

BRAZIL IS ENTERING ITS DECADE OF WATERSHED CASELAWS ON CLIMATE ACTION AND INTER-LEGALITY CAN PLAY A KEY ROLE IN IT

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The current Brazilian Federal Government, which began in January 2019, has been dismantling the structure for the protection of the environment that has been put together in the past twenty years, by freezing national funds, firing the personnel responsible for the surveillance of protected forest areas and by speaking in favor (therefore incentivizing) the reduction of indigenous land and protected areas. In this context, different lawsuits have been filed before the Federal Supreme Court, aiming at *i*) impeding further dismantling of national structures; *ii*) restoring federal efforts towards preserving the environment and *iii*) recognizing the *conditioning* of Brazil's environmental public policies to its commitments on the matter at the global level.

So far, ten major lawsuits¹ were filed against deleterious actions and omissions of the Federal Government, eight of which before the Federal Supreme Court, and two other before Federal Courts in the States of Amazonas² and Paraná³. Symbolically speaking, lawsuits were filled in the North, the South and in the Center regions of Brazil.

Two of the eight lawsuits filed in the Federal Supreme Court by different political parties are, for theoretical reasons, the ones that interest us the most from the perspective of inter-legality. They are the ADPF n° 708, filed on June 30th 2020 and the ADPF n° 760, filed on November 12th 2020.

ADPF means, literally, “Arguing for transgression of a fundamental provision” and it is the procedural tool to be used, in absence of a specific type of action, in order to avoid and/or repair the violation of fundamental rights provisions of the Brazilian Constitution⁴. Both ADPFs

¹ A chart with all Federal Supreme Court's lawsuits is available at the end of this post.

² Available at <<<http://www.mpf.mp.br/am/sala-de-imprensa/docs/acp-principal-hotpots-desmatamento-amazonia>>> Last seen on January 15th, 2021.

³ Available at <<http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201008_12742_complaint.pdf>> Last seen on January 15th, 2021.

⁴ Brazilian Constitution, article 102, paragraph 1. Law n° 9.882/1999.

were filed by a coalition of political parties and they both seek to repair the damages already done and to avoid further damages by the Federal Government, whom did not abide by the existing normative framework on matters of environmental protection from deforestation and mitigation of the effects of climate change.

The ADPF n° 708, seeks to declare the Government's omission to release the "Climate Fund" as unconstitutional, for it has so far strangled any activity that might mitigate the harms of climate change. The ADPF n° 760, in turn, seeks a writ to command the Government to fulfill its duty to apply the "Action Plan for Prevention and Controlling of Amazon Deforestation" (PPCDAm), for it has not been employed in the past two years, thereby blocking all national measures aimed at preventing deforestation of the Amazon forest.

Both lawsuits go beyond the invocation of the relevant national normative framework and argue that, when it comes to deforestation prevention and climate change mitigation, Brazil has a commitment not only to itself, under Article 225 of the Constitution, but also with (and to) the international sphere. In order to do so, the plaintiffs invoked *i*) the Paris Agreement; *ii*) the United Nations' Sustainable Development Goals; *iii*) the UN's Conference on Environment and Development (UNCED) output, known as the "Rio Declaration on Environment and Development" of 1992; *iv*) the UN's Framework Convention on Climate Change and the UN's Intergovernmental Panel on Climate Change and; *v*) the UN's Convention on the Rights of the Child.

The plaintiffs argue that the current Federal Government's actions and omissions, which are not only blatantly harmful to the environment immediately situated on the Brazilian territory but also deleterious beyond national borders for they accelerate climate change. As a consequence, it is argued, they are not only precluded by the domestic law but also by international law. That is, the Federal Government's (in)actions violate both the national and international normative frameworks. This is precisely where the composite character of the normativity of the cases comes to light.

Said "composite character" images the entanglement of the national and international legal spheres, which, in the present cases, is being argued by the plaintiffs through, on the one hand, the weaving of the preservation of the forest and the mitigating of climate change as *sine qua non* conditions to guarantee the fundamental rights (for example, of the next generation of

children, indigenous people and the ecologically balanced environment) under the Brazilian Constitution, and on the other, the fulfilment of the country's international commitments and the conditioning that these – i.e. the commitments – play within the domestic sphere. That is, the *conditioning* of the domestic legality (the normative production and the public policies pursued) by the extra-State legality, for the latter serves in various ways as a parameter for the establishing (and concretization) of the former. This means the two mentioned cases may become a landmark for the interpreting of constitutional environmental related provisions in light of international environmental law. For both environmental domestic and international law are connected.

