

The awakening of climate litigation in Brazil: strategies based on the existing legal toolkit

O despertar da litigância climática no Brasil: estratégias a partir de ferramentas jurídicas existentes

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1. Introduction

George Bernard Shaw once said: “All great truths begin as blasphemies”. There is a quote with a similar idea attributed to the German philosopher Arthur Schopenhauer, according to which all truth passes through three

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stages: first, it is ridiculed; then it is violently opposed; and, finally, it is accepted as self-evident and becomes commonplace. It is no different with the law and the political and social advances that can be achieved through it. The law can be a powerful tool for forcing powerful systemic changes. Some examples are LGBTQIA+ rights, reproductive rights, rights related to gender and race, and also environmental rights.

Since the 1960's environmental movement, Environmental Law has been a testimony to the truth behind these quotes. The Environmental Law field has been successfully confronting most of the traditional legal tools that were inadequate to face contemporary society's challenges, especially the complexities and peculiarities of environmental – and now also climate – demands. The development of legal theses and tools for environmental protection often depends on the questioning and rupture of long-established legal structures. It is for this reason that Environmental Law has come to be considered a subversive area of law: it causes – and it must cause – real disruption. The same should be applied for climate change.

The climate emergency state imposes a new look at society's responsibilities in promoting climate justice. While socio-environmental burdens related to climate risks and actual harm have been neglected and externalized to society as a whole, especially to vulnerable social groups, bonuses are concentrated in the hands of those who produce these same risks and harm. In such scenario, the legal system must be reinterpreted and updated so it can be applied efficiently to environmental and climate-related problems.

According to the Grantham Research Institute on Climate Change and the Environment¹ policy report² at least 1,587 cases have been filed around the world between 1986 and the end of May 2020 calling on the responsibility of governments and private companies for the climate crises we are already living in. These cases are primarily concentrated in the USA (76%), but the other cases (374) are distributed in 36 other countries and eight regional or international jurisdictions³. The report highlights an interesting aspect of the recent involvement of the global South in this movement, which has a concentration of 37 cases of climate litigation. More than half

1 The Grantham Research Institute on Climate Change and the Environment is hosted by the London School of Economics and Political Science (LSE): <https://www.lse.ac.uk/granthaminstitute/>.

2 SETZER; BYRNES, 2020.

3 UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP), 2020.

of these cases (21) were brought in the last six years. Similar numbers were found in the United Nations Environmental Programme (UNEP) report⁴.

Until the end of May 2020, 14 cases were identified in Latin America, six of them in Brazil⁵. At least four of the first cases identified by the Climate Change Laws of the World (CCLW) database⁶ were typical environmental cases, only touching the climate issue in a peripheral and incidental way⁷. Only two cases were predominantly grounded on climate legislation and are still pending decisions: The first is São Paulo Public Prosecutor's Office vs. United Airlines and Others, seeking the reforestation of lands around an airport in the State of São Paulo (Guarulhos) to offset greenhouse gas emissions and other pollutants. The second one is Federal Environmental Agency (IBAMA) vs. Siderúrgica São Luiz Ltd. and Martins, an attempt to hold a steel company and its manager liable for climate environmental damage (promoting unlawful deforestation and greenhouse gases derived from the illegally sourced coal). According to Rodríguez-Garavito this Southern route to climate litigation is not by chance, it is in fact a route whose tracks were firmly laid over through public interest law practice, research, and judicial activism regarding constitutional rights in general and socioeconomic rights (SERs) for the past three decades⁸.

However, 2020 seems to be the beginning of the era in which we began to testify the awakening of a significant and potentially powerful movement for litigating the climate crisis effectively. At the time this paper was written⁹, the CCLW database registers eleven climate litigation cases in Brazil and the Sabin Center Climate Change Litigation Databases of Columbia University¹⁰ registers ten. These numbers reflect the Brazilian scenario for the year 2020, when five impactful new cases were filed, all predomi-

4 RODRÍGUEZ-GARAVITO, 2020.

5 SETZER; BYRNES, 2020, pp. 5-6.

6 Climate Change Laws of the World (CCLW) database is an open access, searchable database created and maintained by the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science (LSE). Available at: <https://climate-laws.org/cclow>.

7 "An example of a court case where climate change is at the periphery is a decision rendered by the Brazilian Superior Court of Justice to prohibit the use of fire as a harvesting method for sugar cane. The Court considered, among other environmental impacts, the negative effects of carbon emissions" (SETZER; BYRNES, 2020, p. 13).

