Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

The Paris Agreement as a Human Rights Treaty: The Ruling in PSB et al v Brazil (on Climate Fund)

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Received 08 December 2022; *Accepted* 13 December 2022; *Published* 21 December 2022

This article examines the ruling of the Brazilian Supreme Court in the case PSB et al v Brazil (on Climate Fund) and its contribution to the climate litigation debate. It puts forward two main arguments. The first argument revolves around the politicisation of climate litigation. It reflects on the fact that the case was petitioned by four Brazilian political parties opposed to the current government in power. The second argument stresses that the force of recognising the Paris Agreement as a human rights treaty can be characterised as ambivalent: on the one hand, it serves as a vehicle for the affirmation and realisation of climate change as human rights; on the other, it can act as a form of political manipulation to disguise situations in which there is a lack of rights associated with climate change if there is a high degree of normative-judicial ineffectiveness. In doing so, this work broadens the discussion on climate litigation as a tool to address climate change and highlights research opportunities in the field of decolonial comparative law.

Keywords: *climate change, the paris agreement, human rights, climate fund, treaty.*

INTRODUCTION

Scholarly literature has long associated human rights with the protection of environmental interests and has invoked human rights as a mechanism to hold to account public authorities and private actors for not taking adequate climate action.[1] More recently there has also been the recognition by scholars that the environment is of constitutional value.[2] The Paris Agreement, which entered into force in 2016 was then the first global environmental legal instrument to explicitly mention human rights, albeit consigned to the preamble, which calls on states to "respect, promote and consider their respective obligations on human rights" when tackling climate change. The United Nations (UN) Human Rights Council also recognised that the right to a clean, healthy and sustainable environment is a human right.[3] It is therefore not a surprise that there is a growing number of climate litigation cases that have invoked human rights and/or have been brought before human rights bodies, covering issues of climate migration, the right to a healthy environment, and the rights of vulnerable groups, such as children, women and indigenous communities.[4]

Citing the case of ***Kawas Fernández v Honduras*** in an advisory opinion concerning the interpretation of Articles 1(1), 4(1), and 5(1) of the American Convention on Human Rights, the Inter-American Court of Human Rights recognised the right to a healthy environment as a human right because environmental degradation affects the effective enjoyment of other human rights, for example, the rights to life, personal integrity, health or property. In addition, the Court emphasised the interdependence and indivisibility between human rights, the

[1] D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law
[2] Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) Transnational Environmental Law
[3] Human Rights Council, 48/13, 'Human right to a safe, clean, healthy and sustainable environment' (8 October 2021) A/HRC/48/L.23/Rev.1
[4] A Savaresi & J Setzer, 'Rights-base litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13(1) Journal of Human Rights and the Environment <https://doi.org/10.4337/jhre.2022.01.01> accessed 25 November 2022

environment and sustainable development, since the full enjoyment of all human rights depends on a favourable environment.[5]

The case ***I.L. v Italian Ministry of the Interior and Attorney General*** *at the Court of Appeal of Ancona* before the Italian Supreme Court of Cassation notably determined that humanitarian protection should be granted to individuals exposed to a real risk to their right to live in the country of origin when such risk is due to an adverse social, environmental and climate situation and not only to a situation of armed conflict. In *Environmental Justice Australia (EJA) v Australia*, the United Nations Special Rapporteurs are also currently examining a complaint submitted by the Environmental Justice Australia (EJA) against the Australian government over whether Australia is violating the human rights of young people by presenting inadequate Nationally Determined Contributions.

Although national and international bodies have recognised climate change as a human rights issue, the Brazilian Supreme Court in *PSB et al v Brazil (on Climate Fund)* was the first high court to formally recognise that the Paris Agreement is a human rights treaty. The Supreme Court clarified that environmental law treaties constitute a particular type of human rights treaty, which enjoy "supranational" status. However, what are the consequences of this recognition?

