

# HUMAN-RIGHTS PROTECTION AS A MEANS FOR CLIMATE LITIGATION<sup>1</sup>

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## ABSTRACT

This article assesses whether human rights-based climate litigation adheres to the Brazilian legal framework. To this end, we characterize the progressive rapprochement between the international legal regimes of climate change and human rights, highlighting the recognition that the impacts caused by climate change on water availability, agricultural productivity and biodiversity, among others, contribute to the violation of the fundamental rights to life, health, food security and access to drinking water. This article illustrates the integration between climate change litigation and human rights by describing four cases – Urgenda × government of the Netherlands, Dejusticia × government of Colombia, Leghari × government of Pakistan, and Greenpeace × Commission on Human Rights of the Philippines. On the basis of this preliminary investigation, we raise legal arguments in the context of Brazilian legal scholarship and caselaw that support the correlation between human rights, environmental protection and climate change. Finally, we conclude that there are elements of the Brazilian legal framework that lend validity to the violation of fundamental rights as an object of climate litigation.

**Keywords:** climate change; human rights; litigation.

<sup>1</sup> This article is one of the results of a post-doctoral research internship carried out at the Pontifícia Universidade Católica de Santos, with support from a PNPd/CAPES post-doctoral scholarship (public notice 48/2017).

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*PROTEÇÃO DOS DIREITOS HUMANOS COMO  
MEIO PARA LITÍGIOS CLIMÁTICOS*

*RESUMO*

*Este artigo tem como objetivo avaliar a aderência, ao arcabouço jurídico brasileiro, de litígios climáticos baseados na violação de direitos humanos fundamentais. Para tanto, buscou-se apresentar a progressiva aproximação entre os regimes jurídicos internacionais de mudanças climáticas e de direitos humanos, destacando-se o reconhecimento de que os impactos provocados pelas mudanças climáticas na disponibilidade hídrica, produtividade agrícola e na biodiversidade, entre outros, contribuem para a violação do direito à vida, à saúde, à segurança alimentar e ao acesso à água potável. Feita essa correlação, o artigo debruçou-se sobre quatro casos de litigância climática baseados na infração aos direitos fundamentais – Urgenda × governo da Holanda, Dejusticia × governo da Colômbia, Leghari × governo do Paquistão e Greenpeace × Comissão de Direitos Humanos das Filipinas. A partir desse levantamento, o artigo levanta, na doutrina e na jurisprudência brasileiras, argumentos jurídicos que embasam a correlação entre direitos humanos, proteção ambiental e mudanças climáticas. Ao fim, conclui-se haver elementos no direito brasileiro a permitirem explorar a via de litígios climáticos baseados em violação dos direitos fundamentais.*

**Palavras-chave:** *direitos humanos; litigância; mudanças climáticas.*

## INTRODUCTION

Among other extreme events, human-induced climate change continues to cause heat waves and torrential rains, leading to severe flooding. It is also likely to contribute to an increase in the occurrence of natural disasters in the future. The recurrence of intense droughts with increased fires and other adverse effects, as seen in California (BORUNDA, 2018); severe floods, as observed in Australia (POWER et al., 2017), and never-before-seen heat waves during the European summer (VAUGHAN, 2018) have drawn attention to the interconnection between global climate change and the increase in the frequency and intensity of extreme weather events around the world. Common to all these cases is the direct impact on populations, especially the poorest and most vulnerable segments. This leads not only to economic losses, but also to the violation of minimum existential conditions, such as food security, health, access to water, property rights, etc.

From a legal perspective, the failure or inadequacy of governments when it comes to implementing measures to mitigate greenhouse gas (GHG) emissions and adapting to climate change, as well as the increase in GHG emissions caused by large emitters – direct causes of extreme weather events – are beginning to be interpreted as potential human-rights violations. In several jurisdictions, the establishment of a direct connection between these rights and global climate change is increasingly being claimed as the basis for judicial and administrative actions meant to impose a duty of protection and remediation in answer to extreme climatic events. These measures comprise one of the possible pathways of so-called climate litigation.

Considering the above, the objective of this article is to assess whether climate litigations whose object is the violation of fundamental human rights adhere to the Brazilian legal framework. In order to fulfill the proposed objective, this article is divided into three parts: the first explains the correlations between climate change and fundamental human rights; the second exemplifies human rights-based climate litigation through the comparative analysis of four cases, highlighting some challenges faced by the area of law; and the third evaluates the potential of climate litigation in Brazil by assessing the national legal scholarship and caselaw. The last part develops some considerations and makes a few recommendations.

## 1 CLIMATE CHANGE AND THE VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

The Intergovernmental Panel on Climate Change (IPCC) estimates that human activities have already caused a 1-degree-Celsius average increase in terrestrial temperature. It is very likely that this is causing changes in natural and human systems (IPCC, 2018). Although projections point to more significant impacts in the medium and long term, the IPCC has confirmed that global climate change is currently acting as a vector for the intensification of extreme weather events in some regions of the world (IPCC, 2018).

