228, Paragraph 1, of the Civil Code provides that “The right to property must be exercised, consonant with its economic and social ends, and in accordance with specific law, such that flora, fauna, natural wonders, ecological equilibrium and artistic and historic heritage are preserved, and air and water pollution are avoided.” Código Civil, Lei 10.406, de 10 de janeiro de 2002, art 1.228, § 1, available at http://www.planalto.gov.br/ccivil_03/leis/2002/L10406.htm.
assumed that, upon remand to the state court, any such finding based on common law principles would be “unlikely.”

An additional example of how the STJ has resolved conflict between public and private interests at the intersection of environmental and property law is seen in the interpretation of the Forest Code, the centerpiece of Brazilian law on the protection of flora, which dates in its current form to 1965. One of the key provisions, the legal forest reserve (reserva legal) requirement, requires rural landowners to set aside a portion of land to be covered with vegetation as the landholding’s legal reserve. In addition, the Forest Code requires that the owner officially register the portion to be kept aside as the reserve. In line with the decision that the legal forest reserve requirement applies to new owners that acquire rural property as a propter rem obligation, running with and tied to the land, the STJ decided that the obligation to register the legal reserve is also applicable to new landowners, even when the previous owner has failed to do so or deforested the entire parcel of land. Justice João Otávio de Noronha, writing for the Second Panel, issued the decision, highlighting the Forest Code’s interaction with private property rights:

[The Forest Code], in providing for the setting-aside of a portion of rural properties to establish a legal forest reserve, is the result of a felicitous and necessary ecological consciousness that has arisen in society due to the effects of natural disasters that have occurred over time, resulting from mankind’s unchecked environmental degradation. These nefarious consequences gradually lead to an awareness that natural resources must be used sustainably and preserved so as to assure a high quality of life for future generations.

What we have in this case is the public interest prevailing over the private, this collective interest that affects even the owner of the reserve, in the sense that such may also benefit from a stable and balanced environment. Thus, the legal

66 See Lucas, 505 U.S. at 1031.
68 Id. art. 16.
69 Id. art. 16, § 8.
70 See [Brazil’s Green Court notes 130–150 and accompanying text.]
reserve comprises part of private lands and constitutes a true restriction on property rights.

. . . [W]ere it not so, legal reserves would never be restored on private lands, which would frustrate the law’s purpose of assuring environmental preservation and equilibrium.

. . .

The ecologically balanced environment was elevated to the category of constitutional dogma as a right enjoyed by all (art. 225 of the Constitution), encompassing present and future generations. However, there still remains a considerable portion of the population that resists this collective idea, seeing only their immediate interests.

In this sense, to free landowners from the registration requirement is to empty the law of all its content. The same applies to acquirers of any title to the land, in the act of registering the property. There is no sense in freeing them from their respective registration requirements, seeing that the legal reserve is a restriction on property rights, established legally since 1965. In this regard, I emphasize that this restriction will be forty years old this coming September [2005], giving sufficient time for incorporation into the culture, and not justifying that, even today, there are owners resistant to establishing the reserve.\(^72\)

The key point from this opinion in examining the STJ’s jurisprudence is that environmental law, as a system designed to protect the public’s collective and diffuse interests, can in some cases constitute a restriction on private property rights. If so, the STJ plays an important role in balancing public and private interests—both rooted in the Constitution\(^73\)—as it interprets federal law. In doing so, the STJ has established the position that “the public interest must prevail over the private” when the two cannot be reconciled.\(^74\)

\textbf{B. Water and Property: Property Law in Light of the 1988 Constitution}

Article 20 of Brazil’s Constitution of 1988, in defining the extent of the property belonging to the Union, laid out a new system of management for the nation’s water resources:

The following are goods owned by the Union:

\ldots

\(^72\) Id. at 6–8.

\(^73\) Brazil’s constitution guarantees the right to property, but also requires that property fulfill its “social function,” an explicit manifestation of how the law seeks to balance public interests with private interests in the use and management of real property. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [Constitution] art. 5, XXII–XXIII (Braz.).

\(^74\) S.T.J., REsp No. 403.190/SP (2d Panel), Relator: Min. João Otávio de Noronha, Decision of June 27, 2006, at 8.
III—lakes, rivers, and whatsoever bodies of water in lands owned by the Union, or that run in more than one State, serve as boundaries with other countries, or extend into or from foreign territory, as well as the banks of such waters and floodplains.\textsuperscript{75}

Thus, in providing for the management of water, a public good and key component of the right to an ecologically balanced environment, the constitutional regime places a restriction on what types of private property rights may be exercised on such lands. One issue that then arises under this system of federal ownership of waters and riverbanks is what compensation is due when areas are condemned for public use. The Brazilian Supreme Court (STF) interpreted the Constitution in this regard to mean that “the banks of navigable rivers are within the public domain, not susceptible to expropriation, and as such, excluded from compensation.”\textsuperscript{76} Although the STJ does not have jurisdiction to decide constitutional questions, this constitutional provision and interpretation becomes relevant in guiding the STJ’s application of related federal laws.\textsuperscript{77}

In what is now the STJ’s leading case on this issue, the Second Panel decided a controversy between a state electricity company, which was developing a hydroelectric project, and a private property owner.\textsuperscript{78} At issue before the court was whether the electricity company was required to pay compensation to the property owner for the portion of riverbank land affected, defined as \textit{reserved lands} under Brazil’s Water Code—land that was registered as belonging to the property owner.\textsuperscript{79} Justice Otávio de Noronha’s original opinion held that, because the area was registered in the name of the appellees, compensation would be required. Any attempt to conclude otherwise, the opinion suggests, would impermissibly require a re-

\textsuperscript{75} Id. art. 20, III (translation by author).
\textsuperscript{76} Súmula 479/STF.
\textsuperscript{78} Id. at 11–12.
\textsuperscript{79} Id. at 8 (original opinion of Min. João Otávio de Noronha, Relator); [cite to Water Code?].
examination of fact (the STJ’s jurisdiction in a Special Appeal is limited to examining questions of law, rather than fact).\textsuperscript{80}

