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Analysis of State Civil Responsibility in Climate Litigation Conflicts, in the Context of the Elevation of Environmental Causes to the Human Rights Protection Category

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***Keywords*— Climate Litigation, State Civil Liability, Human Rights.**

***Abstract*—** *The objective of this article is to present the transformation of the Climate Litigation theme, under a contemporary context, inserted in the approach within the category of human rights and in the face of the phenomenon of globalization of environmental issues. We sought to analyze the opposite context to the traditional discourse of punishment of the private sectors, such as entrepreneurs and individuals for environmental attacks. Thus, the purpose was to bring to light that the State has gone from a mere spectator of environmental causes to the main agent in legal matters, inspection, and applicator of penalties to violators of environmental policies. Failure to do so may result in liability. Notwithstanding the Paris Agreement, which governs measures to reduce greenhouse gas emissions from 2020, does not establish penalties for violators of the goals established for countries, there is a tendency, within the scope of domestic law, for state accountability in demands of Climate Litigation. Through the analysis of concrete cases, such as Massachussets et al v. Environmental Protection Agency, the case Lliuya v. Rwe, and other genuinely Brazilian cases, sought to present the trend of the judicialization of climate issues, supported by the mainstay of state responsibility, through legal institutes that allow the civil, administrative and criminal conviction of the public entity. The article was produced by the descriptive method, with data and qualitative bibliographic research. Now, if it is the guarantor of fundamental rights such as the right to life, health, food security, property and if it authorizes the consumption of natural resources and the approval of environmental projects, why not demand the parameters of sustainability in the context of public policy?*

I. INTRODUCION

The growing legal demands related to the emission of greenhouse gases, called "GHG", are the result of a transformation of values in which climate issues are of deep concern today.

The recent environmental disasters, caused by hurricanes, tsunamis, droughts and floods, are almost mostly related, directly or indirectly, to atmospheric pollution (Martine, Eustáquio, 2019), which caused changes in a hitherto invisible and imaginary theme that became the main concern for the future and survival of humanity.

Initially, these climatic events were seen as sporadic events, resulting from the very transformation of nature, however, over the years, there was an interconnection between them and a greater frequency of environmental disasters on the planet. The search for scientific knowledge has increasingly brought human actions closer to the negative consequences of environmental issues.

The point of intersection between them is that it is not only possible to see economic losses for nations, but the direct impact mainly on the most needy and vulnerable populations, which generates risks to the existential minimum such as food security, health, human dignity, access to water, property rights, etc.

The change in view of the climate crisis theme is justified by its elevation to the category of Human Rights. Currently, the theme is no longer a simple environmental issue, whose concern is only related to the preservation of water and mineral resources and the preservation of terrestrial biomes. The theme gained contours of survival of humanity, from a context of globalization of environmental issues.

In this scenario, the role of the State arises both as a guarantor of compliance with environmental legislation, and, on the other hand, as a civil liability for damage to the environment, resulting from its own action or by private violators of environmental rules.

The research will initially address the evolution of the approach to climate change with its current focus on human rights and its implications and threats to fundamental rights.

The civil liability of the State will also be analyzed, with its current trend, in climate litigation conflicts, with the analysis of specific cases highlighted, decided or in progress in Brazil and abroad.

II. CLIMATE LITIGANCE

2.1 BRIEF EVOLUTION OF THE THEME

To act in the preservation of the environment, it is necessary to prepare society on aspects of climate change and preservation of the future of humanity. Several mechanisms emerge to prevent and repress environmental violations, from legislation, social awareness and disputes in institutional and legal spaces (MANTELLI G., NABUCO J. and BORGES C. 2019).

In the field of public policies, the State has the role of guarantor of environmental preservation. In this context, civil society plays its role of collection, so that it can efficiently and adequately carry out the mechanisms of environmental protection. The judiciary enters this scenario in order to demand and encourage the executive to protect the environment, and this, in turn, needs the normative and regulatory frameworks approved by the legislature.