According to the IPCC's 5th report, published in 2014, in many regions of the planet, rainfall changes and the melting of glaciers are altering hydrological systems, affecting water resources both quantitatively and qualitatively. There are also changes in the availability of drinking water, as well as in the natural supply of fish and other species used as a food source. The increased occurrence and duration of dry periods, mainly in tropical regions, has impacted agricultural activity, reducing productivity and consequently threatening food security. Tropical diseases such as malaria and yellow fever are also increasing in occurrence and geographical extension. In the same sense, the intensification of heat waves tends to put health at risk, especially that of the most vulnerable groups – children and older adults (IPCC, 2014).

As Khan (2017) points out, climate change's implications for human rights are diverse, with the phenomenon representing a direct threat to the enjoyment of a wide range of fundamental rights. For Cavedon and Vieira (2011), exposure to the risks and effects of climate change can be understood as a human-rights violation, since environmental vulnerability contributes to greater exposure to the nonobservance of fundamental prerogatives such as the right to life. This is also the case when it comes to the right to a healthy environment, the right to a dignified life and physical integrity, the right to water, the right to adequate food, the right to health, the right to adequate housing and the right not to be forcibly displaced, as well as the right to property (be it individual or collective) (RIAÑO, 2019). For the International Bar Association, these violations also have a bearing over cultural rights, such as the preservation of indigenous traditions, and citizenship rights, given the increase of migratory waves, armed conflicts

and even the disappearance of entire nations (IBA, 2014).

Therefore, the climate crisis emerges alongside new challenges for the protection of fundamental human rights, further predicating their full enjoyment on the existence of certain environmental (such as water availability) and social (such as resilient cities) conditions, which climate change does in fact put under threat (PRESTON, 2018). For the International Bar Association (IBA, 2014), human rights are undergoing a process of “greening,” enabling the consolidation of an ensemble of international guidelines and constitutional/legal prescriptions meant to protect such rights (KALIL; FERREIRA, 2017).

The relationship between human rights and climate change started gaining strength in the international human rights regime in 2008, when the United Nations’ (UN) Human Rights Council issued Resolution 7/23, expressing human rights-related environmental concerns (PEEL; OSOFSKY, 2018). In preparation for the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) held in 2015 (COP 21), the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a report entitled *Understanding Human Rights and Climate Change*. This report not only lists the fundamental rights that stand under threat, but also emphasizes several recommendations: among them, it argues that mitigation and adaptation efforts should put human beings first and guarantee the rights of persons, groups and populations, especially the most vulnerable, such as women, children, indigenous people and the poorest (OHCHR, 2015).

Shortly before that, a group of lawyers, academics and judges operating at the international level signed the Oslo Principles on Global Climate Change Obligations. Its declaratory character notwithstanding, this document reinforces the recognition that international human-rights law is one of the sources for governments’ and companies’ obligations to respond effectively to global warming (KHAN, 2017). On the basis of these developments, the fight against climate change is now able to rely on the solidity of the most important international rights treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the American Convention of Human Rights (IBA, 2014).

The interconnection between climate change and human rights has also been consolidated in the international legal regime on climate change. In this regard, it is worth noting that the COP 16 (held in Cancun in 2010)

accepted the UN Human Rights Council Resolution 10/4, which recognizes the direct and indirect implications of global warming over fundamental human rights. As a result, the Cancun Agreements explicitly raised adaptation measures to the same level of importance as mitigation actions (PEEL; OSOFSKY, 2018).

Even the Paris Agreement – the main international treaty on climate change still in effect today – declares, in its preamble, that States Parties:

[...] should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity (CONFERÊNCIA DAS PARTES, 2015, p.2).

According to Márquez & Pérez (2018), international environmental-justice and climate-justice movements have played a crucial role in the growing rapprochement between the respective human-rights and climate-change legal regimes. Firstly, they redefined the concept of justice, reinforcing the need to adopt more equitable measures of climate-change mitigation and adaptation, both in legal and political terms. They also rescued the principles of intergenerational equity (by characterizing future generations as entitled to fundamental rights) and intragenerational equity (by calling attention to the special situation of the most vulnerable segments of the population). Secondly, the first initiatives that activated Justice as a means of protecting these rights came from the climate-justice movement (IBA, 2014).

It appears, therefore, that, both within the scope of international human-rights law and international environmental law, there is a progressive recognition of the interrelationship between the challenge of global climate change and the protection of human rights.

## 2 CLIMATE LITIGATION AND HUMAN RIGHTS

In several parts of the world, there is a growing number of lawsuits involving issues directly or indirectly related to the mitigation of greenhouse gas (GHG) emissions and adaptation to global climate change. This is known as *climate litigation*. These actions are linked to a strategic approach that surpasses specific requests for protecting the rights associated with them. This is because they have been brought to the fore on the basis of a

broad perspective, which recognizes the Judiciary's institutions as relevant actors in climate governance. The growing number of processes and the quality of some of the cases have been exerting pressure on governments and companies to move forward with regulation, mitigation and adaptation; they have also positively influenced public opinion regarding the issue's urgency, prompting governmental advancements at the local, regional and even international level.

According to the Grantham Research Institute on Climate Change and the Environment, there are more than 256 ongoing cases in 25 countries, besides approximately 800 litigations in the United States alone. A considerable part of these initiatives relies on the human-rights violation thesis, with actions at different levels – international, regional and domestic (NACHMANY; SETZER, 2018).