Justice Herman Benjamin then issued a separate opinion in the case, concluding that the property owner had no legal interest in the reserved lands, and that the area must therefore be excluded for purposes of compensation.\textsuperscript{81} Justice Benjamin writes that the case had broad repercussions as an assessment of the legal nature of the so-called reserved lands, on the banks of federally-owned rivers, specifically as to: a) the public nature [of the reserved lands]; b) the possibility of private acquisition; c) the legal effect of a real estate ownership record of a public good, drawn up in contradiction with an express constitutional provision; and d) whether the Government has the duty, when expropriating the rest of the grove, to also provide compensation [for the reserved lands].\textsuperscript{82}

Justice Benjamin explains how previous decisions of the STJ interpreted the 1934 Water Code and its application to reserved lands next to public waterways:

[Justice Otávio de Noronha cited] precedents of this Court that adopt the understanding that areas located along the banks of navigable rivers are not public when a private party holds a valid title, under the specific terms of art. 11 of the Water Code (emphasis added):

Art. 11. The following are public domain, \textit{unless} designated for common use, or by some \textit{legitimate title} they belong to some \textit{private domain};

\begin{itemize}
\item 2º, \textit{reserved lands} on the banks of public waterways \ldots
\end{itemize}

While it is not up to this Court to directly interpret the Federal Constitution, provisions of federal law must be examined in light of the Greater Law, especially as to their \textit{validity}, for if it were understood differently, we would have the STJ apply infraconstitutional norms in this case that have been clearly revoked by the Constitution’s drafters.\textsuperscript{83}

\begin{footnotes}
\item[80]Id.
\item[81]Id. at 14–19 (original opinion of Min. Antonio Herman Benjamin).
\item[82]Id. at 12.
\item[83]Id. at 14–15 (quoting Decreto 24.643, of July 10, 1934, art. 11 (Water Code)).
\end{footnotes}
While the Water Code allowed for private parties, as an exception, to hold title to waterways, the Constitution does not; reading Article 20 (regarding the property of the federal government) together with Article 26 (regarding the property of the states), the possibility of private ownership of reserved lands envisioned in the Water Code is no longer valid.\textsuperscript{84} Thus, Justice Benjamin concludes, the only “legitimate title” a private party may have under the Water Code would be through lease or concession, in which case the government could be made responsible for providing compensation in certain cases.\textsuperscript{85}

In the specific context of the case, the absence of lease or concession led the STJ to hold that the property owner’s claim to compensation for the riverbank area was invalid; following Justice Benjamin’s original opinion, Justice Otávio de Noronha modified the original opinion to reflect that judgment.\textsuperscript{86} In the broader context, the case has implications for how the STJ judges issues of environmental law and balances public interests against private ones. Even though the constitutionally defined mission of the STJ is to standardize the interpretation of federal law, leaving questions of constitutional interpretation to the Supreme Court (Supremo Tribunal Federal), the STJ cannot ignore the Constitution. When the Constitution is clear, the STJ must examine federal laws in light of the Constitution, an interesting proposition when many of the governing laws in the country predate the higher law.

Although this decision was issued recently—in 2007, nearly 20 years after the adoption of the current Constitution, it represents a shift in thinking about how courts in Brazil should examine the 1988 Constitution and how the Constitution affects the previously existing legal system. Property law is restricted by the government’s management of a public good: water. What does this mean for environmental protection in general? If the constitutional provisions

\textsuperscript{84} Id. at 16.
\textsuperscript{85} Id. at 17–18.
\textsuperscript{86} Id. at 23–24 (modified opinion of Min. João Otávio de Noronha, Relator).
regarding public ownership of water have such an effect on interpreting long-standing laws, other provisions may affect property law as well.

C. Preserving Natural and Cultural Heritage: Private Appropriation of Public Goods

Following the theme of private appropriation of public goods, the STJ has several recent precedents involving the private use of land (whether publicly or privately owned) protected for its value as natural or cultural heritage. Three cases merit citation in particular, regarding the Billings Reservoir in São Paulo, the Botanic Gardens of Rio de Janeiro, and the planned residential blocks in Brazil’s greatest urban planning project, Brasilia. In each case, the STJ explicitly places public interests in preserving natural and cultural heritage over private interests—whether in regards to property use, housing, or even safety.

In the case involving the Billings Reservoir, which is located to the south of the city of São Paulo and serves as a major source of freshwater for the area, the State Public Prosecutors’ Office brought the suit seeking the removal of an illegal housing development near the reservoir and compensation for environmental damage caused.87 The Second Panel upheld the state court’s order requiring the defendants to

restore the area to its previous state, including the complete restoration of the ecosystem, demolition of buildings constructed, restoration of the surface of the land, recovery of the soil with vegetation, removal of sediment from streams, and other measures as indicated by a technical expert in order to compensate for environmental damage caused. 88

The case involved a degree of social tension, as it would require the removal and dislocation of lower-class families from the area; in justifying this action, however, Justice Otávio de Noronha’s opinion relies on homocentric, rather than ecocentric, concerns:

However, in this specific case, the opinion below notes an important piece of information, that the “Billings Reservoir” serves a part of the Greater São

---

88 Id. at 2.
Paulo area with water (citation omitted). As such, the environmental damage denounced here stands out not only because of the destruction of Atlantic Forest, but principally because of the reservoir, which, according to the record, is being filled with sediment, which will, evidently, compromise the reservoir’s function as a water source for São Paulo, which is already subjected to water rationing at specified times throughout the year.

There is clearly a social factor that weighs on the decision—the removal of families residing clandestinely in the area . . . .

This case is not a matter of wanting to preserve a few trees at the expense of needy families that were probably deceived by the project developers in the hope of obtaining a place to live with dignity, but rather of preserving an urban reservoir that benefits a far greater number of people than those living in the preserved area. Thus, the public interest must prevail over the private, given that, in casu, there is no way to satisfactorily reconcile the two. Evidently, fulfilling the court’s order will cause suffering for those people affected, however, it will avoid greater suffering by a greater number of people in the future, and this cannot be ignored.