This is the inter-legality perspective, that is, “the overlapping among regimes and orders as a consequence of interconnectedness”⁵, that ought to play a key role in the adjudication of the cases at issue. Especially because, the interconnectedness here at stake is not only normative, but also factual, since international environmental laws and agreements state not only rules, but also (scientific) facts on the current health state of the Earth.

So far, there has not been any definitive ruling in any of the Federal Supreme Court cases. Only minor procedural decisions, preliminary injunctions and the conduction of public hearings (on the ADO n° 59⁶ and ADPFs n° 708) were released. On the latter, when determining the realization of the public hearing, Justice Barroso highlighted the importance of the case at hand by mentioning two rulings of the Inter-American Court of Human Rights⁷ and by somewhat reckoning the need to take into account international environmental law, which may indicate an openness of the Brazilian Supreme Court to further recognize the overlapping of regimes and orders in play.

The seven cases filed before the Federal Supreme Court, with especial attention to the two mentioned above, will be the ones to set the tone for the future climate change lawsuits in the decade that has just began. The present cases might therefore represent a watershed on environmental protection in Brazil and, depending on their outcomes, have a positive, albeit small,

⁵ PALOMBELLA, G. *Theory, Realities, and Promises of Inter-Legality: A Manifest*. In: KLABBER, Jan; PALOMBELLA, Gianluigi. *The Challenge of Inter-legality*. Cambridge University Press. 2019. p. 368

⁶ See the charter by the end of the post.

⁷ The cases mentioned were *Advisory Opinion OC-23/17*, which established a healthy environment as a fundamental right for the development of mankind, and *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, which recognized the duty of States to prevent the environment from harm, in order to grant to all access to secure food and water.

impact on the tackling of global climate change. And the inter-legality perspective can play a key role in their outcomes.

LAWSUIT	DATE	AT ISSUE
ADPF 592 ⁸	14/06/2019	The annulment of the procedures that have practically extinguished civil penalties and administrative fines for the deforestation of protected areas, created through presidential decree (n° 9.760/19).
ADO 54	23/08/2019	The declaration of an unconstitutional omission (for inactivity) on the part of the President and the Minister of the Environment regarding the amazon forest's protection, with the consequent injunction to obligate them to act within the existing legal framework.
ADPF 623 ⁹	16/09/2019	Restoring the public and civil society's participation on the National Environmental Council (CONAMA), through the declaration of unconstitutionality of the presidential decree (n° 9.806/19) that excluded them from it.
ADO 59 ¹⁰	05/06/2020	The declaration of an unconstitutional omission by the Federal Government for not releasing the "Amazon Fund" budget, since 2019 (therefore impeding activities in benefit of the forest and the environment), with the consequent release of said funds.
ADPF 708 ¹¹	30/06/2020	The declaration of an unconstitutional omission by the Federal Government for not releasing the "Climate Fund" budget, since 2019 (therefore impeding all activities to mitigate the effects of climate change), with the consequent release of said funds, <u>so the country can meet its commitments on the legalized global space regarding climate change.</u>
ADPF 747 ¹²	30/09/2020	The declaration of unconstitutionality of the resolution n° 500/20 of the National Environmental Council (CONAMA), which has greatly dropped environmental protection standards on "permanently protected areas" throughout the country.
ADPF 755 ¹³	22/10/2020	The restoring of the environmental organs' sanctioning powers, on matters of environmental crimes and administrative rules' violations, which have been paralyzed by presidential decree (n° 9.760/19).
ADPF 760 ¹⁴	12/11/2020	The application of the PPCDAm, in order to achieve the national goals of deforestation prevention planned for 2021 and the <u>fulfilment of the climate goals assumed in the international sphere.</u>

⁸ Available at <<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5718836>>> Last seen on January 15th, 2021.

⁹ Available at <<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5774620>>> Last seen on January 15th, 2021.

¹⁰ Available at <<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5930766>>> Last seen on January 15th, 2021.

¹¹ Available at <<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5951856>>> Last seen on January 15th, 2021.

¹² Available at <<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6016616>>> Last seen on January 15th, 2021.

¹³ Available at <<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6034288>>> Last seen on January 15th, 2021.

¹⁴ Available at <<<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6049993>>> Last seen on January 15th, 2021.