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Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate

Joana Setzer | Délton Winter de Carvalho

Correspondence
Email: j.setzer@lse.ac.uk

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Abstract

In recent years, climate cases to combat illegal deforestation in the Amazon have begun to be brought before Brazilian courts. We focus on a lawsuit filed by the Institute of Amazonian Studies against the Brazilian state. The lawsuit seeks not only an order to compel the federal government to comply with national climate law but also the recognition of a fundamental right to a stable climate, for present and future generations, under the Brazilian Constitution. We argue that this case both exists in the context of a transnational movement, as it draws from existing rights-based cases, whilst also trying to develop this movement. This lawsuit seeks to establish that a stable climate system is critical to the protection of other fundamental rights. We consider what it means to seek a constitutional right to a stable climate through courts within the wider context in which national governance systems are constitutionalizing climate change commitments.

> [C]limate stability is a new social need, essential to the preservation of human life and ecological balance. (*IEA v Brazil*, Complaint at 45)

1 | INTRODUCTION

Any effort to reduce greenhouse gas (GHG) emissions in Brazil, stop biodiversity loss and protect weather and climate patterns depends on combating illegal deforestation in the Amazon. Brazil is the seventh largest global GHG emitter, responsible for 2.9 percent of global emissions. GHG emissions in Brazil are largely connected to changes in land use and land management practices.[1] Deforestation has been the main source of land use emissions, representing 93 percent of the sector's total for the period 1990 to 2018. Deforestation in the Brazilian Legal Amazon,[2] in particular, was responsible for 25.7 percent of the country's total annual GHG emissions in 2018 and 59 percent of emissions from land use and land cover change. In 2018, land use and land cover change contributed to 44 percent of the total emissions of the country, followed by agriculture, which accounted for 25 percent.[3] But deforestation not only causes GHG emissions. The Brazilian Amazon also houses remarkable biodiversity and plays an important role in regulating regional as well as global weather and climate patterns.[4]

[1]SEEG Brasil (Sistema de Estimativa de Emissões de Gases de Efeito Estufa), 'Emissões do setor de mudança do uso da terra – 1990–2016' (2018) (http://www.observatoriodoclima.eco.br/wpcontent/uploads/2018/05/Relato%CC%81rios-SEEG-2018-MUT-Final-v1.pdf). The figure includes emissions that result from offshoring production promoted by foreign companies that operate in Brazil; T de Azevedo et al, 'SEEG Initiative Estimates of Brazilian Greenhouse Gas Emissions from 1970 to 2015' (2018) 5 Science Data 180045.

[2]The Brazilian 'Legal Amazon' is a special designation resulting from a political concept and not from an imperative based on geography. This concept arose from the Brazilian government's need to plan and promote the colonization and development of the *hinterland* during the post-war period following the period of military dictatorship between 1964 and 1985. The Legal Amazon was created by Decree in 1953 and is composed of the states of Amazonas, Acre, Pará, Rondônia, Roraima, Tocantins, the western portion of Maranhão and the northern portion of Mato Grosso. Its surface corresponds to about 61 percent of the Brazilian territory, and its population corresponds to 12.32 percent of the total inhabitants. See RCO Prado, 'Human Rights, Indigenous Peoples and Development in the Expansion of Agricultural Frontier in Brazilian Amazon' (2011) 2 Direito econômico e socioambiental PUC-PR (https://periodicos.pucpr.br/index.php/direitoeconomico/article/view/776). For official data, see the Brazilian National Geographical and Statistical Institute (IBGE) 'Amazonia Legal' (https://www.ibge.gov.br).

[3]SEEG Brasil, 'Análise das emissões brasileiras de GEE e suas implicações para as metas do Brasil (1970–2018) – Relatório-síntese' (https://seeg-br.s3.amazonaws.com/2019-v7.0/documentos-analiticos/SEEG-Relatorio-Analitico-2019.pdf).

[4]Y Malhi et al, 'Climate Change, Deforestation, and the Fate of the Amazon' (2008) 319 Science 169.

Certainly, deforestation in the Brazilian Amazon is not a new problem and attempts to combat illegal deforestation have been made for several decades. Over the years, significant reductions in deforestation rates have been achieved through the implementation of conservation policies.[5] The creation of protected areas and the implementation of deforestation control plans (particularly the Action Plan for Prevention and Control of Deforestation in Legal Amazon [PPCDAm]) are considered the most successful policies for decoupling agricultural commodities from deforestation in the region,[6] contributing to the conservation of primary forests, especially within protected areas, and the conversion of agricultural areas into secondary forests.[7]

However, the first two years of the Bolsonaro administration saw the intensification of forest fires in the Amazon. The total area destroyed in 2019 and 2020 was higher than in any year since 2008, and this rise in deforestation rates accounted for Brazilian emissions increasing by 9.6 percent in 2019.[8] The federal government has been absent from its role as surveyor and enforcer of environmental policies,[9] having also proposed, or supported, several legislative bills that provide amnesty to criminal activities and other illegal activities relating to land use in the country.[10] This challenging scenario has fuelled a significant national and international debate on the environmental crisis facing the country.

One of the ways in which Brazilian actors reacted to this crisis was by bringing legal actions against the government and against individuals and corporations responsible for deforestation. Litigation has been a tool used to fight illegal deforestation for many decades, with thousands of lawsuits filed before Brazilian courts on issues relating to management and/or conversion and clearing of land, including illegal logging, forest-clearing and restoration of degraded areas.[11] What is different this time is that actors filing the lawsuits have started bringing *climate* cases. In other words, in addition to alleging environmental damages and grounding their action on environmental legislation,[12] this new wave of cases clarifies the many linkages between protecting the Amazon and the climate (including the GHG emissions caused by deforestation and forests' function as carbon sinks). They are also grounded on domestic climate law.[13]

This new wave of climate litigation in Brazil is also part of a wider global movement of climate litigation.[14] Particularly, it is part of a group of cases being brought in the Global South that target the poor enforcement of domestic climate and forestry legislation[15] and the failures of governments to implement measures upholding nationally determined contribution (NDC) submitted pursuant to the Paris Agreement, specifically in relation to land use change and forestry. In its first NDC, Brazil committed to a reduction of GHG emissions by 37 percent by 2025, aiming for a reduction of 43 percent by 2030, which would be achieved, along with other actions, through measures in the area of land use change and forestry, including an 80 percent reduction in illegal deforestation. In December 2020, the Brazilian government submitted an updated Paris Agreement NDC that effectively weakens its already insufficient climate action targets for 2025 and 2030.[16]

In 2019 and 2020, at least seven lawsuits were filed in Brazil challenging the inaction and the deregulatory actions of the Bolsonaro administration and directly linking deforestation and climate change.[17] This body of cases has common goals: combat illegal deforestation, reduce Brazil's GHG emissions and bring the topic of climate action to Brazilian courts. Yet the cases are also quite distinct. They are brought

[5]AA Azevedo et al, 'Limits of Brazil's Forest Code as a Means to End Illegal Deforestation' (2017) 114 Proceedings of the National Academy of Sciences of the United States of America 7653, 7658.