## 2.1 Actions before international courts

Within the scope of international law, one should mention the Government of Colombia's plea before the Inter-American Court of Human Rights. Made in 2015, it demanded a position on the obligations of states regarding the environment, in the context of protecting and ensuring the rights to life and personal integrity, recognized in articles 4th and 5th of the American Convention on Human Rights (BRASIL, 1992). In response, the Court issued an opinion recognizing a healthy environment as an autonomous right protected by the aforementioned convention, justifying actions to be brought before said Court. The opinion also concludes that states had to take action to prevent significant damage to the environment inside and outside their territory (BANDA, 2018).

According to Pinto-Bazurco (2018), although not directly related to climate change, this new stance opens up the possibility of bringing climate disputes before the Inter-American Court. This is because the recognition of environmental harm as a cause for litigation can be employed by those who have been affected by the impacts of climate change. Moreover, by emphasizing that states must behave in accordance with the precautionary principle, the Court incorporates the idea of climate risk and reduces the need for scientific certainty as an evidentiary basis.

More recently, a group of citizens from the northern Australian islands, most of them of indigenous origin, appeared before the United Nations International Court of Human Rights to file a complaint against the

Australian government. They claimed that rising sea levels were already affecting their living conditions as well as their sacred sites, in violation of their fundamental right to cultural integrity. Thus, they argued that by failing to take appropriate action against climate change the Government of Australia was in violation of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The plaintiffs required the Australian government to allocate USD 20 million towards emergency sea-containment measures and to promote sustained investment in long-term adaptation actions. They also required Australia to reduce its emissions by at least 65% compared to the levels measured in 2005, reaching zero net emissions in 2050. To this end, they demanded a decommissioning program for the country's coal-fired power stations (CLIMATE THREATENED, 2019).

## 2.2 Regional actions

Within the scope of European regional law, one should mention the action brought before the European Court by Amândio Ferrão and others against the European Parliament and the European Commission. It was proposed by a group of Portuguese, French, German, Romanian and Italian families, as well as families of Kenyan and Fijian origin, besides a youth association from Switzerland. According to the Sabin Center for Climate Change Law (2018), the action was based on two main elements: the first entailed the nullification of three European directives, as they failed to establish adequate targets for mitigating GHG emissions: the 2003/87/EC Directive on emissions from large electricity generation installations, the 2018/EU regulation on emissions from industry, transport, buildings, agriculture, etc., and the 2018/EU regulation on emissions from deforestation and land use. The issuance of new, stricter standards was also demanded. The second element comprised the argument that fundamental rights to life, health, education etc. were being infringed.

## 2.3 Actions in national jurisdictions

It is in domestic law that human rights-based climate litigations have gained more strength. Four successful cases are worthy of mention: Urgenda Foundation *versus* the Government of the Netherlands, Leguari *versus* the Government of Pakistan, Dejusticia *versus* the Government of

Colombia, and Greenpeace *versus* the Human Rights Commission of the Philippines.

Urgenda, a civil society organization, filed a lawsuit against the Government of the Netherlands, in the person of the Ministry of Infrastructure and Environment. They required the country's Judiciary to impose a 40% (or at least 25% as compared to 1990 levels) reduction – or assurance of reduction – in the Netherlands' GHG emissions by 2020. Alternatively, by 2030, emissions were to be reduced to 40% of their 1990 levels. Such a demand would entail a more ambitious goal than the one formally assumed by the Government of the Netherlands, which had committed itself, within the scope of its obligations to the European Union, to contribute to the bloc's overall reduction goals with a 20% reduction, to be achieved by 2020. This would have meant that the country's reduction commitment would hover around 17% of the levels seen in 1990 (LAMBRECHT; ITUARTE-LIMA, 2016).

As a source of law, Urgenda's lawyers mentioned the legal obligations assumed by the country at several different levels: at the international level, they highlighted each of the international treaties and standards the Netherlands had signed, from the UNFCCC to the Bali Action Plan; within the scope of the regional legal framework, they made mention of the European directives for the protection of the environment, climate and human rights; domestically, they referred to the fundamental rights enshrined in the country's Constitution, as well as to legal standards for mitigating GHG emissions (LAMBRECHT; ITUARTE-LIMA, 2016). It is important to remember that, to substantiate their argument that the Netherlands stood in violation of fundamental human rights, the action relied on the precedents of the European Court of Human Rights, as explained by Preston (2018).

The decision of the Dutch Supreme Court was released in 2015 and favored Urgenda, making the Government of the Netherlands responsible for reducing or imposing the reduction of the country's emissions by at least 25% until 2020 (in comparison to 1990 levels). The Supreme Court's understanding was that, in the Netherlands, the separation between powers was not so clear-cut, enabling judicial courts to assess whether fundamental rights were being observed. It also understood that the Government of the Netherlands had not been able to prove the impossibility of assuming more ambitious mitigation goals; nor had it demonstrated that the country's role in reducing emissions was relatively secondary (ELAW, 2015b).