In Rio de Janeiro, the next case involved a house illegally built on federal property comprising the Botanic Gardens of Rio de Janeiro in the 1950s.\textsuperscript{90} The Botanic Gardens, founded originally by the Portuguese King Dom João VI upon his arrival in Rio de Janeiro in 1808, have been registered as a natural and cultural heritage site in Brazil since 1937.\textsuperscript{91} Before the STJ, the only issue in the case was whether the occupant of the house was entitled to compensation from the government upon its removal, as it had already been determined before the appeal that the house was built illegally.\textsuperscript{92}

Justice Benjamin wrote for the Second Panel that “without the express, unequivocal, valid, and current authorization” of the government entity responsible for managing the property, “occupation of a public area . . . cannot generate rights” such as the right to compensation for

\textsuperscript{89} Id. at 7–8.
\textsuperscript{90} S.T.J., REsp No. 808.708/RJ (2d Panel), Relator: Min. Antonio Herman Benjamin, Decision of Aug. 18, 2009, at 7.
\textsuperscript{91} Id. at 14.
\textsuperscript{92} Id. at 8.
As in the previous case, Justice Benjamin’s opinion turns to balance between one private party and the interests of society:

[T]he grave housing crisis that continues to affect Brazil will not be resolved, nor would it be prudent to do so, by destroying the historic and cultural heritage sites of the nation. Rich and poor, schooled or illiterate, we are all co-owners of what tangibly and intangibly remains of our history as a Nation. To mutilate or destroy it under the pretext of providing a home and shelter to a few would nonetheless leave millions more without a roof over their heads and, at the same time, without their inheritance from the past to recount and pass on to their descendants.94

In sum, in this line of cases, the STJ reiterates its position that efforts to solve other, perhaps serious, societal problems will not justify irregularities in the application of environmental laws designed to serve the public interest. The same position was emphasized in regard to the planned residential blocks of the “pilot plan” area of Brasília, the grand, modern urban planning project. Lúcio Costa, the architect who planned the city layout, had designed ground-level terraces (pilotis) to be included underneath all residential buildings in the city (all residential buildings are raised up as if on stilts), so as to create open spaces where neighbors could gather and people could pass through within the city blocks (superquadras).95

The pilot plan of Brasília is listed on the national registry for protection of heritage sites, and is also protected under the Convention on the Protection of Global Cultural and National Heritage (UNESCO).96 In addition, federal law prohibits any “alteration of the pilot plan . . . without authorization by federal law.”97 Notwithstanding these restrictions, the local government in the Federal District (which encompasses Brasília) had been permitting the fencing off of the terraces of residential buildings in the Cruzeiro Novo neighborhood, protected within

---

93 Id. at 12.
94 Id. at 17–18.
96 See id. at __ ( Majority Opinion, Min. Antonio Herman Benjamin).
97 Lei 3.751, de 13 de abril de 1960, available at http://www.planalto.gov.br/ccivil_03/leis/L3751.htm (quoted in REsp 840.918/DF at __).
the pilot plan. Once again, here the STJ, in the words of Justice Benjamin, writing for the majority of the Second Panel, rejects the idea that the existence of another societal problem, even related to citizen safety and security, would excuse any deviance from the mandate to protect natural and cultural heritage:

The grave problem of urban violence, which, unfortunately, devastates and intimidates our cities, does not excuse compromising our Brazilian cultural heritage, nor does it authorize the private appropriation of public space. Public security can be achieved by increasing and improving policing, along with social inclusion programs, and not by offending other collective interests and goods, especially those that also belong to future generations.  

D. Environmental Covenants and Easements

A final topic illustrating the relationship between environmental law and property law, between public and private interests, in STJ jurisprudence is the enforcement of easements and covenants, contractual or other restrictions on specific parcels of property. In such cases, environmental law overlaps with concerns of zoning and urban planning.

The Second Panel recently discussed these issues at length in upholding the restrictions in a covenant in the City Lapa region of the city of São Paulo. The region was planned in the early 20th century by English architect Barry Parker in the style of “Garden Cities” developed by Ebenezer Howard. When the area was parceled out into individual lots in the 1930s, the developer included a restriction by covenant that only single-family residences could be built on the properties. The local neighborhood association and another public interest group brought the case in 1996, which would only finally be resolved by the STJ in 2010, when a builder began

---

98 REsp 840.918/DF at 12.
99 Id. at 31.
101 Id. at 51–55.
102 Id. at 1, 47–48.
construction of a nine-floor apartment building on one of the lots. Before the STJ, the parties argued over the interpretation of subsequent zoning and planning laws, passed in the 1970s and 1980s, and whether they had any effect on the original covenant from the 1930s.

One additional point that makes the case interesting beyond its specific application is how the court interprets administrative actions. Despite the fact that the Municipality of São Paulo had approved the building, Justice Benjamin writes that there can be no real argument that the builder acted in good faith. Everyone familiar with the neighborhood is aware that there must be some type of building restriction; it is not merely by chance that the area remains characterized by single-family residences even while enveloped by the high-rise, high-density buildings now ubiquitous in the São Paulo skyline. Justice Benjamin then defends judicial intervention in the case, notwithstanding the fact that the building had received administrative approval: “The existence of the municipal permit . . . highlights the necessity of judicial intervention, for it is precisely when the administrator fails to fulfill his duty-power that the presence and action of the Judiciary is most justified, especially in cases that pit the public interest against private, strictly commercial interests.”

Justice Benjamin’s opinion for the majority of the Second Panel, which was split 3-2 in the case, highlights two important principles. Both principles are examined in this case in the context of urban law, but both apply naturally in terms of environmental law as well. First is the notion that, given two regulations, one private and the other public, the court will follow the more restrictive regulation (regra da maior restrição). Second is the non-regression principle

---

103 Id. at 1, 116.
104 Id. at 49.
105 Id. at 106, 111, 113, 118.
106 Id. at 111.
107 Id. at 118.
108 Id. at 73.
(proibição do retrocesso), borrowed from human rights law, which in this context serves as a "guarantee that the urbanistic or environmental advances achieved in the past are not destroyed or negated by the present generation."\(^{109}\)

Returning to the first principle, under which the court will apply the more restrictive of two applicable standards, the applicable law may provide a "floor" for regulation,\(^{110}\) above which private parties may voluntarily agree together to impose a greater level of restriction. This is true, as demonstrated in this case, regardless of which regulation came first. The opinion navigates through a history of different laws, municipal, state, and federal, as well as the original covenant from when the City Lapa area was developed, in delineating and applying this principle.