It should not be forgotten that climate litigation is also related as an inducer of change in the private and business sectors. The positive influence of public opinion encourages the adoption of conscious consumption, in order to select increasingly demanding markets for companies that have an environmental commitment at their core. (OSOFKSKY, 2010, p.10)

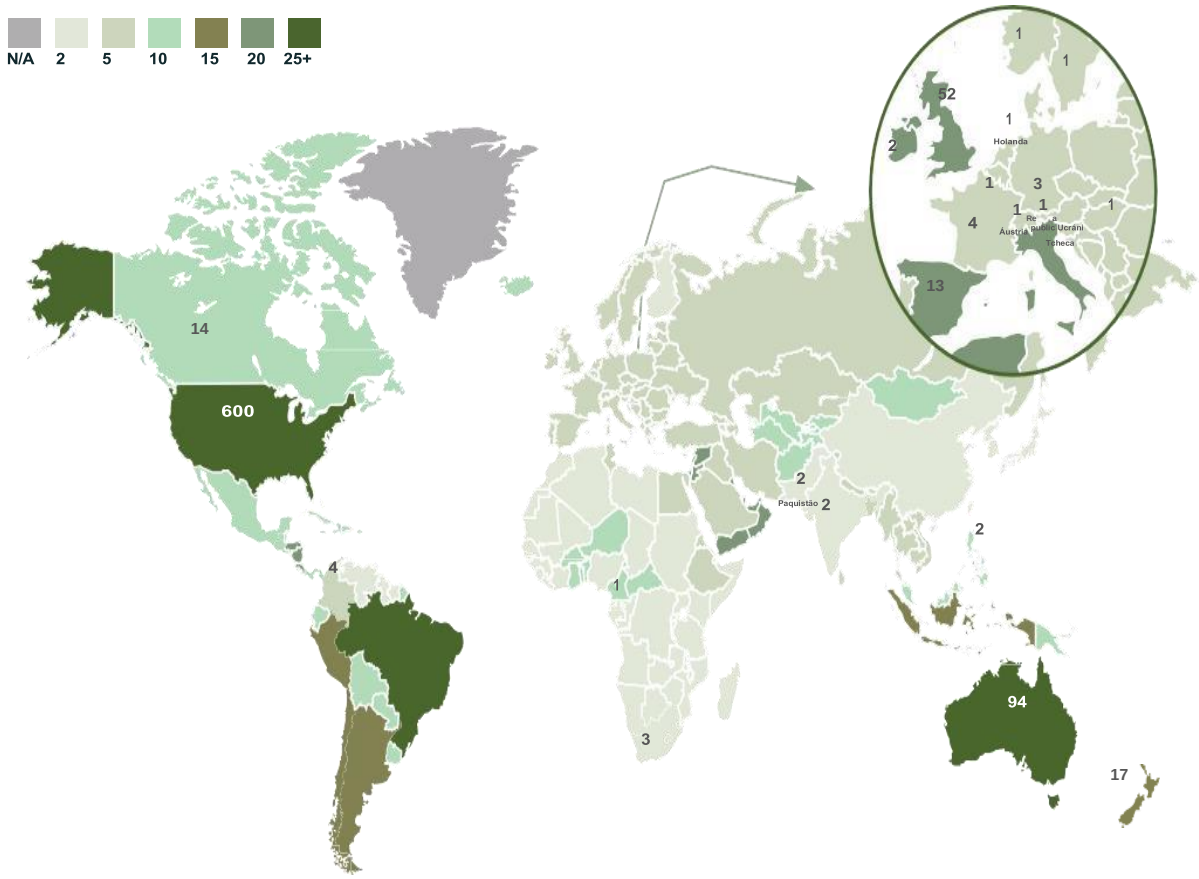
Climate disputes can be understood, in general, as lawsuits that require decisions from the Judiciary or administrative bodies that expressly address issues, facts or legal norms related, in essence, to the causes or impacts of climate change (MANTELLI G. , NABUCO J. and BORGES C. 2019).