In its decision, the Dutch Supreme Court found that the country's

climate policy did not stand in violation of any fundamental human rights, claiming that, as a legal entity, Urgenda was unable to legitimately pose as a victim of the violation of an individual fundamental right. Despite this decision, the general reasoning employed by the Supreme Court signaled that the human-rights violation argument played a relevant analytical role, since, as explained by Peel and Osofsky (2018, p. 38), it employed this concept to interpret the legislation surrounding the case: “Nonetheless, it gave serious consideration to the arguments based on human rights, and used rights as an interpretative tool in analyzing the question of whether the Dutch government had breached its duty of care towards Urgenda and the Dutch people.”

The correlation between climate change and fundamental human rights was not featured only in the Urgenda case. The Leghari × Pakistan case is a good example of this theory’s application. In 2015, a farmer filed a lawsuit against the Government of Pakistan alleging that the latter had incurred in failure and delays in implementing the National Policy on Climate Change and addressing the vulnerabilities associated with climate change. These behaviors allegedly violated the farmer’s fundamental, constitutionally protected rights to life and dignity. The action argued that climate change was linked to the risk of flooding, to the loss of fishing conditions etc. Thus, it requested the government to be obliged to immediately implement the guidelines of the aforementioned Climate Change Policy (PRESTON, 2018).

The court accepted the request, deciding for the definition, by each government agency involved in the lawsuit, of a person responsible for acting alongside the Ministry of Climate Change in the implementation of the Climate Change Policy’s guidelines. The assigned parties should also liaison with the Court, keeping it informed of how the compliance measures were progressing. The Court also ordered the creation of a commission – comprising representatives of government agencies, technical experts and civil-society organizations – to monitor the implementation of the National Policy on Climate Change (ELAW, 2015a).

In early 2018, 25 children and young people, assisted by the non-governmental organization Dejusticia, filed a guardianship action against the Colombian government. They alleged that the state’s failure to control deforestation in the Colombian Amazon not only contradicted the country’s commitment to reduce deforestation, but also put the plaintiffs’ right to a healthy environment in harm’s way. According to the action,

the significant increase in deforestation rates should be seen as a direct threat to an ensemble of fundamental and constitutionally protected rights, including (DEJUSTICIA, 2018):

- The right to life for those children and young people, generations who would have their rights to healthy conditions of life directly violated;
- The right to health, due to reduced access to drinking water caused by the ongoing changes in the Amazon's hydrological regime across different parts of Colombia, threatening water availability;
- The right to food security, due to the risks posed to the country's agricultural activity.

The action also relied on an ensemble of international environmental law principles, with emphasis on intergenerational equity, the precautionary principle, solidarity and absolute priority for children and adolescents (DEJUSTICIA, 2018).

With unusual celerity, the Colombian Supreme Court made its decision in April 2018, complying with the request and condemning the country's government to a series of obligations, with emphasis on the development of an Action Plan to control deforestation and an Intergenerational Pact for the Life of the Colombian Amazon (DEJUSTICIA, 2018).

In September 2015, Greenpeace – together with the Philippine Movement for Rural Reconstruction and a group of organizations and individuals – submitted a petition to the Philippines' Commission on Human Rights, requesting an investigation into how 47 major investors and companies in the area of fossil fuels and cement had contributed to global warming. The petition's main argument was the finding that climate change was the immediate cause of the major environmental disasters that had recently hit the country. For the authors, these disasters directly harmed the Filipinos' most elementary rights, such as life, health, food security and property (BHRC, 2018).

In the same year, the Philippines' Commission on Human Rights acknowledged the request and opened an inquiry forcing the 47 companies to demonstrate the absence of a relationship between their activities and the impacts of global climate change in the country. The investigation was concluded in 2018 and the Commission expressed its recognition of the causality link between the companies' actions and the damage and impacts suffered by the Filipino population, in contradiction to human rights. As the Business and Human Rights Center (2018) explains, the fact that the Commission did not have decision-making powers was less important than

its role in recognizing the causal link between the activities of the so-called carbon majors and the damage and impacts they inflicted upon the country.

In summary, it appears that, on the one hand, the abovementioned cases not only illustrate the legal and evidentiary solutions found by different jurisdictions when it comes to protecting human rights, but also reiterate that the implications of climate change for the protection of fundamental human rights are becoming increasingly obvious (PEEL; OSOFSKY, 2018). On the other hand, they also indicate the complexity inherent in this kind of litigation. As Peel and Osofsky (2018) point out, there is no way to deny the challenges pertaining the establishment of a causal link between the GHG emissions of a country or company – or the failures of public policies – and specific climate impacts. In the same direction, one cannot deny the difficulty of establishing a causal relationship between these impacts and the violation of human rights.

When it comes to the Brazilian legal system, the inevitable question is whether climate litigation of this kind has legal support, and, furthermore, what challenges stand in the way of their feasibility.

### **3 BRAZILIAN LAW AND HUMAN RIGHTS-BASED CLIMATE LITIGATION**

When transposed into Brazilian law, climate litigations based on the violation of human rights appear to have constitutional support. At least, that is the dominant understanding in legal scholarship and caselaw.