8 RODRÍGUEZ-GARAVITO, 2020.

9 Final draft finalized in March 2021.

10 Available at: <http://climatecasechart.com/>.

nantly centered in climate change law¹¹. More climate cases are expected to be filed, as Brazil is also home to relevant domestic climate change laws and policies, including a national Climate Act (Law 12,187/2009), and all states and the federal district have climate change laws, some more robust such as state climate policies, others being regarded as soft law¹².

Nevertheless, neither climate litigation cases nor specific laws on the subject are the focus of this article. It aims to briefly explore part of the existing legal toolkit – of legislation case law, and doctrine – that is already consolidated in the Environmental Law field and should be explored for litigating the climate crisis in Brazil. By doing this, we intend to show two things: first, that climate litigation is not dissociated from environmental litigation, and the successes of 40 years of development of environmental litigation can serve as a “shortcut” to climate litigation; second, the reasons why some, including the authors of this article, believe Brazil is a fertile ground for climate-related cases.

2. Climate litigation as part of environmental litigation

Environmental litigation has fought “organized irresponsibility”¹³ in the

11 The five new cases we have mentioned, filed in 2020, are: (i) Amazonas Federal Public Prosecutor’s Office vs. Federal Union, Ibama, ICMBio and Funai (ACP 1007104-63.2020.4.01.3200), in which Public Prosecutors request that such Federal Agencies promote articulated measures to stop illicit activities (land-grabbing, illegal mining and illegal logging) in ten hot spots of deforestation in the Amazon; (ii) Instituto Socioambiental, Abrampa & Greenpeace Brasil vs. Ibama and the Federal Union (ACP 1009665-60.2020.4.01.3200), in which plaintiffs request the court to declare null and void the decision of the president of the federal environmental agency that allowed the export of native wood without government oversight; (iii) PSB et al. vs. Federal Union (ADO 59/DF, 2020), in which political parties request the Federal Supreme Court to compel the Ministry of the Environment to resume the activities of the Amazon Fund; (iv) PSB et al. vs. Federal Union (ADO 60/DF, 2020, admitted as ADPF 708/DF, 2020), in which four political parties request the Federal Supreme Court to compel the Ministry of the Environment to resume the activities of the Climate Fund; and (v) PSB et al. vs. Federal Union (ADPF 760/DF, 2020), in which seven political parties in Brazil argue that by failing to implement Brazil’s Action Plan for Prevention and Control of the Legal Amazon Deforestation (PPCDAm), the federal government violated the fundamental rights of indigenous peoples and present and future generations.

12 MOREIRA, 2021.

13 “For it [organized irresponsibility] is precisely the other way around: it is the application of prevalent norms that guarantees the non-attributability of systemic hazards; hazards are writ small as risks, compared away and legally and scientifically normalized into improbable ‘residual risks’, making possible the stigmatization of protest as outbreaks of ‘irrationality’. Those who uphold maximum pollution levels turn white into black, danger into normality, by act of government. Whoever waves the banners of rigorous causal proof while demanding that the injured parties do the same, not only demands the unachievable, as science has meanwhile

“risk society” over the last 40 years, seeking to reformulate the “prevailing relations of definition”¹⁴, based on risks typical of the industrial society, incompatible with the complexity of environmental (and climate) issues. The normative structures must be able to guarantee control, prevention, mitigation, and repair of impacts and damage arising from multiple causes, dissolved in a multiplicity of actors and conditions¹⁵.

The legal system needs to be continuously updated to face the challenges of the modern world. There is a theory that characterizes public policy problems that present special features, such as “enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution”, as “wicked problems”¹⁶. Climate change has been fairly described as a “super wicked problem” due to its even further exacerbating features¹⁷. The available legal instruments need to be updated, adapted, and improved to handle the challenge that the climate change crisis poses to us.

The challenges to develop and implement climate-related laws and policies highlight the litigation potential to address climate change and its impacts. But the comprehensive issues that climate change engages call for connection and dialogue between policies and norms related to sustainable development and environmental protection in general. Such policies and norms already exist and are ready to be put into practice under this new perspective.

adequately confirmed, but thereby also holds aloft a shining shield to keep rising, collectively conditioned hazards out of the reach of politics or attribution to individuals” (BECK, 1995, p. 64). “The law suppresses the justice it was supposed to establish. Through a series of legal and procedural technicalities, the lawyer becomes technology’s legal adviser. The greater the hazard to basic individual rights, the less the legal protection” (BECK, 1995, p. 68).

