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through the lens of the Brazilian Constitution**

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clima à luz da Constituição brasileira**

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**FUNDAMENTAL RIGHTS THEORY AND CLIMATE PROTECTION
THROUGH THE LENS OF THE BRAZILIAN CONSTITUTION**

**TEORIA DOS DIREITOS FUNDAMENTAIS E PROTEÇÃO DO CLIMA À
LUZ DA CONSTITUIÇÃO BRASILEIRA**

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Summary: 1. Introduction. 2. Climate as a legal interest with constitutional status. 3. Recognition of the fundamental right to a clean, healthy and safe climate and its legal-constitutional regime. 4. The subjective and objective perspectives of the fundamental right to a clean, healthy and safe climate. 5. State duties of climate protection and binding of state authorities. 6. The supra-legal status of international treaties on climate matters and the duty of conventionality control assigned to national Judges and Courts. 7. Articulated conclusions.

Sumário: 1. Introdução. 2. O clima como um interesse legal com status constitucional. 3. Reconhecimento do direito fundamental a um clima limpo, saudável e seguro e seu regime jurídico-constitucional. 4. As perspectivas subjetivas e objetivas do direito fundamental a um clima limpo, saudável e seguro. 5. Os deveres estatais de proteção do clima e a vinculação das autoridades estatais. 6. O status supra-legal dos tratados internacionais sobre questões climáticas e o dever de controle convencional atribuído aos Juízes e Tribunais nacionais. 7. Conclusões articuladas.

Abstract: Given the challenges that arise from the present climate crisis resulting from global warming, not only but also for the theory and practice of Constitutional Law and Fundamental Rights, the scope of this article is to emphasize Brazil's constitutional system to discuss to what extent the climate (or climate system) is raised to the status of a legal interest at constitutional level, to explore the topic of its character as a fundamental right, stressing the so-called objective dimension of fundamental rights, and to make a few notes on the role of Brazil's constitutional jurisdiction in its enforcement, including the role of international climate treaties and the power-duty of conventionality control assigned to Brazilian Judges and Courts.

Resumo: Diante dos desafios que surgem da atual crise climática resultante do aquecimento global, não apenas mas também para a teoria e prática do Direito Constitucional e dos Direitos Fundamentais, o escopo deste artigo consiste em enfatizar o sistema constitucional brasileiro para discutir até que ponto o clima (ou sistema climático) é elevado ao status de interesse legal em nível constitucional, explorar o tema de seu caráter como um direito fundamental, enfatizando a chamada dimensão objetiva dos direitos fundamentais, e fazer algumas observações sobre o papel da jurisdição constitucional brasileira em sua aplicação, incluindo o papel dos tratados internacionais sobre o clima e o poder-dever de controle convencional atribuído aos juízes e tribunais brasileiros.

Keywords: constitutional law, fundamental rights, conventionality control, climate crisis, global warming.

Palavras-chave: direito constitucional, direitos fundamentais, controle de convencionalidade, crise climática, aquecimento global.

1. Introduction

“The climate issue is *the* issue of our time. It is the question that destiny is directing at us and the answers that we are able to formulate will decide what future humankind will have – or whether there will be any future at all. There is no other agenda, there is no other problem, there is no other question. Climate emergency is the anteroom of all other emergencies. (Luiz Edson Fachin, Judge of the Federal Supreme Court)”.³

The present climate crisis resulting from global warming and climate change constitutes a great challenge, not only but also for the theory and practice of Constitutional Law and Fundamental Rights, so much so that there is even reference to a novel (sub)discipline, the so-called Climate Constitutional Law. The seriousness of the climate issue and its consequences is notoriously of such a magnitude that some countries have decreed a “climate emergency state”, which was done, for example, by the European Union through the European Parliament in 2019.⁴ The recognition of a state of climate emergency has found a broad support in the scientific community, as shown, for instance, by reports of the UN’s Intergovernmental Panel on Climate Change (IPCC), particularly the Sixth Report (AR6) released between 2021 (Group 1) and 2022 (Groups 2 and 3). It has found, among other noteworthy points, a greater intensity and frequency of extreme climate events already underway.

This scenario of already caused harms and serious risks to human life and the biotic and abiotic environment, as well as to human dignity and human and fundamental rights, has given rise to an important discussion in legal scholarship (Sarlet IW, Fensterseifer T, 2021; Wedy G, 2018) around the recognition of a fundamental right to a clean, healthy and safe climate as derived from the constitutional regime of environmental protection and particularly from the fundamental right to an ecologically balanced environment as provided in Article 225 of Brazil’s 1988 Federal Constitution (FC).⁵

On the other hand, this request has also gained increasing significance at the international level, as in this context there are already appeals for the recognition of the human right to a clean, healthy and safe climate, as shown ahead in more detail. From this perspective, the Ecological Rule of Law (Voigt C, 2013) – also a Democratic and Social Rule of Law, taking Brazil’s

3. Passage of the opinion of Justice Luiz Edson Fachin in the judgment of the FSC [STF], ADPF [Claim of Noncompliance with a Fundamental Precept] 708, Full Court, Justice-Rapporteur Luis Roberto Barroso, judged on July 1st, 2022.

4. The Framework Climate Law (n.º 98/2021) of the Portuguese Republic expressly recognized the “situation of climate emergency” (Article 2).

5. Two constitutional amendment proposals [PECs] that are being discussed in the National Congress (PEC n.º 233/2019 and PEC n.º 37/2021) aim at expressly including the climate agenda in the Constitution’s text. The present drafting of PEC n.º 37/2021 proposes the following inclusion: “Article 5 - All people are equal before the law, without any distinction whatsoever. Brazilians and foreigners residing in the country are ensured the inviolability of their right to life, liberty, equality, security, property, an ecologically balanced environment and climate security, under the following terms ...”; “Article 170 ... X - maintenance of climate security, guaranteeing actions of mitigation and adaptation to climate change”; and “Article 225 ... para. 1 ... VIII - adopt actions of mitigation of climate change and adaptation to its adverse consequences.”

constitutional order as a paradigm⁶ – must henceforward necessarily incorporate a climatic dimension.

In this context it should be pointed out that, concerning the objective dimension of fundamental rights, beyond the state duties of ecological protection already enshrined in Article 225 of the FC, the view sketched above has also led to the recognition of state duties of climate protection. This was explicitly established in a recent decision by the Federal Supreme Court (FSC) on the ADPF [Claim of Noncompliance with a Fundamental Precept] n.º 708 (Fundo Clima case), also in regards to the reinforcement of Brazil's commitment to environmental and climate-related international treaties, such as the Framework Convention on Climate Changes (1992) and the Paris Agreement (2015). In the opinion given by Luís Roberto Barroso, the case's Justice-Rapporteur, the international treaties on environmental issues were expressly recognized as a "species" of the "genus" international human rights treaties. Thus, they had their supra-legal normative status approved by the Court.⁷

Another aspect to be mentioned in advance is that, in spite of the prevalently constitutional approach – focused on Brazil's positive Constitutional Law – the topic discussed here is part of a context necessarily marked by an intense dialog between legal systems, besides the multilevel perspective characterizing the interaction between International Law (at global and regional level) and the states' domestic law. Perhaps we might speak of a Climate Law "without borders or frontiers", as suggested by Vasco Pereira da Silva in the field of Constitutional Law (2019: 31-32).

This implies a multilevel constitutional approach, which, regarding the problem of the protection and promotion of a balanced and healthy environment and particularly of undamaged, healthy and safe climate conditions, becomes especially relevant given the fact that the problem has a global dimension and that, regardless of the individual share of each state in terms of the emission of greenhouse gases, each one must contribute to overcome the planetary climate crisis.

In this sense it should be highlighted that the state conceived by the FC, as can be easily seen through a simple reading of the principles ruling Brazil's international relations is an open and cooperative constitutional state (Häberle P, 2008), which gains increasing importance as far as the Brazilian state's commitments related to the safeguarding of a clean, healthy and safe climate system is concerned. For this purpose, the fight against deforestation and the protection of the Amazon rainforest is a *conditio sine qua non*.

In view of the above, our purpose is emphasizing Brazil's constitutional system (2) to discuss to what extent the climate (or climate system) is raised

6. We consider here the Constitution's normative program and recent trends in scholarship and caselaw, since the deficient social effectiveness of environmental protection, also in relation to the climate, cannot be simply neglected. See, for example, SCJ [STJ], AgIntAgREsp [Internal Interlocutory Appeal] Special Appeal 1,926,267/ES, 2nd Panel, Justice-Rapporteur Herman Benjamin, judged on June 8th, 2022.