[6]J Assunção, C Gandour and R Rocha, 'Deforestation Slowdown in the Brazilian Amazon: Prices or Policies?' (2015) 20 Environment and Development Economics 697, 702.

[7]C Sanquetta et al, 'Greenhouse Gas Emissions Due to Land Use Change in Brazil from 1990 to 2015: Comparison of Methodological Approaches' (2020) 53 Desenvolvimento e Meio Ambiente 25. However, Ferreira and colleagues argue that the goals of the PPCDAm 'could have been bolder' and that the PPCDAm worked as a buffer for plans for other biomes, which took effect with their reduction already fully achieved; HS Ferreira, D Serraglio and R Mendes, 'Activity of the Brazilian Judiciary in the Amazon and Cerrado Biomes Aimed at Combating Global Warming' in C Voigt and Z Makuch (eds), *Courts and the Environment* (Edward Elgar 2018) 127.

[8]SEEG Brasil, 'Documento Analítico – SEEG 8 (1990–2019) – Análise das emissões brasileiras de gases de efeito estufa e suas implicações para as metas de clima do Brasil' (2019) (https://seeg-br.s3.amazonaws.com/Documentos%20Analiticos/SEEG_8/SEEG8_DOC_ANALITICO_SINTESE_1990-2019.pdf).

[9]M Raftopoulos and J Morley, 'Ecocide in the Amazon: The Contested Politics of Environmental Rights in Brazil' (2020) 24 International Journal of Human Rights 1616, 1641. See also D Abessa, A Famá and L Buruaem, 'The Systematic Dismantling of Brazilian Environmental Laws Risks Losses on All Fronts' (2019) 3 Nature Ecology & Evolution 510, 511.

[10]For example, the Provisional Measure n. 910 (Brazilian Federal Act on Land Regularization). For an analysis, see J Chiavari and CL Lopes, 'Medida Provisória Recompensa Atividades Criminosas' (Climate Policy Initiative 2020) (inputbrasil.org/publicacoes/medida-provisoria-recompensa-atividades-criminosas/).

[11]See Coalizão Brasil, 'Identificação da demanda por restauração nativa proveniente de mecanismos legais para além da Lei de Proteção da Vegetação Nativa' (2020) (http://www.coalizaobr.com.br/home/index.php/boletim-n-52/831-estudo-analisa-demanda-firme-por-restauracao-no-pais). See also J Setzer, C Borges and G Leal, 'Climate Change Litigation in Brazil: Will Green Courts Become Greener?' in I Alogna, C Bakker, JP Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021) 143. Others have started to consider the viability of bringing proceedings in international courts and tribunals to protect the Amazon. See J Bendel and T Stephens, 'Turning to International Litigation to Protect the Amazon?' (2021) 30 Review of European, Comparative and International Environmental Law.

[12]There are three important milestones in Brazilian environmental law: the 1981 National Environmental Policy, which laid down a nationwide framework for environmental protection; the 1985 Public Civil Action Act, which allows public prosecutors and nongovernmental organizations to file public civil actions seeking compliance with environmental rules and compensation for damages; and the 1988 Federal Constitution, which recognized present and future generations' fundamental right to an 'ecologically balanced environment' (art 225).

[13]The key piece of climate legislation in Brazil is the National Policy on Climate Change (Law No. 12187/2009), which creates a comprehensive framework for tackling climate change, establishing key principles, objectives, instruments, institutional arrangements and mitigation targets. This law was regulated by Decree No. 7390/2010 (replaced by Decree No. 9578/2018), which established the goal of reducing deforestation in the Amazon by 80 percent in relation to the 1996–2005 verified average, corresponding to 3925 km^2/year until 2020.

[14]J Setzer and R Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2020) (https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Globaltrends-in-climate-change-litigation_2020-snapshot.pdf).

[15]J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679; J Setzer and L Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 8 Transnational Environmental Law 1; J Setzer and L Benjamin, 'Climate Change Litigation in the Global South: Filling in Gaps' (2020) 114 AJIL Unbound 56; K Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 Journal of Environmental Law 483.

[16]M Angelo, 'Brazil's Updated Climate Plan Seen Lacking Credibility as Forests Shrink' (Reuters, 10 December 2020). See also Climate Action Tracker, 'Brazil: Overview' (https://climateactiontracker.org/countries/brazil/).

[17]The related cases can be found on the online databases maintained by the Grantham Research Institute (https://climate-laws.org) and the Sabin Center for Climate Change Law (http://climatecasechart.com). These two databases compile judicial cases and targeted adjudications involving climate change presented to administrative entities and a few international bodies. Ferreira and colleagues confirm that 'the inclusion of variables related to climate change and deforestation of the Amazon Rainforest and the Cerrado in judicial decisions is still in its infancy'; Ferreira et al (n 7) 141.

by a diverse set of actors (public prosecutors, civil society organizations and opposition political parties[18]) and are grounded on different legal provisions. The cases are ongoing, but the distinct motivation, legal basis and potential contributions of these lawsuits to protect the Amazon in Brazil merit exploration.

This article examines a particular lawsuit filed by the Institute of Amazonian Studies (*Instituto de Estudos Amazônicos* [IEA]) against the Brazilian state in October 2020.[19] The lawsuit seeks not only an order to compel the federal government to comply with national climate law but also the recognition of a fundamental right to a stable climate, for present and future generations, under the Brazilian Constitution.[20] We argue that this case constitutes a significant strategic and legal progression, in Brazil and globally. The case exists in the context of a transnational movement, as it draws from existing rights-based climate litigation cases. At the same time, it also tries to develop this movement. By seeking the recognition of a fundamental right to a stable climate, this lawsuit helps to establish that a stable climate system is critical to the protection of other fundamental rights and that the right to a stable climate merits being recognized as an implicit fundamental right under the Brazilian Constitution. We conclude by considering what it means to seek a constitutional right to a stable climate through courts within the wider context of climate change commitments needing/waiting to be constitutionalised in national governance systems.

2 | CLIMATE LITIGATION TO COMBAT ILLEGAL DEFORESTATION IN BRAZIL

As of May 2021, the Sabin Center for Climate Change Law and the Grantham Research Institute on Climate Change and the Environment databases have recorded 13 cases of climate litigation in Brazil. Until 2020, climate lawsuits in Brazil were few and only had climate change at the periphery of the claim.[21] In 2020, climate litigation emerged as a clearer movement in Brazil: at least seven lawsuits were filed challenging the government's failure to adopt effective measures against deforestation in the Amazon and linking the consequences of this inaction to climate change. However, there is no type of climate litigation aimed at protecting the Brazilian Amazon. Rather, there are several types of legal strategies that have already been tested – and there are other types yet to be tested. In this section, we consider the climate cases filed to protect the Amazon, categorizing them according to (i) the types of actors bringing the cases and the defendants targeted and (ii) the types of legal claims made and whether they seek the imposition of negative or positive obligations.[22]

2.1 | The parties involved

Climate litigation to combat illegal deforestation in the Amazon involves a considerable diversity of plaintiffs. The different lawsuits have been filed by the government (the Federal Environmental Protection Agency [IBAMA]) and by (national and international) non-governmental organizations (NGOs) and also by public prosecutors and by political parties.

