Strategic climate change litigation in the Global South: Selected reflections from Brazil and South Africa

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However beautiful the strategy, you should occasionally look at the results.
Winston Churchill

Abstract

Born as a US phenomenon, strategic climate litigation has evolved into a global form of legal mobilization during the last decade. Civil society groups, political parties, public prosecutors, and local authorities have turned to courts to hold governments and high-emitting companies accountable for their carbon footprint in every region of the world. Furthermore, despite an early north-centric bias, recent academic initiatives have devoted increasing attention to the analysis of climate cases in the global south.

The chapter aims to contribute to the academic debate through a comparative reflection of the climate litigation landscape in Brazil and South Africa. As global emerging economies, both countries have a high carbon footprint, and are, as such, promising and challenging territories for the implementation of climate and energy policies, and a conducive legal environment for the rise of climate litigation.

Firstly, given their economic weight, Brazil and South Africa's commitment to a sustainable transition is essential to achieve the Paris Agreement objectives. Nonetheless, it needs to be noted that recently, the respective governments have adopted or authorised unsustainable policies, in the name of national economic development, and ultimately in favour of the agri-business and extractive industries' expansion. Secondly, both Brazil

1 The author is particularly grateful to professor Danielle Andrade Moreira and Carolina de Figuereido Garrido for their support and guidance in her research on climate litigation in Brazil, and wishes to acknowledge the Austrian Science Fund (FWF), that funded this research under the Research Grant W1256 (Doctoral Programme Climate Change: Uncertainties, Thresholds and Coping Strategies).

and South Africa provide favourable legal conditions to climate litigation, which have led to a considerable increase of cases in the last few years. Besides favourable access to justice requirements, and a rich environmental and climate regulation, the respective judiciaries have been prominent in the promotion of environmental and socio-economic rights, also through the domestication and implementation of international law treaties. Against this background, the chapter analyses the most recent developments concerning climate litigation in the two countries, and their prospects to influence transnational litigation, and more broadly, legal innovation.

The brief comparative analysis is structured into three parts: Sections 1.1. and 1.2. provide an overview of the main types of cases brought in Brazil and South Africa. Following the typology proposed by *Jacqueline Peel* and *Jolene Lin*, the Sections classify the rising number of lawsuits based on the cases' legal bases, the importance of climate-related arguments in the claim, and the identity of the litigants. In this way, they assess whether climate litigation in the two countries fall in the aforementioned typology.

Sections 2.1. and 2.2. describe the conditions that make Brazil and South Africa promising jurisdictions for strategic climate litigation. They do so by focusing on selected social, procedural, substantive, and judicial variables.

Sections 3.1., 3.2. and 3.3. highlight the main innovations advanced by the climate decisions recently taken in the two countries. They show the ways in which Brazilian and South African courts creatively used international and constitutional law provisions to stop deregulatory and unsustainable practices by governments and companies. Finally, Section 4 provides a brief conclusion from a comparative perspective.

1. Brazilian and South African climate litigation in the Global South: Analytical framework

Despite its novel character, strategic climate litigation is growing all over the world, and it does not seem close to an arrest. Thus, the urge for scholars exists to keep analysing and classifying new cases, questioning, and when necessary, updating previous typologies and classifications. The section uses the analytical framework proposed by Jacqueline Peel and Jolene Lin as a reference to assess whether the climate lawsuits emerged in the two countries represent a typical or atypical case of climate litigation in the global south. In 2019, the two renowned scholars conducted the first

comprehensive comparative study of climate litigation in the global south.[2] Guided by the results of their analysis, they hypothesised that the "southern docket" is characterised by the following elements:

1) Climate change law and science are at the periphery, rather than at the centre of the claim;
2) fundamental rights, environmental impact assessment (EIA) laws, and the public trust doctrine, form the main legal basis;
3) climate claims aim to enforce climate legislation and the Paris Agreement, and;
4) they receive support from local NGOs, and partially, from non-local NGOs and funders.

Hence, the following sections refer to the four variables above to test whether climate litigation aligns with Peel and Lin's typology, or else, can offer some insight on the development of strategic climate litigation in the global south.

1.1. Brazil: Breaking away from expectations?

In Brazil, the number of climate cases has steeply increased during the Bolsonaro government, turning the country into a hotspot for strategic climate litigation. [3] Compared to the nine legal actions filed until 2019, according to the Sabin Centre Climate Change Litigation Database, the total number of cases has risen to 40 between 2020 and today.[4] Furthermore, following the Brazilian Climate Litigation Platform created by the JUMA Research Centre, the total number of climate lawsuits in Brazil would amount to 78.[5] The boom of climate cases in the country is not entirely surprising, given the former government's outspoken determination to "pass

2 Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679. Pp. 687-710.

3 Joana Setzer, Caio Borges and Guilherme Leal, 'Public Prosecutors, Political Parties, and NGOs Are Paving the Way for Vital Climate Change Litigation in Brazil' (LSE Blog, 25 November 2020) <https://blogs.lse.ac.uk/latamcaribbean/2020/11/25/public-prosecutors-political-parties-and-ngos-are-paving-the-way-for-vital-climate-change-litigation-in-brazil/>.

4 Cf. http://climatecasechart.com/non-us-jurisdiction/brazil/.

5 Cf. https://www.juma.nima.puc-rio.br/base-dados-litigancia-climatica-no-brasil.

the herd", i.e., change and simplify environmental laws in the country, to inter alia incentivise land-grabbing, deforestation and illegal logging.[6]

The section identifies the distinctive elements of strategic climate litigation in Brazil, looking at the type of litigants, the main legal bases used, and their aims. Hence, it investigates whether Brazil can still be considered a "typical" case of climate litigation in the global south following the analytical framework proposed by Jacqueline Peel and Jolene Lin illustrated above.

Regarding the role played by climate change in the legal claim, multiple contributions have distinguished direct and indirect climate cases, depending on the central or marginal role of climate-related arguments. Cases where climate change is at the centre of the argumentation are deemed as direct, differently from cases where climate lies at the case's periphery, defined as indirect. In their respective analyses, *Setzer* et al.,[7] and *Mello* and *Mantelli*[8] concluded that most climate cases in Brazil have so far been indirect, addressing the causes and consequences of climate change, rather than climate change directly.

Nonetheless, neither of the two analyses precede, at least partially, the most recent boom of climate cases in the country. Only between 2021 and 2022, eight further cases have put climate change concerns at the centre of the claim, with the result that direct cases now amount to the (slight) majority of the overall picture in Brazil. Besides central, the most recent cases have also been described as "structural", insofar as they "tend to challenge complex public policies with a wide territorial scope".[9] Recently, two lawsuits requested the government to upgrade its nationally determined contributions (NDCs), similarly to the *Urgenda*-like cases in Europe.[10] Two

6 Gil Alessi, 'Salles vê "Oportunidade" Com Coronavírus Para "Passar de Boiada" Desregulação Da Proteção Ao Meio Ambiente' (*El Pais*, 22 May 2020) <https://brasil.elpais.com/brasil/2020-05-22/salles-ve-oportunidade-com-coronavirus-para-passar-de-boiada-desregulacao-da-protecao-ao-meio-ambiente.html>.

7 Joana Setzer, Guilherme JS Leal and Caio Borges, 'Climate Change Litigation in Brazil: Will Green Courts Become Greener?' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) <https://brill.com/view/book/edcoll/9789004447615/BP000008.xml>.

8 Julia Mello Neiva and Gabriel Mantelli, 'Is There a Brazilian Approach to Climate Litigation? The Climate Crisis, Political Instability, and Litigation Possibilities in Brazil', *Litigating the Climate Emergency: Human Rights and Climate Litigation around the World* (Cambridge University Press 2022).

9 Mello Neiva and Mantelli (n 8). P. 254.

10 *Six Youths v. Minister of Environment and Others* [2021] 14th Federal Civil Court of São Paulo 5008035-37.2021.4.03.6100; *Laboratorio do Observatorio do Clima v.*

further cases requested to reorient the national energy and bank policies in a more sustainable direction,[11] whereas four cases asked for the enforcement of the national deforestation policies (i.e., Plan for the Control and Prevention of Deforestation of the Amazon, also: PPCDAm).[12] Furthermore, a few lawsuits were filed directly before the Supreme Court of Brazil, aiming to request the full application of crucial climate mechanisms, namely, the Amazon Fund, Climate Fund. [13]

In that sense, *Peel* and *Lin's* forecast that the enforcement of climate legislation will be a main objective in southern climate cases seem to hold true for Brazil. Starting from 2020, most Brazilian cases have aimed to halt climate and environmental deregulation and reactivate policies and institutions created under the previous governments. On the other hand, climate litigation in Brazil cannot be reduced to enforcement cases, as part of the lawsuits also aimed to change current climate policies. Regarding their legal bases, the Brazilian case study also appears to be partly in line with the two authors' prophecy. Again, with some interesting peculiarities. The number of rights-based lawsuits, partly inspired by similar cases in Latin America, grew also in Brazil. Seventeen out of the twenty-seven analysed cases have been based on constitutional rights, among other grounds, and most of them on the right to a balanced environment (art. 225 of the Brazilian Constitution). What also needs to be noted is that, given the wide variety of public interest procedures (section II), Brazilian litigators do not need to allege the personal violation of a constitutional right, even in a rights-based claim. Differently from the European wave of rights-based cases, and even

Minister of Environment and Brazil [2021] 7th Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas 1027282-96.2021.4.01.3200.