This work aims to present some reflections on this question. It puts forward two main arguments. The first argument revolves around the politicisation of climate litigation. It reflects on the fact that the case was petitioned by four Brazilian political parties opposed to the current government in power. The second argument stresses that the force of recognising the Paris Agreement as a human rights treaty can be characterised as ambivalent: on the one hand, it serves as a vehicle for the affirmation and realisation of climate change as human rights; on the other, it can act as a form of political manipulation to disguise situations in which there is a lack of rights associated with climate change if there is a high degree of normative-judicial

[5] Inter-American Court of Human Rights, 'Advisory Opinion OC-23/17 of November 15, 2017 requested by the Republic of Colombia' (*Climate Case Chart*, 2017) <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2017/20171115_OC-2317_opinion.pdf> accessed 25 November 2022

ineffectiveness. In doing so, this work broadens the discussion on climate litigation as a tool to address climate change.

This paper is organised into four sections. The first section presents a summary of the facts in *PSB et al v Brazil (on Climate Fund)* and the context in which it is inserted. The second section discusses the first main argument on the politicisation of climate litigation. The third section assesses the ambivalent character of the ruling in *PSB et al v Brazil (on Climate Fund)* and demonstrates its possible opposing outcomes. The final section concludes by highlighting future research opportunities in the field of decolonial comparative law.

THE CASE *PSB ET AL V BRAZIL (ON CLIMATE FUND)*: CONTEXT AND SUMMARY OF FACTS

The case *PSB et al v Brazil (on Climate Fund)* can be contextualised within the upsurge of climate litigation in Brazil before non-judicial and judicial bodies challenging the government's failure to adopt effective measures to combat climate change and deforestation, for example, ***Associação Brasileira dos Membros do Ministério Público de Meio Ambiente v Ministro de Estado do Meio Ambiente ADPF 814***, ***Federal Environmental Agency – IBAMA v Siderúrgica São Luiz Ltd. and Martins***, ***PSB et al v Brazil (on deforestation and human rights)***, ***Institute of Amazonian Studies v Brazil***, ***Laboratório do Observatório do Clima v Minister of Environment and Brazil*** and the most recent case of ***Conectas Direitos Humanos v BNDES and BNDESPAR***. This follows the trend around the world to use climate litigation as a strategy to strengthen climate governance.[6]

PSB et al v Brazil (on Climate Fund) was concerned about the government's failure to distribute money from the National Fund on Climate Change (Climate Fund). The Climate Fund is one of the instruments of the National Policy on Climate Change and was created by Federal Law 12114 on 9 December 2009, regulated by Decree 7343 of 26 October 2010, and currently governed by Decree 10143 of 28 November 2019. It consists of an accounting fund, linked to the Ministry of

[6] Joana Setzer & Lisa Vanhala, 'Climate change litigation: a review of research on courts and litigants in climate governance' (2019) 10(3) Wiley Interdisciplinary Review Climate Change 1; Jacqueline Peel & Hari Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 1

the Environment to guarantee resources to support projects or studies and finance ventures that have the objective of mitigating climate change.

The Brazilian Socialist Party, the Socialism and Freedom Party, the Workers' Party, and the Rede Sustentabilidade filed the case. These four Brazilian political parties sought that the Federal Supreme Court determine: (i) the resumption of the Fund's operation; (ii) the declaration of the Union's duty to allocate such resources and the determination that it refrains from new omissions; and (iii) the prohibition of the contingency of such amounts, based on the constitutional right to a healthy environment.[7]

The claim was based on the precautionary principle and a violation of Article 225 of the Brazilian Federal Constitution, regarding the State's duties to preserve and restore ecological processes; promote the ecological management of ecosystems; define territorial spaces and their components to be specially protected; and protect fauna and flora. The Supreme Court ruled that the executive branch has a constitutional duty to execute and allocate the funds of the Climate Fund to mitigate climate change considering the international commitments under the climate change framework, based on both the separation of powers and the constitutional right to a healthy environment.

POLITICAL LITIGANTS IN *PSB ET AL V BRAZIL (ON CLIMATE FUND)*: POLITICISATION OF CLIMATE LITIGATION?

