Climate Litigation

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Authors

Rafael da Rocha Castilho

Raquel Mansanaro

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The changes in our planet's climate over recent decades[1] have increasingly brought the courts into center stage in the climate debate. In fact, organizations and even individuals have been calling on the courts to take a position on the various changes to the climate, with a view to inciting judicial institutions to act – and to interfere – in the system of climate governance.

This is what has come to be called "climate litigation": the use of judicial avenues to try to compel governments and companies, through legal proceedings brought by States, non-governmental organizations and individuals, to implement measures to mitigate (reduce greenhouse gas emissions), adapt (reduce vulnerability to the effects of climate change), and manage and/or compensate (repair or remediate damage) risks related to the impacts of climate change.

There are many examples of climate litigation around the world,[2] especially after the leading case, known as the "Urgenda Case" was decided. Based on legislative and political commitments assumed by the Netherlands, Urgenda, a civil society organization, brought an action in 2015 to compel the Dutch government to reduce or ensure the reduction of greenhouse gases (GHG) by at least 25% by 2020, in comparison with 1990 levels. The court granted the claim, concluding that the state has a duty to take measures to mitigate climatic changes in view of the "severity of the consequences of climate change and the great risk of climate change occurring." Among other provisions, the Dutch court cited Dutch Constitution, EU emissions reduction targets and principles under the European Convention on Human Rights.[3]

Another noteworthy decision is the recent judgment by the District Court of The Hague in the Royal Dutch Shell case.[4] The court ruled that the company must reduce its emissions by 45% by 2030, in comparison with 2019 levels, in all its activities, including both its own emissions and end-use emissions – in other words, considering all emissions from use of the oil the company produces. The levels ordered by the court are consistent with the Paris Agreement made at COP21 in 2015, and the decision covers all companies and legal entities within the Shell group. It's believed that this is the first time that environmentalists have taken legal action against a multinational company, and this precedent should open the way for similar actions in other countries to hold companies liable if, by action or omission, they violate a duty of care or human rights (or both) by failing to adopt measures to contain greenhouse gas emissions.[5]

In Brazil, although litigation involving climate impacts is not yet significant,[6] the country's position with respect to its international commitments increases the chances that climate litigation will grow.

The emblematic case in Brazil is Public Civil Action no. 5030786-95.2021.8.04.7100, brought by the Rio Grande do Sul Association for Protection of the Natural Environment – Agapan (Associação Gaúcha de Proteção ao Meio Ambiente Natural) against the federal environmental agency, IBAMA, and Copelmi Mineração Ltda., a mining company. The federal courts of the state of Rio Grande do Sul issued a preliminary decision holding that the environmental licensing process for carbon-intensive enterprises must address climate issues. Among other things, the decision suspended the environmental licensing procedures for the thermo-electric plant and ordered that the licensing procedure comply with the legal guidelines established in the National Climate Change Policy (Law 12.187/2009) and in State Law 13.594/2010, "above all with respect to the need for a Strategic Environmental Assessment, within the terms of article 9 of the Sate Law, and the need to include an analysis of risks to human health."

There can be no doubt that the trend is toward more climate litigation, involving increasingly complex issues, which will require the courts to form opinions on the constitutional and legal rights and duties involved in such actions. A close watch should be kept on developments in the case law: increased litigation means that government will have to be more attentive than ever to their policies, and businesses will need solid planning to mitigate the risks associated with legal proceedings brought to enforce environmental goals and guidelines.

NOTES:

[1] See, for example, the conclusions of the Climate Transparency Report released on October 14, 2021. The Climate Transparency Report is a broad global review of the impact of climate change on the G20 economies, and will certainly influence the discussions at COP26. The report notes that while GHG emissions fell for a short time during the covid-19 pandemic, they have since rebounded. As for Brazil, the Report states that the commitments assumed by the nation are not on track to maintain global warming within the limit of 1.5°c. GHG emissions increased by 79% from 1990 to 2018 and deforestation, which is responsible for almost half of Brazil's emissions, grew significantly during the pandemic. https://www.climate-transparency.org/wp-content/uploads/2021/10/CT2021Brazil.pdf

[2] https://www.unep.org/resources/publication/status-climate-change-litigation-global-review

[3] The also cited the "no harm" principle of international law, the doctrine of hazardous negligence and the fairness and precautionary principles. See http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/

[4] The decision was issued on May 26, 2021.

[5]https://news.bloomberglaw.com/environment-and-energy/shell-case-to-fuel-more-climate-suits-targeting-companies

[6] There are a few cases, however, such as Constitutional Cases ADPF 708, which deals with the federal government's omissions with respect to the Climate Fund, which the plaintiffs contend was wrongly paralyzed from 2019 to 2020; ADO 59, which deals with the government's omissions in connection with the Amazon Fund, and is directly related to deforestation, and ADPF 743, which also addresses omissions by the federal government, this time in connection with the land-clearing and wildfires in the Mato Grosso swamplands.

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Rafael da Rocha Castilho


Raquel Mansanaro