

Trends in climate litigation

08.04.2021 3 min read

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According to the United Nation's 2020 Global Climate Litigation Report, there are currently about 1550 cases involving climate change pending in courts around the world.

In the earliest climate cases, dating from the 1990s, the questions at issue tended to be highly specific, and cases were often dismissed under the Political Question Doctrine, which holds that courts should refuse to decide questions that are essentially political rather than legal in nature, on the grounds that they can only be decided by the executive and legislative branches of government – not the judicial branch.

That is now changing. In *Urgenda Foundation v. State of the Netherlands* (2015) and *Leghari v. Federation of Pakistan* (2015), for example, the courts found that the governments had failed to meet their legislative and political commitments to reduce greenhouse gas emissions (GHG) and to implement measures to adapt to the effects of climate change, in decisions that confirm the courts' jurisdiction to protect citizens' environmental rights.

In *Lliuya v. RWE AG* (2015), a Peruvian farmer sued RWE, Germany's largest power company and an emitter of sizeable amounts of GHG, demanding that RWE pay for protecting Peruvian citizens from the environmental impacts brought about by climate change, and specifically by melting glaciers. At first instance, the case was dismissed by the German court for lack of causal nexus. That decision was reversed on appeal in 2017, and the case is now in the evidentiary stage. The appeal decision shows that, at least in theory, the claimant had standing to bring action and that a decision by the courts on the questions raised in the case would not violate the separation of powers.

In *Juliana v. United States of America* (2015), the claimants challenged the way the United States government has conducted its energy policy, contrary to accepted scientific opinion and facts in the US's own academic community, and in violation of the fundamental rights of current and future generations of US citizens.

In Brazil, the Superior Court of Justice (*STJ – Superior Tribunal de Justiça*) recently upheld a decision dismissing a public civil action brought by the Public Prosecution Service of São Paulo against Airlines for their GHG and other emissions at the São Paulo International Airport. In judging appeal RESP 1856031-SP, the STJ held that rules cannot be imposed on airlines by the courts on the pretext of protecting the environment because to do so would violate the separation of powers and invade the jurisdiction of the National Civil Aviation Agency – ANAC.

In contrast, Brazil's constitutional court, the Supreme Federal Court (*STF – Supremo Tribunal Federal*) has agreed to hear two constitutional challenges (ADO and ADPF 60), which seek a declaration by the court that the Executive branch has failed in its duty with respect to the funding, implementation and operation of the Amazon Fund and the National Fund on Climate Change.

These cases indicate the direction that the international climate litigation movement is taking, with disputes over massive damage claims, probability theory in the context of causation, the use of scientific studies as evidence, and omission by states and private agents, among other sensitive issues that, sooner or later, will find their way to the Brazilian courts.

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