After discussing São Paulo’s municipal laws, the Second Panel provides an interpretation of a federal law, Lei 6.766 of December 19, 1979 (the "Lehmann Act"),\(^{111}\) which governs the dividing up of parcels of land for urban use:

[Under Article 26, VII, of the Lehmann Act,\(^{\text{112}}\) an appeal to municipal law is even made unnecessary, as federal law has already clarified that urban restrictions by covenant are allowed on new developments to “supplement the applicable law.” And if they are to “supplement” the law, they must add to, and never subtract from, . . . to complement existing regulations as well as to fill gaps in the law . . . .\(^{\text{112}}\]

In short, this principle—that covenants may impose additional urban or environmental requirements, but are not undone by the promulgation of new, less strict law—allows private parties, by contract, to “experiment [with] innovations not yet incorporated into the law.”\(^{113}\)

According to Justice Benjamin, urban-environmental covenants are of a public, collective nature;

\(^{109}\) Id. at 67.
\(^{110}\) See id. at 65.
\(^{112}\) Id. at 75.
\(^{113}\) Id. at 61.
they are not simply private agreements, but are intended to benefit members of society (both within and outside the neighborhood) as a group.\textsuperscript{114} As such, the government does possess the power to alter such covenants, but such power is limited to exceptional circumstances.\textsuperscript{115} Once again, in balancing public and private interests regarding property, the STJ will favor the public interest, enforcing the covenant, rather than tipping the balance toward the interests of the owners of and builders on a single lot.\textsuperscript{116}

To summarize, the common theme running throughout all these cases which touch on the relationship between property law and environmental law is that, in the jurisprudence of the STJ, public and collective interests must be held above limited, private interests—a hierarchy that has not existed historically, but which the STJ now seeks to enforce. Returning to Justice Benjamin’s opinion on preserving the cultural heritage of Brasília:

> 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 \textit{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 the necessities of the present. As such, the natural tendency is to reject, discredit, or obstruct any legal regime that stands in the way of tractors, cranes, dynamite, chainsaws, disregard, clientelism, or innocent ignorance.\textsuperscript{117}

Housing shortages and concerns over safety may affect people individually or in small groups, as suggested in all the cases cited in this section, but on a larger scale, they are nonetheless societal interests. However, the trend in the STJ’s jurisprudence, as shown in these cases, is to place a higher priority on those societal and collective interests—environmental rights and the protection

\textsuperscript{114} See \textit{id.} at 63.
\textsuperscript{115} Justice Benjamin cites the example of covenants with an explicit or implicit purpose of racial exclusion, such as were common in the United States. \textit{id.} at 70–71, 76; see also, \textit{e.g.}, Shelley v. Kraemer, 334 U.S. 1 (1948).
\textsuperscript{116} See REsp 302.906, supra note 100, at 109.
of natural and cultural heritage—that are diffuse and by their nature affect larger numbers of people simultaneously.

CONCLUSION

The constitutionalization of environmental rights has provided a framework under which the STJ applies an ecological component to the social function of property. This ecological function emphasizes the public good associated with environmental protection; through this doctrine, the STJ elevates public interests over private interests in cases of conflict at the intersection of environmental law and private property rights.

[As noted above, the following excerpts appended to this piece are also borrowed from Nicholas S. Bryner, Brazil’s Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil), 29 PACE ENVTL. L. REV. (forthcoming 2012). The cases discussed below do not address specifically the ecological function of property rights, but provide further examples of the Court’s role in compliance and enforcement of environmental law in Brazil.]

III. ANALYSIS OF THE HIGH COURT OF BRAZIL’S ENVIRONMENTAL JURISPRUDENCE

The High Court of Brazil has positioned itself as a key actor in the interpretation and implementation of environmental law. The Court issued hundreds of decisions on environmental cases; this section includes only a select few on key issues, focusing on interpretation of Brazil’s Forest Code and the imposition of strict liability for environmental harms. These decisions illustrate a trend toward interpretations that give stronger effect to constitutional and statutory provisions on environmental protection.

A. The Forest Code’s Day in Court: Giving Effect to Environmental Statutes

The High Court of Brazil’s recent jurisprudence emphasizes a broad interpretation of a crucial piece of environmental legislation in Brazil—the Forest Code (Código Florestal). The
Forest Code is the foundation of Brazilian environmental law regarding the protection and maintenance of flora. The Forest Code of 1965 institutes two key mechanisms for the protection of flora—the legal reserve (reserva legal), and the permanent preservation areas (áreas de preservação permanente, or APPs)—and includes many other provisions regulating the management and use of forests and other vegetation.\textsuperscript{118}

Although the current framework of the Forest Code dates back to the military dictatorship era, the STJ now interprets the law in light of the environmental provisions in the 1988 Constitution. Discussed below are two examples of how the STJ’s jurisprudence has developed to expand the application of the Forest Code. First, the STJ has adopted a broad interpretation of the Code’s definition of permanent preservation areas, resisting efforts to loosen the law. Second, despite earlier decisions to the contrary, the STJ now interprets the Forest Code’s prohibition on unauthorized burning to include cultivated vegetation, such as sugar cane, rather than only native vegetation. These new precedents give greater effect to the Forest Code as a concrete implementation of environmental rights, placing public interests above private interests in natural resource management.

1. Protection of Riparian Vegetation

Article 2 of the Forest Code describes various types of land that are considered “permanent preservation areas” (APPs), including riparian buffer zones, areas with steep inclines (greater than 45°), and the tops of mountains and hills.\textsuperscript{119} Although the Forest Code specifically protects vegetation, the emphasis on riparian buffers creates an important protection regime for

\textsuperscript{118} CÓDIGO FLORESTAL [C.FLOR.] [FOREST CODE] arts. 2, 16, Lei No. 4771, de 15 de Setembro de 1965 (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/l4771.htm. Article 1 of the Forest Code describes the scope of the Code, extending not only to forests but to all “other forms of vegetation” as well. Id. art. 1.