Public prosecutors, both state and federal, enjoy a high degree of autonomy in Brazil. They have the prerogative to investigate and prosecute cases that protect collective and diffuse rights such as children's rights or consumers' rights, as well as those relating to the environment.[23]

Political parties in Brazil also have the right to pursue judicial relief for alleged violations of constitutional rights and human rights directly before the Supreme Court. Since the process of democratization in the 1980s, political parties have made extensive use of their power to request judicial review of legal and administrative acts from the legislative and executive branches. On the back of this history of constitutional litigation, political parties are now turning their focus to the adjudication of climate change.[24]

Some climate cases have been brought by combinations of these actors, for example, NGOs filing a case jointly with public prosecutors (in *Instituto Socioambiental et al v IBAMA and the Federal Union*[25]). There are also cases brought jointly by political parties and NGOs (in *PSB et al v Brazil (on deforestation and human rights*[26]), which suggests a politicization of climate litigation in Brazil.

In terms of the defendants, most climate cases to fight deforestation have aimed at holding the government accountable for actions and inactions concerning GHG emissions. However, climate lawsuits have now also been filed – and are likely to continue being filed

[18]Setzer et al (n 11).

[19]*Institute of Amazonian Studies v Brazil*, 11th Lower Federal Court of Curitiba (5048951-39.2020.4.04.7000), filed 8 October 2020 (https://climate-laws.org/geographies/brazil/litigation_cases/institute-of-amazonian-studies-v-brazil).

[20]The analysis of *IEA v Brazil* also draws upon the second author's experience as the lead counsel representing the IEA in the litigation filed against the Brazilian government.

[21]The cases consisted of enforcement actions against companies and environmental agencies for violations of natural resource management laws or the failure to implement environmental policies. The exception was a group of lawsuits filed in 2014 by the Public Prosecutor's Office against airline companies that operate in the international airport of Guarulhos. *Public Prosecutor Office of Sao Paulo v United Airlines*, 2nd Civil Lower Court of Guarulhos (0006393-67.2015.4.03.6119), filed 10 August 2010 (https://climate-laws.org/geographies/brazil/litigation_cases/sao-paulo-public-prosecutor-s-office-v-united-airlines-and-others). See also Setzer et al (n 11).

[22]We derive this categorization from A Savaresi and J Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (2021) (https://www.academia.edu/45145709/Mapping_the_Whole_of_the_Moon_An_Analysis_of_the_Role_of_Human_Rights_in_Climate_Litigation).

[23]J Setzer, C Borges and G Leal, 'Public Prosecutors, Political Parties, and NGOs are Paving the Way for Vital Climate Change Litigation in Brazil' (LSE Latin America and Caribbean, November 2020) (https://blogs.lse.ac.uk/latamcaribbean/2020/11/25/public-prosecutors-political-parties-and-ngos-are-paving-the-way-for-vital-climate-change-litigation-in-brazil/).

[24]Setzer et al (n 23). Lawsuits that follow the 'normal' procedure can take up to 50 years (depending on the number of appeals) to eventually reach the Supreme Court. Agência Brasil, 'STF julga processo que tramitou por 50 anos na Corte' (12 March 2020) (https://agenciabrasil.ebc.com.br/justica/noticia/2020-03/stf-julga-processo-que-tramitou-por-50-anos-na-corte).

[25]*Instituto Socioambiental, Greenpeace Brasil & Abrampa v Ibama and the Federal Union*, 7th Federal Lower Court (1009665-60.2020.4.01.3200), filed 4 June 2020 (https://climate-laws.org/geographies/brazil/litigation_cases/instituto-socioambiental-abrampa-greenpeace-brasil-v-ibama-and-the-federal-union).

[26]*PSB et al v Brazil (on deforestation and human rights)*, Supreme Court, Arguição de Descumprimento de Preceito Fundamental – ADPF 760, filed 11 November 2020 (https://climate-laws.org/geographies/brazil/litigation_cases/psb-et-al-v-brazil-on-deforestation-and-human-rights).

– against corporations and/or individuals, as in *Federal Environmental Agency – IBAMA v Siderúrgica São Luiz Ltd. and Martins*.[27]

2.2 | Legal claims

Federal Environmental Agency – IBAMA v Siderúrgica São Luiz Ltd. and Martins was grounded on civil liability for environmental damage related to climate change.[28] The lawsuit sought to hold a steel company and its manager liable for environmental damages (promoting illegal deforestation) and climate damages (GHG emissions derived from the illegally sourced coal). The plaintiffs alleged failure from the company to carry out due diligence in the supply chain to avoid the use of illegally sourced charcoal and sought redress for both environmental and climate damages.

The cases against the government deal with actions and inactions that are leading to increasing deforestation and GHG emissions. When fighting specific acts, litigants seek the imposition of *negative* obligations to ensure the government refrains from activities that may lead to violations associated with climate impacts. In *Instituto Socioambiental et al v IBAMA and the Federal Union*,[29] NGOs Instituto Socioambiental and Greenpeace Brazil, in collaboration with the Brazil's Environmental Prosecutors Association, seek to overturn a measure by the federal environmental agency that relaxed regulations on timber exports.

Government inaction, in turn, has led plaintiffs to seek the imposition of *positive* obligations to adopt, implement and enforce measures to reduce emissions.[30] In the case *Amazon Task Force v Ibama et al*,[31] the Prosecutors Office argued that the government was not on track to achieve the climate targets established in the national climate law and the Brazilian NDC, including its commitment to reduce the annual rate of deforestation by 80 percent.

Litigants have also challenged the paralysis of domestic climate governance mechanisms, arguing that such paralysis is leading to a surge in deforestation. Four opposition political parties have filed two cases before the Supreme Court: *PSB et al v Brazil (on the Amazon Fund)*[32] calls on the government to mobilize resources from the Amazon Fund, which was created through donations from Norway and Germany with the aim of curbing deforestation; and *PSB et al v Brazil (on the Climate Fund)*[33] seeks to compel the Ministry of the Environment to reactivate the governance structures of the National Fund for Climate Change.