11 *Conectas Direitos Humanos v. BNDES and BNDESPAR* [2022] 9th Federal Civil Court of the Federal District 1038657-42.2022.4.01.3400; *Rede Sustentabilidade et al. v. Brazilian Congress (Complexo Termoelectrico Jorge Lacerde)* [2022] Federal Supreme Court ADI 7095/2022.

12 *PSB et al. v. Brazil (on Amazon Fund)* Federal Supreme Court (pending) ADO 59/DF; *PSB et al. v. Brazil (on Climate Fund)* [2022] Federal Supreme Court ADPF no. 708, Luís Roberto Barroso; *Instituto de Estudios Amazonicos (IEA) v. Federal Government of Brasil* [2021] Federal Regional Tribunal of the 4th Region, ACP no. 5033746-81.2021.4.04.0000/PR, Vania Hack de Almeida; *PSB et al. v. Brazil (on deforestation and human rights)* [2022] Federal Supreme Court ADPF no. 760, Carmen Lucia.

13 *PSB et al. v. Brazil (on Amazon Fund)* (n 12); *PSB et al. v. Brazil (on Climate Fund)* [2022] Federal Supreme Court ADPF no. 708 (n 12); *ABRAMPA v. Brazilian Minister of Environment Federal* [2021], Supreme Court. ADPF no. 814.

from other jurisdictions in Latin America, only a minority of rights cases alleged a concrete human rights violation.

Finally, an analysis of the identity of the litigators in Brazil, and of their further partnerships reveals a quite original and complex picture. On the one hand, cases alleging a concrete human rights violation, e.g. at the expenses of young people or indigenous groups, tended to be filed by local movements with the support of public prosecutors or larger NGOs operating on the national scale. On the other hand, cases tackling structural actions or omissions on the government side, and alleging a rather abstract rights violation, tended to be filed and funded by political parties, urban-based NGOs, or public prosecutors.[14] As an example of the former case, in *AGAPAN et al. v. COPELMI*[15], a group of local NGOs challenged the authorisation of a large mining project in Rio Grande do Sul, alleging that the latter had violated the right to participation of the affected rural communities. Secondly, in structural cases aiming at the enforcement of climate-related policies, national NGOs or movements specialised in the protection of the Amazon territory, indigenous people, and human rights, such as *Instituto Socio-Ambiental*, *Conectas* and *APIB*, i.e., the Brazilian Articulation of Indigenous Peoples, worked in coalition with other national actors, such as Greenpeace and the Brazilian Association of Public Prosecutors on the Environment (ABRAMPA). Furthermore, most of the cases filed after 2020 received financial support from both domestic and transnational organisations. The Institute for Climate and Society, i.e., a Brazilian philanthropic organisation aiming to strengthen the national economy and reduce inequalities through climate action, provided financial and non-fin-

14 For example, the three cases challenging extractive projects in the state of Rio Grande do Sul, were filed by NGOs and movements active in the affected territory. *Arayara Association of Education and Culture and the Poty Guarani Indigenous Association v. FUNAI, Copelmi Mineração Ltda and FEPAM (Mina Guaíba Project and affected indigenous communities)*, [2022] 9th Federal Court of Rio Grande do Sul, ACP no. 5069057-47.2019.4.04.7100/RS; *Arayara Association of Education and Culture v. Copelmi Mineração Ltda and FEPAM (Guaíba Mine Project and hydrological risks)*, [2020] Court of Justice of the State of Rio Grande do Sul, ACP no. 5049921-30.2020.4.04.7100/RS; *AGAPAN, INGÁ, COONATERRA-BIONATUR, CEPPA v. Copelmi Mineraçao Ltda and IBAMA* [2021], 9th Federal Court of Rio Grande do Sul, TCA no. 5030786- 95.2021.4.04.7100/RS.

15 *AGAPAN, INGÁ, COONATERRA-BIONATUR, CEPPA v. Copelmi Mineraçao Ltda and IBAMA* (9th Federal Court of Rio Grande do Sul) (n 14).

ancial support in both central and peripheral cases, thanks to the funding provided by foreign organisations.[16]

An overview of the Brazilian climate litigation wave offers some interesting insights about the present and potential developments of climate litigation in the global south. First, climate litigation appears to be increasingly direct, and as a result, more and more often based on national climate change law and the Paris Agreement. Furthermore, environmental and climate legislation and the constitutional environmental provisions have been the main legal basis of all the strategic environmental lawsuits filed so far in the country. This is because climate litigation in the country happened in continuity with the previous environmental litigation wave.[17] Finally, the community of climate litigators in Brazil seems to have gained complexity and diversity over the last few years. Especially after the beginning of the former President's mandate, in 2020, the Brazilian climate litigation community has come to include a wide variety of interconnected actors often acting in alliance or coordination, namely, environmental and youth movements, national and international funding organisations, prosecutors, politicians, lawyers, and scientists. It would seem that the previous government's openly anti-environmental policy, also causing the international media to focus on its effects in the Amazon, played an important role for the rise of strategic cases in the country and the strengthening of the climate litigation movement.

1.2. South Africa: Typical strategic climate litigation in the Global South?

In this section we briefly assess whether climate cases in South Africa align with the global south typology constructed by *Peel* and *Lin*. We do so by looking at the role of climate change arguments in the claim, the legal bases used, their final aim, and the type of litigants. According to the Sabin Centre Database, the total number of climate cases filed in South Africa to this day amounts to nine, a considerable number, even though relatively low when compared to the recent boom of cases in Brazil. Furthermore, and differently from the Brazilian example, these lawsuits present a higher

16 'Institute for Climate and Society (Annual Report)' (ICS, 2021). <https://climaesociedade.org/wp-content/uploads/2022/06/Projeto-RA2022-FINAL_ING-1.pdf>.

17 Setzer, Leal and Borges (n 7); Danielle de Andrade Moreira and Stella Luz Andreatta Herschmann, 'The Awakening of Climate Litigation in Brazil: Strategies Based on the Existing Legal Toolkit' (2021) 59 172; Mello Neiva and Mantelli (n 8).

degree of homogeneity. Quite surprisingly, seven out of the nine lawsuits can be considered direct climate cases, as climate arguments are at the centre of the claim. Furthermore, with two exceptions, all of them are project-based, meaning that they challenge extractive projects deeming them excessively carbon-intensive and thus in contrast with the country's national and international commitments.

As for the legal bases, given their focus on carbon-intensive projects, the National Environmental Management Act 107 of 1998 (NEMA), and particularly provisions on Environmental Impact Assessment (EIA) (section 24 (4)) have formed the main legal bases of South African climate lawsuits. In the so-called *Thabametsi* case,[18] Earthlife Africa, a national environmental NGO, argued that the approval of the coal fired *Thabametsi* project was invalid because it failed to consider, broadly speaking, the project's climate change impacts. Following their reasoning, the EIA of a new coal-fired plant should include the extent to which the latter will contribute to climate change, by increasing GHG emissions, its resilience to the impacts of climate change, including rising temperature, diminishing water, and extreme weather events, and how these impacts may be avoided, mitigated and/or remedied.[19]

The High Court of South Africa Gauteng Division, Pretoria upheld these considerations, thus striking down the project's authorisation. The same argument has been replicated in other cases since then. Inspired by the *Thabametsi* decision, Groundwork, a national NGO focused on environmental and climate justice, filed cases to oppose new coal-fired plants in the Mpumalanga Highveld, and a gas-fired plant.[20]

EIA provisions also formed the legal basis of the so-called *Philippi* case, a lawsuit regarding urban development in a horticultural area, and three

18 *EarthLife Africa Johannesburg v. Minister of Environmental Affairs (Thabametsi Power Project), [2017]* High Court (Gauteng Division) 65662/16.

19 ibid., P. 6.