14 “The density of legislation and of official controls, public, industrial and private expenditure on environmental protection – these are all on the increase, as are the recorded pollution levels and the lists of dying plant and animal species. The reason lies in the stability of the relations of definition, which emerged in the age of individual culpability principle. In the present age of worldwide traffic in toxic and harmful substances, the relations of definition turn the legal system into an accomplice of ubiquitous pollution, which cannot in principle be proved to stem from an individual” (BECK, 1995, p. 134). “With ‘relations of definitions’, I refer to the resources and power of agents (experts, states, industries, national and industrial organizations), the standards, rules and capacities that determine the social construction and assessment of what is a global risk and what is not. Among these are the politics of invisibility, the standards of proof, and the standards of compensation. To what extent can imperceptible risks (such as nuclear radiation and climate change) be made publicly invisible and unobservable? To what extent does the politics of invisibility produce a situation of not knowing the existential risk?” (BECK, 2016, p. 98).

15 BECK, 1995; BECK, 2016.

16 LAZARUS, 2009, p. 1159.

17 LAZARUS, 2009, p. 1159.

3. Why the ground of climate litigation in Brazil is fertile?

Brazil has a robust legal system applicable to environmental (and climate) issues. The Brazilian Constitution (1988), influenced by the Stockholm Declaration of 1972, provides for a collective right to an “ecologically balanced environment” as a third-generation human right¹⁸. Such human right goes beyond its individual dimension, having also a collective dimension^{19,20}. The environment is this “the set of conditions, laws, influences and interactions of a physical, chemical and biological order, which allows, shelters and governs life in all its forms”²¹. A balanced environment,

18 Since 1995, the Brazilian Supreme Court has understood that “[...] the right to the integrity of the environment constitutes a legal prerogative of collective ownership, reflecting, within the process of affirming human rights, the significant expression of a power attributed not to the individual identified in his uniqueness, but in a more comprehensive sense, to the social collectivity itself” (STF Plenary. MS 22.164-0/São Paulo. Reporting Justice Celso de Mello. 17 November 1995). More recently, the Inter-American Court of Human Rights established, in Advisory Opinion OC-23/17, that the right to a healthy environment is “a universal interest” and “a fundamental right for the existence of humanity” and that States must “protect nature”, not only for its “utility” or “effects” on human beings, but “also for its importance for other living organisms with which the planet is shared” (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2017).

19 An important thesis upheld by Minister Edson Fachin on the trial of ADC 42/DF (STF Plenary. ADC 42/Distrito Federal. Reporting Justice Luiz Fux. 28 February 2018) is the existence of “an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights”. This is a reference to an excerpt from Advisory Opinion OC-23/17, issued by the Inter-American Court on 11.15.2017, in response to a request from the Republic of Colombia (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2017).

20 “The human right to a healthy environment has been understood as a right that has both individual and collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind. (...) Thus, the right to a healthy environment as an autonomous right differs from the environmental content that arises from the protection of other rights, such as the right to life or the right to personal integrity. (...) Nevertheless, some human rights are more susceptible than others to certain types of environmental damage (supra paras. 47 to 55). The rights especially linked to the environment have been classified into two groups: (i) rights whose enjoyment is particularly vulnerable to environmental degradation, also identified as substantive rights (for example, the rights to life, personal integrity, health or property), and (ii) rights whose exercise supports better environmental policymaking, also identified as procedural rights (such as the rights to freedom of expression and association, to information, to participation in decision-making, and to an effective remedy) (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2017).

21 Law 6,938/1981, article 3, I.

as a fundamental right, is considered a “common use of the people and essential to the healthy quality of life” of present and future generations²². Within this broad concept, is included the atmosphere and the climatic system. Therefore, traditional legal concepts of Environmental Law must be interpreted considering the climate as naturally inserted in it, allowing to treat the right to a stable climate as inherent in or at least associated with the right to a healthy environment.

The Brazilian Constitution also sets forth a duty of the collectivity and the government to guarantee conditions to a healthy quality of life. This right/duty of the people to a balanced environment expressly reaches future generations, to which the present ones have duties and bonds of solidarity²³. The Constitution prescribes three different and independent types of environmental liability: civil, administrative, and criminal. In the same way as the obligation to repair the environmental harm²⁴, duties related to environmental permits also have constitutional grounds in Brazil.