Some of these cases rely strongly on human rights, with plaintiffs grounding their claim not only on the right to life and to a stable environment but also on other fundamental rights. In *PSB et al v Brazil (on deforestation and human rights)*,[34] seven political parties and a coalition of NGOs allege omissions in the execution of the PPCDAm, claiming that the government has violated fundamental rights of the populations living in the Amazon and throughout Brazil, particularly the rights of indigenous peoples and traditional communities, as well as both present and future generations.

In *IEA v Brazil*, litigants have gone a step further, seeking the recognition of a fundamental right to a stable climate.[35] In this case, the plaintiffs focus squarely on illegal deforestation as Brazil's main source of GHG emissions and aim to ensure that the PPCDAm is brought into line with the National Policy on Climate Change. The case is unique in the domestic context, as well as globally, in the wider context of climate litigation as a transnational movement: IEA asks the judiciary not only to ensure the government complies with national climate legislation and the constitutional right to a healthy environment but also to recognize a new norm – a fundamental right to a stable climate for present and future generations under the Brazilian Constitution.

3 | *IEA V BRAZIL* AND THE FUNDAMENTAL RIGHT TO A STABLE CLIMATE

With an increase in the number and types of climate cases being brought, scholars have been developing more analytical and systematic typologies of climate litigation.[36] Such typologies are based on the type of litigant, the legislative basis, the type of court and the field of law grounding the case.[37] Different publications have surveyed global climate change litigation, its trends and key issues that courts must resolve.[38] Particularly relevant to this analysis, scholars have identified a 'rights turn' in climate litigation.[39]

Within this group of rights-based claims, litigants are seeking an enhanced recognition of rights – including the recognition of the right to a stable climate.[40] However, there are still few examples of cases that focus on the right to a stable climate, and scholarly work on this topic is for the most part limited to the US legal system and case law. In this section, we examine (i) climate litigation in the wider context of

[27] *Federal Environmental Agency (IBAMA) v Siderúrgica São Luiz Ltd. and Martins*, Federal Court 1st Region (No. 1010603-35.2019.4.01.3800), filed 2 July 2019 (http://climatecasechart.com/non-us-case/federal-environmental-agency-ibama-v-siderurgica-sao-luiz-ltda-and-martins/).

[28] The National Policy on the Environment (Law No. 6938/81) and the National Policy on Climate Change (Law No. 12,187/2009).

[29] Setzer et al (n 23).

[30] Savaresi and Setzer (n 22).

[31] *Public Prosecutor Office of Manaus (Amazon Task Force) v Ibama et al*, 7th Federal Court (1007104-63.2020.4.01.3200). The original version in Portuguese is available at http://www.mpf.mp.br/am/sala-de-imprensa/docs/decisao-desmatamento-amazonia.

[32] *PSB et al v Brazil (on the Amazon Fund)*, Supreme Court, Ação direta de inconstitucionalidade por omissão – ADO 59, filed 5 June 2020 (https://climate-laws.org/geographies/brazil/litigation_cases/psb-et-al-v-brazil-on-amazon-fund).

[33] *PSB et al v Brazil (on the Climate Fund)*, Supreme Court, Arguição de Descumprimento de Preceito Fundamental – ADPF 708, filed 30 June 2020 (https://climate-laws.org/geographies/brazil/litigation_cases/psb-et-al-v-brazil-on-climate-fund).

[34] *PSB et al v Brazil (on deforestation and human rights)* (n 26).

[35] *Institute of Amazonian Studies v Brazil*, 11th Lower Federal Court of Curitiba (5048951-39.2020.4.04.7000), filed 8 October 2020 (https://climate-laws.org/geographies/brazil/litigation_cases/institute-of-amazonian-studies-v-brazil)

[36] NS Ghaleigh, 'Six Honest Serving-Men: Climate Change Litigation as Legal Mobilization and the Utility of Typologies' (2010) 1 Climate Law 31. Peel and Osofsky include this type of research in what they call a 'second wave' of climate litigation; see J Peel and HM Osofsky, 'A Rights Turn in Climate Litigation?' (2018) 7 Transnational Environmental Law 37.

[37] J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 WIREs Climate Change e580.

[38] United Nations Environment Programme (UNEP), 'Global Climate Litigation Report: 2020 Status Review' (UNEP 2020) (https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1%26isAllowed=y).

[39] Peel and Osofsky (n 36).

[40] Savaresi and Setzer (n 22).

climate constitutionalism, (ii) some of the landmark cases of rights-based climate litigation that have raised the right to a stable climate and (iii) the approach to a right to a stable climate adopted in *IEA v Brazil*.

3.1 | Climate litigation in the wider context of climate constitutionalism

Before considering what it means to seek a constitutional right to a stable climate through courts, it is instructive to outline the existing scholarly understanding around environmental and climate constitutionalism.[41]

Mirroring the growing environmental concerns of the past decades, countries have increasingly included environmental rights and duties in their constitutions. Substantive constitutional environmental provisions started emerging in the early 1970s. As of 2017, 150 countries had enshrined environmental protection or the right to a healthy environment in their constitutions.[42] The provisions vary from those that impose a constitutional duty on the state to pursue environmentally sound development, sustainable use of natural resources and the maintenance of a safe and healthy environment for the citizens or residents of the state, to ones that provide for the individual's right to a clean and healthy environment and those that also provide for an individual's duty to protect and conserve the environment. In Latin America, since the late 1980s, most countries have incorporated environmental rights into their constitutions.[43] Ecuador and Bolivia have recognized at the core of the constitutions that environmental and cultural rights are intertwined, going as far as to consider nature a legal entity.[44] In Brazil, the environment is not treated as a legal entity but is considered as a common asset, essential for a good quality of life.[45]

The movement towards including environmental provisions within countries' constitutions led scholars to develop the concept of 'environmental constitutionalism'.[46] Despite the differences across constitutional systems, environmental constitutionalism provides a degree of interpretative coherence to the various national constitutional traditions.[47] At the heart of this concept is the idea that the environment is a subject that warrants worldwide constitutional protection. Environmental constitutionalism draws from constitutional law, human rights law, international law and environmental rights – from which specific rights, such as the rights life, health, housing, food and education, derive.[48]

Environmental constitutionalism arguably has several advantages over regular environmental statutes. Daly and May point to five advantages.[49] The first is that constitutional law has normative superiority and is more durable than ordinary laws. The second is that, as part of the supreme law of the land, a constitutional provision guides public discourse and behaviour. A third advantage is that there is more likelihood of compliance with constitutional provisions. The fourth advantage is that, when compared with ordinary environmental laws, which tend to protect specific environmental resources, environmental constitutional provisions protect substantive rights broadly. A fifth advantage is that environmental constitutionalism provides a safety net to protect the environment when international and/or domestic laws do not offer specific grounds for a case.[50] Based on such provisions, independent courts can enforce the protection of environmental rights against governments' or corporations' actions or omissions on a constitutional basis.[51]

The growing understanding of the climate crisis has caused environmental constitutionalism to evolve. As part of this trend, some constitutions have now been amended to include climate provisions. In 2011, McHarg anticipated that national governance systems would constitutionalize climate change,[52] and in 2019, May and Daly identified at least seven countries that already incorporated climate change into constitutional texts.[53] Other countries such as France,[54] Chile[55] and Sri Lanka[56] are now also considering including climate change provisions in their constitutions.

