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Is There a Brazilian Approach to Climate Litigation?

The Climate Crisis, Political Instability, and Litigation Possibilities in Brazil

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In Brazil, climate litigation has gained strength as a result of recent national experiences. Brazilian legal researchers have been developing studies in this field, now published in Portuguese, and debates are occurring in institutional and legal arenas throughout the country. Since the climate crisis functions according to a logic that is both global and local, it is very important to understand certain local dynamics in order to propose local solutions and consider how these solutions can contribute to the global agenda on the climate crisis. In this chapter, we offer an analysis of climate litigation within the current context of attacks on Brazilian democracy, the growing risks of a climate collapse, and a possible response from civil society. This chapter ultimately provides insight, based on the experience of a civil society organization, into how strategic litigation can be an important tool to combat such setbacks.

19.1 THE ENVIRONMENTAL AND CLIMATE CRISIS IN BRAZIL

Since President Bolsonaro's first day in office in January 2019, the Brazilian government has been imposing restrictions and increasing its control over the actions of civil society.[1] The activities of human rights and environmental defenders have been increasingly criminalized. The government has suppressed rights, weakened protections for forests and Indigenous peoples, and cut funding for policies on the protection of human rights and the environment, among other threats and forms of backlash.[2]

[1] See 'Retrospective: Human Rights in 2019', Conectas Human Rights, 19 December 2019, <https://www.conectas.org/en/noticias/retrospective-human-rights-in-2019/>.

[2] See, e.g., Fabrício H. Chagas Bastos, 'Political Realignment in Brazil: Jair Bolsonaro and the Right Turn' (2019) 69 *Revista de Estudio Sociales* 92; see also François-Michel Le Tourneau,

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In 2019, fires and deforestation hit record levels in Brazil, especially in the Amazon. Fires in the Amazon are common in August. However, the rates compiled by the National Institute for Space Research (INPE) showed an increase of 84 per cent in 2019 in comparison to the same period in 2018.[3] After the data was published, President Bolsonaro fired the president of the INPE, alleging that the data was false – a claim that was contested by several scientists in the country and abroad, including NASA.[4] Investigations into the possible direct involvement of land grabbers and farmers in the fires are currently underway. Bolsonaro has, however, attacked NGOs and blamed them for the fires. Deforestation has been strongly linked to the agribusiness sector and irresponsible and illegal logging.[5]

Yet, despite these challenges, the government continues to cut funding for environmental protection. Moreover, importantly, the Environment Minister himself is under investigation for environmental crimes, and in late February 2020, he dismissed the employees of his ministry responsible for climate policies. In the past, the Minister described global warming as a secondary issue and claimed, as did the president, that fines for environmental crimes were ideologically motivated.[6] Bolsonaro has also claimed several times that Brazil has an 'industry' of environmental fines, which put too many limits on development. Less than 95 per cent of these fines, however, are actually paid.[7] Many officials hired to work for the Bolsonaro government challenge the concept and very existence of climate change.

The government has been weakening the institutional framework established to protect people and the environment. It continues to support the

'O governo Bolsonaro contra os Povos Indígenas: as garantias constitucionais postas à prova' (2019) 69 *Confins* 501.

3 See 'Amazon Fires Increase by 84% in One Year – Space Agency', BBC, 21 August 2019, <https://www.bbc.com/news/world-latin-america-49415973#:~:text=Brazil's%20Amazon%20rainforest%20has%20seen,the%20same%20period%20in%202018>; see also Rodrigo de Oliveira Andrade, 'Alarming Surge in Amazon Fires Prompts Global Outcry', *Nature*, 23 August 2019, <https://www.nature.com/articles/d41586-019-02537-0#:~:text=Several%20million%20plant%2C%20animal%20and,have%20prompted%20an%20international%20outcry>.

4 See 'Uptick in Amazon Fire Activity in 2019', NASA Earth Observatory, 19 August 2019, <https://visibleearth.nasa.gov/images/145498/uptick-in-amazon-fire-activity-in-2019/145515w>.

5 See, e.g., Leandro Valle Ferreira et al., 'O desmatamento na Amazônia e a importância das áreas protegidas' (2005) 19 *Estudos Avançados* 157.

6 See Anna Jean Kaiser, 'Brazil Environment Chief Accused of "War on NGOs" as Partnerships Paused', *The Guardian*, 17 January 2019, <https://www.theguardian.com/world/2019/jan/16/brazil-environment-chief-accused-of-war-on-ngos-as-partnerships-paused>.