20 *Trustees for the Time Being of GroundWork Trust v. Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station Ltd and Others,* [2017] High Court (Gauteng Division) 61561/17; *Trustees for the Time Being of the Groundwork Trust v. Minister of Environmental Affairs, KiPower Ltd, and Others, [2017] High Court (Gauteng Division) 54087/17.*; Trustees for the Time Being of GroundWork Trust and Another v. Minister of Environmental Affairs and Others, [2023] High Court (Gauteng Division) 39724/19.

further lawsuits, challenging oil and gas exploration projects and the governmental plan to raise the coal production[21].

In addition to environmental law, and in accordance with Peel and Lin's prediction, complainants and courts have supported their arguments relying on constitutional rights and the Paris Agreement. Despite the lack of an explicit referral to human rights in the complaint, in the *Thabametsi* case, the High Court interpreted the EIA provisions (section 24 NEMA) in light of the constitutional right to a healthy environment (section 24 of the 1996 South African Constitution), and the international climate framework, notably the Paris Agreement.

Thus, in the following *Khanyisa*[22] and *Ki Power*[23] cases, the complainants explicitly relied on the same legal sources as interpretative guidance of section 24 of NEMA. Similarly, in the *Philippi* case,[24] the Western Cape High Court struck down a development project in the horticultural area of Philippi based on its impacts on water scarcity, and thus, on the environmental rights set out in section 24 of the South African Constitution. Environmental and socio-economic rights also formed the legal bases of two successive high-profile cases: *#Cancelcoal* and *Sustaining the Wild Coast et al*.[25]

In the *#Cancelcoal* case, given its nature as a direct constitutional challenge,[26] rights-based arguments represented a central part of the claim. The case presents the characteristics of a structural case, as it challenges the government's plan to further extend the coal-fired power supply in the

21 *Philippi Horticultural Area Food & Farming Campaign and Another v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape and Others,*. ***[2020]*** **High Court** (Western Cape Division) *16779/17*. ***South Durban Community Environmental Alliance v. Minister of Environment and Others, [2021] High Court (Gauteng Division)*** *17554/2021,* ***South Durban Community Environmental Alliance &*** GroundWork ***v. Minister of Forestry, Fisheries, and the Environment, [2021] High Court (Gauteng Division).***

22 *Trustees for the Time Being of GroundWork v. Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station Ltd and Others* (n 20). Par. 27 and 39.

23 *Trustees for the Time Being of the Groundwork Trust v. Minister of Environmental Affairs, KiPower Ltd, and Others* (n 20). Par. 139.

24 *Philippi Horticultural Area Food & Farming Campaign and Another v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape and Others.*(n 21).

25 *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others,* [2022] High Court (Eastern Cape Division) 3491/21.

26 *Africa Climate Alliance and Others v. Minister of Mineral Resources and Energy and Others (#CancelCoal case)* [2022] High Court (Gauteng Division) 56907/21. P. 323.

country, rather than an individual project. The involved NGOs referred to the impacts of climate change driven extreme weather patterns, such as droughts and water scarcity, among others, on the young applicants' and the South African citizens' environmental rights, their rights to life and human dignity, equality, water, health care and food.[27] In the aforementioned cases, the rights framework was also used to translate climate justice concerns into legal language. As the applicants point out, new coal-fired plants threaten the rights to equality and fair discrimination: This is because poor, previously disadvantaged South Africans, and particularly women and children, are the primary victims of ecological degradation and air pollution caused by coal-fired power.[28]

Sustaining the Wild Coast et al. had to do with the validity of an authorisation for a seismic survey, given its scientifically proven impacts on marine ecosystems in the Eastern Cape Coast, as well as on the economic, cultural, and spiritual practices of its inhabitants. Particularly, the affected coastal communities, represented by four human rights organisations, alleged that the offshore oil exploration activities risked violating "their constitutionally and customarily held rights, including customary fishing rights",[29] and for that very reason, they ought to be consulted. The court ruled that the exploration right which was awarded without regard to the applicants' right to meaningful consultation constituted a *prima facie* violation of their right. The granting of the exploration right was set aside. The Paris Agreement and national climate policies also played a role in national climate cases. Among other domestic legal sources, the South Africa's Low Emission Development Strategy and the National Climate Change Response White Paper were particularly relevant.[30]

As in Brazil, the climate litigation movement in South Africa presents some degree of heterogeneity. On one end of the spectrum, most of the "central" climate cases have inter alia been filed by Earthlife Africa, the Centre for Environmental Rights, Groundwork and the South Durban Environmental Alliance, i.e., established, large and urban NGOs with a pre-existing litigation agenda. On the other hand, two recent and potentially

27 ibid., Par. 115-149.
28 ibid. Par. 358.
29 *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* (n 25). Par. 3.
30 *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* (n 25). Par. 56.

influential cases have been filed by small and rural organisations aiming to defend the socio-economic and cultural rights of specific areas and communities. The *Philippi Horticultural Area Food and Farming Campaign* was a grassroot movement formed by local activists worried about the impacts of urban development policies on their land, economy and water security. Most of the cases received support predominantly from local NGOs and related movements. Interestingly, in the *#CancelCoal* case, i.e., the domestic lawsuit most similar to European litigation typology, the evidence was provided by the Centre on Environmental Rights, a South African NGO which receives funding from foreign and philanthropic organisations.[31]

In conclusion, the South African example might seem to predominantly represent a typical case of climate litigation in the global south, according to *Peel* and *Lin's* typology. Indeed, with the two exceptions of the cases filed by the smaller local organisations, climate cases in South Africa had at their centre a climate-related argument. In that sense, they contrast with *Peel* and *Lin's* prediction that global south cases would be mostly indirect. Furthermore, the *#CancelCoal* case also presents a structural type of litigation, as it aims to challenge a governmental plan, rather than an individual project. To that extent, the latter case resembles the *Urgenda-like* climate cases filed in Europe. Besides these aspects, the climate cases filed in South Africa adhere to the hypothesis found in *Peel* and *Lin's* framework, insofar as they rely on EIA laws, constitutional rights, and the Paris Agreement, aiming at enforcement of existing climate and environmental standards, and they mostly counted on the support of local NGOs.

2. Brazil and South Africa: A conducive legal environment for climate litigation?

2.1. Brazil

The Brazilian climate litigation wave, sketched above, was born in a conducive environment : social, legal (i.e., procedural and substantive), and judicial factors laid strong foundations for the legal mobilisation of climate change in the country. Firstly, strategic litigation is not a novel phenomenon in the country. In all Latin American countries, including Brazil, stra-

31 Cf: https://cer.org.za/about/funders.

tegic litigation spread already in the 1980s, thanks to the influence of the public interest litigation movement in the US, the funding provided by international foundations, and the expertise of transnational legal elites.[32]

Furthermore, Brazilian litigators could count with a wide and interconnected "support structure" to climate litigation, namely, a wide community of agents willing and able to support the litigation process.[33] Although the first climate cases were filed already in the 2010s, the beginning of the 2020s, marked as they were by environmental and climate deregulation at the federal level and the affirmation of the global climate movement, gave the Brazilian "climate epistemic community" a particularly strong momentum. Such community, including "lawyers, judges, scientists, business entities, politicians, prosecutors, academics, NGOs and subnational governments",[34] united forces with the aim of resisting the governmental rollbacks during Bolsonaro's presidency. It is not surprising that most climate cases until 2022 were filed against government authorities, and to a significant extent, by political parties, often in coordination with non-governmental organisations.

Secondly, as noted by *Setzer* at al., climate change litigation in Brazil "does not take place in a regulatory vacuum."[35] Quite on the contrary, the Brazilian legal system counts with a progressive and rather comprehensive environmental and climate legislation, and even enshrines environmental duties and rights in its constitutional context. Quite ahead of its time, the National Environmental Policy Act defined the environment as an autonomous legal good and established a strict civil liability regime for environmental harms. Following the latter and its interpretation by the Brazilian judiciary, even potential polluters must compensate environmental harms, independently from their fault, when arising directly and indirectly from their activities.[36] As noted in the literature, however, Brazilian

32 Mariana Prandini Assis, 'Strategic Litigation in Brazil: Exploring the Translocalisation of a Legal Practice' (2021) 12 Transnational Legal Theory 360. P. 8.

33 Joana Setzer and Lisa C Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 Wiley Interdisciplinary Reviews: Climate Change e580. P. 6.

34 Alessandra Lehmen, 'Advancing Strategic Climate Litigation in Brazil' (2021) 22 German Law Journal 1471. P. 1472

35 Setzer, Leal and Borges (n 7). P. 144.

36 Danielle De Andrade Moreira, Letícia Maria Rêgo Teixeira Lima and Izabel Freire Moreira, 'O Principio Do Poluidor-Pagador Na Jurisprudencia Do STF y Del STJ: Uma Análisis Critica' (2019) 16 Veredas do Direito: Direito Ambiental e Desenvolvimento Sustentável 367.