The literature and recent court decisions[57] highlight the increasing importance that constitutional rights have in climate cases. Yet some critics have questioned the movement towards constitutionalizing climate change. Common counterarguments are linked to constitutional provisions having a precommitment approach – binding a future polity to a set course of action.[58] Questions arise on whether climate

[41]See A McHarg, 'Climate Change Constitutionalism? Lessons from the United Kingdom' (2011) 2 Climate Law 469. See also NS Ghaleigh and C Verkuijl, 'Paris Agreement, Article 2: Aims, Objectives and Principles' in G Van Calster and L Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 94.

[42]UNEP, 'Environmental Rule of Law: First Global Report' (2019) (https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report).

[43]DB Maldonado, 'El constitucionalismo radical ambiental y la diversidad cultural en América Latina. Los derechos de la naturaleza y el buen vivir en Ecuador y Bolivia' (2019) 42 Derecho del Estado 3, 5–6.

[44]ibid 12–13. Constitution of Bolivia (https://www.oas.org/dil/esp/constitucion_bolivia.pdf) Title III, art 407(4); Constitution of Ecuador (https://www.oas.org/juridico/pdfs/mesicic4_ecu_const.pdf) Section 7, art 414.

[45]1988 Federal Constitution (n 12) art 225.

[46]LJ Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016) 145.

[47]LJ Kotzé, 'A Global Environmental Constitution for the Anthropocene's Climate Crisis' in J Jaria-Manzano and S Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019) 55.

[48]E Daly and JR May, 'Comparative Environmental Constitutionalism' (2015) 6 Jindal Global Law Review 30.

[49]ibid 21–22.

[50]C Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 AJIL Unbound 40.

[51]In the *Oposa* case, the Philippines Supreme Court described rights to a balanced and healthy environment as 'basic rights', which 'predate all governments and constitutions' and 'need not be written in the Constitution for they are assumed to exist from the inception of humankind'; *Oposa v Factoran GR* No 101083 SC 30 July 1993.

[52]McHarg (n 41). In turn, Muinzer argues that it is desirable that the UK Climate Change Act is considered a constitutional statute. See TL Muinzer, 'Is the Climate Change Act 2008 a Constitutional Statute?' (2018) 24 European Public Law 733, 754.

[53]JR May and E Daly 'Global Climate Constitutionalism and Justice in the Courts' in Jaria-Manzano and Borrás (n 47) 240.

[54]'Macron Offers Referendum on Adding Climate Goal to Constitution' (Reuters, 14 December 2020).

[55]J Heine, 'Chile is at a Turning Point as Majority Favours New Constitution' (The Wire, 3 November 2020) (https://thewire.in/world/chile-new-constitution-plebiscite).

[56]NS Ghaleigh and A Welikala, 'Need for a Constitutional and Statutory Framework on the Environment and Climate Change in Sri Lanka' (Daily FT, 23 March 2021) (http://www.ft.lk/opinion/Need-for-a-constitutional-and-statutory-framework-on-the-environment-and-climate-change-in-Sri-Lanka/14-715165).

[57]See, for example, *Neubauer et al v Germany*, Federal Constitutional Court (2021) (1BvR 2656/18, 1BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20) (https://climate-laws.org/geographies/germany/litigation_cases/neubauer-et-al-v-germany).

[58]McHarg (n 41).

constitutionalism would be antidemocratic or represent a way of intergenerational domination.[59] Another set of counterarguments to domestic climate constitutionalism are directed at the risk posed by unilaterally binding a state to climate action when other countries may not follow suit.[60] Owing to the cross-border effects of climate change, the state adopting climate constitutionalism would face significant costs with low foreseeable benefits in terms of climate stability if other states fail to align.

However, there has also been an effort within the literature to justify climate constitutionalism. First, constitutions are more durable than ordinary laws, so expressing constitutional incorporation of provisions addressing climate change would establish the conditions for climate action in the long term, even against the background of changing political agendas.[61] Second, constitutional climate provisions increase the credibility of commitments on climate change made by states.[62] The increased credibility of commitments would have implications for the international sphere, where this could help reduce doubts between parties to international climate change treaties that other states will freeride. Third, climate constitutionalism could also signal greater investment certainty to investors in new low-carbon infrastructure.[63] Fourth, once the right to a stable climate is recognized as a fundamental right, rights holders can require that duty bearers—states or non-state actors—meet their obligations.[64] Depending on the jurisdiction, constitutional provisions can also provide support for citizens' judicial claims.[65] However, as we discuss in the next section, litigants are taking rights-based cases to court even without constitutional provisions that protect the right to a stable climate, and in the process thereof, they are pushing forward the recognition of such a right.

3.2 | The right to a stable climate in cases that influenced *IEA v Brazil*

Climate litigation has become a transnational movement, characterized as a dynamic and innovative process to fight the omission of governments and private actors in taking the necessary measures for climate mitigation and/or adaptation.[66] Litigants and potential litigants are in constant dialogue, influencing strategies and bringing about reflections on the viability of and adherence to proposed strategies at the domestic level.[67] An important feature of this phenomenon is how cases are reinterpreting and expanding legal principles. In a more recent trend, these climate lawsuits have been calling attention to the direct relationship between the consequences of climate change and its deleterious effects on human rights – either violating or weakening them.[68]

Among the pioneering and successful examples of the rights-based approach in climate litigation are, to mention a few, *Leghari v Pakistan*,[69] *Urgenda v Netherlands*[70] and *Future Generations v Ministry of the Environment and Others* (Colombia).[71] For Chief Justice Syed Mansoor Ali Shah, the judge who gave the landmark decision in *Leghari v Pakistan*,[72] climate cases require a movement from a 'linear local environmental issue' inherent in environmental justice issues 'to a more complex global problem'.[73] Climate justice, therefore, 'links human rights and development to achieve a human-centered approach' and is 'informed by science, responds to science and acknowledges the need for equitable stewardship of the world's resources'.[74] As Justice Ali Shah stated in the *Leghari* decision, the constitutional rights framework today must be 'fashioned to meet the needs of something more urgent and over-powering, i.e. Climate Change'.[75]

Juliana v United States[76] stimulated a significant discussion around the constitutional viability of defending *a fundamental right to a stable climate system*. Among several innovative aspects, the lawsuit argued that the US Constitution guarantees an unenumerated fundamental right to a 'stable climate system'.[77] The plaintiffs – 21 American youths – claimed that government policies and programmes promoting the use of fossil fuels have violated their constitutional rights to life, freedom, property, equal protection and public trust resources.[78] The plaintiffs postulated that the federal government had authorized, funded and implemented policies and programmes that destabilize the climate system, negatively affecting the ordered liberty secured by the US Constitution.