7 See Aldem Bourscheit et al., 'Calote Biolonáro', *The Intercept Brasil*, 21 October 2019, <https://theintercept.com/2019/10/21/ibama-bilhoes-multas-ambientais/>.

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relaxation of environmental laws despite the clear impacts that a poor and incomplete environmental licensing system generates, especially when combined with an irresponsible and predatory mining sector, as can be seen in the tailings dam disasters in Brumadinho and the Doce River.[8] The legacy of these disasters still looms large for the affected communities: death, destruction of livelihoods, pollution of rivers and land, intensification of social and land-related conflicts, gender discrimination, health problems, and threats to defenders, among other harms. To make matters worse, these negative impacts are present in almost all mining projects in the country. These disasters were not enough to prevent the government from supporting a new licensing bill that, if passed, will speed up and simplify the licensing process for projects.

The government continues to present and support many other bills that clearly threaten the environment and Indigenous and traditional communities, such as bill no. 191/2020.[9] Unfortunately, Brazil is a global leader in the killing of rights defenders, according to the 2018, 2019, and 2020 Global Witness reports.[10] Brazil has always been one of the most dangerous places in the world for human rights defenders, particularly in rural areas. Yet, as a result of the new political context, in 2019, it became even more dangerous to be a human rights defender.

Serious setbacks regarding environmental and climate issues have resulted primarily from a political context where the institutional structure for environmental protection is not only neglected but also dismantled. This has put the effectiveness of these legal instruments to the test. Yet, in the midst of such an unfavourable context, they are increasingly being used as a tool to demand that public authorities fulfil the obligations established by legislation. This trend is increasingly important given that, in Brazil, climate issues are managed mainly by the executive and legislative branches of government, which are often the direct (or indirect, by omission) perpetrators of attacks on the environment. This much was recently revealed in a statement by

[8] See '"Brazil Learned Nothing from Its Worst Ever Social and Environmental Disaster", Says Experts', Conectas Human Rights, 25 January 2020, <https://www.conectas.org/en/noticias/brazil-learned-nothing-from-its-worst-ever-social-and-environmental-disaster-say-experts/>.

[9] See Julia Neiva and Juliana de Batista, 'Mineração Predatória como Política de Governo', Nexo, 14 February 2020, <https://www.nexojornal.com.br/ensaio/2020/Minera%C3%A7%C3%A3o-predat%C3%B3ria-como-pol%C3%ADtica-de-governo>.

[10] See 'At What Cost?' (2018) *Global Witness*, <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>; see also 'Enemies of the State?' (2019) Global Witness, <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/>; see also 'Defending Tomorrow' (2020) Global Witness, <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>.

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Environment Minister Ricardo Salles, who admitted to using the COVID-19 pandemic to distract public attention in order to 'run the herd through' and undermine environmental protection legislation.[11]

19.2 ENVIRONMENTAL AND CLIMATE RACISM AS A CHALLENGE

Some groups suffer from environmental and climate impacts more intensely than others,[12] particularly in countries where structural racism pervades society, as is the case in Brazil.[13] The groups affected the most by socio-environmental disasters – natural or man-made – are generally poorer, non-white populations, in which women are even more harshly impacted. The intersection of characteristics like gender, race, class, and territoriality increases the experience of oppression and the marginalization of poor and non-white women.[14] It also affects how they experience socio-environmental impacts, which are assumed to be more intense for them than for other women.

Yet, even though different groups experience environmental harms differently, the effects of climate change will be increasingly felt by all. In January and February 2020, the rains in the Brazilian south-eastern states of São Paulo, Minas Gerais, and Espírito Santo were so intense that they affected the richer and white populations living in the posh city neighbourhoods close to the rivers that flooded, in addition to impacting poorer and more marginalized communities.

In São Paulo, it rained more in a twenty-four-hour period than it had in the last thirty-seven years. As a result, 5 people died, 500 were displaced, 142 lost their homes, and thousands were unable to go to work. In Minas Gerais, the

[11] 'Ministro do Meio Ambiente defende passar "a boiada" e "mudar" regras enquanto atenção da mídia está voltada para a Covid-19', Globo, 22 May 2020, <https://g1.globo.com/politica/noticia/2020/05/22/ministro-do-meio-ambiente-defende-passar-a-boiada-e-mudar-regramento-e-simplificar-normas.ghtml>.

[12] See generally Joan Martínez Alier, *El Ecologismo de los Pobres* (Barcelona: Icaria Editorial, 2009); see also Henri Acselrad, 'Ambientalização das Lutas Sociais - O Caso do Movimento por Justiça Ambiental' (2010) 24 *Estudos Avançados* 103.