The approach to the issue of litigation, in its conceptual basis, as well as its legal nature, implies putting pressure on the Legislator and Administrator State to promote climate regulation measures, by guaranteeing the cut of greenhouse gases and stimulating the production of renewable energies.

For this, skillful judicial measures are used to implement the principle of prediction and precaution, in order to avoid environmental catastrophes and promote sustainable development, in addition to guaranteeing the protection of human rights.

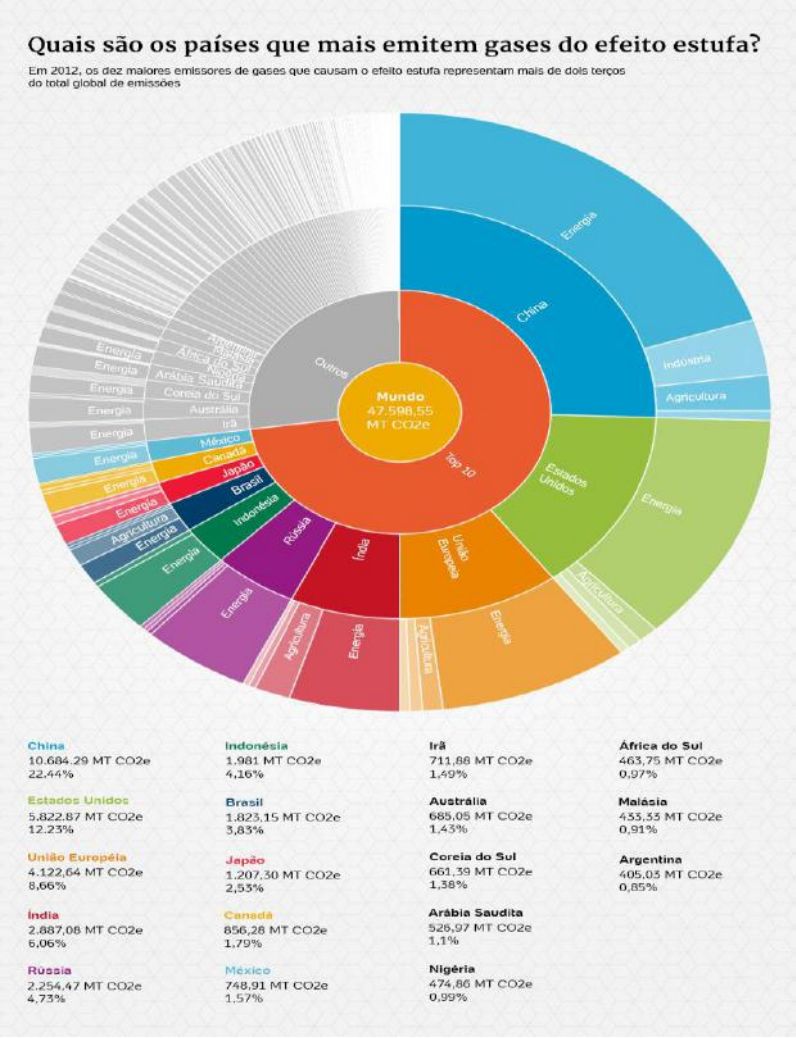
In this sense, as described by Khan (2017), the negative effects on human rights related to the causes of climate change are diverse, which pose risks to fundamental rights. Thus, one can highlight the right to life, property, state protection, cultural rights, such as the preservation of indigenous, riverine, quilombola traditions and the right to citizenship, related to the increase in migratory waves, armed conflicts and even the disappearance of entire nations (IBA, 2004).

On the subject, as can be seen in the figure below, it is possible to verify the proportionality of the number of conflicts involving climate litigation and climate legislation in the world. The numbers indicate the amount of climate litigation in countries in 2018, and the colors indicate the number of climate laws.



Source: CONECTAS DIREITOS HUMANOS (2019).