Claiming that there can be no ordered liberty without a 'stable climate system', the (later dismissed) decision by Oregon District Court Judge Ann Aiken accepted the plaintiffs' claim that a more demanding standard should be adopted to demonstrate the constitutionality of government energy policies in the case of a judicial scrutiny to ascertain whether fundamental rights may have been or are being

[59]L Beckman, 'Power and Future People's Freedom: Intergenerational Domination, Climate Change, and Constitutionalism' (2016) 9 Journal of Political Power 289.
[60]D Thompson, 'Democracy in Time: Popular Sovereignty and Temporal Representation' (2005) 12 Constellations 245, 261.
[61]Jaria-Manzano and Borrás (n 47).
[62]McHarg (n 41).
[63]Ghaleigh and Verkuijl (n 41).
[64]AO Jegede, 'Arguing the Right to a Safe Climate under the UN Human Rights System' (2020) 9 International Human Rights Law Review 184, 204.
[65]B Hudson, 'Structural Environmental Constitutionalism' (2015) 21 Widener Law Review 201, 207.
[66]J Peel and HM Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015).
[67]Setzer and Vanhala (n 37).
[68]Savaresi and Setzer (n 22); J Peel and HM Osofsky (n 36); RS Abate, 'Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?' (2019) 10.1 George Washington Journal of Energy and Environmental Law 34.
[69]*Leghari v Pakistan*, Lahore High Court Green Bench, judgement 25 January 2018 (W.P. No. 25501/2015) (https://climate-laws.org/geographies/pakistan/litigation_cases/ashgar-leghari-v-federation-of-pakistan-lahore-high-court-green-bench-2015).
[70]*Urgenda Foundation v State of Netherlands*, HR 20 December 2019, ECLI:NL:HR:2019:2006.
[71]*Future Generations v Ministry of Environment and Others*, Colombian Supreme Court, judgement 5 April 2018 (11001-22-03-000-2018-00319-01) (https://climate-laws.org/geographies/colombia/litigation_cases/future-generations-v-ministry-of-the-environment-and-others).
[72]*Leghari v Pakistan* (n 69).
[73]ibid paras 21–22.
[74]ibid.
[75]ibid paras 11–12.
[76]*Juliana v United States*, 947 F.3d 1159 (9th Cir. 2020).
[77]ibid.
[78]JR May and E Daly, 'Can the U.S. Constitution Accommodate a Right to a Stable Climate? (Yes, It Can)' (2021) 39 UCLA Journal of Environmental Law and Policy 39.

violated.[79] Adopting the notion of ordered liberty as a fundamental right, based on the substantive due process clause in *Obergefell*,[80] Judge Aiken asserted that '[e]xercising my reasoned judgment, I have no doubt that a climate system capable of sustaining human life is fundamental to a free and ordered society'.[81] Thus, governmental actions that harm the climate system may compromise fundamental rights such as life, freedom and property, which are protected constitutionally under the substantial due process clause. Judge Aiken further stated that the existence of a fundamental right to a stable climate system under the understanding that fundamental rights can be those enumerated in the US Constitution, as well as those that, although not expressly provided for, are 'deeply rooted in this Nation's history and tradition' or 'fundamental to our scheme of ordered liberty'.[82] However, Judge Aiken was careful to limit this newfound constitutional environmental right, stating that 'acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation'.[83]

Juliana v United States was a key influence for the legal team involved in the *IEA v Brazil* case. The team studied closely the *Juliana* case and considered arguments that could be adapted and used in a case brought in Brazil. Other preceding cases also influenced the public interest civil suit brought against the Brazilian government, particularly *Future Generations v Ministry of Environment of Colombia*, *Leghari v Pakistan* and *Urgenda v Netherlands*. However, as we discuss in the next subsection, *IEA v Brazil* is unique in that it explicitly seeks the recognition of a *fundamental right to a stable climate* for present and future generations. The case seeks this wide recognition, and it postulates the fulfilment of obligations and goals objectively foreseen in Brazilian climate legislation, specifically related to deforestation control in the Amazon. Whereas *Leghari v Pakistan* is centred on a new reading of traditional fundamental rights based on principles of climate justice (to life, human dignity, health, heritage and the environment), *IEA v Brazil* postulates the right to climate stability as an autonomous fundamental right. Compared with *Juliana v United States*, which implicitly asks for a right to a healthy climate as an extension of other established constitutional rights, the Brazilian case explicitly asks for its recognition.

3.3 | The right to a stable climate in *IEA v Brazil*

IEA v Brazil was brought by the Brazilian NGO Institute for Amazonian Studies. IEA was founded in 1986 to support the struggle of Chico Mendes[84] and the National Council of Rubber Tappers against deforestation in the Amazon. IEA developed the first model of conservation unit (the so-called Extractive Reserve) that established concession contracts for the use of natural resources between the state and local communities in the Amazon. Supporting communities and protecting the forest have been the focus of IEA's work since. In 2018, concerned with the sharp increase in the levels of deforestation in the Amazon, IEA decided to bring a lawsuit against the Brazilian state to protect the forest.

In preparing the case, the legal team took a strategic decision not to base the action purely on existing environmental law. The rationale behind this decision was the understanding that current environmental laws do not provide sufficient protection against the risks of dangerous climate change. The litigants also wanted courts to establish that there is a legal norm that requires governments to protect the forest and the climate.

Scholars have previously explored whether a 'right to a safe climate' can be classified as a 'new' human right. Ademola Jegede provides several reasons why such right meets the criteria of a new human right, including that the effects of climate change negatively affect human dignity;[85] climate impacts are universal;[86] the right to a safe climate can be interpreted consistently with United Nations Charter obligations, customary law or general principles of law;[87] notwithstanding its connection with several other human rights, the right to a safe climate does not replicate an existing right;[88] there is strong judicialization of climate issues in several countries;[89] and the right to a safe climate is sufficiently precise to identify specific rights and duties.[90]

After almost two years of preparing the case, IEA filed its climate 'public civil action' (i.e. class action) before the Federal Circuit Court of Curitiba. The plaintiffs allege that the federal government has failed to comply with its own action plans to prevent deforestation and mitigate and adapt to climate change, violating national law and fundamental rights. More specifically, IEA asserts that the government has failed to meet the Brazilian emissions targets set out in the National Climate Change Policy Act, a binding law passed by the Brazilian legislature.[91] To meet these targets, the federal government set out specific action plans for preventing and controlling deforestation in various Brazilian biomes.[92] Of these action plans, the PPCDAm was launched in 2004 and consisted of four distinct phases: PPCDAm-I (2004–2008), II (2009–2011), III (2012–2015) and IV (2016–2020). By 2020, the government should have achieved an 80 percent reduction in the Legal Amazon annual deforestation rate in relation to the

