Brazil Fights Itself: Climate Litigation Against Incoming Backfire

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I – From 'only a handful of cases'...

On February 2020, leading scholars on climate change policy and litigation, Joana Setzer and Lisa Benjamin, published a piece entitled *Climate Change Litigation in the Global South: filling the gaps*, stating (p. 59) that Brazil had "a promising but still untested legislative toolbox for climate litigation", alongside "a robust legal system, a well-established judiciary, and a wide range of independent political actors with legal capacity to file class actions involving state and private liability for environmental and human rights offences". At that time, as the authors noted (p. 60), "only a handful of cases" had "mentioned climate change as an issue related to the claims". Previously to Setzer and Benjamin's statement, Gabriel Wendy, in a 2017 piece, had declared climate litigation in Brazil to be still "recent and fragile" (p. 23).

The present Brazilian landscape greatly differs from the reality of then. One can now say, for instance, that "climate litigation emerged as a clearer movement in Brazil" (Setzer, Carvalho, 2021, p. 199), as part of a wider transnational one. With this statement as its backdrop, this post tries to demonstrate against *whom* the current national wave of climate litigation is fighting against, *why* and *how*. In other words, the Brazilian legislative toolbox and its broad range of legal tools are being put to a stress test by a variety of actors, which is giving rise to a very particular climate change litigation experience.

II … to a clear movement

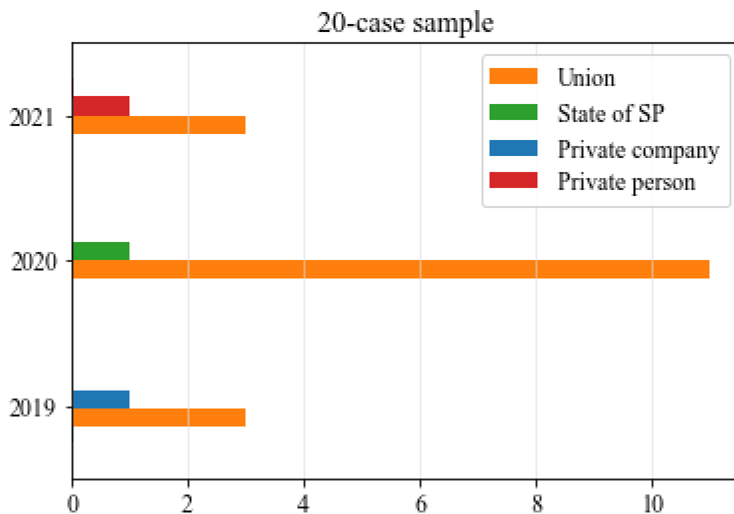
According to the criteria used by the leading databases maintained by the Sabin Center and the Grantham Research Institute to define what can be considered as a "climate case", Brazil has had so far at least twelve filings since February 2020. However, for the purposes of this post, and in order to gather as much data as possible, I am considering as climate cases also those in

which climate change adaptation or mitigation concerns are among the main drivers of the *legal reasoning* of the claim. Hence including the ones that, at first sight, might have seemed as purely concerned with institutional design, administrative bureaucracy or environmental protection *per se*, but are to have clear impacts on the climate-driven agenda. This study thus deals with twenty climate cases, including the initial 'handful' that only mentioned climate change as a peripheral issue.

III – Stress-testing the legislative toolbox…

Before deepening the analysis of the cases, I believe some preliminary metadata regarding them can be useful to sketch a preliminary image of the Brazilian climate litigation landscape.

Of the sample here considered, four cases were filed in 2019, twelve in 2020 and four in 2021; seventeen were filed against the Federal Union (Federal Government and Federal Administration's bodies), being fifteen done by private actors (political parties and NGOs) and two by the Federal Public Prosecutor Office (MPF); one case against a private person and one against a private company, being the former filed by the MPF and the latter by the Attorney-General's Office (AGU) on behalf of the Federal Environmental Agency (IBAMA); one case filed by private actors (NGO members) against the State of São Paulo.



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The analysis that follows divides the twenty-case sample in three groups, defined by the type of defendants: *i)* the State of São Paulo, *ii)* private person and private company and *iii)* the Union.