The American supremacy in this regard is impressive. Despite being the second largest polluter, as shown in the table below, it is also verified that it has the largest global engagement on the subject.



Source: Worlds Resources Institute[1]

The concern with climate issues is rooted in American legislation, which is why the amount of demands on American soil is justified. A turning point took place in 2017, when, despite popular pressure, the President of the United States, Donald Trump, formally left the Paris Agreement, ratified in 2015.

However, in February 2021, President Joe Biden resumed the country's entry into the Agreement, committing to the reduction of pollutants, according to the established goals.

This policy implied a new twist on the subject. The emission of gases by the United States, from 2012 to 2021, there was a reduction to 11% of the total of gases, while in the same period, China increased to 27% its participation in this regard.

It appears that the promise of carbon neutralization by 2060, as predicted by the Paris Agreement, is far away. However, cases of climate litigation gained worldwide prominence, in which regional conflicts became causes that have international reflexes and repercussions, as we will see in the analysis of some specific cases of climate litigation.

III. CIVIL RESPONSIBILITY IN CLIMATE LITIGANCE CONFLICTS

The approach to civil liability for environmental damage reveals itself to be a progressively current and always timely legal issue (Custódio, 1996).

The issue surrounding the issue of liability for damage to nature always brings contradictory reflections. If, on the one hand, the use of natural resources is justified as a way of guaranteeing the minimum livelihood of human beings, on the other hand, invasive human actions significantly compromise these resources and, currently,

[1] 10 countries that produce more than 68% of global emissions: Available at: https://www.johannes-friedrich.com/, accessed 3/20/2022.

have brought together nations in search of a common good, the survival of planet earth.

The environment enshrined in the so-called Third Generation Rights, which assists the entire human race in a subjectively indeterminate way, cannot be seen as a "res nullius", but as a right for all.

In addition to the protective and preservative measures provided for in § 1, I-VII, of art. 225 of the Federal Constitution, in its § 3 it deals with the criminal, administrative and civil liability of those who cause damage to the environment.

The theory of integral risk in matters of environmental responsibility prevails in the current Brazilian jurisprudential system. Therefore, exclusions of liability, such as fortuitous event or force majeure, are inadmissible. In the event of damage, identified the author and the causal link, liability is inherent (Cavalieri Filho 2020).

However, as well observed (Tartuce, 2011), although in Brazil the theory of integral risk has gained strength in the doctrine and understanding of the Courts, there are many doctrinal attempts to minimize its reach. In any case, the essence of objective civil liability lies in proving the causal relationship between the agent's action or omission and the damage or risk of the latter to the environment.

And how to prove that some human activity was a decisive factor in triggering a certain environmental catastrophe? Or, on the other hand, how to prove, negatively, that such an action did not contribute to a certain climatic phenomenon? - is the so-called diabolical proof - expression originating in canon law in which it is stated that only the devil could produce negative proof. This is the challenge of the Judiciary in climate litigation conflicts.

An emblematic case on the current issue is that of the Peruvian farmer Saul Lliuja who filed a lawsuit in Germany, at the Essen Regional Court, against the largest German electricity producer, Rheinisch-Westfälisches Elektrizitätswerk AG (Rhenish-Westphalian Power Plant or RWE) , located in the Essen region, north of the Rhine.

In short, the farmer stated that the melting of glaciers in the high mountains in the city of Huaraz, in Peru, was linked to the large amount of carbon dioxide, CO2, emitted by the German energy company.

Despite the German court not recognizing the "conditio sine qua non" between human activity and environmental catastrophe, Saul's action led to the recognition of the possibility of judicialization of the dispute in the supreme court that culminated in a series of demands and regulation of the aforementioned company. .

As seen, the tendency of the theme is to transgress beyond the positivist question, which in the conception of Kelsen, 1996 "the basis of validity of a norm can only be the validity of another norm". It is close to natural law ideas, which represents a system of intersubjective norms of conduct different from the system constituted by norms established by the State (positive law).