It is also important to mention the polluter-pays principle (“who pays the bill?”). In response to the unequal scenario where costs are socialized and profits privatized, the polluter-pays principle imposes the duty to internalize negative externalities. In other words, the polluter (even the potential polluter) has to bear the costs and measures to prevent and to repair environmental harm arising directly or indirectly from its activities^{25,26,27}. This goal of promoting distributive environmental and climate justice²⁸

22 Federal Constitution, article 225, caput; Law 6,938/1981, articles 2, I, e 3, I; Decree 2,652/1998, article 1, III; MOREIRA, 2021.

23 1988 Brazilian Federal Constitution, article 225: “Everyone has the right to an ecologically balanced environment, which is an asset for the collective use by the people and is essential to a healthy quality of life, it being the duty of the Government and the community to defend and preserve it for present and future generations”.

24 1988 Brazilian Federal Constitution, article 225, paragraph 3: “conducts and activities deemed to be harmful to the environment shall subject the offender, whether a natural or a legal person, to criminal and administrative penalties, regardless of the obligation to repair the damage”.

25 MOREIRA; LIMA; MOREIRA, 2019.

26 On the importance of the polluter-pays principle, see STF Plenary. RE 654.833/Acre. Reporting Justice Alexandre de Moraes. 24 June 2020.

27 According to the Brazilian Superior Court of Justice “the polluter must bear the costs of prevention, repression and repair of pollution (...) imposing on the economic agents the internalization of costs external to the dynamics of investments involved in their private activity, avoiding the ‘privatization of profits and socialization of losses’” (STJ. 3rd Panel. REsp 1.612.887/Paraná. Reporting Justice Nancy Andrichi. 7 May 2020).

28 About the “redistributive function of environmental law”, Justice Antonio Herman Benjamin

may be achieved with the help of at least two legal tools that have already been tested in the Brazilian courts, and that can be applied as part of a climate litigation strategy: (i) environmental licensing procedures, and (ii) the civil environmental liability regime.

3.1 Licensing and environmental impact assessments as powerful tools for fighting the climate crisis

The Brazilian National Environmental Policy Act (Law 6,938/1981)²⁹ and the Federal Constitution (1988)³⁰, based on the experience of the United States' National Environmental Policy Act (NEPA), created a system of environmental permits, licensing procedures and its related environmental impact assessment studies as its primary preventive instrument³¹.

The main goal is to assess all environmental impacts (direct and indirect; short, medium, and long term; temporary and permanent; with cumulative and/or synergistic effects) previous to potentially polluting activities³². Accordingly, after assessing the environmental viability of a par-

points out: "I should begin with possibly the most fundamental and controversial aspect of this debate: environmental protection redistributes ecological value, and by doing so, redistributes economic value as well and reorganizes property rights. This is the redistributive function of environmental law. Think about how the equation of negative environmental externalities is reversed when statutes and courts begin to require a polluter to install emissions control equipment [...]" (BENJAMIN, 2012, pp. 586-587).

29 Article 9, III, and IV, sets forth the assessment of environmental impacts and the licensing and review of effective or potentially polluting activities as some of the instruments of the National Environment Policy Act. According to article 10: "The construction, installation, expansion, and operation of establishments and activities that use environmental resources, effectively or potentially polluting or capable, in any form, of causing environmental degradation will depend on prior environmental licensing."

30 1988 Brazilian Federal Constitution, article 225, paragraph 1, IV: "In order to ensure the effectiveness of this right [to an ecologically balanced environment], it is incumbent upon the Government to: (...) IV – demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public".

31 BRYNER, 2012.

32 The Brazilian National Environmental Policy Act (PNMA) defines (article 3) in broad terms what is understood by "environment", "degradation of environmental quality", "pollution" ("the degradation of environmental quality resulting from activities that directly or indirectly: a) harm the health, safety and well-being of the population; b) create adverse conditions for social and economic activities; c) adversely affect the biota; and d) affect the aesthetic or sanitary conditions of the environment"), and "polluter". It has also created a National Environment Council (CONAMA), to which was given strong regulatory powers. CONAMA's Resolution 1/86 broadly defines

ticular project, measures to avoid, mitigate, and compensate the adverse impacts must be imposed.