7. FSC [STF], ADPF [Claim of Noncompliance with a Fundamental Precept] 708, Full Court, Justice-Rapporteur Luis Roberto Barroso, judged on July 1st, 2022.

to the status of a legal interest at constitutional level, (3) to explore the topic of its character as a fundamental right, stressing the so-called objective dimension of fundamental rights, and (4) to make a few notes on the role of Brazil's constitutional jurisdiction in its enforcement, including the role of international climate treaties and the power-duty of conventionality control assigned to Brazilian Judges and Courts. Finally (5), some conclusions are offered.

2. Climate as a legal interest with constitutional status

"The *climate* is a *common good*, belonging to all and meant for all. At the global level, it is a complex system linked to many of the essential conditions for human life. A very solid scientific consensus indicates that we are presently witnessing a disturbing warming of the climatic system" (Pope Francis, Encyclical Letter *Laudato si'*, 2015).

Before entering the sphere of the discussion around the existence of a fundamental right to a clean, healthy and safe climate, it should be emphasized that the climate or climate system must be recognized as a legal interest of constitutional status awarded a special protection by the FC. Climate as a legal interest refers primarily to the "global or planetary atmosphere",⁸ although it also has a regional, national and local dimension, not only considering the factual peculiarities but also in legal terms, since legal regulation in all these spheres continues to exist and to be absolutely relevant.

The International Court of Justice stated in the Advisory Opinion on the Threat and Legality of the Use of Nuclear Weapons (1996) that environmental protection is part of the corpus of International Law through the "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control". The Court also recognized that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (ICJ, 1996: 241-242, § 29). Just as the environment is not an "abstraction", the climate or climate system is also something concrete and is directly related to the safeguarding of the most basic interests and rights of human beings (present and future generations), such as life, health, physical and psychic integrity, among others.

The assignment of the status of a constitutional interest has a strong support in the regime of ecological protection established by Article 225 of the FC, particularly regarding the duty of protection and safeguarding of "essential ecological processes", as expressly provided in item I of § 1º, since the climate system is undoubtedly an "essential ecological process" and even a

8. Thus, this is something different from the so-called "outer space", which, by the way, is also an object of international treaties and specific legal regulation. See, for instance, the Outer Space Treaty (1967); the Space Liability Convention (1972); and Moon Treaty (1979).

central one for the protection and promotion of an ecologically healthy and balanced environment.

Additionally, through Constitutional Amendment n.º 123/2022, a new item VIII was included in § 1 of Article 225 of the FC that textually regulates precisely the Brazilian state's duties of climate protection in the sense of promoting the decarbonization of the economy and neutralization of the climate concerning greenhouse gas emissions resulting from the burning of fossil fuels, by "maintaining a favored fiscal regime for biofuels designed for final consumption, in the form of supplementary law, in order to guarantee them a lower taxation than the one payable on fossil fuels so as to ensure them a competitive difference in relation to the latter [...]".

Furthermore, it is possible to agree with the view that the climate system takes on the condition of an autonomous constitutional interest in the same way as the ecologically balanced environment (Article 225, FC).

It should be underlined, however, that "autonomy" here refers to a necessary (although partial) specialization, despite the omnipresence and transversality of the climate issue. It must be noted that – at least in Brazil – the same occurred with environmental protection in general. Whereas in the past (until the 1970s) the legal protection of nature and natural resources hinged on other legal interests (health, property, economic interests etc.), the National Environmental Policy Act (Act n.º 6,938/1981) broke with this view by establishing the environment as an autonomous legal interest at the nonconstitutional level, which was also later adopted by the FC in 1988.

Today we find a similar situation in the climate system which concerns the conventional (international), constitutional, and infraconstitutional level. The conceptual and legal distinction of "climate" from "environment", with its recognition as a legal interest with (relative) autonomy and a legal specialization of its own, results in the affirmation of a distinguished legal status and greater visibility of the climate issue and its protection in the sphere of law.

Climate as a legal interest can be equated, in certain respects, with the category of global commons such as seas and oceans (particularly the deep-sea), the Antarctic, aquifers (such as the Guarani Aquifer in South America), among others.⁹ The Amazon Forest as the largest rainforest in the world and in light of its cross-border range, as it encompasses the territory of nine South American countries,¹⁰ but mainly because of its crucial importance for the integrity of the ecological and climate system at the planetary level, could also be considered a global common interest, notwithstanding the discussion around the sovereignty of the involved countries, such as Brazil, which holds about 60% of the rainforest's territory.

In this sense, the integrity of the climate system can be identified as a "common concern of humankind", a phrase expressly used in the Preamble

9. The reference to the phrase "global climate system" is found in a recent decision by the Superior Court of Justice: SCJ [STJ], MS [Writ of Mandamus] 28,123/DF, 1st Section, Justice-Rapporteur Gurgel de Faria, judged on March 23rd, 2022.

10. Brazil, Peru, Bolivia, Ecuador, Colombia, Venezuela, French Guiana, British Guiana and Suriname.

of the Paris Agreement (2015): “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights [...]”.

In foreign law, we highlight the provision contained in Article 3, b of the Framework Climate Law (n.º 98/2021) of the Portuguese Republic about the goal of its climate policy, viz. “Guarantee climate justice, ensuring the protection of communities most vulnerable to the climate crisis, respect for human rights, equality and collective rights over the *commons*”.¹¹

In Brazil’s infraconstitutional legislation, Act n.º 6,398/1981 reinforces this view as it expressly includes the “atmosphere” in the concept of environmental resources laid out in item V of Article 3.¹² The concept of “environment” established in item I of the same act is also in line with that view, mainly because it proposes a functional, holistic or systemic understanding of ecological legal interest, viz. as “the group of conditions, principles, influences and interactions of a physical, chemical and biological nature that enables, shelters and rules all forms of life”.

In this sense, the climate system is one of the best examples that illustrate the set of interdependent and complex relations established in nature at a planetary level. The concept of environment – and the same view applies to the climate – is not something static, but dynamic. Beyond the elements of nature understood in an isolated way, it is precisely in the ecological relations and processes that lies what is most important in terms of legal protection and safeguarding of the integrity and functionality¹³ of ecological legal interests and the ecological services provided by them.

The concept of a climatic legal interest endowed with autonomy is also found in the explicit establishment of the protection of the climate system’s integrity, both in the Forest Code (Act n.º 12,651/2012), Article 1-A, sole paragraph, and in the Act on the National Climate Change Policy (Act No. 12,187/2009), in Article 3, I and 4, I. Another important normative reference is found in the Act on the National Policy of Payments for Environmental Services (Act n.º 14,119/2021),¹⁴ especially in the characterization of “climate services”. In its description of the ecosystem services of regulation (Article

11. The Civil and Commercial Code of Argentina (2015) also established a major advance in the legal regime of common legal interests by providing, in Article 14, the so-called “rights of collective incidence” as well as the institute of “ecological abuse of right”: “The Law does not support the abusive exercise of individual rights when it may affect the environment and the rights of collective incidence in general”. The same discussion can be related to the understanding of climatic legal interest, including the characterization of “climatic abuse of right”. In scholarship, see Sozzo G (2019: 532-533).

12. Article 3, V: “Environmental resources: the atmosphere, the inland, superficial and ground water, the estuaries, the territorial sea, the soil, the subsoil and the components of the biosphere”.

13. Act n.º 14,119/2021, in its concept of “ecosystem”, emphasizes precisely the view of “functional unit” characterized by the interaction of biotic and abiotic elements: “Article 2 - ... I - ecosystem: dynamic complex of vegetal, animal and microorganic communities and their inorganic environment that interact as a functional unit”.

14. Before Act n.º 14,119/2021, the Forest Code of 2012 (Act n.º 12,651/2012) also expressly enshrined the “climatic ecological services” in its Article 41.

2, II, c), the law defines them as those “that contribute to the maintenance of the stability of ecosystem processes, such as carbon sequestration, air purification, attenuation of extreme climate events, maintenance of the balance of the hydrologic cycle, minimization of floods and droughts, and control of critical processes of erosion and slope sliding”.