3.1 CIVIL LIABILITY AND FUTURE ENVIRONMENTAL DAMAGE

Although the possibility of liability for future environmental damage is already admissible, both in its doctrinal and legal aspects, this environmental responsibility lacks characterizing descriptions. This is because there is still no solid legal theory that can have support, applicability and operability.

However, jurisprudence, both in domestic law and in international environmental litigation issues, has made an effort to bring together the elements of damage and liability of the causes or even potential harmful agents of environmental damage.

And what would that basis be? It appears that the law already admits future damages in civil matters, as in the case of loss of profits in which it is possible to measure potential losses that the party may suffer.

As Professor Paulo Bessa Antunes teaches, Brazilian Courts have long faced difficulties with regard to the subject, since the materiality of the evidence, in terms of doctrine and legislation, is essential for the characterization of civil liability. Therefore, how to impute responsibility for a damage, even if predictable, however difficult to measure? The author talks about this topic.

> "Brazilian Courts have had an extremely restrictive understanding of the concept of environmental damage and, consequently, of the legal interest of the environment. In general, they have adopted a stance that demands actual damage and not just potential damage. It seems to me that the principle of caution in environmental matters has not been applied and observed, which, as is well known, is one of the principles of Environmental Law". (Antunes, Paulo Bessa 2006, 5th ed. Pg. 169).

However, it is necessary to consider the protection of future generations with regard to the possibility of future environmental damage, from the perspective of a legal mechanism for investigation, assessment and management of environmental and ecological risks.

To justify future environmental damage, it is possible to do so through a new Theory of Risk (Abstract Risk Theory), in a different sense from the classical theory exposed in the Theory of Concrete Risk, which requires the occurrence of damage to impute the civil responsability.

As explained by Delton Winter de Carvalho, contrary to what occurs in the Theory of Concrete Risk, one cannot demand the occurrence of real and concrete damage, as a "sine qua non" condition, for the attribution of strict liability to the dangerous and risky activity. , with regard to future environmental damage, under penalty of losing its preventive meaning.

Thus, in the face of a scenario of probable environmental damage, the future consequences of this damage must also be foreseen, for the purpose of preventing and minimizing the consequences. In this sense, Professor Delton Winter teaches:

> Thus, the Law must be envisaged not only as a corrective element, of post factum incidence, but also as a risk management instrument, acting preventively to the effectuation of environmental damages. Future environmental damage is exactly the dogmatic notion produced by Environmental Law to enhance communication about ecological and environmental risks in Law. For this reason, it is up to us to state that, under the dogmatic notion of future environmental damage, there is a notion of risk as legal communication for observation and formation of links with the future.

By requiring the plaintiff to prove the actual damage, the Courts, in fact, impose the entire burden of judicial proof on the plaintiffs, weakening the polluter's strict liability. Furthermore, it is important to note that Environmental Law exerts its protective function, also in relation to future generations, as a result of the concept of intergenerational equity, which is one of its main aspects. However, future damage, many times, cannot be proved by plan, coming to materialize, only, with the passage of time.

3.2 STATE ENVIRONMENTAL RESPONSIBILITY IN CLIMATE LITIGANCE CONFLICTS

One of the main challenges with regard to litigation is state accountability for environmental damage.

The topic causes controversy when it comes to the imposition of GHG reduction policies on Nation States. To implement this policy, drastic changes are necessary, which may reflect, at first, on the economy, on employability, on the competitiveness of companies, high investments in cutting-edge technologies to reduce pollutants. This can have negative consequences for commercial competition between nations.

The current world treaty in force, ratified by 195 countries (IPCC, 2019), the Paris Agreement, which replaced the Kyoto Protocol in mid-2020, does not establish coercive means in case of non-compliance.

The problem is that non-compliance with the Agreement itself does not generate a legal penalty for the country that violates the rule. Through the analysis of the entire document, there is no mention of punishment for violation.

Therefore, if the international regulations themselves do not establish punitive guidelines, on the other hand, how to encourage the engagement of participating countries? In addition, if it is not possible to establish coercive means at the international level, at the domestic level, what would be the commitment of the Nation States to create and comply with environmental legislation.