#### **3.1 Right to a healthy environment as a fundamental right**

The Federal Constitution of 1988, when enshrining art. 225, understands an ecologically balanced environment as a precondition for proper quality of life, and, therefore, as a precondition for the integrity of a dignified personhood. This is why the prevailing opinion of Brazilian jurists associates environmental health with a fundamental human right (BRASIL, 1988). In the words of Fensterseifer:

Brazilian legal scholarship and caselaw have settled the issue of recognizing the right to the environment as one of the fundamental rights and guarantees of the human person, per the 1988 Constitution. To the extent that it is included in the Constitution (art. 225), even if not expressly referred to as part of the category of fundamental rights, it can be said that the right to the environment is formally and materially a

fundamental right. Despite not being provided for in Title II of the Constitution, it is through positive constitutional law (art. 5th, §2, of the Federal Constitution) that the right to the environment is endowed with a material foundation (FENSTERSEIFER, 2007, p. 35, our translation).

Kalil and Ferreira (2017, p. 339) have the same understanding. They also point out that the fundamental character of the right to an ecologically balanced environment “lies in the fact that it is indispensable to a healthy life, which, in turn, is essential for enabling human beings to live with dignity.” Derani and Vieira head in the same direction, arguing that “the concept of quality of life places emphasis on the qualitative aspects of existential conditions, besides their economic value, the normalization of primary needs and the latter’s satisfaction through social welfare programs” (DERANI; VIEIRA, 2014, p. 163, our translation). In other words, the right to a balanced environment is seen as a “right of condition” for the enablement of other fundamental rights, such as life itself, health, food security, access to water etc.

For Canotilho (2010), as a fundamental right, the right to an ecologically balanced environment must be interpreted in a generalist manner, since it is a precondition for the dignified existence of present *and* future generations. The author reiterates the constitutional duty of solidarity between generations and, furthermore, insists upon prevention and precaution as guiding principles for the application of constitutional environmental law.

Bravo (2014), on the other hand, leaves no doubt that climatic balance is implied in the fundamental right to an ecologically balanced environment, since, from a legal point of view, this right would have to be understood on the basis of a broad and comprehensive vision of the environment as the set of external conditions that make up the context of human life.

Wedy (2018) further argues that climate change imposes a new interpretation of the 1988 Federal Constitution, establishing the right to sustainable development as a fundamental right. This is predicated on a reading of the Preamble in conjunction with articles 1st, Title III, 3rd, Title II, 5th, §2, 170 and 225. Thus, in the era of climate change, the fundamental right to sustainable development would contemplate the assurance of a dignified life for present and future generations, as well as the legal instruments for preventing extreme weather events and for demanding that both state and individuals adopt adaptation and resilience measures (WEDY, 2018, p. 379). In another work, the same author reinforces that “the constituent

assembly adopted the concept of a broad anthropocentrism, on the basis of an intragenerational and intergenerational perspective, providing for the assurance of environmental good for generations to come” (WEDY, 2019, p. 90, our translation).

To exemplify this finding, Gueta, Oviedo and Bensusan (2019) bring up the case of the Brazilian Amazon, whose deforestation, besides causing irreparable loss of biodiversity, has also impacted the rain regime in other parts of the country, particularly the center-northwest and southeast regions, our main agricultural areas. As these authors argue:

The integrity of forest ecosystems has proven itself increasingly essential to guarantee climate regulation on a regional and global scale, besides the regulation of local climate and water availability, the conservation of biodiversity, the cultural integrity of indigenous and traditional communities, and human health (GUETA; OVIEDO; BENSUSAN, 2019, p. 247, our translation).

### **3.2 Ecological existential minimum and the state’s duty to protect**

While conditioning the dignity of the individual to an ecologically balanced environment, the current legal scholarship has advanced the concept of an ecological existential minimum, a variation of John Rawls’ concept of the social minimum (GARCIA, 2013; FENSTERSEIFER, 2007). As explained by Garcia (2013), this concept has two main implications: the first is the right not to be deprived of what is considered essential to the maintenance of a minimally dignified existence; the second is the right to demand benefits from the state that are conducive to this minimum – this is a consequence of the state’s duty to protect, which will be further discussed below. Canotilho (2010) adds that citizens and civil society have a right and a duty to defend environmental goods and rights.

The theory of the existential ecological minimum has been echoed by Brazilian Caselaw. In this regard, RE835.558/SP, which had Minister Luiz Fux as its rapporteur, is worth mentioning:

COMPETENCE OF FEDERAL JUSTICE TO JUDGE ENVIRONMENTAL CRIMES BASED ON THE RELATIONSHIP BETWEEN THE ENVIRONMENT AND HUMAN RIGHTS + CONCEPT OF CORRELATION BETWEEN THE ENVIRONMENT AND HUMAN RIGHTS AS AN EXISTENTIAL MINIMUM. It is important to highlight, among these hypotheses, the competence of Federal Justice for the judgment of “human rights-related causes,” which became part of the constitutional text by means of constitutional Amendment 45/2004 (article 109, VA).