[13] See Silvio Almeida, *Racismo Estrutural* (São Paulo: Pólen Produção Editorial, 2019). For more on climate racism and injustice in Brazil, see Rogério Santos Rammê, 'A Política da Justiça Climática: Conjugando Riscos, Vulnerabilidades e Injustiças Decorrentes das Mudanças Climáticas' (2012) 17 *Revista de Direito Ambiental* 367; see also Gabriel Antonio Silveira Mantelli et al., 'Uma Análise da Justiça Climática na Perspectiva do Socioambientalismo Brasileiro' (2017) 67 *Revista de Direitos Difusos* 95.

[14] See Bob Bolin and Liza C. Kurtz, 'Race, Class, Ethnicity, and Disaster Vulnerability' in Donner H. Rodríguez et al. (eds.), *Handbook of Disaster Research* (New York: Springer, 2018), pp. 181–203.

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volume of rain for the month of January was the highest it had been in 110 years. There, 101 cities declared a state of emergency, 55 people were killed, and over 45,000 were forced to leave their homes. The mayor of Belo Horizonte, the state capital, stated that reconstruction of the city will cost over seventy million US dollars. In addition, in the state of Espírito Santo, over 10,000 people left their homes as a result of floods caused by the heavy rains.

Despite the fact that the rainy season in southern Brazilian states occurs during the country's summer, from December to March, such heavy rains were not frequent. The social and environmental disasters that they have caused were the combined result of the failure to implement public policies to deal with the impacts of climate change, poor urban planning, and the global increase in rainfall as a result of climate change. In the state of São Paulo, for instance, 42 per cent of the budget for policies to prevent the impacts of floods have not been used.[15]

19.3 CONTEXTUALIZED STRATEGIC LITIGATION AS A POSSIBLE RESPONSE

Considering the context described above, it is clear that socio-environmental threats are a human rights issue and, as a result, are on the human rights agenda. Human rights and environmental activists and NGOs met in September 2019 at the Peoples' Summit on Climate, Rights and Human Survival to discuss these intersections and plan for the future.[16] As already stated by United Nation reports and documents, climate change and human rights must be acknowledged as major challenges for civil society.[17] The interdependence of the climate system and human rights, coupled with

[15] See Léo Arcoverde, 'Em 10 anos, governo de SP deixou de usar 42% da verba contra enchentes', G1, 11 February 2020, <https://g1.globo.com/sp/sao-paulo/noticia/2020/02/11/em-10-anos-governo-de-sp-deixou-de-usar-42percent-da-verba-contra-enchentes.ghtml>.

[16] See 'Announcing The First Ever Global Summit on Human Rights and Climate Change', Amnesty International, 9 July 2019, <https://www.amnesty.org/en/latest/news/2019/07/announcing-peoples-summit-on-climate-rights-and-human-survival/>.

[17] See, e.g., Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 'Mapping Report', UN Doc. A/HRC/25/53 (2013); see also 'A New Climate Change Agreement Must Include Human Rights Protections for All', OHCHR, 17 October 2014, <https://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf>; see also 'Human Rights Council Holds Discussion on the Adverse Impacts of Climate Change on States' Efforts to Realize the Right to Food', OHCHR, 6 March 2015, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15661&LangID=E>; see also Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the

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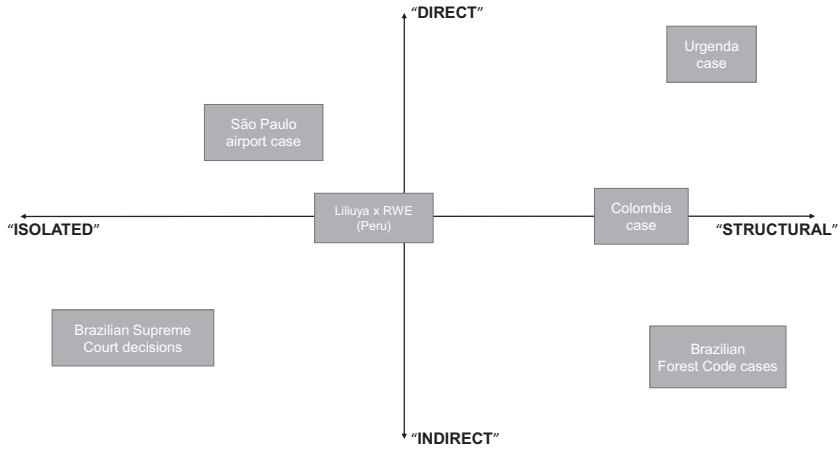