Notwithstanding the failure of penalties at the international level, there is a growing tendency in litigation conflicts to hold the State responsible, for the omission of norms, inspection or incentives to environmental sustainability.

Currently, 76% of climate litigation takes place in the United States (Wedy, 2021). The country has become a reference on the subject, through the engagement of civil society, companies and the State itself, either sporadically or coercively, with the help of the judiciary, despite being the second largest emitter of greenhouse gases in the world.

One of the outstanding North American cases on the subject was Massachusetts et al v. Environmental Protection Agency. In this specific demand, the US Environmental Protection Agency (EPA) had refused to regulate carbon dioxide emissions from new motor vehicles, even after a request by 19 US non-governmental organizations.

After several clashes, the result culminated in a new regulatory framework and the understanding of a model of judicialization of climatic-environmental conflicts. This is because the North American Supreme Court understood the EPA's competence to regulate the emission of gases from new and used motor vehicles.

And, moreover, regarding the questioning of the illegitimacy of the judiciary to establish guidelines or levels of emission of pollutants, the Honorable Court judged that it did not interfere with the American administrative competence, since the judiciary does not have the technical,

scientific capacity to enter into this matter, however judged that the state environmental agency has the resources to regulate this matter.

This pressure exerted by the litigants resulted in the reform of existing regulations, such as the air pollution law and the US national environmental policy.

This case represents a valuable example of how legal proceedings can serve as a tool to provoke government actions in the field of climate change without violating the principle of separation of powers (Bernardo, 2017).

In Brazil, even though the matter has an embryonic legal nature, if compared to the American model, there are trends of state accountability. On the subject, one can cite the decision in ACP filed by the MP of São Paulo, in 2017, against the Environmental Company of the State of São Paulo (CETESB) mentions the importance of restinga areas for adaptation to sea level rise .

At the national level, ADPF 708 on the functioning of the National Climate Change Fund (Climate Fund), presented at the Federal Supreme Court in June 2020, can be pointed out as the first great example of climate litigation in Brazil. In that action, we seek to discuss the direct affectation of the right to a healthy and ecologically balanced environment provided for in article 225 of the Federal Constitution and to compel the Executive to guarantee the regular functioning of the Climate Fund.

The judicialization of this issue represents an unprecedented opportunity to advance the climate debate in Brazil based on International Environmental Law in relation to the State's responsibility for damages arising from climate change and violations of international agreements signed by Brazil (GIURIATO, 2021).

Therefore, there is this strong trend of state accountability on the subject. This is because it has mechanisms of regulation and environmental inspection. On the other hand, if the private company has authorization to operate from the public entity, it becomes difficult to hold it accountable, since state approval is presumed to have fulfilled the legal requirements, including environmental ones, for operation.

But this context was decisive in putting pressure on governments and polluters to deal with global warming effectively.

IV. CONCLUSION

The institutes of collective actions in the field of climate litigation have increased considerably since 2006. In this context, the role of the judiciary in the conduct of proceedings stands out, so as not to always interfere with the competence of other powers and in order to preserve their independence.

The elevation of environmental issues to the category of human rights caused a greater concern and commitment of the various authors in search of sustainability and less risk to the environment.

The differences of opinion between the countries and the non-compliance with the goals established in the Paris Agreement in force are, without a doubt, great challenges for the subject.

The imputation of state responsibility both internationally and in the field of national law is a strong tendency to mitigate climate conflicts.

Climate litigation must be mitigated with the implementation of commitments assumed by the country and, also at the international level, judicialization is an essential tool that can be used in the search for environmental public policies.

Through the analysis of the research, it is concluded that it is possible to file actions to the detriment of public agents so that they pay attention to climate change when planning the planning of urban spaces or analyzing environmental impact studies of specific projects, with the possibility of intervention in the technologies, methods and safety to be adopted by the enterprises under analysis.

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