Thus, considering the above and particularly from the perspective of Brazil’s legal system, the climate system safeguard is directly linked to the ecological and climate services it provides. On the other hand, air pollution, global warming, and climate change represent the antithesis of climate services and present serious existential risks to life, dignity, and fundamental rights, including their intertemporal – intergenerational – dimension.

3. Recognition of the fundamental right to a clean, healthy and safe climate and its legal-constitutional regime

“Acknowledging that climate change is a *common concern of humankind*, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on *human rights*, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and *people in vulnerable situations* and the right to development, as well as gender equality, empowerment of women and intergenerational equity” (Preamble of the Paris Agreement of 2015).

This passage in the Preamble of the Paris Agreement (2015) illustrates the acknowledgment of the relation between climate change and human and fundamental rights, particularly due to the interdependence and indivisibility that increasingly characterizes the legal regime of fundamental rights.¹⁵ The climate crisis represents one of the greatest challenges in civilizational terms, both at the global and national (regional and local) level, to the protection and promotion of fundamental rights. For this reason, the international (global and regional) systems of human rights protection have increasingly addressed the present climate crisis and the violation of human rights resulting from it, such as in the issue of climate refugees and displaced persons, which is a phenomenon found both in the international and national context as a consequence of ever more frequent and intense extreme climate events (e.g. droughts, floods, landslides, forest fires, etc.). Human life and dignity – and the whole range of fundamental rights (Article 5, 6 and 225 FC) – depend on the safety and integrity of the climate system for their adequate safeguarding in constitutional terms.

Besides its ecological dimension – which is already largely enshrined in legal scholarship (Sarlet IW, Fensterseifer T, 2021: 118-125) and court precedents¹⁶

15. Supporting a unified (although not completely homogeneous) legal regime of fundamental rights, see Robert Alexy (Germany), Ingo W. Sarlet (Brazil) and Jorge Reis Novais (Portugal).

16. Justice Carmen Lucia, in her rapporteur’s opinion in ADPF n.º 760 (PPCDAm case), of April 6th, 2022, during the (not yet finished) trial on the so-called “green agenda” by the FSC – which also includes ADO [Direct Action for the Declaration of Unconstitutionality by Omission] n.º 54, ADPFs n.º 735 and n.º 651 and ADIs [Direct

- the principle of human dignity should be understood as including a *climate dimension*. Likewise, the climate crisis imposes on the constitutional legal regime the acknowledgment of an *intertemporal dimension* of the protection of life and human dignity, since the greatest existential risk caused by climate changes lies in the future. It is, above all, the life, dignity, and fundamental rights of the younger generations - for instance, children and adolescents, and future generations that are more threatened by climate change if we exceed the increase of 1.5°C in global temperature, as pointed out by the IPCC reports.

A more recent case deserves mention as an illustration of the importance of the debate on climate justice between the various human generations in the constitutional sphere, viz. the Neubauer et alii v Germany case, decided by the German Federal Constitutional Court (BVerfG) in 2021. The constitutional complaints that led to the Court's decision were submitted by a group of nine persons, most of them young - including the German activist Luisa Neubauer, of the Fridays for Future student movement - supported by several environmental entities. Among the plaintiffs there were even residents of other countries, such as Nepal and Bangladesh. Among the various arguments presented by the claimants there are alleged violations of the fundamental right to a future consistent with human dignity (*menschenwürdige Zukunft*) and the fundamental right to an ecological minimum standard of living (*ökologisches Existenzminimum*).

At the occasion, the Court acknowledged the violation of the state duties of environment and climate protection in the ambit of the Federal Climate Protection Act (*Klimaschutzgesetz* [KSG]) of 2019. According to the Court, the burden derived from restrictions on fundamental rights resulting from the regulation of the emissions of greenhouse gases by providing for reduction targets until 2030 has been distributed in a disproportional manner between the present and the younger and future generations. By doing that, the Court acknowledged that the fundamental right to freedom has an inter or transgenerational dimension that must be protected by the state through an intertemporal guarantee of freedom (*intertemporale Freiheitssicherung*).

By recognizing the unconstitutionality of provisions of the German climate legislation, the Court stated that the legislator violated its duty to ensure that "the reduction in CO2 emissions to the point of climate neutrality that is constitutionally necessary under Article 20a GG must be distributed over time in a forward-looking manner that respects fundamental rights". Also according to the Court, "respecting future freedom requires that the transition to climate neutrality should be initiated in good time. In all areas of life - production, services, infrastructure, administration, culture, consumption, basically all activities that are currently still CO2-relevant -

Action for the Declaration of Unconstitutionality] n.º 6,148 and n.º 6,808 - explicitly recognized the "principle of environmental dignity" in pointing out that "... it is a function of the Brazilian state to guard and protect the Amazon Forest, the rights of the indigenous peoples and of all Brazilians and people of the present and the future, holders of the right to environmental dignity that is inherent in life with dignity", available at <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=484966&tip=UN>.

developments need to be set in motion to ensure that in the future, meaningful use can still be made of freedom protected by fundamental rights”.

Both Article 20a of the German Fundamental law (1949) and Article 225 of the FC expressly enshrine the protection and safeguarding of the interests and rights of future generations, thus reinforcing the legal regime of ecological protection and the characterization of state climate duties. As registered in the German Constitutional Court’s ruling, it is the right to the future (Freitas J, 2019) and, particularly, the effectiveness of fundamental rights in the future, that is at stake. One can even claim that there is a certain political-democratic sub-representation of the interest and rights of the younger generations in the contemporary Constitutional State, since they do not directly elect the political leaders charged with making decisions on climate protection in the present.

The UN General Assembly, through its recent Resolution A/76/L.75 recognizing a human right to a clean, healthy and sustainable environment, stressed precisely the threat that the ecological crises (in particular regarding the climate) represent to the future enjoyment of human rights by coming generations. According to the Resolution, “environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights”.

Thus, it seems to us that there is an increasing need for the recognition of a fundamental right to a clean, healthy and safe climate as a logical corollary of recent developments in this matter, both in the field of Constitutional Law (and the theory of fundamental rights) (Sarlet IW, Fensterseifer T, 2021: 74-77; Sarlet IW, Fensterseifer T, 2020: 318-320) and of International Human Rights Law. Although the right to clean air can be taken as a content encompassed by the right to a clean environment, the seriousness of the climate crisis in particular and the whole development and specialization found in recent decades in the field of Climate Law or Climate Change Law reinforce the need to ensure a greater autonomy and legal visibility of the right to live in a clean, healthy and safe climate.

The acknowledgment of a right to a clean and safe climate and the correlated state duties is expressly dealt with in the “Report on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment” (A/HRC/40/55), elaborated by the Special Rapporteur on Human Rights and Environment of the UN High Commissioner for Human Rights, David R. Boyd, published in the beginning of 2019.¹⁷ According to the document,

“44. Poor air quality has implications for a wide range of human rights, including the rights to life, health, water, food, housing and an adequate

17. The other reports and documents worked out by the Special Rapporteur on Human Rights and the Environment of the United Nations High Commissioner for Human Rights are available at <https://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx>.

standard of living. Air pollution also clearly violates the right to a healthy and sustainable environment. While the General Assembly has adopted numerous resolutions on the right to clean water, it has never adopted a resolution on the right to clean air. Surely if there is a human right to clean water, there must be a human right to clean air. Both are essential to life, health, dignity and well-being” (UN, 2019: § 44, 9).

Resolution A/HCR/48/L. Rev. I of the UN Human Rights Council, adopted shortly before the COP 26 in Glasgow in 2021, recognized the right to a safe, clean, healthy and sustainable environment as an autonomous human right. The text of the Resolution states that the Human Rights Council “1. Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights ...”. At the same occasion, through Resolution A/HCR/48. L. 27, the Council decided to create a Special Rapporteur on Human Rights and Climate Change, reinforcing the human rights nature inherent in the right to enjoy a clean, healthy and safe climate.

In the Interamerican Regional System of Human Rights (OAS, 2008), the Advisory Opinion n.º 23/2017 on “Environment and Human Rights” of the Inter-American Court of Human Rights (ICHR) also stressed the relationship between human rights and climate change: “This Court has recognized the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights” (§ 47). “[... T]he Inter-American Commission has stressed that «several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources.» [...] Likewise, the OAS General Assembly has recognized the close relationship between the protection of the environment and human rights (supra para. 22) and emphasized that «the adverse effects of climate change have a negative impact on the enjoyment of human rights»” (§ 49).