\textsuperscript{119} Id. art. 2.
aquatic ecosystems and ecological corridors. As such, it constitutes an additional important element in Brazilian law regarding water resources.\(^{120}\)

The STJ decided a case in 2008 related to the Forest Code’s protection of riparian vegetation.\(^{121}\) The issue presented before the court was whether the width of a particular stream of water was relevant in determining the application of the Forest Code’s prohibition on clearing riparian vegetation.\(^{122}\)

The case involved a stream only seventy cm (slightly over two feet) wide. The municipality of Joinville, in the southern state of Santa Catarina, had channeled the stream and cleared the surrounding Atlantic Forest vegetation to provide access to a new amphitheater and sports arena.\(^{123}\) The Federal Public Prosecutors’ office had brought the action against the municipality (and against two government agencies) for failure to comply with the Forest Code. The court below, the Federal Court of Appeals (TRF) for the Fourth Circuit, noted the small size of the stream and held that “[t]he prohibition on clearing riparian vegetation in the Forest Code does not apply in this specific case, in this circumstance in which there is little or no environmental repercussion.”\(^{124}\)

The STJ’s Second Panel reversed the decision, in an opinion by Justice Antonio Herman Benjamin. The Court began by quoting the relevant portion of the Forest Code:

\begin{quote}
Art. 2. By the force of this law, forests and other natural vegetation located as listed below are categorized as permanent preservation areas:
(a) the strip of land alongside a river or any body of water, from its highest level, with a minimum width of:
(1) – 30 (thirty) meters for bodies of water less than 10 (ten) meters wide . . . .\(^{125}\)
\end{quote}

\(^{120}\) For a discussion of water resources law in Brazil, see Antonio Herman Benjamin et al., The Water Giant Awakes: An Overview of Water Law in Brazil, 83 TEX. L. REV. 2185 (2005).
\(^{121}\) S.T.J., REsp No. 176.753/SC (2d Panel), Relator: Min. Antonio Herman Benjamin, 07.02.2008 (Braz.).
\(^{122}\) Id. at 7-8.
\(^{123}\) Id. at 8.
\(^{124}\) Id.
\(^{125}\) CÓDIGO FLORESTAL [C.FLOR.] [FOREST CODE] art. 2 Lei No. 4.771, de 15 de Setembro de 1965 (Braz.), available at https://www.planalto.gov.br/ccivil_03/leis/l4771.htm (quoted in REsp No. 176.753/SC, at 6).
The opinion continues with an explanation of the importance of riparian Permanent Preservation Areas:

The Federal Constitution supports *essential ecological processes*, among them riparian Permanent Preservation Areas. Their necessity is rooted in the *ecological functions* they perform, above all the conservation of soil and water. Among these functions are: a) the protection of water quality and availability, by facilitating groundwater seepage and storage, by preserving the physicochemical integrity of bodies of water, from the headwaters to the mouth, as a plug and filter, and above all by slowing down erosion and sedimentary deposits and by blocking pollutants and debris, and b) the maintenance of wildlife habitats and the formation of biological corridors, increasingly valuable in the face of territorial fragmentation caused by human occupation.

... 

... [That the vegetation cleared was within the riparian zone of the creeks in the area] is an incontrovertible fact that, moreover, cannot be questioned in a Special Appeal...  

By categorizing the riparian buffer as an “essential ecological process,” the Court links the Forest Code’s provision to a higher, constitutional norm. Article 225 of the Constitution, which guarantees the right to an “ecologically balanced environment,” requires the Government to “preserve and restore the essential ecological processes” in order to ensure the right. With this constitutional backing, the Court reasoned that the Forest Code’s protection of riparian vegetation cannot be interpreted so narrowly as to impede the Government from fulfilling its constitutional responsibility.

Of course, one cannot know for sure the extent to which the constitutionalization of environmental norms in Brazil affects the outcome of this and other legal disputes. It may be that the outcome of this particular case would be the same, given that the plain language of the statute clearly indicates the inclusion of riparian vegetation along *any* body of water. After all,
the question before the STJ was of interpretation of federal law, not the Constitution. Nonetheless, it is easy to envision the counter argument, as espoused by the lower court, that applying the Forest Code to such a small stream would be an absurd result and inconsistent with the intent of the statute. With the constitutional mandate to protect “essential ecological processes,” that argument becomes less plausible as the court views the statute in a new context, in furtherance of the constitutional goal.

The Second Panel’s opinion turns to focus on the lower court’s holding, rejecting any distinction based on the small size of the body of water as an improper judicial creation:

[Such an] exception to the prohibition on clearing vegetation does not exist in the law, making its creation by judicial interpretation unviable. The law, in cases such as this, only allows clearing in Permanent Preservation Areas when the party shows that the work, undertaking or activity is of “public utility” or “social interest” and, under this exception, obtains the necessary and proper authorization. In this case, none of that occurred.

In reality, given that we are dealing with a body of water (a fact not in controversy), the only possible conclusion under the law . . . is that the strip of land 30 meters wide along its banks is of permanent preservation, any destruction of vegetation therein being absolutely prohibited.

It should be noted that at no point does the law condition the protection of bodies of water and of riparian vegetation based on their width, as the court below did. Rather, the legislators’ decision in 1965 in favor of a fixed regime was intentional, designed precisely to be distinguished from a discretionary regime, which had characterized the 1934 Forest Code and resulted in its well-known failure.

. . . . [I]t is not the Judiciary’s role to extend the exceptions to the prohibition of deforestation, at the risk of weakening the system of environmental protection delineated by the Constitution and prescribed by federal legislation. Otherwise, a true Pandora’s box would be opened, in which each case would be treated independently, thus instituting, in the place of a nondiscretionary legal system of environmental administration, a new regime that, informally, eventually becomes discretionary, dependent on subtle judgments of convenience and opportunity by the administrator, case by case.

In sum, the legal protection of riparian Permanent Preservation Areas extends not only along the banks of “rivers,” but also along the edge of “any body of water” (Forest Code, art. 2), thus including streams, currents, creeks, brooks, lakes, reservoirs—in short, all of the complex hydrological mosaic that makes up the river basin. The legal regime of Permanent Preservation Areas is universal,
both in the sense that it is applicable to all bodies of water in the nation’s territory, regardless of their flow or hydrological characteristics, and in that it includes banks still covered with vegetation . . . as well as those already cleared and that, as such, need to be restored.

It is not up to the judge to remove the legal requirements regarding the maintenance of riparian vegetation under the argument that we are dealing with a simple “rivulet,” reasoning that, taken to its logical conclusion, would end up making the protection of headwaters impractical as well. More so than in large rivers, it is precisely in these small bodies of water that riparian vegetation fulfill a fundamental role of thermic stabilization, which is so important for aquatic life, due to its interception and absorption of solar radiation. In short, great rivers cannot exist without their headwaters and diverse tributaries, even the smallest and narrowest, the width of which does not reduce its essential importance in maintaining the integrity of the system as a whole.