Courts have yet to decide on the application of the civil liability regime to climate harms.[37]

Regarding climate legislation, the National Policy on Climate Change (PNMC)[38] sets a comprehensive framework, establishing principles and directives to climate action, i.e., the principles of prevention, precaution, and sustainable development, institutional arrangements and mitigation targets.[39] Importantly, art. 5 of the PNMC establishes that the international commitments taken by Brazil, in the context of the United Nations Framework Convention on Climate Change (UNFCCC) Conference of Parties (COPs), shall be observed as directives of national policies, and count as normative parameters for judicial review, independently of their internal ratification.[40] Finally, art. 225 of the Brazilian Constitution enshrines an intergenerational right to a balanced environment and a public and collective duty to environmental protection. Given its double nature as a right and duty and its intergenerational scope, the provision has been praised as a rather strong and comprehensive provision.[41] Moreover, its judicial use has been successful in most cases, triggering some important policy impacts.[42] Namely, it led to the adoption of a comprehensive policy attributing to all citizens a core minimum of environmental services, namely, access to clean water, sanitation, and proper waste management.[43]

Thirdly, Brazilian law provides a vast repertoire of legal actions for environmental and climate protection. In a recent contribution, a Brazilian justice and scholar listed seven legal procedures that might be relevant to that purpose.[44] Quite interestingly, all of them are public interest actions,

37 Setzer, Leal and Borges (n 7).

38 Law no. 12.185, 29 December 2009, *(Politica Nacional sobre Mudança do Clima (PNMC)*.

39 Setzer, Leal and Borges (n 7). P. 148.

40 Gabriel Wedy, *Litígios Climaticos de Acordo Com o Direito Brasileiro, Norte-Americano e Alemão* (Editora Jus Podium 2019). P. 72.

41 ibid; Paulo Alfonso Leme Machado, *Direito Ambiental Brasileiro* (Malheiros 2005). P. 116.

42 David R Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54 Environment: Science and Policy for Sustainable Development 3. P. 9.

43 ibid, p. 9. Supreme Court of Justice of Minas Gerais, *Appeal no. 575998*; Supreme Court of Justice of Rio Grande do Sul, *Appeal no 70011759842*.

44 Wedy (n 40). P. 81 and ss. Five of those have already been experimented, namely, the public civil action, the action for the violation of a fundamental precept, the direct action for unconstitutional omission, the popular action, and the direct action for unconstitutionality.

thus, they do not require the proof of violation of an individual legal position, often a significant hurdle in climate cases.[45] Secondly, three of those are direct constitutional complaints, with the peculiarity that they can also be filed by political parties, thus, by the opposition to the government in power. Moreover, public civil actions and actions for unconstitutional omission can be directed against both acts and omissions. Thus, when deciding on the two actions, judges can order to perform an action to put an end to the situation of illegality or unconstitutionality ("obrigaçao pra fazer").[46] The latter remedy is quite relevant in the context of climate litigation, where litigators often request that governments adopt new laws or policies to comply with their international commitments or with scientific recommendations.[47]

Finally, after the 1988 adoption of the Constitution, Brazilian Courts have developed an environmentally oriented case law,[48] as well as an "activist" attitude towards other state's functions. As noted by *Luis Barroso*, one of the Brazilian Supreme Court judges, starting from the 1990s, the judiciary has actively interfered with policy matters in different ways, for instance,

45 Pau De Vilchez Moragues, *Climate in Court: Defining State Obligations on Global Warming through Domestic Climate Litigation* (Edward Elgar Publishing 2022); Joana Setzer et al., 'Climate Litigation in Europe. A Summary Report for the European Union Forum of Judges for the Environment' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science and the European Union Forum of Judges for the Environment 2022); Ian Curry, 'Establishing Climate Change Standing: A New Approach' (2019) 36; Orla Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2022) 34 Journal of Environmental Law 107.

46 Art. 3, Law no. 7347/1985, 24 July 1985, *(Disciplina a ação civil pública de responsabilidade por danos causados ao meio-ambiente, ao consumidor, a bens e direitos de valor artístico, estético, histórico, turístico e paisagístico e dá outras providências)*; Art. 12 a, Law no. 9868/1999, 10 November 1999 *(Dispõe sobre o processo e julgamento da ação direta de inconstitucionalidade e da ação declaratória de constitucionalidade perante o Supremo Tribunal Federal).*

47 The fact that judges lack a clear-cut power to impose an obligation to do upon the state has been considered a legal barrier in some European climate cases, including in Belgium, Spain, Italy. See, among others, Marien Liselot and Leonie Reins, 'Local Liability for Global Consequences? Climate Change Litigation in Belgium', *Comparative climate change litigation: beyond the usual suspects* (Springer 2021); Rosa Fernández Egea, Sofia Simou and Albert Ruda, 'Climate Change Litigation in Spain', *Comparative climate change litigation: beyond the usual suspects* (Springer); Ines Bruno, 'La Causa «Giudizio Universale». Quattro Testcostituzionali Sui Poteri Del Giudice Adito' (2022) 2 Federalismi.it 27.

48 Nicholas S Bryner , 'Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)', (2012) 29 Pace Envtl. L. Rev. 470.

by imposing to undertake specific activities, when deeming public policies insufficient to protect social rights effectively.[49] Furthermore, it is important to note that, far from consisting in isolated positions, the Supreme Court's activism is associated to the adhesion, by several judges, to neo-constitutionalism, i.e., a stream of thought promoting the use of moral principles in legal argumentation and a strong judicial role in the implementation of the Constitution's values.[50] This ideological and methodological toolkit might prompt the judiciary to take courageous decisions in a disruptive and morally loaded field such as climate litigation.[51]

In the environmental field, more specifically, the Supreme Court recognised that guaranteeing a minimum threshold of ecological integrity is essential to a dignified life,[52] and international environmental treaties enjoy a supra-legal status in the legal hierarchy due to their function to protect fundamental rights.[53] Moreover, already in the 2010s, the High Court of Justice recognised climate protection as an implicit objective of Brazilian environmental legislation. In an influential precedent, Justice *Antonio Benjamin*, one of the main precursors of judicial environmentalism in Brazil, considered climate change as an issue raising the urgency of protecting threatened ecosystems, and a reason to interpret restrictively any exception to environmental laws.[54]

2.2. South Africa

Just like Brazil, South Africa offers an increasingly conducive legal environment for climate change litigation as it presents favourable conditions from a social, legal, and judicial standpoint. From the perspective of the actors initiating and supporting strategic litigation in the country, the envir-

49 Luis Roberto Barroso, 'Constituçao, Democracia e Supremacia Judicial: Direito e Politica No Brasil Contemporaneo', *As novas faces do ativismo judicial* (Jus Podium 2011). P. 233.

50 Daniel Sarmamento, 'O Neoconstitucionalismo No Brasil: Riscos e Possibilidades', *As novas faces do activismo judicial* (Jus Podium 2011). P. 87-88.

51 Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change: Climate Change and Legal Disruption' (2017) 80 The Modern Law Review 173.

52 *ADI 4903/DF* [2018] Ricardo Lewandowski (Supremo Tribunal Federal).

53 *ADI 4066/DF* [2017] Rosa Weber (Supremo Tribunal Federal).

54 High Court of Justice, [2009], *Resp n 1000731-RO*, Antonio Herman Benjamin. Wedy (n 40). PP. 107-108.

onmental movement in South Africa seems to have turned to courts to a minor extent when compared to Brazil. On the one hand, only few NGOs have predominantly brought environmental and climate-related disputes to South African courts. The relative minor engagement might have to do with the fact that there is only a limited number of public interest organisations in the country, and their expansion is hindered by severe resource and knowledge constraints as well as by the politico-legal environment.[55] On the other hand, public interest organisations have joined efforts with legal advocacy networks, research institutes and social movements since the late 1980s in the attempt to remedy the structural inequalities in the country through strategic litigation. In some cases, with far-reaching impacts, such as "the massive expansion of access to HIV/AIDs medicine, the dramatic drop in large-scale urban evictions, and the expansion of the system of social grants to marginalised groups."[56] Hence, one could hope that the climate and environmental litigation movement will be able to harness the lessons learnt by previous social movements that, during the past decades, successfully engaged in public interest cases.

From a procedural perspective, section 38 of the South African Constitution provides the legal basis for public interest litigation and class actions, allowing to file a case "in the public interest" and to associations to act in the interest of their members.[57] Although public interest litigation is not yet common in the African continental context, section 38 of the South African Constitution provides legal standing (locus standi) for class action and public interest litigation.