An environmental impact assessment (EIA) is required to take greenhouse gases (GHG) into account because GHG are – as all evidence seems to show – sources of adverse environmental impacts³³. Taking GHG's emissions into account means to address them in one of the following ways: they must be avoided, mitigated, or compensated. Thus, an activity that emits (direct polluter) or is a cause of emission (indirect polluter) of substantial volumes of GHG should be required to, as said, avoid, mitigate, or compensate such emissions.

This idea of including the climate variable in the environmental licensing procedures should not be seen as improper or ungrounded. In view of the provision for a comprehensive assessment of environmental impacts provided by federal law, some Brazilian states³⁴ already expressly foresee, in their environmental licensing or climate rules, the need for incorporating climate impacts in licensing procedures and assessments³⁵.

environmental impacts (article 1 – “is considered any change physical, chemical and biological properties of the environment, caused by any form of matter or energy resulting from human activities that directly or indirectly affect: I – the health, safety and well-being of the population; II – social and economic activities; III – the biota; IV – the aesthetic and sanitary conditions of the environment; and V – the quality of environmental resources”) and provides a representative list of activities that are to be subject to environmental licensing with the previous preparation of a complete environmental impact assessment (EIA). When mentioning the EIA, CONAMA's Resolution 1/86 article 6 sets forth the minimum technical elements of and EIA and (i) explicitly includes the climate among what should be contemplated on the physical environment analysis; and (ii) defines comprehensively which impacts should be taken into account. Article 6, II, establishes that “analysis of the environmental impacts of the project and its alternatives, through identification, prediction of the magnitude and interpretation of the importance of the likely relevant impacts, discriminating: the positive and negative impacts (beneficial and adverse), direct and indirect, immediate and in the medium and long term, temporary and permanent; its degree of reversibility; its cumulative and synergistic properties; the distribution of social burdens and benefits”. Another relevant resolution from CONAMA is Resolution 237/97, which defines, in article 1, some key concepts such as environmental licensing procedure, environmental license, environmental assessments. Article 2 establishes which activities must be subject to environmental licensing, and article 3 establishes what triggers an EIA. In the following articles, the rules for attribution of each federative entity to act, the types of license, and the procedure rite.

33 For more on this relevant issue, but not the focus of this article, see the American court cases *Massachusetts vs. EPA*, 549 U.S. 497 (2007), and *Coalition for Responsible Regulation vs. EPA*, 684 F3d 102 (D.C. Circ. 2012).

34 These States, together with the Federal Union, are: Amazonas, Bahia, Ceará, Espírito Santo, Goiás, Maranhão, Mato Grosso, Mato Grosso do Sul, Pará, Paraná, Pernambuco, Rio de Janeiro, Rio Grande do Sul, Rondônia, Santa Catarina, São Paulo, and Tocantins.

35 For more information on the status of the insertion of the climate variable in environmental licensing in Brazil, see MOREIRA, 2021.

3.2 Civil environmental liability regime

The other tool mentioned above is civil environmental liability, which is understood from a comprehensive perspective. In addition to its specific function of promoting reparation and compensation for damages, it has also a preventative role. It induces standards of care so that the harm does not occur in the first place.

Some of the peculiarities of the Brazilian civil environmental liability regime that play in favor of climate litigation are the following:

- (i) Strict liability³⁶: this is applied regardless of fault on the part of the (direct or indirect) polluter. In other words, liability is imposed regardless of an intent to cause harm or a breach of a duty to exercise reasonable care³⁷. For civil liability to be applied, the following elements will suffice: (1) environmental damage, (2) conduct (an act or an omission), and (3) causation;
- (ii) Full risk liability (“*risco integral*”): Brazilian scholars and the Superior Court of Justice widely accept the concept of the so-called “full risk liability”³⁸. According to this theory, typical defenses based on intervening causes (such as third-party conduct or acts of God, whether or not foreseeable) are not admitted. Whoever creates a risk of damage to the environment and third parties, due to its mere existence, may be held liable if such damage occurs;
- (iii) Far-reaching concept of causation (“indirect polluter”)³⁹: the notion of causation must be built with reference to the legal definition of polluter. Under the Brazilian National Policy Act, the polluter is the party directly or

36 Law 6,938/1981 (Brazilian National Environmental Policy Act), article 14, paragraph 1: “(...) the polluter is obliged to, regardless of fault, indemnify or recover the damages caused to the environment and to third parties affected by its activity”.