For these reasons, the possibility of clearing riparian vegetation based on the width of the water flow must be refuted.\textsuperscript{128}

The opinion is notable for its tone in framing the case as a simple literal (and ecological) interpretation of the plain language in the statute. Thus, the court’s focus is on refusing to loosen the law or expose itself to a slippery slope of judicial discretion regarding the application of the Forest Code. This is in response to frequent criticism of environmental laws in Brazil as laws that fail to “stick” in the face of inertia and cultural resistance.\textsuperscript{129} Justice Benjamin, prior to his appointment to the STJ, had written to this effect regarding the Forest Code: “while it was covered in mold on the shelf, the Code was [considered] a good law; once its instruments began even minimally to be used, it instantly became an overreaching law, incompatible with the needs of modern society.”\textsuperscript{130}

\[. . .\]

\textsuperscript{128} REsp No. 176.753/SC, at 8-10.

\textsuperscript{129} See, e.g., Crawford & Pignataro, supra note 19. The issue of cultural resistance to environmental law is discussed infra Part IV.

\textsuperscript{130} Santiago, supra note 32, at 4, quoting Antônio Herman V. Benjamin, A Proteção das Florestas Brasileiras: Ascensão e Queda do Código Florestal, 18 REVISTA DE DIREITO AMBIENTAL 23 (2000).
b. Liability of the State

As stated above, the definition of “polluter” in Brazilian law includes those who directly and indirectly cause environmental degradation.\(^{131}\) In addition to allowing for the possibility of multiple liable parties, this definition explicitly includes public as well as private entities.\(^{132}\) As noted in other cases, persons or entities that allow pollution to occur, whether by action or omission, or that finance activities that result in pollution, may all be held equally under the law as having caused environmental damage.\(^{133}\) Public entities’ liability in Brazil is based on the strong set of affirmative duties placed on the state in the Constitution and in environmental laws. This foundation and its application is discussed below in two STJ precedents related to state liability for environmental harm, whether by direct state action or by omission.

The STJ judged one such case in 2005, brought by federal environmental prosecutors against all levels of government—the Federal Government, the State of Paraná, the Municipality of Foz do Iguaçu—as well as IBAMA, Brazil’s environmental agency.\(^{134}\) The Public Prosecutor originally filed the suit, seeking a court order to halt the municipality’s construction of a road along the edge of the Paraná River, as well as an order for the three levels of government to restore the environment and vegetation in the affected area.\(^{135}\) The State of Paraná appealed the case to the STJ, arguing that it was not a proper defendant in the case, but rather that the federal agency, IBAMA, was liable for having authorized the construction.\(^{136}\)

Justice Castro Meira, writing for the Second Panel in affirming the state’s liability, focused on the specific application of civil liability to the state; however, it provides an important

\(^{131}\) Lei No. 6.938, de 31 Agosto de 1981 (Braz.).
\(^{132}\) Id.
\(^{133}\) See [Brazil’s Green Court note 128 and accompanying text].
\(^{134}\) S.T.J., REsp No. 604.725/PR (2d Panel), Relator: Min. Castro Meira, 21.06.2005, at 5 (Braz.).
\(^{135}\) Id.
\(^{136}\) Id. at 8.
discussion of public entities’ liability in general for environmental damage. Justice Castro Meira explains the constitutional foundation of state liability:

Art. 23, VI, of the [Federal] Constitution establishes the common authority of the Union, States, Federal District, and Municipalities related to the protection of the environment and to combating all forms of pollution, and the heading to art. 225 provides for the right of all to an ecologically balanced environment, and imposes on the Government and on society the duty to defend it and preserve it for present and future generations. In the paragraphs [of art. 225] are found the directives for the State (in the broad sense) to use in effectuating these ideals, the consequences that result from failure to observe these duties, and the objective nature of liability in such cases . . . .

Thus, in accordance with the Constitution, the Government, which includes all public entities, and therefore, the appellant State, has the duty to preserve and to monitor the preservation of the environment. In this case, the State, as part of its monitoring duty, should have required an Environmental Impact Study and report, the holding of public hearings on the subject, or even the suspension of the construction.137

In this portion of the opinion, the case presents another concrete example of the strength of the environmental provisions in the Brazilian Constitution. With environmental rights in Article 225 come duties on the part of the government and society, and in this case, the STJ applies that duty in support of a decision that holds a state jointly liable along with federal and local government for failing to meet that duty. The Constitution allows the paradigm shift; if courts are thus willing to enforce the duty, then the constitutional provision can carry with it real weight to affect the way in which public entities undertake their administrative responsibilities.

Justice Castro Meira, having discussed the constitutional foundation, proceeds to describe how Brazil’s federal law includes each level of government’s duties regarding the environment.138 The State of Paraná’s argument was that it had not acted in any way so as to make it liable in this particular case, and that the responsibility lied with other governmental

137 Id. at 8–9 (emphasis of “all public entities” added).
138 Id. at 9–12.
entities; however, according to Justice Castro Meira, this contention “encounters obstacles” throughout the National Environmental Policy Act.\textsuperscript{139} For example, as quoted earlier, Article 3 of the Act explicitly provides that actors, both public and private, may be held liable for \textit{indirectly} causing environmental damage.\textsuperscript{140} Article 6 lays out the organization of the National Environment System (SISNAMA), comprised of municipal, state, and federal authorities, and includes specific requirements for state agencies within this framework to “control and monitor activities capable of causing environmental degradation”\textsuperscript{141} and for states themselves to “establish . . . complementary norms and standards related to the environment.”\textsuperscript{142}

A second major case, decided by the STJ in 2009, is the case cited above for its discussion of joint and several liability, regarding the construction in and illegal occupation of a protected area, Jacuripanga State Park, in São Paulo.\textsuperscript{143} In the opinion, the Second Panel also addresses the issue of whether the Government’s duty to enforce environmental law and monitor activities potentially harmful to the environment is mandatory (or merely discretionary), as well as the resulting liability when the duty is not met. This is rooted in the theory of the State’s responsibility to implement and enforce the rule of law:

The matter under analysis deals with the co-liability of the State when, as a consequence of its omission in exercising the duty-power of environmental control and enforcement, environmental damage is caused by a private party that invaded an Area of Strict Protection (State Park), of public ownership, constructing buildings and undergoing agricultural activities therein.

. . . .