Indeed, in the event of serious human-rights violations, it has been acknowledged that “the Attorney General of the Republic, with the purpose of ensuring compliance with obligations arising from international human-rights treaties to which Brazil is a signatory, may raise, before the Superior Court of Justice, at any stage of the investigation or proceeding, a petition for removal of the case to a federal court” (article 109, §5, CF/88). It is beyond doubt that the most serious environmental violations, which we have been witnessing not only at the international level, but also in our own country, can have a devastating impact on the sphere of human rights and on the fundamental rights of entire communities. For Édis Milaré, the ecological existential minimum would be essential to the preservation of people’s physical, moral and intellectual integrity. This is why it would constitute a fundamental individual right, given its connection with the very dignity of the human person (MILARÉ, Édis. *Direito ao ambiente: a gestão ambiental em foco*. 7ª ed. São Paulo: Editora Revista dos Tribunais, 2011, p. 136). Therefore, it is undeniable that serious environmental violations can simultaneously constitute serious human-rights violations, especially if we consider that the elementary material nucleus of human dignity, according to Minister Luís Roberto Barroso, “comprises the existential minimum, a term that identifies the set of necessities and utilities fundamental for physical subsistence and indispensable for the enjoyment of one’s freedom. Below that level, even though there might be survival, there is no dignity” (BRASIL, 2017, p. 16, our translation).

By regarding an ecologically balanced environment as an ecological existential minimum, Brazilian law has accepted the theory of the state’s duty to protect the environment (BITTENCOURT; MARCONDES, 1997). According to Mirra (1996, p. 332):

Since the environment is *res communis omnium* – property of the entire community – as a structure meant to ensure social cohesion, the state is obliged to act within the limits entrusted to it (i.e., legality) in order to establish constraints to harmful individual activity and ensure the defense of goods meant “for the common use of the people.” It should be noted that the constituent assembly, in addition to imposing a general duty of protection, determined that the state was to adopt minimum measures for the full materialization of the right to the environment.

Herman Benjamin (2015) reinforces at least two effects arising from the state’s duty to protect, considering the constitutional right to an ecologically balanced environment:

- the imposition of state intervention for environmental protection: “in the face of the exploitation of natural resources, the absence of the Government demands full justification, under penalty of violation of the unavoidable duty towards (prompt) action and protection” (BENJAMIN, 2015, p. 100, our translation);
- the reduction of administrative discretion, imposing pro-environment

behavior on the part of the Government, “endowing the citizen with the possibility of questioning administrative actions that significantly harm natural systems and biodiversity” (BENJAMIN, 2015, p. 101).

The state’s duty to protect the environment is supported by respected jurist Canotilho, for whom the government has a long-term responsibility:

15. In legal-constitutional terms, it implies, from the outset, the obligation for states (and other political constellations) to adopt protective measures designed to guarantee the survival of the human species and the dignified existence of future generations. In this sense, adequate protection and prevention measures are all those that provide for a precautionary limit or neutralization of causes of environmental damage whose total or partial irreversibility generates negative effects, damage and imbalances affecting the dignified survival of human life (anthropocentric responsibility) and of all forms of life that rely on the balance and stability of natural or transformed ecosystems (ecocentric responsibility). 16. Long-term responsibility presupposes not only an obligation on the part of the state to adopt adequate protection measures, but also a duty to observe the principle of a high level of protection regarding natural environmental components (CANOTILHO, 2010, p. 17).

As explained by Sarlet and Fensterseifer (2010), the state’s protective duty lies within the scope of the dual dimension of the principle of proportionality, inasmuch as the latter implies both the prohibition of excessive intervention, on the one hand, and the prohibition of insufficient protection, on the other. In the former, care must be taken in observing proportionality when environmental protection interferes with fundamental rights (such as property rights). In the latter, the state must not neglect or fall short of its duty of environmental and climate protection.

In the same direction, Alberto and Mendes (2019) argue that the maintenance of climate balance also falls within the state’s constitutional duty of protection, even at the international sphere. The same authors emphasize that climate policy is a state policy and, as such, constitutes a state obligation.

In this regard, it is worth emphasizing that the National Policy on Climate Change (PNMC), approved by Law no. 12,187/2009, not only correlates the confrontation of climate change with fundamental human rights, but also ascribes the state a set of obligations. Article 1st, II lists the adverse effects of climate change, explaining its deleterious effects on human health and well-being, among others. In articles 6th and 11th, sole paragraph, the PNMC establishes the adaptation plan as one of its instruments (BRASIL, 2009).

The National Adaptation Plan (PNA) was instituted in 2016, with the

objective of promoting the reduction of national vulnerability to climate change and to carry out risk-management actions regarding this phenomenon. As pointed out by Iocca and Fidélis (2018), we cannot help but see the PNA as an advancement, since it establishes a total of 24 goals and guidelines, including transversal and sectoral strategies.

Among these goals, we highlight the creation of reference centers for coastal management, meant to collect and organize data and tools for modeling climate risks and generating qualified responses in the Coastal Zone. Furthermore, the Plan predicts the National Water Quality Monitoring Program for Human Consumption to be expanded to 85% of Brazilian municipalities.

Clearly, the goals and guidelines established in the National Adaptation Plan conform to the obligations assumed by the state, obligations that make it liable in case of omission or faulty implementation. This understanding is supported by Sarlet and Fensterseifer (2010, p. 871, our translation), for whom

[...] Failure to act (when it is legally required to act) or insufficient action (as in failure to adequately and sufficiently protect fundamental rights) with regard to legislative and administrative measures aimed at combating the causes of environmental degradation can go as far as making the state liable, obligating it to repair the damage caused to individuals and social groups affected by the negative effects of environmental damage.