[79]BC Mank, 'Does the Evolving Concept of Due Process in *Obergefell* Justify Judicial Regulation of Greenhouse Gases and Climate Change?: *Juliana v. United States*' (2018) 52 UC Davis Law Review 875. See also *Juliana v United States*, 947 F.3d 1159 (9th Cir. 2020), Judge Ann Aiken Order Opinion and Order, 10/11/2016 (Aiken Order) 29–30.
[80]*Obergefell v Hodges*, 135 S. Ct. 2598 (2015).
[81]Aiken Order (n 79) 32, referring to *Juliana v United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), rev'd, 947 F.3d 1159 (9th Cir. 2020).
[82]ibid 21. For an analysis of this argument, see also S Novak, 'The Role of Courts in Remedying Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously' (2020) 32 Georgetown Environmental Law Review 752.
[83]*Juliana v United States* (n 81).
[84]Chico Mendes was a Brazilian rubber tapper (*seringueiro*), trade union leader and environmental activist who fought to preserve the Amazon rainforest and advocated for the human rights of Brazilian peasants and indigenous peoples. Chico Mendes was killed by a rancher on 22 December 1988. See (https://www.britannica.com/biography/Chico-Mendes).
[85]Jegede (n 64) 211–212.
[86]ibid 197.
[87]ibid 198. In Jegede's work – and in this article – there is no distinction between the 'right to a safe climate' and the 'right to a stable climate'.
[88]ibid 199, 212.
[89]ibid 200.
[90]ibid 200–201.
[91]Law No. 12187/2009 (n 13).
[92]Decree No. 7390/2010, replaced by Decree No. 9578/2018 (n 13).

1996–2005 average (i.e. from 19,625 to 3925 km^2/year).[93] By failing to meet this critical target set in the PPCDAm, the plaintiffs allege that the government is violating fundamental rights and national law. In terms of remedies, IEA asks for an order to compel the federal government to comply with its existing policies, to reforest an area equivalent to what was deforested beyond the statutory limit and to allocate sufficient budgetary resources for this purpose.[94]

As with climate cases in other jurisdictions,[95] science plays a crucial role in the case. IEA refers to scientific consensus regarding dangerous climate change and the importance of combating deforestation to protect biodiversity and the climate. To make their argument, IEA relied on officially available data on deforestation and its influence on the climate at national and regional levels. The lawsuit also translated the robust scientific evidence about the causes and negative effects of climate change into claims on violations of several fundamental rights. For that, the litigants relied on one of the most renowned experts on climate change and the Amazon in Brazil, Professor Carlos Afonso Nobre,[96] who submitted a technical report in support of the lawsuit.[97] Moreover, the Brazilian National Institute for Space Research,[98] the governmental agency responsible for the satellite-based monitoring system recording deforestation in the country, was indicated as a 'friend of the court' and called to attest the reliability of the scientific information submitted.

The most significant innovation of the case is that it seeks the recognition of a fundamental right to a stable climate that IEA argues is implicitly entrenched in the Constitution. The strategic choice to enforce climate protection duties on the Brazilian government through the recognition of a fundamental right for a stable climate rests on three main motivations. First, this remedy is justified in the Brazilian legal system given the existence of constitutional and infra-constitutional legislation on 'collective interests' and fundamental social rights, especially environmental rights. This does not result solely from the existence of a constitutional right to an 'ecologically balanced environment' (Article 225 of the Constitution) but also from a legal tradition that focuses on the collective dimension of fundamental rights. These collective interests are defined as 'transindividual rights', making the term preferred over the American 'public interest'.[99] With wide access to courts guaranteed since the 1985 Public Civil Action Law and with fundamental rights protected by the 1988 Constitution, Brazil shifted from a liberal legal order that privileged individual rights to a legal order in which collective rights are paramount.[100] Judges, in turn, responded to this shift by reinterpreting the duties and obligations of the state in the light of human rights and environmental rights.[101]

Second, the right to a stable climate for present and future generations was presented as a logical consequence of integrating fundamental rights expressly foreseen in the Brazilian Constitution. In other words, the demand for the recognition of a fundamental right to a stable climate builds on synergies between more traditional fundamental rights that are expressly provided for in the constitutional text. Among these more traditional fundamental rights that ground the *IEA v Brazil* case are the dignity of the human person[102]; the right to an ecologically balanced environment[103]; the inviolability of the right to life, freedom, equality, security and property[104]; and the right to health, food and housing.[105] This is also why the option of arguing that the state was violating obligations imposed by the Paris Agreement was discarded. Rather, by grounding the case on fundamental rights enshrined in the Constitution and on existing domestic legislation, the plaintiffs tried to avoid unnecessary debates about whether the Paris Agreement and the NDCs the Brazil submitted would be legally binding in the domestic context.

Third, the fundamental right to a stable climate represents a new implicit constitutional category, resulting from the synergy between fundamental rights and a new generation of global environmental problems. Specifically, IEA argues that based on the magnitude of the climate crisis and the negative repercussions that climate change imposes on so many fundamental rights, there is a need to recognize a new and autonomous right that guarantees a stable climate system capable of sustaining human life. The fundamental right to a healthy environment is sufficient to protect the environment as a community good for collective and diffuse enjoyment. However, in the context of the climate crisis, it is fundamental rights, both individual rights (dignity of the human person) and collective rights (ecologically balanced environment), that must also be protected. The protection of environmental rights and human rights cannot be distinguished in this context. It is for this reason that IEA claims that the right to a stable climate merits constitutional status.

[93]TAP West and PM Fearnside, 'Brazil's Conservation Reform and the Reduction of Deforestation in Amazonia' (2021) 100 Land Use Policy 105072.

[94]Brazil's official deforestation statistics track annual destruction from August to July. Therefore, the deforestation rate for 2020 will become available in July 2021.

[95]R Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands' (2016) 34 Journal of Energy and Natural Resources Law 143, 163.

[96]Professor Nobre is one of Brazil's top climate scientists and lead author for the Intergovernmental Panel on Climate Change. See Instituto de Estudos Avançados, Universidade de São Paulo, 'Professor Carlos Afonso Nobre' (http://www.iea.usp.br/pessoas/pasta-pessoac/carlos-afonso-nobre).

[97]See CA Nobre, 'Supporting Technical Report for the Public Interest Civil Action' (http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200924_12742_na.pdf). The report provides the court with the state-of-the-art science that is relevant for the case, in particular (i) the role of the Amazon tropical rainforest in stabilizing regional climate system, (ii) the relation between the rates of deforestation in the Brazilian Legal Amazon and the country's GHG emissions, and (iii) the current deforestation rates and the unlikelihood of compliance with legal deforestation targets.

[98]See http://www.inpe.br/.

[99]LK McAllister, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Stanford University Press 2008) 165.