FIGURE 19.1. Possible combinations of climate litigation cases.
SOURCE: Adapted from *Guia de Litigância Climática* (Conectas, 2019).

governments' failure to implement effective policies to combat climate change, have contributed to the emergence of numerous climate cases around the world.[18] Among the host of avenues for climate action, climate litigation has become a worldwide trend.[19]

Conectas Human Rights has created a schematic chart to help visualize the possibilities for climate litigation in the Brazilian context.[20] Figure 19.1 illustrates the possible combinations of climate actions based on two criteria: (1) the scope of the action and (2) the relationship with specific climate legislation. For the first criterion (scope), the action can be 'structural'

Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', UN Doc. A/HRC/31/52 (2016), <https://undocs.org/A/HRC/31/52>.

[18] See 'The Status of Climate Change Litigation: A Global Review' (2017) UN Environment Programme, <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y>; see also Eric A. Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2006) 155 *University of Pennsylvania Law Review* 1925.

[19] See, e.g., Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Litigation: 2020 Snapshot' (2020) Grantham Research Institute on Climate Change and the Environment, <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf>; see also Katerina Mitkidis and Theodora N. Valkanou, 'Climate Change Litigation: Trends, Policy Implications and the Way Forward' (2020) 9 *Transnational Environmental Law* 11.

[20] See James Dawson, 'Conectas Launches Climate Litigation Guide during COP25', Conectas, 6 December 2019, <https://www.conectas.org/en/noticias/conectas-launches-climate-litigation-guide-during-cop25/>; see also Gabriel Mantelli et al., *Guia de Litigância Climática* (São Paulo: Conectas, 2019), <https://www.conectas.org/publicacao/guia-de-litigancia-climatica/>.

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or 'isolated'. With respect to the relationship with climate law, it can be 'direct' or 'indirect'.

Structural court actions are those that tend to challenge complex public policies with a wide territorial scope (such as national adaptation policies). Isolated court actions can exist under different modalities. They can be those in which the objective of the action is to obtain a more administrative decision (such as the requirement to carry out a climate impact assessment to obtain a licence for a thermoelectric plant), those where the focus is sectorial (as in the energy and urban mobility cases), or, finally, those cases filed with subnational authorities.

Direct actions are those where the main basis is climate change, in fact and in law. An example of such a climate dispute is one that directly questions climate programmes and policies and is expressly based on climate laws and climate-related institutional frameworks. Indirect climate actions are ones in which environmental norms and other legal arguments not explicitly linked to climate change are invoked, but the result, if favourable, would have an important impact on climate mitigation or adaptation. An example of a hypothetical indirect action is a dispute that requires authorities to protect the peoples of the forest, in which one could argue that the importance of these peoples is their role in forest management without explicitly mentioning the conservation of ecosystems that serve as carbon sinks.

In the Brazilian context, the combination of these two criteria – scope and climate approach – creates numerous possibilities for configuring a concrete climate lawsuit. Any court actions developed based on these criteria and this schema have varying chances of success and face certain challenges. Structural actions tend to attract more controversial issues that are part of the broader legal debate about the relationship between the judiciary and other powers, and they may be costlier due to the action's potential proportions and the procedural financial support needed, especially in the preliminary procedural phases. Isolated actions, in turn, can be promising, as they reduce the risks associated with 'all or nothing' scenarios – that is, they can serve as a litigation experience, and they can be replicated.

Direct actions can help raise awareness and facilitate the direct enforcement of climate laws within the judiciary and by other actors in the justice system. However, there is a risk that the initial burden of demonstrating the very existence of the climate impacts at issue through scientific evidence will raise challenges associated with causation. Indirect actions are an alternative approach and more subtly tackle the climate issue, addressing the determinants of global warming in language that has already been tested in court. A favourable decision in an indirect action can have positive repercussions for

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the climate issue as a whole. One downside is that by not addressing climate issues directly on a factual and legal basis, it does not serve as an opportunity to raise normative awareness of climate change among judges and courts.