Looking at other developments in terms of national laws, the explicit enshrinement of the right to climate balance in the Framework Climate Law (n.º 98/2021) of the Portuguese Republic should be highlighted. Although not being expressly enshrined at the constitutional level, the adoption by the Portuguese legislator of the “right” and “duty” formula applied to the legal regime of climate protection represents a significant advance in the discipline of Climate Law. Article 5 of the above-mentioned legislation establishes the normative framework and realm of protection of the right to climate balance, which is characterized by a material dimension, i.e. as a right of defense against the negative impacts of climate change resulting from actions or omissions by public and private entities and agents. This right also implies the power to demand from these entities and agents the fulfilment of duties and obligations to which they are bound in climate issues. Likewise, the Portuguese Climate Law established a procedural dimension of the right to climate balance, through the recognition of climate participation rights: access to information, public participation in decision-making and access to the courts in climate matters. Finally, the Portuguese climate legislation

establishes duties of private parties regarding climate issues, besides introducing the concept of climate citizenship and reinforcing the democratic-participatory character of the climate system's integrity protection in the legal and political system.

The gradual development of a legal regime both in the constitutional and international sphere around climate protection is undoubtable. The abovementioned examples show this. In our view, however, the most recent and innovative aspect concerns the intertwining between climate protection and the safeguarding of human rights and fundamental rights. Corresponding to what can be found in the international context, the constitutional regime of ecological protection in Brazil has made a significant advance regards the recognition of a fundamental right to a clean, healthy and safe climate and the related state duties of climate protection.

4. The subjective and objective perspectives of the fundamental right to a clean, healthy and safe climate

According to the classic theory of Konrad Hesse, the fundamental rights have a double dimension, because they operate at the same time as "subjective rights" and as "fundamental elements of the collectivity's objective order" (1998: 228-244). The individual and collective dimensions establish a permanent dialectical tension in the political-legal ambit, especially when the exercise of fundamental rights is at stake. The protection of individuals and the affirmation of their fundamental interacts with the collective sphere and the public interest.

Concerning this "double function", Pérez Luño points out that "fundamental rights, both liberties and social rights, have, along with their institutional dimension, in which they appear as a set of constitutionally ratified objective values of the community, a subjective meaning insofar as they are the basic guarantees of the individual legal situations of the person's full development" (2005: 210). Gomes Canotilho, in turn, characterizes the subjective perspective as "referring to the meaning or relevance of the norm enshrining a fundamental right for the individual, their interests, their life situation, their freedom" (2002: 1242). Regarding the objective perspective of the norm defining a fundamental right, Gomes Canotilho sustains that this meaning is given "when considering its meaning for the whole collectivity, for the public interest, for community life" (2002: 1242).

The fundamental right to the environment, as expressly provided by Article 225 of the FC, besides representing a value of the whole state community (objective perspective), also has a subjective dimension, since "everyone has the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life". In this sense, it is important to underline the significant influence of the Portuguese Constitution (1976) on the constitutional formula applied to ecological

protection by the FC.¹⁸ Observing this constitutional orientation, the FC expressly treated environmental protection as a “subjective right”, besides, of course, acknowledging it as a state task or duty, as will be seen below.

The same view can be applied to climate protection, so as to recognize both the character of a subjective right entitling everyone to enjoy a clean, healthy and safe climate, and state duties of climate protection, binding all state actors to their implementation. To mention an example, the subjective facet of the fundamental right to the climate is revealed, in practice, through the recent (especially in Brazil) phenomenon of climate litigation,¹⁹ including the growing recourse to the Judiciary because of the omission or insufficient action by government entities.

Just as in the case of the fundamental right to the environment, the subjective perspective of the fundamental right to the climate guarantees its holder (individuals and society) the possibility of judicially claiming its protection in case its protection sphere is violated, both in the case of actions or omissions by public or private actors. In the case of Brazil there is a wide range of procedural instruments capable of promoting climate protection in these situations, specially the so called public civil action (Act n.º 7,347/1985), the popular action (Act n.º 4,717/1965 and Article 5, LXXIII of the FC²⁰), besides other constitutional actions (concentrated and abstract control of constitutionality actions), *amicus curiae* briefs, among others. They even enable citizens and nongovernmental climate protection organizations to directly file climate actions (such as in the case of public civil actions or popular actions).

On the other hand, in the spectrum of the objective dimension we can highlight, besides the climate protection duties to be discussed in the next section, the organizational and procedural perspective of the fundamental right to the climate. According to Ferreira Mendes, scholarship has used the concept of right to organization and procedure (*Recht auf Organisation und Verfahren*) to refer to all those fundamental rights whose enforcement depends both on state measures aiming at the creation and structure of agencies, sectors or offices (right to organization) and on others, usually of a normative nature, designed to organize the fruition of certain rights or guarantees, such as procedural-constitutional guarantees (rights of access to courts, rights to judicial protection, rights to defense) (2004: 8). The rights to organization and procedure delineate techniques to be implemented by the state for the enforcement of fundamental rights. These perspectives involve an instrumental function of fundamental rights, but

18. Mention should be made here of the controversy around the possibility of recognition of a subjective right to environmental protection, which is a discussion also conducted in Portugal. See in this sense, questioning the regime of subjective right, especially Gomes CA (2007: 146ss).

19. In scholarship, see Fabbri AB et al (2019); Wedy G (2019).

20. “LXXIII - any citizen has standing to file a popular action to annul an act injurious to the public property or to the property of an entity in which the State participates, to administrative morality, to the environment and to the historic and cultural heritage; except in the case of proven bad faith, the plaintiff is exempt from court costs and from the burden of paying the prevailing party’s attorneys’ fees and costs”.

they are of no less importance, since it is through these organizational and procedural mechanisms that fundamental rights became effective.

It is important to stress the strengthening of the legal regime of the so-called “environmental participation rights” (access to information, public participation in decision-making, access to courts), as can be seen, in the wake of Principle 10 of the Rio Declaration (1992), through the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement, 2018). The climate participation rights – as laid out in Article 7, item 5 and § 12 of the Paris Agreement (2015) – reinforce the defense and promotion of the fundamental right to the climate insofar as they establish a more robust legal regime with more autonomy of the rights’ holders (individuals and society), in organizational and procedural terms, to take measures vis-à-vis the Judicial System in case of violation both by action or omission of the state and private entities or persons.

The Office of the Public Prosecutor and the Office of the Public Defender, as autonomous institutions that are part of the Brazilian System of Justice and have authority for the protection of the environment and the climate, must also act to defend and promote the fundamental right to a clean, healthy and safe climate²¹. This has had, for instance, a direct reflection in the phenomenon of climate litigation in all judicial spheres in Brazil.

In Brazil climate litigation was established definitely in the FSC in 2020 with the filing of (at least) three suits dealing directly with the climate system protection. Two of them were discussed in public hearings of great repercussion held by the Court. Besides the hearings on ADPF n.º 708 (Fundo Clima case) and ADPF n.º 59 (Fundo Amazônia case), held, respectively, in September and October 2020, we highlight the last and most comprehensive of these actions, ADPF n.º 760 (Action Plan for the Prevention and Control of Deforestation in the Legal Amazon [PPCDAm] case), in which several political parties, along with environmental organizations acting as *amici curiae*, point to serious and irreparable violations of fundamental precepts resulting from actions and omissions of the Union and federal public agencies that prevent the execution of measures aiming at a significant reduction of surveillance and control of deforestation in the Amazon, with their malefic consequences for the climate regime.

5. State duties of climate protection and binding of state authorities

“[It is a] constitutional, supra-legal and legal duty of the Union [Brazilian Federal Administration] and elected representatives to protect the environment and combat climate changes. Therefore, the issue is of a binding legal nature rather than a free political choice. Order that they should abstain from omissions in the management of the Climate Fund and

21. In the case of the Public Defender’s Office, especially in cases in which the negative effects of climate change impact vulnerable individuals and groups.

the allocation of its resources. Understanding of Article 225 and 5, para. 2 of the Federal Constitution” (Judge Luis Roberto Barroso).²²

The state’s environmental protection duties are based on the constitutional commitment entered into by the state entities and by society through the FC. In consonance with this premise, the implementation of fundamental freedoms and guarantees presupposes a positive, rather than just a negative, action of government in the sense of removing the obstacles of an economic, social, cultural and, more recently, also ecological and climatic nature that may hinder the full development of persons (Pérez Luño AE, 2005: 214). Once it has been raised to the constitutional status of a fundamental right, environment, and climate protection, besides being a task and duty of the state and of society, it is identified as indispensable for the safeguarding of well-being, so that any hindrance interfering with the concretization and exercise of that right must be removed by the state, regardless of whether private persons or government itself are responsible for such a behavior or omission.

