

VOTE - VOGAL

Mr. Justice Edson Fachin: I would like, at the outset, to thank the brilliant oral arguments made by Mr. André Maimoni, Mr. Felipe Correa, Mr. Miguel Novaes and Mr. Rafael Lopes, as well as the equally excellent oral arguments made by Mrs. Angela Moura Barbarulo, Mrs. Jucelaine Angelim Barbosa and Mrs. Suely Mara Vaz Guimarães de Araújo.

I welcome the well-released report issued by Minister Roberto Barroso.

Climate Emergency and the Urgency of Mitigation Measures

In the papal encyclical *Laudato Si'*, dated 18.06.2015, Pope Francis states that: " *theological or philosophical reflections on the situation of humanity and the world can sound like a repeated and empty message if they are not presented anew from a confrontation with the current context in what it has that is unprecedented for the history of humanity .*"

It is the mission of all earthlings, to use the expression of the French philosopher Bruno Latour, to prevent the environmental issue and the urgency of measures to mitigate it from becoming repeated and empty messages.

The very recent report (*Sixth Assessment Report - AR6*) of the United Nations Intergovernmental Panel on Climate Change (IPCC), published on 4 April 2022, is full of data that do not allow us to close our eyes.

The extensive document of almost 3 thousand pages, signed by 278 experts from all over the world, focuses on the mitigation issue: what can be done to reduce carbon emissions and slow down the pace of global warming.

This report is in addition to the one published by the IPCC on 28 February 2022, "*Climate Change 2022: Impacts, Adaptation and Vulnerability*", which focuses on adaptation, that is, efforts to live up to the reality of climate change.

AR6 points to paths of hope. The paths and technology to transform the energy matrix and slow down the pace of warming

exist. What is needed, however, is commitment from leaders to put into practice the solutions that already exist, or there will not be enough time to prevent the darkest scenarios.

Regarding the Amazon, AR6 shows that deforestation, which had been declining since 2010, has increased again rapidly in the last four years.

In the document, the IPCC points out that the political polarization that leads to the erosion of environmental governance and the reduced representation of civil society in institutions are barriers to prevent deforestation and sustainable development public policies.

This is not about opinion or ideology, but about scientific evidence.

The need, therefore, for action to address the risks brought by climate change is urgent.

The data shows that half of the world's population is very vulnerable to these cruel and increasingly intense impacts of climate emergencies: droughts, fires, storms, floods, food insecurity, diseases, migrations, destruction of cities.

The planet's temperature has increased by an average of 1.1°C since the pre-industrial era. The Paris Agreement in 2015 set the goal of limiting warming to 2°C, with efforts to keep it to 1.5°C.

Although these figures seem to denote small or smooth changes, this is not how they should be understood.

A change of 1 or 2 degrees Celsius in the *average* temperature of the planet indicates huge, *devastating* changes in extremes.

The North Pole is warming at a faster rate than the rest of the world - double or triple, according to IPCC data. The poles, as we know, fulfil a very important mission in the thermal and ecological balance of the planet. Melting glaciers, rising sea levels, acidification of waters, risks to biodiversity, there are countless damages involved.

The issue is very dramatic. The melting of the poles leads to a decrease in the planet's ability to reflect sunlight. The amount of light the planet returns to space is one of the driving forces behind the climate. The reflective power of a surface is known as albedo. The albedo

from the north pole is decreasing rapidly, which means the planet will have more heat from the sun to absorb, further increasing the temperature.

The decrease in the albedo of the Arctic, the rise in the ocean level that threatens the 12,000 inhabitants of the Pacific Ocean nation Tuvalu with disappearance, the savannisation of the Amazon, the death of the Ok (Okjökull, in Icelandic) glacier and the corresponding tombstone on which was inscribed that humanity *knows* what is happening and what it *needs to do to stop it*.