19.4 AN OVERVIEW OF CLIMATE LITIGATION IN BRAZIL

Brazil was the first country to sign the UN Framework Convention on Climate Change at the 1992 Earth Summit in Rio and commit to mitigating the effects of the climate crisis. It has made several efforts to develop a legal framework specifically for this purpose: it developed the National Policy on Climate Change (or PNMC, its acronym in Portuguese), Law no. 12,187 of 2009, and created the National Climate Change Fund, Law no. 12,114 of 2009.[21] It has extensive environmental legislation that could potentially be used as a basis for climate litigation, as well as constitutional guarantees on environmental protection – namely, article 225 of the Federal Constitution, which states that all have the right to an ecologically balanced environment.[22]

Within this context, climate litigation is becoming an extremely important means for forcing the state or third parties to comply with these standards. This adds another actor to the system of climate governance in Brazil, in addition to the executive and legislative branches: the judiciary.[23] Climate litigation could thus serve as a means to obtain redress not only for direct acts that negatively affect the climate but also for omissions by the state, like the failure to develop and implement climate adaptation and mitigation measures. However, in Brazil, as in much of the Global South, climate litigation, as understood by mainstream literature, is a recent phenomenon.[24] As a result,

[21] See, e.g., Paula Cerski Lavratti and Vanêsca Buzelato Prestes, 'Diagnóstico de Legislação: Identificação das Normas com Incidência em Mitigação e Adaptação às Mudanças Climáticas' (2009) Instituto Planeta Verde, <http://www.planetaverde.org/mudancasclimaticas/index.php?ling=por&cont=pesquisa&codpais=1>; see also Luciana Correia Gaspar Souze and Débora Sotto, 'A Lei de Mudanças Climáticas da Cidade de São Paulo: Aspectos Ambientais e Urbanísticos' (2012) 2 *Revista Direito Ambiental e Sociedade* 318.

[22] See generally Juliana Santilli, 'Os "novos" direitos socioambientais' (2006) VI, no. 9 *Revista Direito e Justiça* 173; see also Ingo Wolfgang Sarlet and Tiago Fensterseifer, 'Direito constitucional ambiental: Estudos sobre a constituição, os direitos fundamentais e a proteção do ambiental' (2011) 19 *Revista dos Tribunais* 297.

[23] See Vinicius Lameira, 'Mudanças climáticas: estratégias de litigância e o papel do judiciário no combate as causas e efeitos do aquecimento global no contexto brasileiro' (2017) 64 *Revista do Ministério Público do Rio de Janeiro* 197.

[24] See, e.g., Carmen G. Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (2015) 13 *Santa Clara Journal of International Law* 151; see also Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679; see also Joana Setzer and Lisa Benjamin,

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there is no well-established doctrine and case law on this subject in Brazilian law.[25]

Among the small number of Brazilian cases on climate change, the vast majority have been indirect, as they have addressed climate change as a peripheral issue and only a couple of cases have made it to the Brazilian Supreme Court (Supremo Tribunal Federal or STF), the highest court in the Brazilian justice system.[26] This only changed in 2020, when ADO 60 (Ação Direta de Inconstitucionalidade por Omissão no. 60) – the Climate Fund Case – on the suspension of the activities of the Climate Fund was submitted directly to the STF.[27]

Before 2020, one of the most important cases to be heard by the STF with indirect climate consequences was the 2012 Forest Code case, which ended in 2018. Since this case focused on the preservation of forest fragments and compensation for consolidated areas,[28] it involved carbon sinks and thus greenhouse gas emissions. The STF ruling that allowed sugarcane producers to burn their fields was also important, as it ignored the negative climate and environmental impacts that this practice generates.

The Superior Court of Justice (another important Brazilian court, known as STJ, its acronym in Portuguese) has seen a wider variety of cases that can be classified as climate litigation. Three precedents are worth highlighting. The first case,[29] presided over by Justice Herman Benjamin, dealt with a garbage dump and the illegal drainage of a mangrove forest. The ruling condemned the company responsible for the environmental damage, ordering it to remove the landfill and the buildings it had constructed in the mangrove area and

'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77.

[25] See generally Joana Setzer et al. (eds.) *Litigância climática: Novas fronteiras para o direito ambiental no Brasil* (São Paulo: Revista dos Tribunais, 2019); see also Caio Borges et al., 'Climate Change Litigation in Brazil', in Ivano Alogna et al. (eds.), *Climate Change Litigation: Global Perspectives* (in press).

[26] See Gabriel Wedy, 'Climate Legislation and Litigation in Brazil' (2017) Sabin Center for Climate Change Law, <https://climate.law.columbia.edu/sites/default/files/content/Wedy-2017-10-Climate-Legislation-and-Litigation-in-Brazil.pdf>; see also Setzer et al., *Litigância climática: Novas fronteiras para o direito ambiental no Brasil*, above note 25.

[27] See Alessandra Lehmen and Caio Borges, 'Climate Fund Case: Climate Litigation Reaches the Brazilian Supreme Court', Oxford Human Rights Hub, 24 July 2020, <https://ohrh.law.ox.ac.uk/climate-fund-case-climate-litigation-reaches-the-brazilian-supreme-court/>.