The case *PSB et al v Brazil (on Climate Fund)* was filed as a direct action for the declaration of unconstitutionality by omission. In the Brazilian legal system, the abstract constitutional control as defined in article 103 of 1988's Federal Constitution is concentrated in the Federal Supreme Court, which is responsible for the process and ruling of the autonomous actions involving constitutional controversies (direct action for the declaration of unconstitutionality, action for

[7] 'Decision (IN English) of PSB et al v Brazil (on Climate Fund)' (*Climate Case Chart*, 7 January 2022) <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220701_ADPF-708_decision-1.pdf> accessed 09 September 2022

the declaration of constitutionality, direct action for the declaration of unconstitutionality by omission and action against a violation of a constitutional fundamental right).[8]

The direct action for the declaration of unconstitutionality by omission is destined to ensure the full effect of constitutional precepts, by assessing whether an administrative or legislative entity is jeopardizing the effectiveness of the Constitution by not actively using its power.[9] In this vein, the case *PSB et al v Brazil (on Climate Fund)* sought to recognise the unconstitutional omission of the Union in not adopting administrative measures aimed at the functioning of the Climate Fund.

Climate litigation around the world before judicial bodies are usually initiated by not-for-profit organisations, associations, class entities, groups of people, or an individual.[10] It is interesting to observe that the case *PSB et al v Brazil (on Climate Fund)* was petitioned by four Brazilian political parties opposed to the current government in power. According to the Constitution of 1988, article 103 (VIII), political parties with representation in the National Congress are legitimate parties to file direct actions for the declaration of unconstitutionality by omission. The question is whether climate change lawsuits brought about by political parties can point towards the politicisation of climate litigation, in the sense of using the courts to promote a political party view and attack the opponents' policies.

It is widely acknowledged that climate change is a matter of high political sensitivity.[11] For some scholars, the courts are not the right forum to interfere with the political issues of climate change as this threatens the balance between the independent branches of democratic government. To address climate change would be the responsibility of the executive and legislative branches,

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[8] Supremo Tribunal Federal, 'Judicial Review' <https://portal.stf.jus.br/internacional/content.asp?id=120199&ori=2&idioma=en_us> accessed 12 September 2022

[9] Alexandre Moraes, *Direito Constitucional* (Atlas 2000); Jader Ferreira Guimarães e Vitor Soares Silvares, *A (in)eficácia das decisões do STF em sede de Ação Direta de Inconstitucionalidade por Omissão* (Editora Fórum 2017)

[10] Sabin Center for Climate Change Law, 'Climate Change Litigation Databases' (*Climate Case Chart*) <http://climatecasechart.com/> accessed 09 September 2022

[11] Sadhbh O Neill & Edwin Alblas, 'Climate Litigation, Politics and Policy Change: Lessons from Urgenda and Climate Case Ireland' in David Robbins & Ors (eds), *Ireland and the Climate Crisis* (Palgrave Macmillan Cham 2020); Siri H Erikse & Ors, 'Reframing adaptation: The political nature of climate change adaptation' (2015) 35 Global Environmental Change 523

not the judicial branch, as decided in the American case *Connecticut et al. v American Electric Power Co et al.* (131 S. Ct. 2527 [2011]).[12] The criticism that the judiciary has overstepped its powers by intruding into an unsuitable area, such as climate change, was put forward by scholars, particularly after the decision in ***The State of the Netherlands v Urgenda Foundation***.[13]

Laura Burgers, when examining the tension between law and politics in her article, 'Should Judges Make Climate Change Law?', concludes that the judiciary has the competence to adjudicate political matters, such as climate change.[14] However, one can argue that climate lawsuits being initiated by political parties can amount to symbolic constitutionalism as put by Neves,[15] which consists of overexploitation of law by politics, in such a way that the operational autonomy of the legal system would itself be damaged by this. This would be applicable if, for example, the reasons behind filing *PSB et al v Brazil (on Climate Fund)* had a primarily political vein, for instance, the use of the judiciary to undermine an opposing government currently in power.

THE AMBIVALENT CHARACTER OF THE RULING IN *PSB ET AL V BRAZIL (ON CLIMATE FUND)*

The force of recognising the Paris Agreement as a human rights treaty can be characterised as ambivalent: on the one hand, it serves as a vehicle for the affirmation and realisation of climate change as human rights; on the other, it can act as a form of political manipulation to disguise situations in which there is a lack of rights associated with climate change if there is a high degree of normative-judicial ineffectiveness. Applying Gusfield's symbolic legislation to understand the legal consequences of the Paris Agreement as a human rights treaty can bring