Although all these facts are staggering and throw us into the most absolute discomfort, at least those who are concerned about the present and future generations, it does not seem to me, for the task we have here, as judges of this Court, useful to pinpoint data.

In fact, for this judgment it is enough to recognise, without euphemisms or evasions, that we are facing a climate emergency.

Recognising the severity and latitude of the climate emergency is the premise of all earthlings. This recognition is grounded in the best scientific knowledge available.

Indeed, in a study published on 5.11.2019 in the journal BioScience, 11,258 scientists from 153 countries warn that the planet faces an *unequivocal* climate emergency and point to broad public policy goals to be achieved to address it.

The climate question is the question of our time. It is the questioning question that throws up our destiny and the answers we can formulate will decide what future humanity will have - or if there will be any future at all. There is no other agenda, no other problem, no other issue. The climate emergency is the antechamber to all others.

The Constitutional Responsibility to Protect the Environment for Future Generations

Having established these premises, which I consider essential, on the dimension of the climate emergency, I would like, before moving on to the vote itself, to make some considerations on the understanding of Article 225 in this scenario.

I reproduce the content of the *caput* of the constitutional provision:

"Art. 225. Everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations.

On the occasion of judging ADIs 4901, 4902, 4903 and 4937, reported by Mr. Luiz Fux, I had the opportunity to state that the best interpretation to be given to art. 225 of the CRFB is that which identifies the right to the environment as a true fundamental right, attracting, for example, the provisions of art. 5, § 2 of the CRFB.

It should be stressed, however, that there is a specificity of environmental protection that does not equate it exclusively with the individual singularly considered.

After all, as I made clear in that judgment, it is precisely environmental protection that gives this fundamental right its specificity.

This is because environmental damage is, by nature, distinct from that classically defined under civil law.

If we recognize that environmental damage has, strictly speaking, multiple causes, such as those listed in Agenda 21 - natural disasters, heavy economic activities, atmospheric pollution, contamination by chemical products, intensive use of natural resources, among others - it is imperative to repeat that human action is now scientifically recognized as responsible for the increase in temperature of the planet and that this increase is due, in large part, to carbon emissions resulting from burning fossil fuels.

Recognizing human activity as the cause of environmental damage has important legal consequences. By recognizing the right to a balanced environment as a fundamental right of the present and future generations, the constituent legislator called on the Public Powers and the collectivity to fulfill the duty to defend and preserve it.

This duty of defence and protection logically also extends to the necessary protection in the face of human actions that degrade the planet.

There is no possibility of interpreting art. 225, CRFB, which authorizes the Public Powers - Legislative, Executive, Judiciary - to ignore this duty.

This is not to argue that political choices can be made in these public policies by the Legislative or the Executive and that they would be technical discretionary choices. There is no separation of powers when public policies are used to undermine environmental protection, when the constituent legislator determined to the Public Powers, to the collectivity - to the earthlings - the environmental protection.

The records of environmental deforestation, the lack of protection for indigenous lands and the hollowing out of environmental supervision highlight the relevance and importance of the role of the Judiciary in this matter.

The scale of the tragedy on our doorstep demands urgent action. We cannot close our eyes to this reality.

This is not an isolated trend or a novelty. Environmental litigation is a reality all over the world.

In a recent decision, the Canadian Supreme Court decided for the possibility of imposing taxes on carbon emissions by the central power even with the opposition of the provinces, in a historic precedent.

In Germany, in an equally historic precedent, the Supreme Court held that the measures applied by the government in the climate crisis are insufficient and require improvement. This is the case of *Neubauer and Others v. Germany*, judged in 2021.

The Federal Constitutional Court of that country recognized, as is clear from the lesson of *Ingo Wolfgang Sarlet, Gabriel Wedy and Tiago Fensterseifer*, the violation of the "state duties of environmental and climate protection" under the Federal Law on Climate Protection (2019), which would have distributed disproportionately - between present and younger and future generations - the burden derived from the restrictions on fundamental rights - in particular the right to freedom - arising from the regulation of greenhouse gas emissions.