Additionally, the South African jurisdiction also provides legal avenues to file private cases to different legal entities, including individuals and associations, notably based on tort (delict) law.[58] No doubt, other robust legislative frameworks that develop or amend laws to mainstream climate change into their empowerment and planning provisions could further

55 David Cote and Jacob Van Garderen, 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest' (2011) 27 South African Journal on Human Rights 167.

56 Malcolm Langford et al. (eds), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2014). P. 454.

57 Cote and Van Garderen (n 55).

58 Oliver C Ruppel, 'South Africa: Climate Change, Responsibility and Liability - the Legal System, Public and Private Law Considerations', *Climate Change, Responsibility and Liability* (Nomos 2022).

facilitate effective design and implementation of climate change response options.

Regarding substantive law, South Africa's constitution and national legislation lay relevant grounds for holding the state accountable over climate change action and/or inaction. Due to space constraints, we will limit ourselves to mention a few of them. Section 24 of the South African Constitution includes an environmental right into the Bill of Rights, providing that 'everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected through reasonable legislative measures.' Section 24 further provides that the environment should be protected for current and future generations through reasonable legislative measures and additional measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development. Although not explicitly mentioned, section 24 indirectly relates to climate change, as the latter is harmful to the environment and can detrimentally implicate citizens' health and wellbeing. Further, climate change is a result of pollution and leads to ecological degradation, suggesting that there is a need for legislation that relates to climate change specifically. Hence, section 24 implicitly requires the South African government to also address climate change and its corresponding impacts.

This is of particular importance regarding natural resources is section 24(b)(iii), according to which measures need to be taken to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Such measures include legislative measures in the form of statutory law, but also other measures implemented by the executive branch, such as policies and programmes. [59]

Secondly, the National Environmental Management Act 107 of 1998 (NEMA)[60] contains the general principles which should orient the government and administrative decision-making on environmental matters. As such, it has been defined as the "the backbone of South African environmental law", and it provides an important basis for climate lawsuits. Importantly, the Act adopts a people-centred approach to environmental

59 ibid.

60 Chapter 1 of the Act.

action and affirms that the latter shall be pursued in a way compatible with environmental justice to avoid worsening the living conditions of already vulnerable and disadvantaged persons. Such principles shall be interpreted in conjunction with the state's responsibility to promote, respect and fulfil socio-economic rights.[61]

Moreover, in terms of administrative law, section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to the right to review administrative action, which must be lawful, reasonable and procedurally fair as per section 33 of the Constitution. Such administrative action is supported by section 31 of NEMA, which provides for access to environmental information and the protection of whistle-blowers.

Additionally, chapter 5 of NEMA provides for integrated environmental management and enshrines the environmental impact assessment regime, i.e., the key regulatory instrument to manage the impacts on new developments and activities on the environment. As noted in the literature,[62] environmental movements have proven already well acquainted in the use of such instruments, as they have used it to for instance prevent the expansion of the nuclear industry.

Ultimately, South Africa's Climate Change Bill B9B—2022 was finally approved by the National Assembly in October 2023 and is currently under consideration by the National Council of Provinces. The Bill heralds an effective climate change response and a long-term, just transition to a low-carbon and climate-resilient economy through an effective national climate change response, including mitigation and adaptation actions.

Clause 21 of the Bill empowers the Minister, in consultation with Cabinet, to determine, by notice in the Gazette, a national greenhouse gas emissions trajectory for the Republic. Until such time as the Minister publishes a national greenhouse gas emissions trajectory, the latest updated Nationally Determined Contribution serves as the trajectory. Among other provisions, clause 21 might turn into a relevant basis for (*Urgenda*-style) climate lawsuits. The clause provides for the mandatory review of the trajectory every five years as well as for a review at any other time should the circumstances require.

Finally, several characteristics of the South African judiciary might encourage movements to turn to courts and help them succeed in climate-re-

61 Ruppel (n 58). P. 219
62 Langford et al. (n 56). P. 427.

lated claims. To begin with, the South African judiciary has been praised for its independence and internal diversity, especially in comparison to other post-transitional states.[63] Further, the South African courts have been open and supportive of the use of strategic litigation as a tool for democratic accountability. In *Mazibuko v. City of Johannesburg*, Justice *Kate O'Regan* affirmed that, by providing citizens with tools to review public policies, "(socio-economic rights) enable citizens to hold the government accountable not only through the ballot box, but also, in a different way, through litigation."[64]

Finally, both international and comparative law occupy a role in domestic judicial review. Such provides section 39(1)(b) of the Constitution that international law must be considered when a court interprets the Bill of Rights. On one hand, the international climate framework, embedding global targets and general principles for climate action, represents a necessary baseline for the judicial review of any national climate policy. On the other hand, a court's openness to comparative references might be transformative in climate cases, given the relative novelty of the field and the existence of ground-breaking precedents at the transnational level.

Finally, the South African judiciary is known for having developed an extensive case law on socio-economic rights and, as a result, an "intellectually robust" methodology for their review.[65] Despite the existence of contrasting views on the transformative impact of such jurisprudence,[66] it has been argued that the socio-economic rights jurisprudence might provide a solid basis for cases brought on behalf of the most marginalised groups, whose vulnerabilities risk to be amplified by climate change.[67] Among others, the engagement remedy, if well developed, might provide an interesting basis to "assist adverse parties", such as environmental movements, the fossil fuel industries and relatively inert administrations, to find "mutually acceptable

63 Cote and Van Garderen (n 55). P. 172.

64 Brian Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 South African Journal on Human Rights 107.

65 ibid.

66 Marius Pieterse, 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004) 26 Human Rights Quarterly 882; Langford and others (n 56); Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013).

67 César Rodríguez-Garavito, 'Human rights: The global south's route to climate litigation' (2020), 114 AJIL Unbound 40, P. 40.

solutions."[68] This requires the engagement of the involved parties, including affected and marginalised populations, and civil society groups, in the implementation of the judicial order.[69]

3. Legal innovation in climate judgements

3.1. Brazil

Over the last few years, the Brazilian judiciary, particularly the Supreme Court, worked towards setting constitutional boundaries to environmental and climate deregulation. The most recent stream of climate activism has taken place in the context of a dramatic regression in the country's environmental policy.[70] As noted, during Bolsonaro's mandate, Brazil's environmental agenda, which in the past had stood out for its protective and markedly ecological character, was marked by an omissive and permissive attitude, openly anti-environmental conducts, including the diversion of environmental funds and the permission of illegal extractive activities in conservation areas and indigenous territories, especially in the Amazon Forest.[71] The results of such policies have recently become more vivid than ever, as the images of the humanitarian crisis hitting the Yanomami people in the Amazon have become of public dominion, showing the effects of years of illegal gold mining in indigenous reserves.[72]

It is in this context that, in two direct constitutional lawsuits, namely the Action for the Violation of a Fundamental Precept (ADPF) no. 708 and 760, Supreme Court Justices *Carmen Lucia* and *Luis Roberto Barroso*, recognised as unconstitutional the government's failure to combat climate change and protect climate vulnerable groups. In the ADPF no.760

68 Ray (n 64). P. 125.

69 ibid., p. 111, Lilian Chenwi and Kate Tissington, *Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right of Housing* (Trident Press 2010).

70 Mello Neiva and Mantelli (n 8). PP. 349- 351.

71 Ingo Wolfgang Sarlet and Thiago Fensterseifer, 'Direito Fundamental Ao Clima Estável, Litigância Climatica e ADPF n. 708/DF', *STF e as mudanças climaticas: contribuiçoes para o debate sobre o Fundo Clima (ADPF 708)* (Telha 2021). PP. 333-334.

72 Sanya Mansoor, 'Why Lula Accused Bolsonaro of "Genocide" Against Brazil's Yanomami People' (Time, 23 January 2023) <https://time.com/6249369/lula-accuses-bolsonaro-genocide-yanomami/>.

and 708,[73] also known as *PSB et al v. Brazil (Deforestation and Human rights case*) and *PSB et al v. Brazil (Climate Fund case),* the Federal Supreme Court noted that the government's failure to, respectively, control deforestation and protect human rights and use public funds for climate policies constituted an "unconstitutional state of affairs". Using a legal instrument originally found in the Colombian case-law, Justice *Carmen Lucia* described Bolsonaro's policies as "a reiterated omission [...] triggering a continuous and serious offense to fundamental rights."[74] Moreover, in the *Climate Fund case*, even recognising the government's discretion on matters of public finance, the court stressed the importance of judicial intervention in a context of "worrying and persistent" degradation of the rights to life, health, and food security, as a result of climate inaction.[75] Thus, in the two actions, the Supreme Court expressly recognised the judiciary's duty to act in the context of a systematic violation of constitutional duties and rights. Furthermore, the two judicial decisions requested to give full material implementation to the climate and environmental laws and standards set by previous governments.