[28] In Brazilian rule, consolidated areas are rural property areas with pre-existing human occupation on 22 July 2008, with buildings, improvements or agricultural activities. See, e.g., Daíse de Felippe and Flávia Trentini, 'O conceito de área rural consolidada no código florestal de 2012: principais controvérsias' (2018) 4 *Revista de Direito Agrário e Agroambiental* 77.

[29] See *Public Prosecutor's Office* v. *H Carlos Schneider S/A Comércio e Indústria & Others*, Special Appeal no. 650.728/SC, Relator: Ministro Herman Benjamin, 2007 (Braz.).

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reforest the area in accordance with the specific characteristics of mangroves. In his argument, endorsed by the other judges, Justice Benjamin cited the important role that mangroves play in controlling climate change and sea level rise, one of their main ecological functions.

The second case[30] worth highlighting, which banned the use of fire to burn straw in sugarcane harvesting, contrasts with the aforementioned ruling by the STF. In this STJ ruling, Justice Humberto Martins references the release of carbon dioxide into the atmosphere in his recommendation. The third precedent[31] also uses climate-related arguments to oppose fires – which, in this case, were illegal – and justify the fine levied for the illegal use of fire, an administrative infraction. Justice Herman Benjamin explicitly mentions the climate change emergency in his recommendation. These precedents set by the STJ demonstrate the court's concern with climate change and indicates that a joint interpretation of Brazil's environmental laws, even on climate-related issues, is possible.[32]

The public civil actions (or ACPs, their acronym in Portuguese)[33] that address climate change are also noteworthy. In 2010, the Public Prosecutor's Office filed a series of ACPs against more than thirty airline companies operating out of the Guarulhos Airport, demanding that they, through reforestation, offset or compensate for the greenhouse gas emissions generated by the taking off and landing of airplanes. The basis for the request was the harm emissions inflict upon the atmosphere and the Brazilian Environmental Policy. In 2017, the São Paulo Public Prosecutor's Office launched an ACP against the São Paulo Environmental Agency (Companhia Ambiental do Estado de São Paulo or CETESB) in an effort to preserve coral reefs, given their important role in combating rising sea levels.

As illustrated in Figure 19.1, the main precedents and trends in climate litigation in Brazil can be classified according to the aforementioned schema. The public civil action involving the Guarulhos Airport was an example of direct climate litigation since the core demand in the case was the reduction

[30] See Interlocutory Appeal of the Motion for Clarification, Special Appeal no. 1.094.873/SP, Relator: Ministro Humberto Martins, 2009 (Braz.).

[31] See Special Appeal no. 1.000.731/RO, Relator: Ministro Herman Benjamin, 8 September 2010 (Braz.).

[32] See Joana Setzer et al., 'Panorama da Litigância Climática no Brasil e no Mundo', in Joana Setzer et al. (eds.), *Litigância climática: novas fronteiras para o direito ambiental no Brasil* (São Paulo: Revista dos Tribunais, 2019), pp. 59–86.

[33] In Brazil, ACPs are procedural instruments that protect diffuse, individual, and homogenous rights and that allow the public administration or any natural or legal person to be named as the defendant. However, only the Public Prosecutor's Office, Public Defender's Offices, and federal bodies can file them.

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of greenhouse gas emissions. This case, however, was the only direct climate litigation prior to 2020. Indirect cases comprise the rest of the case law; some of them are specific, like the cases brought before the STJ, while others are structural, like the lawsuits challenging the constitutionality of the Forest Code.

In 2019 and 2020, as global attention to climate change increased – thanks in part to the mobilizations of youth movements and the COVID-19 crisis – and as the issue continued to appear in courts around the world, climate litigation in Brazil began to further develop and increase in scope. On 5 June 2020, World Environment Day, the Brazilian Association of Members of the Public Prosecutor's Office for the Environment (Associação Brasileira dos Membros do Ministério Público de Meio Ambiente or Abrampa), four political parties, and two NGOs (Greenpeace and Instituto Socioambiental – ISA) launched three court actions challenging Brazil's current environmental policy, with consequences in the climate field.[34]

The first of the three recently launched actions is a public civil action filed by Abrampa, Greenpeace, and ISA against the federal government and the Brazilian Environmental Agency (IBAMA) at the Federal Court of Amazonas. The lawsuit contests IBAMA president Eduardo Bim's decision to permit the export of wood without government inspection – a decision that contradicted the recommendations of the institution's experts. This litigation can be considered indirect, as deforestation has major climate consequences since forests are natural and structural carbon reservoirs. The decision being contested, moreover, was valid for the entire country and is part of a trend in the government's overall environmental policy. In the initial petition, the authors explicitly mention climate change.