In which concerns the present Rule of Law, the issue of environmental and climatic security plays a central role, and the state bodies have the function of safeguarding citizens against new forms of violation of their dignity and fundamental rights due to the environmental and climatic impact produced by the contemporary “risk society” (Beck U, 2001). More recently, considering that ecological degradation is becoming a cross-border phenomenon as exemplified by ocean pollution and global warming, it’s even possible to sustain the concept of a “world risk society” (*Weltrisikogesellschaft*) (Beck U, 2008). In this sense, the Democratic Rule of Law, in its present shape, is failing to effectively handle the environmental and climatic risks that have been generated. This is happening especially because the public sphere has been unable to adequately articulate itself in order to face the scaling up of the risks and uncertainties it has to deal with, and at the same time because the Welfare State project has exhausted its utopian energies (Goldblat D, 1996: 237).

To promote the protection of human dignity and fundamental rights against the new risks to the environment and to security generated by contemporary *technological society*, the actual configuration of a Democratic Ecological Rule of Law must be able, through its democratic institutions, to guarantee citizens the security necessary for the maintenance and protection of life in its environmental quality, which includes anticipating future consequences resulting from the adoption of certain technologies and forms of intervention in nature (e.g. burning of fossil fuels and emission of greenhouse gases). The conception of a model of Rule of Law of Prevention of and Precaution against Risks (*Rechtsstaat der Risikovorsorge*) (Marques AS, 2018: 114-120) is aligned with the acknowledgment of a citizen’s right to demand from public entities their protection against such existential risks resulting from development and, above all, from the manipulation of technology by human beings.

22. Passage of the rapporteur-opinion of Justice Luis Roberto Barroso in the FSC [STF], ADPF [Claim of Noncompliance with a Fundamental Precept] 708, Full Court, judged on July 1st, 2022.

In light of the Portuguese constitutional experience, which is very similar to the Brazilian one, Pereira da Silva stresses that the objective dimension of the fundamental right to the environment, as seen above, implies that the environmental principles and values should be taken as fundamental legal interests projected onto the day-to-day activity of application and concretization of law, besides imposing goals and purposes that cannot be disregarded by government as they are state tasks and goals (2002: 63-64).

According to Alexy's view, in order to fulfill its protection duties, besides its function of protection vis-à-vis third parties, the state is charged, for example, with safeguarding the fundamental rights through norms of criminal law, norms of liability, norms of civil procedure, besides administrative and factual actions (Alexy R, 2008: 450).²³ Thus, the state is charged with the binding adoption of public policies for the protection and promotion of fundamental rights. As an expression of the state's protection duties, besides the drafting of legislation on environmental protection, one can mention the adoption of measures of control and surveillance of forms of pollution,²⁴ the creation of conservation units, the creation and structuring of public agencies designed to protect the environment, and other measures with the purpose of ensuring the enforcement of the fundamental right in question.

Following this understanding, Gomes Canotilho sustains that besides a right to the environment, there is a "right to the protection of the environment", which takes shape through the duties assigned to the state bodies to (a) combat the (concrete) dangers to the environment, in order to guarantee and protect other fundamental rights connected with the environment (right to life, to physical integrity, to health etc.); (b) protect (private) citizens against aggressions to the environment and life quality committed by other (private) citizens (2004: 188).

Ferreira Mendes also underlines the state's protection duty to avoid risks by authorizing state entities to act in defense of citizens by adopting measures of protection or prevention, especially in relation to technical or technological development (2004:12). In this sense, it is of fundamental importance to protect the environment and climate, since some of the greatest ecological threats come from the use of certain techniques with a high level of destructive power or of environmental contamination both at a

23. Concerning Brazil's environmental legislation, it should be noted that it is considered by several national and foreign experts as one of the most advanced in the world, although its effectiveness leaves much to be desired. In this sense, there is a structural, organizational, and procedural deficiency of the bodies tasked with environmental protection and to the available means for an adequate fulfilment of their duties.

24. Regarding this topic, Act n.º 9,605/1998 (Provides for penalties and sanctions resulting from conduct and activities harmful to the environment), in its Article 70, § 1, establishes that "the authorities competent to issue notices of environmental infraction and to bring administrative cases are the employees of the environmental agencies that are part of National Environment System [SISNAMA] tasked with surveillance activities", and, in § 3, that "the environmental authority that takes cognizance of an environmental infraction is obliged to promote its immediate investigation, through a separate administrative process, under penalty of co-liability".

local, regional and national and global level, as in the case of nuclear energy, global warming and chemical contamination.

According to the principles and duties of prevention and precaution, the state must act to anticipate the occurrence of environmental damage, avoiding dangers and serious damage, by adopting, for instance, “systems of monitoring and immediate alert” to detect such situations in advance and “systems of urgent action” to address such threats (Marques AS, 2018: 114-120). For a more adequate protection and fight against the climate crisis, “state systems of prevention of environmental damage” would enable a more effective action in case of extreme climate events, besides anticipating natural disasters and/or at least minimizing their impacts, especially in order to protect people exposed to such situations, mainly vulnerable social groups.²⁵

The constitutional duty of the of the Legislator to adopt measures for the implementation of ecological protection and fundamental rights and of the Executive to execute them in an adequate and sufficient manner must take into account the long-term consequences and effects of the decisions made. And when this does not take place due to omission or insufficient action, the Judiciary is empowered, when called into action, to curb or correct possible violations of the constitutionally required parameters in terms of protection and promotion of environmental and climatic quality and safety.

Another important aspect connected to the state’s duties of environmental protection concerns the limitation of the discretionary power of state actors. In the view of Garcia, the constitutional enshrinement of environmental protection as a state goal implies the imposition of protection duties on the state, forcing it to permanently adjust measures to the situations requiring protection, as well as charging it with a special responsibility to be coherent in social self-regulation (2007: 481).

Along the same lines, Benjamin identifies the reduction of the public administration’s discretion as an advantage of the constitutionalization of environmental protection, since the FC requires and, therefore, binds the administration actions in the sense of a permanent duty to take the environment into account and to positively protect it, even against other members of the state community (Benjamin AH, 2007: 75).

In the case of the FC, it should be noted that paragraph 1 of Article 225 explicitly contains a series of protection measures to be undertaken by

25. Outstanding in the Brazilian legal system is the Law on the National Policy of Protection and Civil Defense (Act n.º 12,608 of April 10th, 2012). The topic of civil defense has acquired an increasing relevance from the point of view of environmental protection, especially due to climate change and particularly the extreme climate episodes resulting from it and the emergence the so-called environmental and climate “needy persons” and “refugees or displaced persons”.

public bodies,²⁶ representing specific normative projections of a general duty of environmental protection that the state is charged with.²⁷

As an example of a measure taken by the Brazilian state to fulfil its environmental protection duty, we highlight the enactment of Law No. 9.605 regulating Criminal and Administrative Penalties relating to Behavior and Activities Harmful to the Environment (1998), including the criminal liability of legal entities (Article 3), so as to regulate a constitutional provision (Article 225, § 3).

In regard to climate protection, Act No. 9,605/1998 defined climatic crimes. To give an example, the definition of the crime of pollution in Article 54 of that law expressly includes the conduct of “causing atmospheric pollution” (§ 2, II) and, in the same context, refers to “those who fail to adopt precautionary measures, when so required by the authorities with jurisdiction, in the event of the risk of serious or irreversible environmental damage” (§ 3). Another definition of crime relevant to climate protection can be seen in Article 50-A, consisting in “destroying, exploiting for economic purposes or damaging native or planted forests in public or vacant land without license from the authorities”. It’s important to underline that the penalty shall be increased if the damage results in “a change in weather patterns” (Article 53, I).