### **3.4 state responsibility and protection of the diffuse right to an ecologically balanced environment**

According to Wolkmer and Paulitsch (2013), by violating its duty of protection, the state's failure to implement public environmental policies justifies interventions by the Judiciary Power. In the authors' words:

Therefore, it should be noted that the binding nature of the environmental norm – as a fundamental right – leads to a reduction in the discretionary power of governmental agents and legislators in the context of environmental policies. This stems from the fact that the legal duty arising from the imperative character of fundamental norms and, in the same sense, of environmental ones, predicts the invalidity of normative acts inadequate to the above precepts, since they would stand in contradiction to the constitutional text ... Thus, within a context of judicialization of environmental policies, the role of the Judiciary is legitimate, especially when the state's omission in combating environmental degradation is apparent. This is because, according to Steigleder, judicial intervention is feasible as a way to ensure the minimal

environmental quality necessary for the quality of human existence, addressing state omissions harmful to environmental quality. This would not mean the creation of a governmental environmental policy obligation; rather, it would merely determine the fulfillment of public obligations that had already been established by environmental legislation (WOLKMER; PAULITSCH 2013, p. 264, our translation).

As explained by Pazzaglini Filho (2000), the violation of the constitutional duty of environmental protection by the Government is sufficient reason for the civil liability of the state before the aggrieved individuals, who would be in their right to demand the repair of the environmental damage that has been caused or may be caused. For the same author, while administrative responsibility is admissible, sometimes the public agent responsible for environmental mismanagement must face criminal responsibility.

Herman Benjamin (1998) recalls that the state's civil liability in cases of violation of its environmental protection duty has constitutional support. He argues that: The framers of the constitution not only determined the polluter's civil liability – as well as their criminal and administrative liability – in a direct way, but also substantially reinforced such a duty of reparation, by (a) providing for a subjective right to an ecologically balanced environment; b) characterizing the environment, in terms of its appropriation, as a good for the common use of the people and; c) also characterizing it, in its social function, as essential to proper quality of life. More than that, the defense of the environment is no longer discretionary and becomes an irrefutable “duty,” both for the Government and for the community. Such a tutelage takes place in the name of the present generation, but also in the name of future ones (BENJAMIN, 1998, p. 234, our translation).

And it is in the field of civil liability that two other topics gain importance: causal relationship and the qualification of the ecologically healthy environment as a diffuse right.

As explained by Cahali (2014), the state's strict liability lies completely outside the civilian-law concept of fault, standing in the field of public law. The author even discusses the theories that attempt to frame the state's liability – integral risk [“risco integral”], administrative fault [“culpa administrativa”], irregularity in the functioning of the public service – to demonstrate that, in reality, the identification of the state's liability must deviate from the analysis of fault and its intricacies and turn to causality. Such is the foundation of the state's strict liability.

This does not, however, eliminate the issue's complexity, especially when considering that, in most environmental cases, there is a multiplicity of factors, levels and interactions standing between a cause and its effects.

This is what Herman Benjamin (1998) calls *complex causality*, which entails that exact proof of the level of the perpetrator's contribution to the damage incurred does not matter – only that the perpetrator did contribute to such damage.

This complexity stems from the interaction between technical or technological malfunctions, human errors and inadequate safety procedures, creating enormous difficulties in terms of determining causality, as there is rarely a single responsible agent. More specifically, environmental damage – as in the entire universe of so-called mass exposure torts – presents two distinct problems of causality. First, it is often difficult (or even impossible) to determine which among the many possible sources of a given pollutant has actually caused the environmental damage in question. This issue entails the “causal relationship between source and damage” (i.e. the identification, among the various possible agents, of the one whose action or omission has an immediate connection with the incurred damage). The fact that many of these substances are invisible to the naked eye, the surreptitious and unconscious nature of the exposure and the long latency period, all contribute to transforming the perpetrators' identification into a remote possibility, since the latter is rarely able to affirm with any degree of certainty where and when exposure took place. Second, and much more common, is the question of determining the source of the environmental damage or conditions presented by the victim. A given environmental damage or disease is rarely linked to a single toxic agent. Here, there is no longer any concern towards identifying the substance or activity, among the many possible ones, which could have caused the damage. At this stage, what one strives to understand is whether that previously identified particular substance or activity was actually an effective cause of the damage: in other words, this stage entails the identification of the “causal link between dangerous or toxic substance and damage” (i.e., identification of the causal modus operandi of the damage in terms of the agent's conduct). This causal complexity does not diminish the polluter's duty to repair the damage. Exclusivity, linearity, temporal or physical proximity, premeditation, unity between conduct and results – in the special system of damage against the environment, none of this is presupposed for the recognition of a causal link, and this remains true even in the classic civil liability regime. Brazilian law, especially after the Federal Constitution of 1988, does not allow for any distinction – except in terms of recourse – between main cause, accessory cause and concomitant cause. Nelson Nery Junior and Rosa Maria B.B. de Andrade Nery are absolutely right in stating that “irrespective of someone's participation in causing a certain damage, that person has a duty to indemnify.” Thus, they must answer for the totality of the damage, even if they are only responsible for part of the damage (BENJAMIN, 1998, p. 240, our translation).