One initial question that is placed by the present Special Appeal is that of knowing whether, in Brazilian law, environmental (and urbanistic) control and enforcement fit, as powers of the Administration, within the scope of a loose, discretionary system, or within the realm of binding administrative obligations. If

\textsuperscript{139}Id. at 9.
\textsuperscript{140}Id.; Lei No. 6.938/81, art. 3, cl. IV.
\textsuperscript{141}REsp No. 604.725/PR, at 10; Lei No. 6.938/81, art. 6, \textit{caput}, cl. V.
\textsuperscript{142}REsp No. 604.725/PR, at 10; Lei No. 6.938/81, art. 6, § 1.
\textsuperscript{143}S.T.J., REsp No. 1.071.741/SP (2d Panel), Relator: Min. Antonio Herman Benjamin, 24.03.2009 (Braz.); see also \textit{Brazil’s Green Court} notes 154–155 and accompanying text.
the conclusion is, as it will be, that urbanistic-environmental control and enforcement is within the realm of unequivocal, unwaivable, unrenounceable, and non-lapsing state duties and powers, the question that then follows is in regard to the content of this duty-power, namely, regarding the measures and provisions of implementation that are expected—rectius, that are required—of the Government, as well as regarding the legal consequences derived from its nonfulfillment.

. . . .

There is no longer any doubt, especially in light of the Federal Constitution of 1988, that the legal order charges the State, more in terms of a duty rather than a right or power, with the function of implementing the law, including against itself or against the immediate interests of the Administrator on duty. It would seem nonsensical to require private parties to fulfill and observe the law, while attributing to public servants, depending on convenience or whim, the choice of zealously watching over it or leaving it to chance. . . . 144

With this foundation, the Court turns to the specific duties of the Government in relation to the environment turning both to constitutional provisions as well as federal law:

The duty-power of environmental control and monitoring (the duty-power of implementation), while also inherent to the State exercise of police power, springs forth directly from the constitutional text (especially arts. 23, VI–VII, 170, VI, and 225) and from infraconstitutional legislation, especially the National Environmental Policy Act (Law 6.938/81, arts. 2, I, V, 6) and Law 9.605/98 (Crimes Against the Environment Act).

. . . .

This duty-power imposed on Government involves two central principles of contemporary state organization. First, the standard of administrative integrity that is expected of public officials, in acting, as well as in their omissions and reactions. Second, the principle of the rule of law, which itself is a limit on the action of the State, but is equally a tool to combat inaction when positive duties are expected of it.

. . . .

[In Article 225 of the Constitution], the Brazilian State, in all of its facets and levels, appears as the guardian and guarantor of the fundamental right to an ecologically balanced environment. The heading and paragraphs of art. 225 of the Constitution list several concrete tasks related to this broad police power, which, in the terms of art. 23, VI (“protect the environment and combat pollution in any form”) and VII (“preserve the forests, fauna, and flora”), is added to the scope of common authority of the Union, States and Federal District, and, inasmuch as it is of local interest, the Municipalities (with special emphasis on urban control and monitoring). Following this line of reasoning, under art. 70, § 1, of Law 9.605/1998, “the employees of environmental agencies that make up the National Environmental System—SISNAMA, that are designated for monitoring

144 REsp No. 1.071.741/SP, at 7.
activities,” among others, are also charged with the duty-power of implementing environmental law.

The National Environmental Policy, in the framework provided by Law 6.938/81, includes among other principles “governmental action in maintaining ecological balance” and the “control and zoning of effectively and potentially polluting activities” (art. 2, I and V, emphasis added).

More direct and unequivocal is art. 70, § 3 of Law 9.605/1998 [Crimes Against the Environment Act], according to which an environmental authority, when it “becomes aware of an environmental infraction is obligated to begin an immediate investigation, through its own administrative process, under penalty of co-liability” (emphasis added). “Immediate investigation” must be understood as much more than the simple identification of the degrader and mere adoption of formal, insincere actions, for these would be meaningless if they were not designed to effectively maintain (from trespass) or recover (in the case of illegal appropriation) possession of environmental assets, require the violator to repair the damage caused, and apply, if necessary, administrative and penal sanctions against him for his reprehensible conduct.145

This opinion provides a more detailed discussion of the park in question, and how governmental entities should act in order to maintain protected areas. In the absence of diligent action by the state, the Court concludes, conservation of such areas cannot be successful:

Reference should also be made to the National System of Protected Areas Act, or SNUC [Portuguese acronym] (Lei 9.985/2000), given that the degradation in the present case occurred in what was then the State Park of Jacupiranga, created by the government of the State of São Paulo in 1969, with approximately 150,000 hectares, due to its notable ecological importance (for sheltering one of the largest remaining tracts of Atlantic Forest) and geological importance (due to its great caverns), an area so large that, in 2008, it was divided into three parks (Caverna do Diabo, Rio Turvo, and Lagamar de Cananéia Parks, under the terms of art. 5 of State Law 12.810/2008).

In its mission to protect the ecologically balanced environment for present and future generations, as the representative for the preservation and restoration of essential ecological processes, it is the State’s duty “to define, in all units of the Federation, territorial spaces and their components which are to receive special protection, any alterations and suppressions being allowed only by means of law, and any use which may harm the integrity of the attributes which justify their protection being forbidden” (Federal Constitution, art. 225, § 1, III).

The creation of Protected Areas is not an end in itself; rather, it is linked to the clear legal and constitutional objectives of the protection of Nature. As such, their establishment does not resolve, halt, or mitigate the biodiversity crisis—directly associated, in Brazil, to rapid and unsustainable habitat destruction—if it is not accompanied by state commitment to sincerely and effectively look after

145 Id. at 8–10.
their physical and ecological integrity and provide for transparent and democratic technical management. If not, nothing more than a “system of paper- or façade-protected areas” will exist, a no-man’s land, where authorities’ omissions are recognized by the “on-duty” land degraders as implicit authorization for illicit deforestation and occupation.146

Imposing liability for environmental damage on the state presents a dilemma. As Justice Benjamin indicates in the opinion, Brazilian law tasks governmental entities with overseeing protected areas. It is easy to see how, without effective monitoring, protected areas become “paper parks.” Placing financial responsibility on the state when pollution or environmental degradation occurs on protected lands clearly provides an incentive for the government to act and take its regulatory authority and police power seriously. However, state liability, when applied, means that the financial burden may ultimately be paid by the citizenry as a whole if the state is unable to obtain contributory payments from other liable parties, whether for political or financial reasons. Although it may induce greater oversight as a general policy, in the cases where government enforcement is truly lacking, private actors that benefit from environmental degradation may be able to externalize the costs on the rest of the public, due to regulators that were willing to turn a blind eye.