37 Brazilian Civil Code, article 927, sole paragraph: “Obligation to repair the damage shall be imposed, regardless of fault, either when established by law, or when the activity normally carried out creates, by its own nature, risk to others’ rights”.

38 Since 2014, the Brazilian Superior Court of Justice publishes a so-called “*Jurisprudência em teses*” where it presents in a consolidated way several court precedents on specific topics, chosen according to their relevance in the legal field. In 2015 one of the consolidated precedents published was: “The liability for environmental damage is strict. It is informed by the full risk liability, and the causal link is the binding factor that allows the risk to be integrated into the unit of the act, being unreasonable to invoke, by the company responsible for environmental damage, exclusions from civil liability to remove their obligation to indemnify” (*Jurisprudência em Teses*, STJ, ed. 30).

39 Law 6,938/1981, article 3, IV: Polluter is “The natural or legal, public or private person, directly or indirectly responsible for an activity that causes environmental degradation”.

indirectly responsible for an activity that causes environmental degradation. According to the Superior Court of Justice, anyone who falls within a vast array of conditions may be held liable, including, for example, those who finance or benefit from others' activities⁴⁰;

(iv) Joint and several liability⁴¹: anyone who directly or indirectly causes environmental damage (polluter) may be held liable, not only strictly, but also jointly and severally. This understanding has two main grounds: (a) the comprehensive legal definition of polluter; and (b) the Brazilian Civil Code, according to which joint and several liability is to be applied whenever several parties (polluters) have caused harm (environmental damage)⁴²;

(v) A broad concept of environmental damage⁴³: the reparation (or compensation) of the environmental damage must cover not only the ecological damage per se, but also related cultural, social, and economic aspects;

(vi) Comprehensive damage repair ("*reparação integral*")^{44, 45}: the reparation of the environmental damage must be "complete", comprehending individual and collective harm, including material and moral damages (the latter often

40 Brazilian Superior Court of Justice on causation: "to determine the cause of an urban-environmental damage and hold codefendants jointly and severally liable, the following persons must be treated equally: whoever acts; whoever fails to act when should have acted; whoever is indifferent to others' actions; whoever remains in silence when they should have denounced; whoever finances others' actions; and whoever enjoys benefits from others' actions" (STJ. 2nd Panel. REsp 1.071.741/São Paulo. Reporting Justice Herman Benjamin. 24 March 2009).

41 Law 6,938/1981, article 3, IV: Polluter is "the natural or legal person, public or private, directly or indirectly responsible for any activity that causes environmental degradation".

42 Brazilian Civil Code, article 942: "(...) if there is more than one offender, all of them shall be jointly and severally liable for reparation".

43 Law 6,938/1981, article 3, III. Legal definition of pollution: "III – pollution, the degradation of the environmental quality resulting from activities that directly or indirectly:

a) harm the health, safety and well-being of the population; b) create adverse conditions for social and economic activities; c) adversely affect the biota; d) affect the aesthetic or sanitary conditions of the environment; e) discharges of materials or energy in disagreement with established environmental standards".

44 Brazilian Superior Court of Justice "[...] the environmental damage is multifaceted (ethically, temporally, ecologically and financially speaking, sensitive to the diversity of the vast universe of victims, ranging from the isolated individual to the community, to future generations and to the ecological processes themselves considered)" (STJ. 2nd Panel. REsp 1.198.727/Minas Gerais. Reporting Justice Herman Benjamin, 09 May 2013).

45 Brazilian Superior Court of Justice: "It is the settled case-law of this Court that a single environmental damage can affect both the individual and collective moral dimensions, causing the polluter to be held liable in both cases, as environmental reparation must be carried out in the most complete manner possible" (STJ. 4th Panel. REsp 1.175.907/Minas Gerais. Reporting Justice Luis Felipe Salomão. 19 August 2014).

associated with punitive damages), interim damage (for the time required for full environmental recovery) and the residual damage (degradation that persists despite remedial measures). Additionally, it is possible to argue for the obligation to return illicit ecological “added value” (reimbursement of economic profits obtained from the degrading activity – disgorgement of profits); (vii) Shifting the burden of proof⁴⁶: the Superior Court of Justice has set forth that the shifting of the burden of proof is a binding rule applicable to all civil lawsuits involving environmental damage. Defendants should bear the burden of proving that either (a) there is no harm or (b) they are not (directly or indirectly) responsible for the damage.

(viii) No statutory limitation period for civil reparation of environmental damage claims^{47, 48}.