And how to assess the occurrence of climate damage? Tartuce (2011) clarifies that article 225, §3, by embracing the “polluter pays” principle, established the understanding that there are no rights to pollution; rather,

there is only an obligation to avoid damage to the environment, in a preventive or precautionary sense. Therefore, liability also occurs in cases where precaution was merited but not properly observed. According to Wedy (2014), “regarding this point, there is no way for the state to act in a discretionary manner: if risks of damage and scientific uncertainty are present, the precautionary principle must be applied, under penalty of state liability in the event of damage to the environment.”

In the case of disregard for the precautionary principle, responsibility arises insofar as, faced by the threat of serious damage to the environment – even in a situation of scientific uncertainty as to the causal link between the activity and its effects – there is failure to take the necessary measures to prevent the materialization of this threat (HAMMERSCHMIDT, 2002). This understanding is also shared by Amaral and Riccetto (2017), Leite and Melo (2007), Barghouti (2016) and Souza, and Hartmann and Silveira (2015).

The idea of complex causality defended by Herman Benjamin (2011) establishes a dialogue with general causality, accepted by the Judiciary in *Urgenda × Holland* and *Leghari × Pakistan*. The common denominator resides in flexibility when it comes to demonstrating the specific and concrete effect-relationship between action/omission and the damage in question, in recognition of the complexity inherent in climate change. To fulfill the need for a correlation between the conduct of the state and its effects on the environment, risk is regarded as a central element that is corroborated through abundant technical-scientific documentation.

Thus, as Rei (2017) observes, the scope of the precautionary principle should be reevaluated, since the complexity entailed in the current risks to the environment calls for the construction and execution of new precautionary and administrative strategies, not predicted by the current legal analysis instruments.

And who are the ones who would be harmed by the absence of protection (or insufficient protection) on the part of state? As Guetta, Oviedo and Bensusan (2019) clarify, the right to an ecologically balanced environment is recognized as a diffuse right, that is, it is a prerogative of undetermined people united by a *de facto* circumstance. Due to this diffuse nature, such a right requires its own judicial mechanisms, e.g. the public-interest civil action, the citizen suit, the collective suit for a writ of *mandamus* [“*mandado de segurança coletivo*”], the writ of injunction [“*mandado de injunção*”], and even the unconstitutionality action (WEDY, 2019).

Among these remedies, public-interest civil action stands out as a remedy applied not only in the defense of the diffuse right to an ecologically balanced environment, but also in the defense of other diffuse rights, such as those related to the protection of children and adolescents, of public and social heritage, and of urban order (BRASIL, 1985).

### **3.5 Considerations on the opportunities and challenges for human rights-based climate litigation in Brazil**

The legal-scholarship and caselaw framework described in this section can be used in climate litigations based on the defense of human rights, insofar as:

- it recognizes the ecologically balanced environment as a fundamental right and as a condition for the full enjoyment of the rights to life, health and dignity of human life, establishing it as an existential [i.e. social] minimum;
- it consolidates the state's duty to protect the environment, and thereby provides legitimacy to the thesis of the state's full and solidary liability for environmental damage;
- it allows for a broader interpretation of the elements of liability, notably causal relationship, insofar as it recognizes the complexity inherent in ecological interrelations;
- it provides for the protection of a diffuse right.

## **CONCLUSION**

One could say that there is a direct connection between climate change and human rights, accepted by several authors and posited by international texts from various organizations, as discussed in this article.

In this sense, the scope of the obligations derived from the international climate-change legal regime goes beyond the mere, but complex, obligation to reduce GHG emissions or take on adaptation measures, based on the technical-scientific-legal framework of the climate issue. These obligations are increasingly broad, seeking integration between *stricto sensu*, social, economic, political and cultural climate issues while dealing with the analysis and potential violation of human rights. In the final analysis, this constitutes a new dilemma to be faced by contemporary society.

Therefore, by demanding a greater interface between human rights

and environmental policies, climate litigation requires new theoretical and even legal support for tackling the issue of global climate change, even resorting to the imperative of protecting social and environmental human rights.

The cases presented in this article illustrate different paths towards fulfilling these rights. They all have in common the fact that their first step was to provide an explicit correlation, in the physical world, between the climate crisis and the violation of rights, with the support of climate science. Moreover, in most of the cases, the motivation for litigation arose from the omission or insufficient action on the part of the state in its role as a planner and agent of effective climate policies.

When transposed to the Brazilian context, human rights-based climate litigation finds support in the understanding, well-established in current caselaw and legal scholarship, according to which the right to an ecologically balanced environment is a condition for a dignified life, for health, and for human welfare.

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Article received on: 05/28/2019.

Article accepted on: 08/06/2019.

**How to cite this article (ABNT):**

CUNHA, K. B.; REI, F. Human rights protection as a means for climate litigation. *Veredas do Direito*, Belo Horizonte, v. 18, n. 40, p. 191-218, jan./apr. 2021. Available from: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/1494>. Access on: Month. day, year.