[12] Miriam Haritz, *An Inconvenient Deliberation. The Precautionary Principle's Contribution to the Uncertainties Surrounding Climate Change Liability* (Kluwer Law International 2011); Siri Gloppen & Catalina Vallejo, 'Red-Green Lawfare: Climate Justice Discourse in Courtrooms' in Jackie Dugard & Ors (eds), *Climate Talk: Rights, Poverty and Justice* (Juta & Company Ltd 2013)
[13] KJ de Graaf & JH Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27(3) Journal of Environmental Law 517
[14] Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) Transnational Environmental Law 55
[15] Marcelo Neves, *A Constitucionalização Simbólica* (WMF Martins Fontes 2011)

about the conclusion that the political-symbolic force of a legal instrument can relate to its lack of legal efficacy.[16]

In *PSB et al v Brazil (on Climate Fund)*, the Supreme Court clarified that environmental law treaties constitute a particular type of human rights treaty, which enjoy "supranational" status, allowing, thus, climate change to enter the constitutional domain. This means that they are above federal, state, and municipal laws in the legal hierarchy. Accordingly, any Brazilian legal and policy instruments that contradict the Paris Agreement, including the nationally determined contribution, are overridden by the treaty. The recognition entails a shift of the status quo to a higher legal hierarchy, preventing the legal value of the Paris Agreement to be overshadowed by national laws. This can serve to help overcome concrete situations of environmental rights denial. It can also trigger internalisation processes about the norms and goals of the Paris Agreement and subsequently activate national action.[17]

Effective enforcement of the Paris Agreement as a human rights treaty can promote changes instrumentally through a direct influence on the actions of people and organisations not only nationally but also internationally. The case *Humane Being v the United Kingdom* can illustrate the attempt to enforce this recognition. On July 26, 2022, the NGO Humane Being filed an application to the European Court of Human Rights (ECHR) challenging factory farming in the UK. The application cited for the first time before the ECHR the ruling of the Brazilian Supreme Court in *PSB et al v Brazil (on Climate Fund)*.[18] This confirms the fact that judicial contribution to global climate governance is not purely a Global North phenomenon,[19] since in *PSB et al v Brazil (on Climate Fund)* a court in the Global South took a bold step to compel action on climate change

[16] Joseph R Gusfield, 'Moral Passage: The Symbolic Process in Public Designations of Deviance' (1967) 5(2) Social Problems 175
[17] Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) Transnational Environmental Law 17; Katerina Mitkidis & Theodora N Valkanou, 'Climate Change Litigation: Trends, Policy Implications and the Way Forward' (2020) 9(1) Transnational Environmental Law 11
[18] Sabin Center for Climate Change Law, 'Humane Being v the United Kingdom' (*Climate Case Chart*, 2022) <http://climatecasechart.com/non-us-case/factory-farming-v-uk/> accessed 11 September 2022
[19] Jacqueline Peel & Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) American Journal of International Law 679

and is now being cited in climate litigation in the Global North. Climate litigation in the Global South is, therefore, opening up avenues for progress in addressing climate change.[20]

When *Humane Being v the United Kingdom* is decided, it would be interesting to analyse the case from the perspective of decolonial comparative law, a new field of research under development at the Max Planck Institute for Comparative and International Law.[21] The decision in *PSB et al v Brazil (on Climate Fund),* formally recognising the Paris Agreement as a human rights treaty for the first time, can inspire a decolonial approach in the domestic legal system and serve as a learning process for other legal systems that are confronting similar problems.[22]

However, if the recognition of the Paris Agreement as a human rights treaty results in being characterised by a high degree of normative-judicial ineffectiveness, this serves to facilitate political manipulation and undermine a broad realisation of rights related to climate action. Effectiveness and enforcement have long been a challenge for Brazil's environmental policies.[23] A study demonstrated that during the COVID-19 pandemic, 57 legislative acts have aimed to weaken Brazilian environmental legislation,[24] showing limited political will for enforcement. In addition to regulatory changes, scholars have also put forward the view of dismantling important environmental governance structures and regulations in Brazil through, for example, weakening and/or limiting civil society's participation in decision-making, cutting budgets for scientific research, environmental monitoring, and protection, leaving vacant or slowly replacing key positions supporting environmental enforcement.[25] Budget cuts, staffing issues as well as strong industrial and commercial lobbies, particularly due to the growing power of