[100]Transindividual rights are held collectively and cannot be exercised individually, such as the right to a healthy environment; ibid 220.

[101]As pointed out by the Brazilian Superior Court of Justice (STJ) in the opinion of Justice Benjamin: 'In Brazil, unlike other countries, the judge does not create obligations to protect the environment. Instead, they emanate from the law once they have been examined by the Legislative Branch. For this reason, we do not require activist judges, because activism is found within the law and the constitutional text. Fortunately, our judiciary is not plagued by a sea of lacunae or a multitude of legislative half-words. If a lacuna does exist, that is not due to lacking legislation, not even to defective legislation, but to absent or deficient administrative and judicial enforcement of the unequivocal environmental duties established by the legislator'. *Public Prosecutor's Office v H Carlos Schneider S/A Comércio e Indústria & Others*, STJ, Second Panel, REsp 650.728/SC, Justice Hermann Benjamin vote, judgement 23 October 2007 (https://climate-laws.org/geographies/brazil/litigation_cases/public-prosecutor-s-office-v-h-carlos-schneider-s-a-comercio-e-industria-others).

[102]1988 Federal Constitution (n 12) art 1.

[103]ibid art 225.

[104]ibid art 5.

[105]ibid art 6.

Describing the fundamental right to a stable climate based on the synergies with fundamental rights that were expressed and consolidated in the Brazilian constitutional system was a strategic decision taken by the legal team bringing the case. IEA's aim was that the right adjudicated could be easily understood by any court, even where the presiding judge was not extensively informed about or sensitive to climate litigation and climate change law. With this goal, the complaint was framed in the following terms:

> Standing out among these rights is the fundamental (individual and collective) right to an ecologically balanced environment for present and future generations, listed in *Article 225 of the Federal Constitution*. This fundamental right agrees and harmonizes with the fundamental (individual and collective) rights and duties *(i)* to the inviolability of the right to life, freedom, equality, security and property, set forth in *article 5 of the Federal Constitution*; and *(ii)* to health, food and housing, set forth in *article 6 of the Federal Constitution*. The rationale behind this is that in order for ALL to enjoy *an ecologically balanced environment*, it is necessary for *people to be guaranteed a free, equal, healthy life, with full access to security, property, housing, and food*.
>
> And in order for this set of fundamental rights to be effectively promoted, it is essential that the environmental, climatic conditions are suitable for the maintenance of human life.
>
> The climatic instability caused by anthropogenic activity, among which, illegal deforestation, generates ecological imbalance of the environment which, in turn, precludes human beings from enjoying the basic conditions of a dignified life (full access to health care, housing, property, food, security, equality and freedom).
>
> These factual and legal grounds confirm that the right of every citizen to climate stability is a fundamental right and a duty implicitly embedded in the federal constitution (implicit fundamental right).[106]

To sum up, although strategic climate litigation takes place as part of a global conversation, every case must be tailored to and respond to its local context. The IEA case took advantage of the particular characteristics of the Brazilian legal system, grounding the case in domestic law whilst addressing a global phenomenon, rather than relying on the global phenomenon to advance domestic law. The lawsuit introduced the discussion about a new fundamental right (the right to a stable climate) by confronting climate challenges with fundamental rights expressly safeguarded by the Brazilian constitutional system. Although *Leghari* broadened the interpretation of fundamental rights to climate change, and *Juliana* advanced the debate on the fundamental right to a climate system capable of sustaining human life, the IEA case probes how this fundamental right is constituted, justifying the need for a 'new' fundamental right to a stable climate under the Brazilian Constitution and demonstrating with scientific evidence that the climate system exercises influence over several human fundamental rights. The IEA case does not offer a formula that can be easily reproduced in other legal systems. However, the grounds on which the case was brought and how the case will be received by courts might well influence other rights-based cases around the world.

4 | CONCLUSION

This article examined how *IEA v Brazil* made a significant contribution to a new trend in climate cases, which seek the recognition of an (often unenumerated) right to a stable climate. We started by examining how a diverse set of actors are challenging the Brazilian state's action or inaction, with the aim of catalysing more robust and effective government responses to halt Amazon deforestation. We focused on those cases asking courts to recognize that governmental inaction in protecting the Amazon constitutes a violation of fundamental rights – particularly the right to life, the right to a healthy environment and, in the IEA case, the right to a stable climate.

Some countries are increasingly addressing climate change in their constitutions. As James May and Erin Daly argue, these trends are likely reflective of an emerging worldwide phase in constitutional litigation.[107] Hence, domestic constitutionalism offers an avenue for the development of a body of law that is more accessible to people and possibly more enforceable.[108] At the same time, pursuing climate constitutionalism through courts can play an important role in advancing climate justice in countries whose constitutions do not expressly address climate change.

IEA v Brazil exists within a framework of transnational climate governance – it translates climate science into a legal language of (climate-related) rights and duties, and it adopts a strategy of rights-based litigation. The claim, however, also goes further. Taking advantage of opportunities offered by the Brazilian legal system, the case incorporates the pillars of climate constitutionalism by expressly aiming at the recognition of climate stability as a fundamental right. This legally protected positing of climate stability, though global in its outlook, will be enforceable to the extent that it becomes entrenched within the country's legal system, regardless of that country's legal tradition. The *IEA v Brazil* case is not only party of the 'rights turn' in climate litigation, but it is also part of a movement of constitutionalization through courts. Ultimately, such domestic constitutionalism could be employed to 'inspire strategies

[106]Unofficial translation of the complaint available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201008_12742_complaint-2.pdf, 40–41.

[107]Daly and May (n 48).

[108]ibid 245.

for the improvement of the legitimacy of an international legal order and institutions without asking for a world state'.[109] Similar to what we have observed with environmental constitutionalism, climate constitutionalism could become a bold critical standard that consolidates global environmental developments and instigates the evolution of national constitutional systems. The apparently unconnected marks of various climate actions worldwide, once seen through the lens of the legal traditions they are challenging, start pointing towards an emerging outline of a fundamental duty to maintain climate stability.

ORCID

Joana Setzer https://orcid.org/0000-0002-7705-7684
Délton Winter de Carvalho https://orcid.org/0000-0001-9469-5779

Joana Setzer is an Assistant Professorial Research Fellow at the Grantham Research Institute on Climate Change and the Environment, at the London School of Economics and Political Science (LSE), with main areas of expertise in climate litigation and global environmental governance.

Délton Winter de Carvalho is a Brazilian attorney-at-law and counsellor-at-law specialized in environmental and catastrophes law by the University of California, Berkeley, and head of the Environmental Law Programme at the Jesuit university, Universidade do Vale do Rio dos Sinos (Unisinos), in the state of Rio Grande do Sul, Brazil.

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[109] A Peters, 'Global Constitutionalism' in M Gibbons (ed), *The Encyclopedia of Political Thought* (Wiley 2015) 1484.