In addition to the traits listed above, the rules on access to justice and defense of “diffuse rights”⁴⁹ in Brazil confer standing to a wide range of parties to file environmental cases. The Public Civil Action Act (Law 7,347/1985) created a cause of action under which public prosecutors and civil society organizations, among others, could bring civil lawsuits involving collective and diffuse interests. Although not focused only on environmental concerns, the act greatly expanded the public and prosecutors’ ability to demand that private parties and government agencies comply with environment-related laws, in which climate issues are included⁵⁰.

46 Brazilian Superior Court of Justice binding rule, approved on 24 October 2018, Súmula 618: “The shift of the burden of proof applies to actions of environmental degradation”.

47 In 2019 one of the consolidated precedents (“*Jurisprudência em teses*”) published was: “There is no statute of limitations for claims seeking reparation of damages to the environment” (*Jurisprudência em teses*, STJ, ed. 119).

48 Brazilian Supreme Court ruled that in claims for civil reparation of environmental damage there is no statutory limitation period (STF Plenary. RE 654.833/Acre. Reporting Justice Alexandre de Moraes. 24 June 2020).

49 According to the Brazilian Consumer Defense Code (Law 8,078/1990), “Art. 81. The defense of the victims’ best interests and rights can be exercised in court individually or collectively. Sole paragraph. Collective defense will be used when the case includes: I - interests or diffuse rights, in other words, in the scope of this Code, trans-individual rights of an indivisible nature in which the parties involved are indeterminate persons connected by circumstances of fate; II - collective interests or rights, in other words, in the scope of this Code, trans-individual rights of an indivisible nature, in which the involved party is a group, category or class of people connected amongst each other or with the defending party through a legal relationship; III - homogeneous individual interests or rights, so understood as those resulting from a common origin”.

50 BRYNER, 2012.

4. Conclusion

Concepts of environment, environmental degradation, and pollution encompass the climate perspective in its various dimensions. Successes already achieved over the 40 years of development of Environmental Law can help boost climate litigation in Brazil.

Both tools presented here – environmental licensing procedure and civil environmental liability – can be brought before national courts as strong legal arguments for climate litigation. They structure and articulate already established and successfully tested legal avenues for preventing, mitigating, and compensating adverse environmental impacts (including those related to climate change) caused by the private sector or by the State.

We believe that Brazil already has a powerful legal toolkit to litigate climate cases meaningfully. Like the frame of a pair of glasses in which only the lenses are changed when the myopia increases, the legal framework that underpins environmental licensing and civil environmental liability in Brazil needs to receive the “lenses” of climate change in order to be transformed into an effective climate litigation tool. This possibility is within our means, necessary, and already starting to become a reality.

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Autoras convidadas.

ABSTRACT: This paper aims to explore part of the existing legal toolkit – of legislation, case law, and doctrine – that is already consolidated in the Environmental Law field and should be explored for litigating the climate crisis in Brazil. The article makes the case that Brazil is a fertile ground for climate litigation by articulating already established and successfully tested legal avenues for preventing, mitigating, and compensating adverse environmental impacts caused by the private sector or by the State, and that can be brought before national courts as strong legal arguments. Like a frame of glasses, the legal framework that underpins environmental licensing and civil environmental liability in Brazil needs to receive the “lenses” of climate change in order to be transformed into an effective climate litigation tool.

Keywords: environment, climate crisis, climate litigation, environmental licensing, civil environmental liability, toolkit.

RESUMO: Este artigo tem como objetivo explorar parte do conjunto de ferramentas jurídicas existente – jurisprudencial, legislativa e doutrinária – que já está consolidado no campo do Direito Ambiental e deve ser explorado para litigar a crise climática no Brasil. O artigo defende que o Brasil é um terreno fértil para litígios climáticos ao articular vias legais já testadas com sucesso para prevenir, mitigar e compensar impactos ambientais adversos causados tanto pelo setor privado, quanto pelo Estado, e que podem ser apresentados aos tribunais nacionais como fortes argumentos jurídicos. Como uma armação de óculos, o arcabouço jurídico que fundamenta o licenciamento ambiental e a responsabilidade civil ambiental no Brasil precisa receber as “lentes” das mudanças climáticas para se transformar em um instrumento eficaz de litígio climático.

Palavras-chave: meio ambiente; crise climática; litígio climático; licenciamento ambiental; responsabilidade civil ambiental; kit de ferramentas.

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