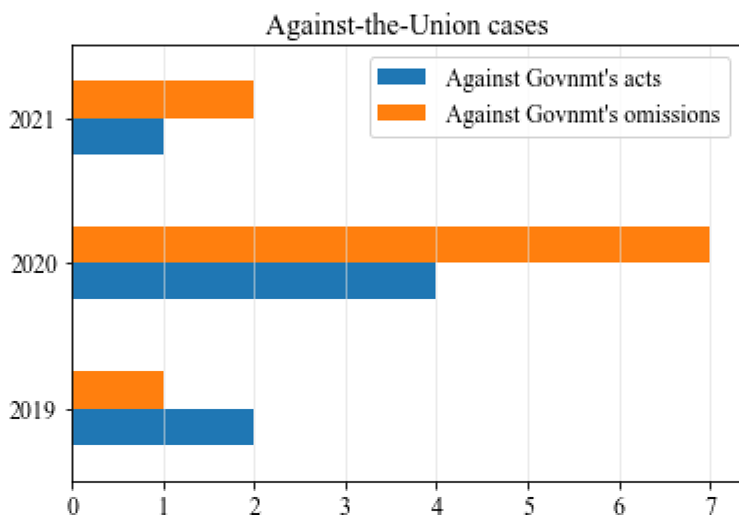
In the single case against the State Government of São Paulo, the plaintiffs sustain that a 2020 State's subsidy to promote the automotive industry lacks due scrutiny regarding greenhouse gases emissions. Their argument is that it violates the State's Policy for Climate Change (PEMC), the National Policy on Climate Change (PNMC) and the Constitution, especially so article 225, which states that all "have the right to an ecologically balanced environment" and that both "the Government and the collectivity have the duty to protect it and preserve it for the present and future generations". The plaintiffs so aim an injunction to force the State's Government to deliver the preliminary studies that base the subsidy object of the claim, if existing. This would then allow a proper class action against the policy itself.

The second group deals with tort cases. In the first, from 2019, the IBAMA sued the 'Steel Company São Luiz ltda' and its managing partner, for the Company's longstanding use of illegally acquired coal. In the second one, from 2021, the Amazon task force from the Public Prosecutor's office sued a private person, responsible for deforesting an area of approximately 2,500 hectares of the forest.

Both actions demand environmental and climate damages. They too sustain their claims on article 225 of the Constitution, the PNMC and the National Policy on the Environment (PNMA). The more recent case additionally raised some well-tailored arguments, *obiter dictum*, on the United Nation's Framework Convention on Climate Change (UNFCCC), the Paris Agreement, American Convention on Human Rights and Copenhagen Accord.

The last group of cases define what I argue to be the core of the Brazilian climate litigation experience at the moment. From the 17 cases brought against the Union, *i)* ten were filed at the Federal Supreme Court (STF); *ii)* three at the federal judiciary section of the State of Amazonas; and *iii)* four distributed before the federal sections of the States of Rio Grande do Sul, Paraná, São Paulo and the Federal District, respectively. Symbolically speaking, climate litigation is now present in four out of five of the administrative regions of the federation, e.g., North, Center-west, Southeast and South – the Northeast being the only region so far without a case.

This core-defining cases can be distinguished in two categories of actions due to their goals: those against specific actions taken by the Federal Government (or the Federal Administration's institutions), thus aimed at *undoing or modifying* rules and institutional or administrative changes done by it and; those filed due to the Government's passiveness, indifference, in face of the illegal activities happening in two of the national biomes (Amazon and Pantanal) and reluctance to apply the existing specific normative framework. All these cases target the climate harms caused or bolstered by the Government's (in)actions.



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The first category amounts to seven cases that take aim at annulling or modifying presidential decrees or other normative acts (resolution, ordinance, etc) done by Federal Institutions. Four of these were brought before the STF (ADPFs, 592, 623, 747 and 755) and three before the federal judiciary sections of Amazonas, São Paulo and Federal District. The last of these cases can be defined as an example of what Setzer and Savaresi (2021, p. 17) defined as rights-based cases "that do not align with climate objectives", for in it a group of oil distributors argue that the Ministry of Energy's ordinance that determined the CO2 reduction target for the year of 2021 did not abide by the necessary procedural obligations. The plaintiffs so seek an injunction to not fulfil the ordinance's target in full, but only a quarter of it.