26. Article 225. “Paragraph 1. To ensure the effectiveness of this right, the government has the responsibility to:

I - preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems;

II - preserve the diversity and integrity of the genetic patrimony of the country and control entities engaged in research and manipulation of genetic material;

III - define, in all federal entities, territorial spaces and their components which are to receive special protection, any alterations and suppressions being allowed only by means of law, and any use which may harm the integrity of the attributes which justify their protection being forbidden;

IV - demand, in the manner prescribed by law, a prior environment impact study, which shall be made public, for the installation of works and activities which may potentially cause significant degradation of the environment;

V - control the production, sale and use of techniques, methods or substances which represent a risk to life, the quality of life and the environment;

VI - promote environmental education in all school levels and public awareness of the need to preserve the environment;

VII - protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty;

VIII - maintained the favored fiscal regime for biofuels designed for end consumption, in the form of supplementary law, in order to guarantee them a taxation lower than the one payable on fossil fuels, capable of ensuring a competitive advantage in relation to the latter, especially in relation to the taxes dealt with in subitem ‘b’ of item I and item IV of the head of Article 195 and Article 239 and to the tax dealt with by item II of the head of Article 155 of this Constitution. (Included by Constitutional Amendment n.º 123/2022)”. The constitutional list of protection duties was received to a large extent and broadened through Supplementary Law n.º 140/2011, as can be inferred from the reading of its Article 7 (Union), 8 (States), 9 (Municipalities) and 10 (Federal District).

27. Édis Milaré also highlights the idea of a “general state duty of defense and preservation of the environment”, claiming that it is spelled out in the specific duties specified in Article 225, § 1 of the FC (Milaré É, 2005: 189ss).

In the case of climatic administrative infractions, Decree No. 6,514/2008 stipulates administrative infractions and sanctions related to the environment and establishes the federal administrative process for their investigation. By reproducing the climatic crimes previously mentioned, Decree 6,514/2008 defines as administrative infractions the same conducts in Article 61 and 62. Another administrative infraction important to climate protection has to do with the conduct described in Article 65 and is related to manufacturers of vehicles or engines, consisting in “failing to comply with the requirements of guaranteeing the observance of the enforceable limits of the emission of pollutants and of noise, during the terms and kilometers provided by the legislation”. Finally, to mention another important example, Article 140 considers “as services of preservation, improvement and recovery of environmental quality those actions, activities and works included in projects with at least one of the following goals: [...] IV – mitigation or adaptation to climate changes”.

It should be emphasized that the list of the state’s duties of environmental protection contained in Article 225 FC is not a closed one,²⁸ being open to other duties necessary for a comprehensive and holistic protection of the environment, especially due to the permanent emergence of new risks and threats to the environment, for instance – as stated for the German case –, implicit climate protection duties (*Klimaschutzpflichten*) (Groß T, 2009: 364-368; Oslo Principles, 2015).

Among the duties of climate protection resulting from the constitutional regime of ecological protection established by Article 20a of the German Basic Law, which can be applied to the Brazilian case, Thomas Groß underlines the prohibition of insufficient protection (*Untermaßverbot*) as a consequence of the state’s duty to protect the environment. Besides this, according to the same author, the following more specific state duties should be underlined: a) the “prohibition of worsening or deterioration” (*Verschlechterungsverbot*) of the climate conditions; b) the correlate duty of adoption of climate-friendly solutions (*klimafreundliche Lösungen*) by the state actors. Coming back to Brazil, the acknowledgment of specific state duties of protection of the climate system, directly derives from the provision of item I, § 1 of Article 225 FC, which stipulates the protection of “essential ecological processes”.

A similar approach can be recognized looking at the so called concurrent legislative competence in environmental matters, which is expressed as “duty to legislate in environmental and climatic matters”, on the following topics: “forests, hunting, fishing, fauna, preservation of nature, defense of land and natural resources, protection of the environment and control of pollution” (Article 24, VI, FC).

More recently and as mentioned previously, the new item VIII inserted into Article 225 FC by Constitutional Amendment 123/2022 establishes the Brazilian state’s duties of climate protection in the sense of promoting the decarbonization of the economy and neutralization of the climate concerning greenhouse gas emissions resulting from the burning of fossil

28. In the sense of defining Article 225, § 1 as an open catalogue rather than a numerus clausus, see Barroso LR (1993: 68).

fuels. The measure in question expresses the state's duty to reduce the emission of greenhouse gases derived from the burning of fossil fuels, besides stimulating technological changes and innovations of Brazil's energy matrix toward the progressive use of clean energies and climate neutrality, implying a shared responsibility between public and private efforts in order to attain the constitutional goals of climate protection.

Considering that Brazil is one of the five countries with the highest global levels of greenhouse gas emissions, especially because of deforestation and the release of greenhouse gases directly derived from this practice, particularly in the Amazon, the formerly mentioned constitutional and legal framework must be taken very seriously. That's why the lack or manifest insufficiency of such protection measures by the state actors in all federal spheres represents an unconstitutional practice subject to judicial review, including the scrutiny of regressive measures (Schmidt R et al, 2017: 61). From a constitutional point of view – as well according to the International Pact on Economic, Social and Cultural Rights and the Protocol of San Salvador –, the state has the duty to implement those rights progressively, a duty which has been upgraded in order to include the gradual improvement of the legal regime of environmental and climatic protection. Grounded in this duty, a principle of prohibition of ecological and climatic retrocession has been recognized by the legal literature and by the jurisprudence of the Brazilian Federal Superior Courts, namely the SCJ and the FSC.

The absence or insufficiency of legislative measures on a given matter, as already stated by the FSC²⁹, constitutes a violation of the duty of protection assigned to the state by the FC and violates the constitution, be it of an omissive or commissive nature. In this sense, the FSC recognized the unconstitutionality of a state legislation that had accorded insufficient protection to permanent protection areas in comparison with the national regulation established by the Forest Code (Act No. 12,651/2012). In that decision the FSC expressly recognized the violation of proportionality and of the prohibition of insufficient protection by the state legislator.³⁰

29. See FSC [STF], RE [Extraordinary Appeal] 778,889/PE, Full Court, Justice-Rapporteur Luis Roberto Barroso, judged on March 10th, 2016.

30. "The Plenary granted the claim formulated in a Direct Action for the Declaration of Unconstitutionality of Article 3, III, 1 (1) of Act n.º 1,939/2008 of the state of Tocantins, which allows buildings exclusively designed for leisure in Permanent Preservation Areas with a maximum area of 190 square meters. The Court considered the formal unconstitutionality of the provision as established. The legislator of Tocantins, by giving the Environmental Protection Areas a *deficient protection* in comparison to the national rules (Forest Code), exceeded the limits of the supplementary competence resulting from the concurring competence between Union and States (FC, Article 24, head, VI, § 2). The Full Court also recognized the material unconstitutionality. There is no proportionality nor reasonableness in exposing legal interests of maximum importance without a plausible justification, especially in the construction of an area of 190 square meters inside a Permanent Protection Area with the mere purpose of leisure, without caring about the size of the land of the condominium or the malefic effects that may be generated. In preservation areas with a size equal to or smaller than 190 square meters, for instance, the construction will put an end to preservation. Furthermore, although the norm stipulates that the building may not contain septic tanks or other pollution sources, the simple fact that there is no piping entails an alteration of the environment, a fact that generates a real damage to the Permanent

Regarding the FSC's view on the articulation between the state duty of environmental protection, the principle of proportionality, and the prohibition of insufficient protection, we quote a passage from the opinion of Judge Celso de Mello in judgement of the Direct Action for the Declaration of Unconstitutionality n.º 4,901/DF, which dealt with the constitutionality of the 2012 Forest Code: "In fact, from Article 225 of our Fundamental Law there emerges the constitutional duty of environment protection, which applies not only to collectivity itself but particularly on Government, on which it imposes the extremely serious task of preventing, on the one hand, environmental degradation and, on the other, of not breaching the postulate that prohibits insufficient or deficient protection, on pain of the Judiciary's intervention to enforce the constitutional order that guarantees the environment's security and to neutralize all government actions or omissions from which a weakening of this asset of common use by the people may result. Thus, it is essential that the state, be it in the exercise of its legislative functions or in the carrying out of its administrative activities, respect the principle of proportionality, the normative structure of which comprehends, besides the prohibition of excess, the postulate that prohibits, in its other dimension, the insufficiency of state protection."³¹

The binding of the Judiciary to the fundamental rights and, therefore, to the protection duties has also been of unique importance concerning the control of the acts of government aiming at the suppression or reduction of the levels of environmental and climatic protection³². In this sense, the judicial bodies – as the FSC did in its decision on the ADI No. 4,988/TO – have the task of identifying the occurrence of unconstitutional practices and, when applicable, suppressing or correcting them.