[...]

IV. CONCLUSIONS: CULTURAL RESISTANCE TO ENVIRONMENTAL LAW

Brazil, given its size, economic power, and natural resources, is and must be a crucial actor in efforts to address the world’s greatest environmental crises, from biodiversity loss to climate change, from dwindling water supplies to air pollution that threatens human health. This is especially true in dealing with the protection of biomes that Brazil shares with other South American nations, such as the Amazon and the Pantanal. Other developing countries will

146 Id. at 10–12 (translation of the excerpt from the Constitution is from the Georgetown Political Database of the Americas, supra note Error! Bookmark not defined.).
undoubtedly look toward Brazil’s advances (and missteps) in environmental law as an example, but in order for the STJ and other institutions to extend this influence, the language barrier (Portuguese is not widely spoken in much of the world) must be broken.

Because Brazil has included environmental rights into its constitutional framework, the potential for legal solutions to manage the country’s domestic and international responsibilities are strong. Yet, these legal solutions cannot become practical realities without the cooperation of all the political branches, various non-state actors, and the citizens themselves.

The STJ, although only in its third decade as an institution, occupies a key position in implementing environmental policy in Brazil. As the focal point for interpretation of environmental law, the STJ has the responsibility of ensuring that the law, though instituted by the legislative branch, is given proper and effective meaning. The STJ has, especially over the past several years, developed itself as Brazil’s “green court,” demonstrating through its jurisprudence a commitment to environmental rights as an essential element of the public order.

The STJ’s decisions speak for themselves, establishing a trend toward stricter application of Brazil’s environmental laws and enforcement of the strict liability system for environmental harms. The few cases cited here, selected from hundreds decided by the court, serve as a broad illustration of this trend, and despite long-standing cultural pressures and the multitude of other social challenges Brazil faces, the STJ has increasingly held its ground in interpreting environmental standards, reasoning that such social challenges will not and cannot be solved by turning a blind eye to environmental problems—although legislative backlash on the Forest Code may test this resolve. As Justice Benjamin wrote in 1999, over a decade ago:

Brazil, it is argued, has today one of the most advanced systems of legal protection for the environment. Legislating as to the essentials is no longer a priority for the future (or the present). We have already done it. What we hope for now from environmental agencies and from citizens, organized or not, is
compliance with the legal requirements, which are often nothing more than lifeless words.\textsuperscript{147}

Three cases in particular provide examples of how the Court has sought to fulfill this goal, challenging societal resistance to environmental law, particularly by those with vested interests that depend on relaxed enforcement. First is the case regarding mangrove swamps, discussed earlier in the application of strict liability.\textsuperscript{148} The Court’s opinion concludes with the following discussion of resistance to the enforcement of environmental law and the objective role of the judge in applying it:

As in all fields of law that regulate human behavior, legislative reform does not always reflect, immediately or fully, popular perception. Old practices ordinarily persist, even when they have been banned by recent law. It is what we call the resistance of the Ancien Régime to legislative changes, dissonance between the law and its subjects that persists, notwithstanding the solid scientific and ethic arguments that inspired the legal reform. In the protection of mangrove swamps, given the divergence between law and practice, the role of the judge is not reduced to the mere cold application of the relevant law against obstinate violators, for it is expected that he, through the strength of his decisions, effectuate the process of internalizing the change in those who still think and act as before.

From the common human point of view, mangrove swamps continue as always—ecosystems that are not normally included on Nature’s postcards. Yet this did not stop lawmakers from recognizing their importance for us and all living beings that depend on that environment.

. . .

This is not a “romantic idea of returning nature to its original state” as the appellants suggest, but rather the simple judicial fulfillment of what is in the Constitution and the statute. In Brazil, courts do not create obligations for environmental protection. They spring forth from the law, after having passed through the analysis of Parliament. Therefore, we do not need activist judges, for the activism is done by the law and the constitutional text. Unlike other countries, our Judiciary is not impeded by a sea of gaps in the law or a series of legislative half-words. If a gap exists, it is not due to the lack of a statute, nor even a defect in the statute; it is because of the absence of or a deficiency in administrative and judicial implementation of the unequivocal environmental duties established by law.\textsuperscript{149}

\begin{flushleft}
\textsuperscript{147} Benjamin, supra note 15, at 82.
\textsuperscript{148} See [Brazil’s Green Court, notes 111–117 and accompanying text].
\textsuperscript{149} S.T.J., REsp No. 650.728 (2d Panel), Relator: Min. Antonio Herman Benjamin, 23.10.2007, at 15–16 (Braz.) (emphasis added).
\end{flushleft}
In Brazil, then, the focus should be on *compliance and enforcement*; the law is strong, but cultural acceptance of the law and effective enforcement are lacking. The continuous challenge, despite over forty-five years of history of the current Forest Code and over twenty years of experience with the Constitution of 1988, is to make the law in practice match the plain language of the law as written.

[...]

Ultimately, what the STJ’s environmental jurisprudence shows is that in Brazil, application of environmental law will be a product of the country’s specific system, with strong laws and constitutional footing, but with an increasingly environmentally-conscious population in conflict with interests that reject the growing emphasis on implementation of the law. As such, the focus in the near future is likely to be on the consolidation of existing laws. Within this context, the STJ’s adherence to environmental law may not be popular among all sectors of society, but it is a crucial component of the rule of law—and a key manifestation of inter-generational equity, refusing to allow the interests of today to interfere with the Constitution, now nearly a generation old, or with its enumerated environmental rights granted to future generations.

The STJ’s trend toward stronger enforcement of environmental law begs the question of where the remaining problems may be in Brazil. Courts can fulfill the judicial role, but rely on the other branches both to craft the law and execute it. More research is needed to show how prosecutors and non-state actors such as NGOs can be better at identifying environmental problems and bringing them to courts’ attention. If courts apply the law, that can be considered a success in itself, but even more successful is a society in which the norms are internalized, consolidated, and followed without always relying on the arbitrator.