The other six cases aim at: *a)* annulling parts of the presidential decree nº, 9.760/2019, for it practically extinguishing civil penalties and administrative fines in cases of environmental harm and meant "total amnesty for environmental pollution" (ADPF 592, p. 3); *b)* restoring the

national sanctioning procedures that were frozen by the never-ending midterm procedures (ADPF 755, pp. 15-32) said decree created; *c*) annulling parts of the presidential decree 9.806/2019, that virtually extinguished civil society seats at the National Environmental Council (CONAMA) and changed the selection procedures for them (ADPF 623); *d)* annulling an internal resolution issued by the new composition of the CONAMA, which dangerously lowered national protection standards on areas of permanent protection (ADPF 747); *e)* reversing the IBAMA's lowering of the federal requirements to export extracted wood (rendering legal the products of illegal logging); *f)* annulling the national 2021 Paris Agreement's National Declared Contributions (NDC) due to its 'accounting trick' that rises GHG emissions by maintaining the 2030 emissions cut goals, but rising the 2005 emissions' calculus at the base of said goal.

These six cases are argumentatively similar with the ten of the second category of actions, i.e., those aimed at forcing the Government to properly act on – and so apply – the environmental and climate oriented normative frameworks, such as the PNMA and the PNMC above mentioned.

This is the example of the Amazon and Climate funds cases (ADO 59 and ADPF 708, respectively), in which four political parties jointly argue that from 2019 to June 2020, the Government restrained almost all the budgets of both Funds and so the activities that depended on them were practically frozen for a year and a half. These are the national financing mechanism for the vast majority of the Amazon preservation and climate-oriented policies. In the Amazon Fund case there is a rather powerful statement (p. 10), that accurately images the overall *leitmotiv* of this third group of cases: "the government began to implode all environmental protection programs, especially so through budget cuts. And, unfortunately, the Amazon Fund was one of its first targets".

The remaining eight cases target the Government's *a)* omissions in regard to the fires that took over the Amazon and Pantanal biomes between 2019 and 2020, for it stood in awe and did not deploy national mechanisms (including the Amazon and climate funds) to contain the environmental devastation and climate-damaging events (cases ADO 54, ADPFs 743, 746, 760); *b)* omission to implement command-and-control measures to contain illegal environmental activities in the Amazon (MPF v. Union *et al*); *c*) lack of efforts to define goals and policies to reduce CO2 emissions (IEA v. Union); *d)* omission to set climate change concerns for

thermoelectric power plants (Inst. Preservar v. Ibama *et al*) and to update the National Policy on Climate Change (PNMC) according to the best available science (Observatório v. Union *et al*).

All seventeen 'against-the-Union' cases rely on the national framework for environmental and climate protection, such as article 225 of the Constitution (fundamental right to an ecologically balanced environment), the PNMA and PNMC, the Action Plan for Prevention and Controlling of Amazon Deforestation (PPCDAm), the National Strategic Plan for Protected Areas (PNAP) and international instruments, being the UNFCCC, the Paris Agreement and the Rio Declaration the ones most cited. These normative instruments have been combed with strong lines of legal reasoning intertwining them with arguments such as the responsibility and solidarity to the rights of future generations, the State's fundamental duty to protect the environment, the claim for a fundamental right to climate stability and the principles of prohibition of insufficient protection of the environment and of socio-environmental and ecological retrogression.

IV – …against incoming backfire

Now that climate litigation has become a clear movement in Brazil, one may thus say the national legislative toolbox is being tested on both ends: for on one hand the Government either acts to dismantle it or it does not act to implement it; while on the other hand, private and public actors are strongly engaged to keep this (in)actions under scrutiny to prevent the domestic normative framework, slowly built in the last three decades, from being emptied out and rendered ineffective.

So instead of properly advancing environmental and climate actions in accordance with the needs of the present, the Government is doing the opposite of what it constitutionally expected of it. As a result, private and public actors are not able to properly push for more progressive climate-driven agendas. Instead of pushing forward, the immediate goal is to stand the ground. To put it differently: as the core-defining cases demonstrate, Brazilian climate litigation is a reaction against (and thus limited by) the governmental incoming backfire.