The two other cases are constitutional actions filed by four political parties at the STF against the federal government.[35] The first one[36] addresses the recent suspension of the activities of the Amazon Fund (Fundo Amazônia),[37] whose goal is to support projects that combat deforestation and promote the conservation and sustainable use of the Legal Amazon region. Given the

[34] See 'Três Ações Judiciais Colocam em Xeque Política Ambiental do Governo Bolsonaro', Observatório do Clima, 5 June 2020, <https://www.oc.eco.br/tres-acoes-judiciais-colocam-em-xeque-politica-ambiental-governo-bolsonaro/>.

[35] See 'Partidos Apontam Omissão da União na Paralisação de Fundos Destinados ao Meio Ambiente', Supremo Tribunal Federal, 10 June 2020, <https://www.oc.eco.br/tres-acoes-judiciais-colocam-em-xeque-politica-ambiental-governo-bolsonaro/>.

[36] See Ação Direta de Inconstitucionalidade por Omissão no. 59, 2020 (Braz.), <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5930766>.

[37] The current government has dismantled the Fund's structure by eliminating two bodies, the Technical Committee and the Guidance Committee. It also froze over 1.5 billion reals by not going ahead with new projects and interrupting all of the fund's activities.

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exponential increase in deforestation rates and the serious fires that occurred in 2019, the political parties are arguing that the federal government's decisions are unconstitutional by omission: the failure to make the Fund's resources for protecting the Amazon available constitutes a violation of the government's constitutional obligation to preserve and protect the environment (art. 225 of the Constitution). The political parties are asking the STF to order the federal government to take administrative measures to reactivate the Amazon Fund. This court action can be considered structural climate litigation, and it falls between direct and indirect. It is structural because it deals with one of the main funding mechanisms for Brazil's climate policy, the Amazon Fund. It can be classified as falling between direct and indirect because climatic balance is an indirect consequence of the protection of the Amazon, and yet, in a context of the climate emergency, the protection of the Amazon is also a specific mitigation measure.

The second case,[38] for its part, is a direct and structural court action related to climate change.[39] It can be categorized as such because it deals with the freezing of the Climate Fund (Fundo Clima), which, similar to the Amazon Fund, is part of the Brazilian system of climate governance. However, it focuses specifically on reducing greenhouse gas emissions and climate adaptation. At the beginning of his mandate, Environment Minister Ricardo Salles dissolved the Secretariat of Climate Change, which was responsible for administering the Climate Fund. In April 2019, President Bolsonaro issued a decree extinguishing the Fund's Steering Committee. The Fund's activities have since been suspended, which drove the political parties to file the case and demand the immediate reactivation of the Fund and the elaboration of a plan within a thirty-day period on the use of its resources, as well as a plan for the next two years.

Finally, on 11 November 2020, seven political parties brought another constitutional action before the Federal Supreme Court against the federal government and its bodies for their acts and omissions in executing the primary national deforestation policy, the Action Plan for Deforestation Prevention and Control in the Legal Amazon (PPCDAm). While the lawsuit was formally brought by political parties due to the procedural requirements of the legal pathway, its development has been led by a coalition of civil society

[38] See Ação Direta de Inconstitucionalidade por Omissão no. 60, Relator: Roberto Barroso, 2020 (Braz.).

[39] See Lehmen and Borges, 'Climate Fund Case: Climate Litigation reaches the Brazilian Supreme Court', above note 27.

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actors.[40] The lawsuit asserts that the government, through its inadequate implementation of PPCDAm and its failure to control deforestation in the Amazon, is significantly contributing to dangerous climate change. The plaintiffs also claim that the government has violated the fundamental rights of the populations living in the Amazon and throughout Brazil, particularly the rights of Indigenous peoples and traditional communities, as well as those of present and future generations.[41]

19.5 CLIMATE LITIGATION IN BRAZIL: THE CHALLENGES

Although climate litigation has been increasingly recognized in recent years as an effective tool for climate mitigation and adaptation, there are still many challenges associated with its development, especially in the Global South. The large majority of existing cases and academic literature on the subject are from the Global North, where not only the climate differs but so do economic and legal conditions. Furthermore, countries in the Global South tend to experience a greater lack of capacity within government agencies, civil society, and the judicial system when broadly compared to the Global North.[42]

In Brazil, the most common types of environmental cases relate to the protection of forests, fauna, and flora, animal protection, nature conservation, soil protection, natural resources, and sustainability. As a result, there is a theoretical-legal gap in the area of climate change, given that environmental law is the legal framework most frequently used and there are limitations to its capacity to handle specific issues in the field of climate change.[43] The debate on this subject is split between two different positions. Those who hold the first position believe that the best way to proceed is to raise the climate debate directly and talk specifically about climate change. Those who hold the second position prefer to use a more evasive strategy that involves addressing

[40] The civil society coalition includes: Artigo 19, Articulação dos Povos Indígenas do Brasil (Apib), Conectas Direitos Humanos, Conselho Nacional das Populações Extrativistas (CNS), Engajamundo, Greenpeace Brazil, Instituto Alana, Instituto Socioambiental (ISA), Observatório do Clima, and Associação Alternativa Terrazul.