3.1.1. Substantive law: Direct and indirect effects

Besides their direct outcome, the two cases are worth analysing for their indirect effects, namely, for their potential to break new legal ground, both in the Brazilian legal system and abroad. To start with, the two judicial decisions were quite original to the extent that they applied doctrines and mechanisms which had previously been used only in a handful of environmental cases. In the *Deforestation and Human Right* case, *Carmen Lucia* interpreted the governments' duties in light of the principle of non-regression in environmental law. The principle prohibits the adoption of legislative or administrative measures whose objective is to downgrade consolidated environmental standards.[76] Furthermore, the Supreme Court interpreted the principle of non-regression as implying that environmentally regressive policies are to be submitted to a rigorous constitutional review. Hence,

73 *PSB et al. v. Brazil (on Climate Fund)* (n 12); *PSB et al. v. Brazil (on deforestation and human rights)* (n 11).
74 *PSB et al. v. Brazil (on deforestation and human rights)* (n 12). P. 142, par. 80; P. 152, par. 84.
75 *PSB et al. v. Brazil (on Climate Fund)* (n 12). P. 7, par. 15.
76 *PSB et al. v. Brazil (on deforestation and human rights)* (n 12). PP. 50-51; par. 30.

public authorities responsible for regressive policies will have to justify them according to the principle of proportionality.

Despite having been previously applied to environmental cases and largely debated in the literature,[77] the principle had never been used in the climate context before. Nonetheless, its application in a climate case might have important legal consequences both on national and transnational climate litigation and policy. Concerning domestic litigation, the principle has already been used in *Laboratorio do Observatorio do Clima v. Minister of the Environment*, where the claimants requested to change the government's last NDCs due to its regressive character. If applied in this context, the principle might provide a constitutional argument for the application of the principle of progression of the NDCs enshrined in the Paris Agreement (art. 4 (3)). More generally, the principle of non-regression in environmental law might constitute a tool against political majorities willing to backslide on climate protective standards. In this way, the principle might turn out to be a constitutional limit to the "tyranny of the contemporary", in the context of a super-wicked problem as climate change, where least affected political and economic elites have the power to irreversibly impact the living conditions of large segments of vulnerable populations, future generations, and not-human beings.[78]

In the *Climate Fund* case, on the other hand, Justice *Barroso* found that the state has a constitutional duty to use the public funds allocated to climate policies. To put it in the words of *Araujo Suely*, director of the Brazilian Climate Observatory, "the government does not have the right to opt for a non-public policy in this field."[79]

Justice *Barroso* found that this obligation derives from the state's duty to protect climate stability (art. 225 of the Brazilian Constitution), and to respect the international commitments arising from human rights treaties,

77 Ingo Wolfgang Sarlet and Thiago Fensterseifer, *Direito Constitucional Ambiental* (Revista dos Tribunais). P. 302. According to the authors, the principle finds its foundation in the welfare state, the principle of human dignity, the principle of legal certainty, and finally, in the international law principle of progression of the economic, social and cultural rights. P. 302.

78 Stephen Mark Gardiner, *A Perfect Moral Storm the Ethical Tragedy of Climate Change* (Oxford University Press 2011); Richard Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present t Liberate the Future' (2009) 194 Cornell L. Rev.1153.

79 'STF Decides That the Paris Agreement Is a Treaty of Human Rights in Brazil' (*Instituto Clima e Sociedade*, 3 February 2023).

provided at art. 5.2 of the Constitution. According to the latter, national laws can be submitted to constitutional review when in conflict with human rights treaties. *Barroso's* argument was just relatively original, as he applied an interpretative mechanism which had previously been used in a Supreme Court decision regarding workers' exposure to asbestos. In the *Asbestos* case, Judge *Rosa Weber* noted for the first time that, falling into the category of human rights treaties, environmental treaties also enjoy supra-legal character.[80] Expanding on that argument, Justice *Barroso* noted that, given its role in protecting human rights, Paris Agreement is to be deemed as a human rights treaty, having supra-legal character in the Brazilian legal system.[81] In this way, the Supreme Court transformed the Paris Agreement into a constitutional parameter for the review of laws and administrative omissions, with the implication that any new climate act or law, including NDCs, could now be invalidated when found to be in contrast with the Paris Agreement.[82] In that sense, the decision might have important effects on pending cases both in Brazil and elsewhere, if other litigators pursue the same argument.[83] This would be particularly influential in Latin American jurisdictions, where international human rights treaties are mostly recognised as directly applicable to the domestic legal systems.[84] Furthermore, the decision also tackled the way in which funds are allocated, indicating that they should be preferentially used to address the most important sources of GHG, i.e., deforestation and land use change.[85] This implies that the Supreme Court in the future might be able to interfere not only with failure to use public funds, but also with their mismanagement, if they are found to be used for irrelevant projects.

80 *ADI 4066/DF (Absestos case)* [2017] Rosa Weber (Federal Supreme Court). Notably, the Supreme Court recognized the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal as a human rights treaty. P. 41.

81 *PSB et al. v. Brazil (on Climate Fund)* (n 12). Par. 17.

82 Maria Antonia Tigre, 'Advancements in Climate Rights in Courts around the World' (*Climate Law Blog of the Sabin Center for Climate Change Law*, 1 July 2022) <https://blogs.law.columbia.edu/climatechange/2022/07/01/advancements-in-climate-rights-in-courts-around-the-world/>.

83 Isabella Kaminski, 'Brazilian Court World's First to Recognise Paris Agreement as Human Rights Treaty' (*Climate Home News*, 7 July 2022) <https://www.climatechangenews.com/2022/07/07/brazilian-court-worlds-first-to-recognise-paris-agreement-as-human-rights-treaty/>.

84 Juan Auz, 'Human Rights-Based Climate Litigation: A Latin American Cartography' (2022), 13 Journal of Human Rights and the Environment 114, 122-125.

85 *PSB et al. v. Brazil (on Climate Fund)* (n 12). Par. 35.

3.1.2. Procedural law: Direct and indirect effects

On a procedural level, in the two aforementioned decisions the Supreme Court seemed animated by an intent to make the decision-making process as plural and democratic as possible. In an unprecedented way in climate litigation, in the *Climate Fund* case, the Supreme Court held a public hearing calling interested parties to provide their perspectives and expertise on climate change in Brazil. In the hearing, described by some as a crucial moment in the context of the country's increasing polarisation,[86] sixty-six experts including scientists, activists, politicians, indigenous people, representatives of the agri-business and financial sector presented their views for their consideration in the case.[87]

Furthermore, the remedies requested in both decisions presented a marked dialogic character. According to a distinction made by *Rodriguez-Garavito*, when imposing dialogic remedies, Courts tend to "set broad goals and specific implementation paths, through e.g. deadlines and progress reports, while leaving substantive decisions and detailed outcomes to government agencies".[88] By interfering with policy matters to a limited extent, while submitting them to review and monitoring, dialogic remedies have been praised for their institutional legitimacy[89] and higher effectiveness.[90] In the *Deforestation and Human Rights* case, Justice *Carmen Lucia* ordered to adopt two plans aiming to, respectively, implement the existing deforestation policies and provide adequate resources to monitor and control deforestation. The Supreme Court Justice also indicated an implementation path, including standards, targets, and time frames to adopt the two plans. Moreover, she requested an online publication of the new plans to allow the

86 Joana Setzer, 'First Climate Case Reaches Brazil's Supreme Court' (LSE, 30 September 2020) <https://www.lse.ac.uk/granthaminstitute/news/first-climate-case-reaches-brazils-supreme-court/>.

87 Caio Borges and Pedro Henrique Vasques, *STF e as Mudanças Climaticas: Contribuçoes Para o Debate Sobre o Fundo Clima (ADPF 708)* (Telha 2021). The book contains a collection and the elaboration of the experts' views presented in the public hearing.

88 César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011), 89 Texas Law Review 1669.1676.

89 Roberto Gargarella, 'Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?', *Deliberative democracy and its discontents* (Routledge 2006). Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (n 89). P. 1687.

90 Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (n 89). P. 1676.

monitoring of their implementation. On the other hand, in a concurring opinion in the *Climate Fund* case, Minister *Edson Fachin* considered that the government should be obliged to publish a report on its use of the climate funds, including its distribution in different policy sectors.