[20] Joana Setzer & Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9(1) Transnational Environmental Law 77

[21] Lena Salaymeh & Ralf Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' (2022) 86(1) The Rabel Journal of Comparative and International Private Law 166

[22] Flavianne Fernanda Bitencourt Nóbrega & Camilla Montanha, 'How the indigenous case of Xukuru before the Inter-American Court of Human Rights can inspire decolonial comparative studies on property rights' (2021) 18(1) Brazilian Journal of International Law 353

[23] Luiz Carlos Garcia & Alberto Fonseca, 'The use of administrative sanctions to prevent environmental damage in impact assessment follow-ups' (2018) 219 Journal of Environmental Management 46

[24] Mariana M Vale & Ors, 'The COVID-19 pandemic as an opportunity to weaken environmental protection in Brazil' (2021) 255 Biological Conservation 108994

[25] Denis Abessa & Ors, 'The systematic dismantling of Brazilian environmental laws risks losses on all fronts' (2019) 3 Nat Ecol Evol 510; Simone Athayde, 'Viewpoint: The far-reaching dangers of rolling back environmental licensing and impact assessment legislation in Brazil' (2022) 94 Environmental Impact Assessment Review 106742

agribusiness, have contributed to hampering the enforcement of environmental legislation in Brazil.[26]

Given the use of the decision in *PSB et al v Brazil (on Climate Fund)* in an application before an international court, its normative-judicial ineffectiveness in the Brazilian legal system may put into check the relevance and merits of this decision not only nationally but also internationally. In addition, instead of serving as a vehicle for the affirmation and realisation of climate change as human rights, the inefficacy of the legal finding that the Paris Agreement is a human rights treaty may undermine the role of the judiciary in addressing climate change.

CONCLUSION

In the scholarly literature as well as in judicial and non-judicial proceedings, it has become a common trend to invoke human rights as a mechanism to hold to account public authorities and private actors for not taking adequate climate action. The recent decision by the Brazilian Supreme Court in *PSB et al v Brazil (on Climate Fund),* formally recognising the Paris Agreement as a human rights treaty, could achieve negative and positive outcomes.

On the negative side, instead of affirming and promoting the realisation of climate change as a human right, if the recognition of the Paris Agreement as a human rights treaty results in being characterised by a high degree of normative-judicial ineffectiveness, this can serve to facilitate political manipulation and to undermine a broad realisation of rights related to climate action. Given the use of the decision in *PSB et al v Brazil (on Climate Fund)* in an international court, its normative-judicial ineffectiveness in the Brazilian legal system may also put into check the relevance and merits of this decision not only nationally but also internationally.

Another important negative aspect is the fact that climate lawsuits being initiated by political parties can amount to overexploitation of law by politics, in such a way that the operational autonomy of the legal system would itself be damaged by this. This would be applicable if, for example, the reasons behind filing *PSB et al v Brazil (on Climate Fund)* had a primarily political

[26] S Singh & S Rajamani, 'Issue of Environmental Compliance in Developing Countries' (2003) 47(12) Water Science and Technology 301

vein, for instance, the use of the judiciary to undermine an opposing government currently in power.

On the positive side, it can serve as a vehicle for the affirmation and realisation of climate change as a human right. Since climate change has entered the constitutional domain, any Brazilian legal and policy instruments that contradict the Paris Agreement, including the nationally determined contribution, are overridden by the treaty. This can trigger internalisation processes regarding the norms and goals of the Paris Agreement and subsequently activate national action.

Effective enforcement of the Paris Agreement as a human rights treaty can also promote changes instrumentally through a direct influence on the actions of people and organisations not only nationally but also internationally, as illustrated by the application in the case *Humane Being v the United Kingdom*. Furthermore, it is relevant to note here that the decision in *PSB et al v Brazil (on Climate Fund)* and the subsequent decision in *Humane Being v the United Kingdom* give rise to future research opportunities. A comparative study of the decision in both cases applying decolonial comparative law can assist in decolonising legal thinking and creating conditions for legal pluriversality. Finally, despite these detrimental features of *PSB et al v Brazil (on Climate Fund)*, this case adds to the judicial contribution to global climate governance by the Global South, opening up avenues for progress in addressing climate change.