[41] See 'Organisations take Brazilian government to the Supreme Court over deforestation and human rights abuses' (2020) Greenpeace, <https://www.greenpeace.org/international/press-release/45634/brazil-climate-litigation-deforestation-climate-human-rights/>.

[42] See Setzer and Benjamin, 'Climate litigation in the Global South: constraints and innovations', above note 24 at 77–101.

[43] See generally Mantelli et al., *Guia de Litigância Climática*, above note 20.

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the problem indirectly and using issues already dealt with under environmental law as the main grounds for the proceedings.[44]

As mentioned earlier, litigation strategies can be described according to two types of judicial-procedural arrangements: the scope of the case and the relationship with specific climate legislation. The scope may be structural or isolated. The relationship with climate legislation can be direct or indirect. Yet, although this opens a range of possibilities for litigation, this area is nonetheless limited in Brazil as a result of procedural issues and matters related to the legal system's organization. Problems arise, for example, from the fact that structural action requires greater efficiency within government branches and is more costly (primarily due to the costs related to the proceedings). Structural action also creates more obstacles in terms of proving the causal link, since the litigator must gather empirical evidence on compliance or non-compliance with national or sectoral policies. As for cases with a specific scope, they tend to be easier as they are related to specific, concrete cases that do not challenge institutional and political structures. This demonstrates one of the problems associated with the judicialization of climate issues in Brazil, which may help to explain why only one structural and direct court action has been filed in the country thus far.

Furthermore, other factors hindering the development of a culture of climate litigation in Brazil include the slowness of the courts, which also raises the costs of litigation, and the lack of knowledge and disinformation of judicial bodies and judges on the issue. In cases involving the private sector, there is additional difficulty in holding companies accountable, often due to the asymmetry in resources at the litigants' disposal as well as the corporate veil, which makes it difficult to hold corporations responsible.[45]

In short, the biggest challenges facing climate litigation in Brazil, especially if the litigation is direct, are the lack of interest on the part of the government in promoting, funding, and supporting climate-related issues (including research and studies), the current political and environmental crisis, and the way that the Brazilian judiciary functions and Brazilian legislation is structured, which allows environmental issues that are not specifically climate-related to prevail.

[44] Ana Maria de Oliveira Nusdeu, 'Política Climática Brasileira e Seu Potencial de Judicialização', Jota, 5 June 2019, <https://www.jota.info/opiniao-e-analise/artigos/politica-climatica-brasileira-e-seu-potencial-de-judicializacao-06052019>.

[45] See, e.g., Vinicius Lameira, 'Mudanças climáticas: estratégias de litigância e o papel do judiciário no combate as causas e efeitos do aquecimento global no contexto brasileiro' (2017) 64 *Revista do Ministério Público do Rio de Janeiro* 197.

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19.6 CONCLUSIONS AND POSSIBILITIES

Brazil does not yet have a paradigmatic case of climate litigation. To summarize, most of the cases that can be classified as relevant to climate change are generic environmental and/or human rights actions that address some climate issues. Key actors currently discussing climate litigation generally believe that it would be best and safer to start with easy and isolated lawsuits, given that certain legal hypotheses have not yet been fully tested. Brazil's judiciary does not yet seem particularly concerned with climate issues. Nevertheless, the debate on climate litigation in Brazil has emerged in recent years, led notably by academia.

Climate litigation strategy also needs to go beyond the traditional normative frameworks that use, for instance, only civil liability and environmental law. Opportunities to use non-environmental legislation in a creative way exist. For instance, it is possible to use legal frameworks that challenge the actions and omissions of public and private actors, such as those on public financing, public procurement, business law, civil legislation (in innovative sub-areas), and disaster law. More importantly, lawsuits should take into consideration the intersectionalities mentioned earlier in order to force the judiciary to address the conditions of affected communities and victims. Environmental and climate racism generates a great deal of injustice, and climate litigation could be an innovative tool to combat it.

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