3.2. Assessing the impacts of climate litigation in Brazil: Comparative and critical remarks

When looked at in the transnational litigation context, the two proceedings seem to bring one step forward the legal conversation about the state's duties to climate protection. Compared to the *Neubauer* decision in Germany, the Brazilian Supreme Court provided that the state has a duty to justify its own policies, when allegedly in contrast with the Paris Agreement or regressive. In the German decision, conversely, the Federal Constitutional Court denied the existence of an independent duty to justify its policies, while admitting the state's duty to take into account the interference with the citizens' constitutional rights in the future.[91] Moreover, while the German Constitutional Court attributed constitutional relevance to the temperature targets set in the Paris Agreement,[92] the Supreme Court in Brazil constitutionalised the climate treaty as a whole.

A second peculiarity in Brazilian litigation has to do with the involvement of civil society actors during the proceedings of direct constitutional complaints. In the two analysed cases, political and non-governmental representatives, as well as experts and business actors, participated in the trial, either as plaintiffs, *amici curiae* or external experts. Differently from European cases, where climate lawsuits were seldom filed by coalitions of different organisations or involved public hearings, in the Brazilian case the involvement of different actors in the framing of the cases might have led to a more holistic diagnosis of the climate problem in the courtrooms. While European lawsuits, referred to the governments' failure to tackle climate

91 ibid.

92 *Neubauer et al v. Germany* [2021], Federal Constitutional Court, Order 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20. Cf. par. 196-197, "However, the legislator does remain obliged to limit the temperature increase to preferably 1.5°C – a target that it formulated when specifying Art. 20a GG (a). […] Art. 20a GG is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations who will be particularly affected". Cf. also Matthias Goldmann, 'Judges for Future' (Verfassungsblog: On Matters Constitutional, 30 April 2021).

change as a matter of non-compliance with national and international emission targets, the two Brazilian cases indicated the systematic ways and sectors in which the government had failed its duty to tackle deforestation.

Finally, the *Deforestation and Human Rights* case, by imposing strict transparency requirements, laid the conditions for a wide public participation in monitoring the decision's implementation. By doing so, the Brazilian Court joined a transnational procedural trend, possibly adding a more democratic note to it. Besides Brazil, Courts have been setting dialogic remedies, imposing standards, targets, and time frames for the adoption of effective climate policies, in leading cases in Pakistan, Colombia, France, Germany, Ireland.[93] In that sense, the Brazilian decision brings a quite innovative trend to the climate litigation landscape in the country, which will potentially be strengthening the domestic climate movement.

To conclude, the two decisions have the potential to trigger some significant legal innovation at the transnational level. The transformation of the Paris Agreement into a constitutional parameter, the application of the principle of non-regression to climate policies, and the wide public participation in the proceedings, observed in the two cases, might encourage global litigators and courts to use similar strategies and arguments. On the other hand, on the national level, the political effects of the two decisions are hard to predict, as they were soon followed by the re-election of Lula, i.e., the leader of the political party that had adopted the Climate Fund and the Plan for the Prevention and Control of the Deforestation in the Amazon. Just a few days after his re-election, Lula already restored the authority of IBAMA, revoked a decree allowing mining in indigenous reserves, and unfroze another important finance mechanism, i.e., the Amazon Fund. However, as noted by many, the full adoption of Lula's ambitious climate policies is likely to be hampered by the Congress, as Bolsonaro's allies obtained control of half of the chambers.[94] A law recently passed by the Congress against a ruling of the Supreme Court and the presidential veto, and denying indigenous peoples their claims to the

93 *Leghari v. Federation of Pakistan* (Lahore District Court) 2550115; *Castilla Salazar and Others v. the State of Colombia* (Supreme Court of Colombia) C-035/16; *Notre Affaire à Tous v. France* [2021] Tribunal Administratif de Paris N°1904967, 1904968, 1904972 1904976/4-1; *Neubauer et al v. Germany (n* 93); *Friends of the Irish Environment v Ireland* [2019] High Court of Ireland 793/17.

94 Meghie Rodrigues, 'Will Brazil's President Lula Keep His Climate Promises?' (2023) 613 Nature 420.

ancestral lands occupied before 1988, would seem to give reason to those warnings.[95]

3.3. South African climate litigation: Between continuity and innovation

Climate cases in South Africa can be described as a successful experiment: among the nine cases filed until today, several positive judicial decisions can be recorded. In several cases, the judiciary decided in favour of climate protection, leading to the halt of carbon-intensive projects, and establishing legal precedents at the internal and transnational level. In the *Thabametsi* case, Earthlife Africa, a local environmental NGO, sought to invalidate the authorisation of a coal-fired power plant, given the governmental authorities' failure to consider its contribution to the global GHG emissions, and thus, to climate change. The South African High Court Gauteng Division, Pretoria considered the EIA process as invalid, having interpreted relevant National Environmental Management Act provisions in conjunction with the constitutional environmental rights and the international commitments taken under the Paris Agreement. The decision is the first climate case in which a South African Court recognised climate change as a relevant issue to take in consideration in (all) developmental decisions.[96]

Besides its immediate effects, the judgement triggered similar cases against other coal projects, gas-powered plants, exploration activities and development plans, which mostly followed a similar legal reasoning and mainly relied on EIA as a legal basis. Such tendency is not surprising, as EIA laws have been a dominant legal basis in projects-based litigation, and in many jurisdictions where such cases have been filed. In such cases climate change has been considered as a relevant matter to be considered during the authorisation process. As noted by *Medici-Colombo*, "[…] in most of the jurisdictions where the issue has been raised (United States, Australia, South Africa, Kenya, India, Mexico) courts have recognised that, even in the absence of express normative requirement, climate change must

95 See Constance Malleret, 'Controversial Brazil Law curbing indigenous rights comes into force', (The Guardian, 28 December 2023), <https://www.theguardian.com/world/2023/dec/28/brazil-law-indigenous-land-rights-claim-time-marker>.

96 Ruppel (n 58) with further references.

be part of authorities' considerations about projects, specifically through the EIA processes."[97]

Section 24(a) and (b) of the South African Constitution recognises the right to an environment that is not harmful to health or wellbeing and to have the environment protected, for the benefit of present and future generations, through measures that secure ecologically sustainable development and use of natural resources. Section 24(4) of NEMA requires that the potential consequences of proposed listed activities be assessed, and that any application must, in terms of section 24(4)(b), include *inter alia* the investigation of the potential consequences on the environment. Section 24O NEMA provides the criteria to be taken into account by authorities when considering environmental approvals. These include all relevant factors, which may comprise pollution, environmental impacts or environmental degradation likely to be caused if the application is approved and measures that may be taken to protect the environment.[98]

Furthermore, in South Africa, the environment for climate litigation is conducive where the legal system follows the rule of precedent, which is established by previous court decisions providing that such decisions are seen as authoritative rather than merely persuasive.[99] Moreover, when it comes to the interpretation of Bill of Rights in terms of section 39(1) of the Constitution, South African courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law. In addition, in terms of section 39(2) of the Constitution, South African courts when interpreting any legislation, and when developing the common law or customary law (…) must promote the spirit, purport and objects of the Bill of Rights.

Such for example in the *Thabametsi* case, it was made clear that NEMA must be interpreted consistently with international law, arising from the obligation contained in section 233 of the Constitution, which enjoined the court to confer an interpretation of legislation consistent with international law. The court, therefore, considered that international agreements to which South Africa was a party, such as the United Nations Framework

97 Gastón Medici-Colombo, 'You Cannot Be Serious! Crisis Climática, Autorización de Proyectos Carbono-Intensivos y Su Control Judicial' (Tesis Doctoral, Universitat Rovira i Virgili, 2021). P. 400.
98 Ruppel (n 58).
99 ibid.

Convention on Climate Change (UNFCCC) and its Paris Agreement.[100] So far, the *Thabametsi* judgment is the most prominent precedent for climate litigation in South Africa.

Following *Thabametsi*, in the *Philippi case*, the Western Cape High Court invalidated the authorisation for a development project in finding that the scoping and environmental impact assessment process was non-compliant with sections 24(4) and 24O of NEMA, read with the relevant regulations, and that relevant considerations were not taken into account in granting such authorisation.

The application was brought under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the review of the environmental authorisation granted for the proposed development and the subsequent refusal of an appeal. PAJA is aimed at establishing the right to legitimate, fair and procedurally just administrative action in terms of section 33 of the Constitution. Although the development was not itself an activity that would contribute to climate change, the court addressed the potential impact of climate change, and consequent water shortage, on the aquifer if the proposed development (with an associated effect on water run-off and absorption) were allowed. In that respect, the *Philippi case* was groundbreaking, insofar as climate change was again recognised as a relevant factor, even though the activity did not itself bear upon or contribute to climate change.[101] The court made reference to the rights set out in section 24 of the Constitution and the provisions of NEMA and its regulations, requiring consideration of the impact in relation to the aquifer as a large underground natural resource, its state, future and impact on issues related to water scarcity and climate change.[102]

In the *Philippi case*, the court further concluded that section 36 of the Land Use Planning Ordinance required the decision-makers to take into account all relevant considerations in connection with the preservation of the natural environment making the *Philippi* case a potential model for future legal challenges, where development activities are assessed in the wider context of environment, development and socio-economic vulnerabilities.