6. The supra-legal status of international treaties on climate matters and the duty of conventionality control assigned to national Judges and Courts

The reception of international legislation on environmental – particularly climatic – matters in the domestic sphere is another relevant topic from the point of view of Environment and Climate Law as being a "multilevel normative system", as indicated above. Underlining this statement, the Brazilian National Policy on Climate Change Act (No. 12,187/2009) recognizes as guidelines under the "commitments Brazil has undertaken under the United Nations Framework Convention on Climate Change, the Kyoto Protocol and other documents on climate change the country may come to sign" (Article 5, I). That these commitments include the Paris Agreement

Protection Areas (FSC [STF], ADI n.º 4,988/TO, Full Court, Justice-Rapporteur Alexandre de Moraes, judged on September 19th, 2018. Informativo n.º 918, September 17th to 21st, 2018).

31. FSC [STF], ADI n.º 4,901/DF, Full Court, Justice-Rapporteur Luiz Fux, judged on February 28, 2018.

32. On the Judiciary's role in implementing environmental and climatic legislation see SCJ [STJ], Resp [Special Appeal] 650,728/SC, 2nd Panel, Justice-Rapporteur Herman Benjamin, judged on October 23rd, 2007.

(2015) and other international normative documents aiming at the protection of the climate sounds quite obvious.

In Brazil, the incorporation into domestic law of international norms, specially – but not only – international human rights treaties establishing reciprocal rights and obligations between states – occurs through a Decree enacted by the National Congress ratifying the assignment of the treaty by the Federal Government. Only after this procedure does the treaty gain legal binding force in the domestic sphere, although in different levels, as is the case of human rights treaties, which have granted a more distinguished hierarchy (Mazzuoli VO, 2013: 353ss).

According to Article 5, § 2 FC, the international treaties on human rights – which is also evident in the case of environmental protection, as indicated by Article 11 of the San Salvador Protocol of 1988³³ – are part of the constitutional fundamental rights catalogue. In spite of this clear provision and the claim of the majority of the legal literature (Piovesan F, 2007: 71ss) sustaining the constitutional hierarchy of human rights treaties, the FSC has been, for a long time after the promulgation of the FC, very reluctant in recognizing a privileged status for those treaties, only assuring the same for federal ordinary legislation.

This understanding has been overruled after the insertion, through Constitutional Amendment No.45/2004 (Reform of the Judiciary), of a 3rd paragraph in Article 5 FC, prescribing that “international human rights treaties and conventions on human rights approved by both Houses of the National Congress, in two different voting sessions, by the vote of three-fifths of their respective members, shall be equivalent to Constitutional Amendments”.

Still regardless of the favorable position of authors on the constitutional hierarchy of all human rights treaties, since the judgement of Extraordinary Appeal 466,343/SP on December 3, 2008, the FSC subscribed – against the dissenting opinion of three Justices in favor of the constitutional status – the thesis of the supra-legality of international human rights treaties, except for the treaties approved through the procedure provided in § 3 of Article 5 of the FC, which has the same force as a constitutional amendment.

In other words, according to the current jurisprudence of the FSC, international human rights treaties approved before the inclusion of § 3 into Article 5 FC (or approved by a simple majority in Congress), prevail over all domestic legislation, being submitted only to the Constitution.

In regard to environmental protection and climate issues, a recent development has taken place, representing an important progress promoted by the FSC. Consolidating a previous decision in the judgment of the ADFP n.º 708 (the so-called Climate Fund case), in July 2022 the Court, following the opinion of Justice Barroso, decided that from the point of view of the

33. “Article 11 Right to a Healthy Environment – 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment”. Brazil ratified the San Salvador Protocol in 1999. It was internally enacted by Decree 3,321/1999.

interdependence of human rights, “treaties on environmental law constitute a species of the genus human rights treaties and enjoy, for this reason, supra-national status”.³⁴

The FSC, as mentioned, confirmed a judgment from 2017, in which Justice Rosa Weber, in the Direct Action of Unconstitutionality (ADI) No. 4,066, in an opinion on the constitutionality of the legislation prohibiting asbestos, assigned a status of supra-legality to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989), equating it with international human rights treaties. From the point of view of normative hierarchy, the recognition of the “supra-legal” status of international treaties on the environment and climate ratified in Brazil, such as the Framework Convention on Climate Change (1992), the Framework Convention on Biodiversity (1992), and the Paris Agreement (2015), situates these international treaties above all Brazilian infra-constitutional legislation.

Another important aspect to be considered is that the normative framework to be used as a parameter for the conventionality control of domestic legislation is not restricted to the international human rights treaties, but also includes case-law – both advisory and contentious – of the International Human Rights Courts, as is it the case, for instance, of the Advisory Opinion 23/2017 on “Environment and Human Rights” of the Inter-American Court of Human Rights.

It is important to note that the conventionality control applies only if granting more protection than offered by the FC or other legislation, which also is the case in the ambit of the environmental and climatic international normative framework. Otherwise, if the international legislation is more permissive, the national infra-constitutional legislation must prevail, considering the application of the *pro homine* principle (Mazzuoli VO, 2013: 869). In the context of Environmental Law, the *pro homine* principle takes on a nomenclature of its own that is more adapted to the matter, being known as a *pro natura* or *in dubio pro natura* principle, which also can be applied in the field of Climate Law, in the sense of a *in dubio pro clima* principle.

One of the most important aspects of the conventionality control concerns the *ex officio* duty of national Judges and Courts to consider and apply the content of international human rights laws, including the treaties on environment protection. As stated by Judge Reynaldo Soares da Fonseca, in the judgement of the Internal Interlocutory Appeal in the Habeas Corpus 136,961/RJ by the Superior Court of Justice, “national judges must act as Interamerican judges and establish the dialog between domestic and international human rights law, also in order to reduce the number of violations and to shorten international claims”.³⁵

Still in this context, the Inter-American Court of Human Rights, in the above mentioned Advisory Opinion 23/2017, pointed out that, along the lines of the

34. FSC [STF], ADPF [Claim of Noncompliance with a Fundamental Precept] 708, Full Court, Justice-Rapporteur Luis Roberto Barroso, judged on July 1st, 2022.

35. SCJ [STJ], AgRg [Regimental Appeal] in the Appeal in HC [habeas corpus] 136,961/RJ, 5th Panel, Justice-Rapporteur Reynaldo Soares da Fonseca, judged on June 15th, 2021.

case-law consolidated by the Court and under International Law, “when a State is a party to an international treaty, such as the American Convention, this treaty is binding for all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention”, also on the basis of the exercise of its advisory competence, thus applying the norms established in Advisory Opinion 23/2017 as a parameter for that control (IACHR, 2017: 15-16).

7. Articulated conclusions

a) The present crisis and state of climate emergency resulting from global warming and climate change, as pointed out by the most recent (AR6) IPCC report, represents an unprecedented challenge in civilizational terms as well as to the theory and practice of Constitutional Law and Fundamental Rights, so much so that there is now reference to a new (sub)discipline, viz. Climate Constitutional Law.

b) The acknowledgment of the climate – climate system, terrestrial atmosphere etc. – as a constitutional legal interest distinct from the environment is strongly supported by the regime of ecological protection established by Article 225 of the FC, particularly concerning the duty to protect and safeguard the “essential ecological processes” (item I, § 1º), and due to the specialization of the matter found in legislative, scholarly, and precedential terms. Just as the environment is not an “abstraction”, the climate too is something concrete and is directly related to the safeguarding of the most basic interests and rights of human beings (of the present and future generations), such as dignity, life, health, freedom, physical and psychic integrity, among others.

c) The recognition of a fundamental right to a clean, healthy and safe climate in the content the constitutional norm set out in Article 225 of the FC constitutes a logical corollary of recent – legislative, scholarly and precedential – developments in this matter, both in the field of Constitutional Law – and the Theory of Fundamental Rights – and International Human Rights Law. The seriousness of the climate crisis and obviously, the development and specialization in recent decades in the field of Climate Law or of Climate Change Law – reinforce the need to ensure the (human and fundamental) right to live in a clean, healthy and safe climate a greater autonomy and legal visibility.

d) The legal-constitutional regime established in the FC (Article 225) makes it possible to recognize the characterization not only of ecological protection duties of the state but also specific state duties of climate protection, as recently recognized in an explicit manner by the FSC (ADPF n.º 708). The climate protection duties bind the state (Legislative, Executive and Judiciary) so as to limit its discretion, to the point of authorizing judicial review in case the state, by action or omission, violates the proportionality principle, such as a violation due to insufficient or deficient climate protection (in light of the principle of prohibition of insufficient protection).

e) The international climate treaties (e.g. Framework Convention on Climate Change or Paris Agreement) must be recognized as a species of the genus international human rights treaties. Consequently, they have a supra-legal hierarchy and status in the realm of National Law, according to the SFC's caselaw (ADPF n.º 708). Furthermore, the recognition of the supra-legality status authorizes the control of conventionality – also as an *ex officio* duty of national Judges and Courts – of all infra-constitutional legislation taking the international climate legislation as a normative parameter.