100 *Earthlife Africa Johannesburg v. Minister of Environmental Affairs (Thabametsi Power Project), [2017]* High Court (Gauteng Division) (n 18) par. 35, 87.

101 *Philippi Horticultural Area Food & Farming Campaign and Another v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape and Others* (n 21) par. 56.

102 ibid, par. 130.

This is especially important in South Africa, where competing socio-economic demands continue to outweigh the need for urgent climate change response. Although South Africa's Just Transition Framework aims to ensure that the shift to a low-carbon economy does not leave any communities or workers behind and considers the social and economic impacts of the transition towards a more sustainable and inclusive economy,[103] it is still one of the unequal societies in world. [104]

As pointed out by *Birsha Ohdedar*, when recognising climate vulnerability as a factor dependent on socio-economic conditions and power relations, climate cases might have wider transformative effects.[105] For example, adaptation cases regarding droughts and water scarcity, might not only focus on climate related measures, but also on their socio-economic context, and thus, for example, tackle poverty alleviation and welfare-mechanisms.[106]

Following an argument by *Rodriguez-Garavito*, the climatisaton of human rights "entails addressing the impacts of global warming on environmental and social rights (ESR) and ensuring that climate action follows ESR norms regarding substantive and procedural equity."[107] The framework elaborated by *Rodriguez Garavito*,[108] the symbolic impacts of a strategic case might include defining a known problem as a human rights violation and shifting visions about its urgency and gravity. In this case, the Court might contribute to reframe the problem of seismic survey in a vulnerable territory as a human rights violation, while at the same time providing a holistic understanding of it as an economic, environmental, spiritual and cultural issue.

In *Sustaining the Wild Coast*, environmental NGOs and affected coastal communities succeeded in blocking Shell from conducting seismic exploration for oil and gas in a sensitive coastal region. The High Court set aside

103 Presidential Climate Commission 'A framework for a just transition in South Africa' (2022).

104 Cf. World Bank, 'The World Bank in South Africa' <www.worldbank.org/en/country/southafrica/overview> accessed 24 June 2023.

105 Birsha Ohdedar, 'Climate Adaptation, Vulnerability and Rights-Based Litigation: Broadening the Scope of Climate Litigation Using Political Ecology' (2022) 13 Journal of Human Rights and the Environment 138. P. 145.

106 ibid.

107 César Rodríguez-Garavito, 'Climatizing Human Rights: Economic and Social Rights for the Anthropocene' in Malcolm Langford, and Katharine G. Young (eds) *The Oxford Handbook of Economic and Social Rights* (Oxford, 2022).

108 Rodríguez-Garavito (n 89).

Shell's exploration rights on multiple grounds, both procedural and substantive, including the absence of any climate change impact assessment. The court held that this assessment was required to determine the need or desirability for further gas and oil exploration. The part of the decision in which the court reiterates the role of communities' and particularly Mr *Zukulu's* statements are particularly remarkable:

> "The applicant communities contend that they bear duties and obligations relating to the sea and other common resources like our land and forests; it is incumbent on them to protect natural resources, including the ocean, for present and future generations; the ocean is the sacred site where their ancestors live and so have a duty to ensure that their ancestors are not unnecessarily disturbed and that they are content. If there is a potential for disturbance, they contend, they must be given the opportunity to follow their customary practices for dealing with the anticipated disturbance. In his affidavit, […] Mr Zukulu has also averred that, even as lay persons, they are already seeing signs of climate change in his area: their agriculture is becoming more challenging as they experience much more unpredictable weather patterns and more extreme weather events such as more droughts and heavier downpours of rain. Their livestock is sick more often. As a coastal community, they are very concerned about the prospect of rising sea levels."[109] The court granted an interim order to block the exploration, followed by a final order setting aside the grant of exploration rights, which is under appeal.[110]

Ultimately, the sample of South African cases is still too small to draw firm conclusions, but litigants seem to benefit from and implemented the lessons of public interest lawyering in South Africa, including the need for strong client organisation, movement building, long-term strategy, and information-sharing. On the one hand climate litigation in South Africa has demonstrated the power of a rights-based approach, where litigants tend to have greater success when climate concerns are (also) connected to human rights obligations.[111] On the other hand, South Africa's contemporary econ-

109 *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* (n 25).

110 Chris McConnachie, 'Why Climate Litigation in South Africa Matters', available at <https://blogs.law.columbia.edu/climatechange/2023/06/21/why-climate-litigation-in-south-africa-matters/> accessed 15 January 2024.

111 ibid.

omy, viewed through the lenses of climate justice, still projects the injustices of the past onto future generations because the burdens of mining and coal are still disproportionately borne by the poor, exacerbating the unjust legacies left behind by apartheid.[112]

4. Conclusion and final comparative remarks

In Brazil as well as South Africa, at least to some extent, climate litigation rose and grew over the past recent years. Both jurisdictions provide a solid environmental legal framework, constitutional environmental rights, and accessible procedures for litigating environmental and climate conflicts. Moreover, since their transition towards democracy, the respective judiciaries have been receptive to the legal mobilisation of human rights by civil society organisations.

Nonetheless, it must be recognised that in the two countries, but especially in Brazil, climate litigation occurred through an unprecedented mobilisation. Due to resource and legal constraints, environmental movements had previously seldom resorted to litigation. Against that background, the extensive deregulation under the Bolsonaro government seemed to incentivise diverse social movements to join their efforts, and the Supreme Court to treat the climate matter with special urgency and thoroughness.

When looked at within the framework of *Peel* and *Lin's* analysis, Brazil and South Africa seem to be only partially "typical cases" of climate litigation in the global south. In the two countries, climate-related arguments increasingly appear to be at the centre, rather than at the periphery of the case, a peculiarity that had been associated to cases filed in the global north. Moreover, while South African lawsuits are by a large majority project-based, many Brazilian cases filed under Bolsonaro presented a "structural" nature, targeting the government's systemic inaction on deforestation and climate change. Additionally, climate litigation was by its largest part supported by a coalition of domestic movements, universities, and funding organisations, and only to a minor extent by north-south partnerships. On the other hand, according to general trends in the global south, most of such lawsuits are based on environmental and climate laws (i.e., EIA),

112 Cf. Ramin Pejan, 'South Africa's Youth Take on Coal and the Climate Crisis' (*Earth Justice*, 9 December 2021) <https://earthjustice.org/from-the-experts/2021-december/south-africas-youth-take-on-coal-and-the-climate-crisis> accessed 23 December 2023.

human rights, and the Paris Agreement, and aim to enforce existing laws or standards. Hence, while partially consistent with academic predictions, the development of climate litigation in Brazil and South Africa offers innovative insights to the transnational litigation movement and its observers. In fact, as one manifestation of strategic litigation, climate cases can produce effects on legal, political, but also immaterial and symbolic dimensions.

Regarding Brazil, the Supreme Court's application of the principle of non-regression to the state's duty to mitigate climate change, and the affirmation of the supra-legal status of the Paris Agreement may provide authoritative guidance in further climate cases. Similarly, the mainstreaming of climate change considerations into developmental policies, consistently affirmed in South African climate cases, may have significant impacts in both global south and north countries. Furthermore, the analysed cases may trigger less visible but similarly impactful effects on a procedural and symbolic level.

From a procedural perspective, the Brazilian Supreme Court's use of public hearings and dialogic remedies has been deemed particularly strategic to legitimise judicial intervention in a context of increasing political polarisation. On a symbolic level, both the Brazilian and South African cases have also been able to re-frame climate change as a systemic and complex issue, by relying on the human rights frame, as well as referencing indigenous and local epistemologies around nature and climate change. These climate litigation efforts have the potential to also increase the levels of legal certainty and general awareness while at the same time promoting social justice. South Africa's as well as Brazil's contemporary economy, viewed through the lenses of climate justice, still projects many injustices of the past onto present and future generations.[113]

Hence, the present comparative analysis warns us against placing a blind trust into general typologies. Abrupt political changes, economic crises, and sometimes individual actors are able to change the course of an otherwise predictable history. It remains to be seen how new political scenarios and legal developments will affect climate litigation and its impacts in the two countries and abroad in the future. For the time being, our analysis has shown that in Brazil and South Africa, strategic climate litigation has successfully established itself in the global south as an instrument to fight environmental and climate backsliding with adverse impacts on the living conditions of most vulnerable populations.

113 With further references Ruppel (n 58).

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