Bibliography

- Alexy R. Teoria dos direitos fundamentais. São Paulo: Malheiros; 2008.
- Barroso LR. Proteção do meio ambiente na Constituição brasileira. Revista Trimestral de Direito Público. (2). 1993. pp. 58-81.
- Beck U. La sociedad del riesgo: hacia una nueva modernidad. Barcelona: Paidós; 2001.
- Beck U. Weltrisikogesellschaft. Frankfurt am Main: Suhrkamp; 2008.
- Benjamin AH. Constitucionalização do ambiente e ecologização da Constituição brasileira. In: Gomes Canotilho JJ, Morato Leite JR, editors. Direito constitucional ambiental brasileiro. São Paulo: Saraiva; 2007.
- Fabrizi AB, Setzer J, Cunha K. Litigância climática: Novas fronteiras para o direito ambiental no Brasil. São Paulo: RT; 2019.
- FEDERAL SUPREME COURT - FSC [STF], ADI n.º 4,901/DF, Full Court, Justice-Rapporteur Luiz Fux, judged on February 28, 2018.
- FEDERAL SUPREME COURT - FSC [STF], ADI n.º 4,988/TO, Full Court, Justice-Rapporteur Alexandre de Moraes, judged on September 19th, 2018. Informativo n.º 918, September 17th to 21st, 2018.
- FEDERAL SUPREME COURT - FSC [STF], ADPF [Claim of Noncompliance with a Fundamental Precept] 708, Full Court, Justice-Rapporteur Luis Roberto Barroso, judged on July 1st, 2022.
- FEDERAL SUPREME COURT - FSC [STF], RE [Extraordinary Appeal] 778,889/PE, Full Court, Justice-Rapporteur Luis Roberto Barroso, judged on March 10th, 2016.
- Ferreira Mendes G. Direitos fundamentais e controle de constitucionalidade. 3rd ed. São Paulo: Saraiva; 2004.
- Freitas J. Sustentabilidade: direito ao futuro. 4th ed. Belo Horizonte: Fórum; 2019.
- Garcia MG. O lugar do direito na proteção do ambiente. Coimbra: Almedina; 2007.
- Goldblat D. Teoria social e ambiente. Lisboa: Instituto Piaget; 1996.
- Gomes CA. Risco e modificação do acto autorizativo concretizador de deveres de protecção do ambiente. Coimbra: Coimbra Editora; 2007.
- Gomes Canotilho JJ. Direito constitucional e teoria da Constituição. 5th ed. Coimbra: Almedina; 2002.
- Gomes Canotilho JJ. O direito ao ambiente como direito subjetivo. In: Gomes Canotilho JJ, editor. Estudos sobre direitos fundamentais. Coimbra: Coimbra Editora; 2004.

Groß T. Welche Klimaschutzpflichten ergeben sich aus Article 20a GG. Zeitschrift für Europäisches Umwelt- und Planungsrecht. 2009; (19):353-363.

Häberle P. Estado constitucional cooperativo. Rio de Janeiro: Renovar; 2008.

Hesse K. Elementos de direito constitucional da República Federal da Alemanha. Porto Alegre: Fabris; 1998.

INTER AMERICAN COURT OF HUMAN RIGHTS (IACHR). Advisory Opinion No. 23/2017, 15th of November 2017, available at https://www.elaw.org/IACHR_CO2317.

INTERNATIONAL COURT OF JUSTICE[ICJ]. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. 1996, available at <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

Marques AS. Der Rechtsstaat der Risikovorsorge. Schriften zum Öffentlichen Recht. Berlin: Duncker & Humblot; 2018.

Mazzuoli VO. Curso de direito internacional público. São Paulo: Revista dos Tribunais; 2013.

Milaré E. Direito do ambiente. 4th ed. São Paulo: Revista dos Tribunais; 2005.

Moon Treaty of 1979, signed on 5th of December 1979, available at <https://treaties.un.org/pages/showDetails.aspx?objid=080000028003b946>.

Novais, JR. Uma Constituição, Dois Sistemas?: Direitos de Liberdade e Direitos Sociais na Constituição Portuguesa. Coimbra: Almedina; 2020.

ORGANIZATION OF AMERICAN STATES [OAS]. General Assembly. Resolution “Human Rights and Climate Change in the Americas” (AG/RES. 2429 XXXVIII/O8), adopted at the fourth plenary session, held on June 3, 2008, available at <http://bit.ly/3EZyz41>.

Oslo Principles on Global Climate Change Obligations, of 2015, available at https://law.yale.edu/system/files/area/center/schell/oslo_principles.pdf.

Outer Space Treaty, signed on 27th of January 1967, available at <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280128cbd>

Pereira da Silva V. Verde cor de direito: lições de direito do ambiente. Coimbra: Almedina; 2002.

Pereira da Silva V. Direito constitucional e administrativo sem fronteiras. Coimbra: Almedina; 2019.

Pérez Luño AE. Los derechos fundamentales. 8th ed. Madrid: Editorial Tecnos; 2005.

Piovesan F. Direitos humanos e o direito constitucional internacional. 8th ed. São Paulo: Saraiva; 2007.

Sarlet IW, Fensterseifer T. Curso de direito ambiental. Rio de Janeiro: Forense; 2020.

Sarlet IW, Fensterseifer T. Direito constitucional ecológico. 7th ed. São Paulo: Revista dos Tribunais/Thomson Reuters; 2021.

Schmidt R, Kahl W, Gärditz KF. Umweltrecht. 10th ed. Munich: C.H.Beck; 2017.

Sozzo G. Derecho privado ambiental: el giro ecológico del derecho privado. Buenos Aires: Rubinzal Culzoni Editores; 2019.

Space Liability Convention, signed on the 29th of March 1972, available at <https://treaties.un.org/pages/showdetails.aspx?objid=08000002801098c7>

SUPERIOR COURT OF JUSTICE - SCJ [STJ], AgIntAgREsp [Internal Interlocutory Appeal] Special Appeal 1,926,267/ES, 2nd Panel, Justice-Rapporteur Herman Benjamin, judged on June 8th, 2022.

SUPERIOR COURT OF JUSTICE - SCJ [STJ], AgRg [Regimental Appeal] in the Appeal in HC [habeas corpus] 136,961/RJ, 5th Panel, Justice-Rapporteur Reynaldo Soares da Fonseca, judged on June 15th, 2021.

SUPERIOR COURT OF JUSTICE - SCJ [STJ], MS [Writ of Mandamus] 28,123/DF, 1st Section, Justice-Rapporteur Gurgel de Faria, judged on March 23rd, 2022.

SUPERIOR COURT OF JUSTICE - SCJ [STJ], Resp [Special Appeal] 650,728/SC, 2nd Panel, Justice-Rapporteur Herman Benjamin, judged on October 23rd, 2007.

UNITED NATIONS [UN]. HIGH COMMISSIONER FOR HUMAN RIGHTS. Report on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (A/HRC/40/55). Special Rapporteur on Human Rights and Environment, 2019, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/002/57/PDF/G1900257.pdf?OpenElement>.

Voigt C, editor. Rule of law for nature: new dimensions and ideas in environmental law. Cambridge: Cambridge University Press; 2013.

Wedy G. Desenvolvimento sustentável na era das mudanças climáticas: um direito fundamental. São Paulo: Saraiva; 2018.

Wedy G. Litígios climáticos: de acordo com o direito brasileiro, norte-americano e alemão. São Paulo: JusPodivm; 2019.