The Court has recognised that the fundamental right to freedom has an inter- or trans-generational dimension, which must be protected by the State and is expressed through "intertemporal guarantees of freedom" (intertemporal *Freiheitssicherung*).

We can also mention OC 23/2017, in which the Inter-American Court conferred new status and autonomy to the human right to the environment.

In that case, whose opinion was requested by the Republic of

Colombia, the IDH Court ruled that States have an obligation to prevent significant environmental damage, within or outside their territories.

This understanding that was reiterated in a more recent precedent, in *Tierra Nuestra v. Argentina* (2020), in which Argentina was condemned for violations of the rights of indigenous communities in the province of Salta.

A logical consequence of the actions envisaged in order to make environmental protection feasible is the fact that science plays a fundamental role: the allocation of risks depends on the basic scientific consensus.

This understanding was also reiterated by the STF when it judged ADI 6241, Reporting Justice Roberto Barroso, on 21.05.2020. On that occasion, the Court established the following theses: "1. An administrative act that entails a violation of the right to life, health, **the balanced environment** or adverse impacts on the economy, due to non-compliance, constitutes a gross error: (i) of scientific and technical norms and criteria; or (ii) of the constitutional principles of precaution and prevention. 2. The authority to decide shall require that the technical opinions on which it will base its decision expressly address: (i) the **scientific and technical** norms and **criteria** applicable to the matter, as established by internationally and nationally recognized organizations and entities; and (ii) compliance with the constitutional principles of precaution and prevention, under penalty of becoming jointly responsible for possible violations of rights.

Although the context of the judgment of ADI 6241 was different, i.e., the civil liability of public agents in the face of the public health emergency caused by the Covid-19 pandemic was being debated, it can be seen that the understanding about the need for public agents to base their decisions on technical and scientific criteria also applies to administrative acts that cause environmental consequences.

Furthermore, the precautionary and preventive principles gain importance, normatively foreseen in the Rio Declaration in 1992, according to which "*where there are threats of serious or irreversible damage, the absence of absolute scientific certainty shall not be used as a reason for postponing economically feasible measures to prevent environmental degradation*".

It should be noted at this point that, according to the case law of this Court, "the Brazilian State ratified its adherence to the Precautionary Principle by signing the Rio Declaration" (RE 835.558, Reporting Justice Luiz Fux, Full, DJe 07.08.2017).

Moreover, the existence of an undeniable relationship between environmental protection and the enforcement of other human rights, as well as the impact of environmental degradation and the adverse effects of climate change on the enjoyment of human rights have already been recognized by the Inter-American Court of Human Rights in the *case of Kawas Fernández Vs.*

As can be gleaned from international experience, the Judiciary must also respond to the climate emergency. It is a crucial issue, before which all others lose importance, because without mitigating the environmental damage caused by global warming caused by the emission of fossil fuels, there is no possibility of human life on the planet.

The respect for state duties of climate protection is imperative. There is no administrative discretion that allows public policies or government programs that ignore such duties, which derive directly from the constitutional text.

It is this understanding that illuminates the interpretation to be given by this Court as to the provisions questioned in the actions under trial.

The Importance of the Climate Fund Functioning

Only to recall, the present claim, proposed by the Brazilian Socialist Party, the Socialism and Freedom Party, the Workers' Party and the Rede Sustentabilidade, seeks that this Court determines that the Union adopt the necessary measures to reactivate the operation of the Climate Fund with all the resources authorized by the budget law and that the Union submit within thirty days a Plan for Application of Climate Fund Resources for the year 2020. In addition, they request that these resources are not contingent.

The central argument brought by the parties is that the Union has not adopted measures to mitigate climate change and that this

behaviour represents an offence against the constitutional protection of the environment and the international commitments assumed by the Brazilian State.

I agree with the conclusions drawn by Justice Roberto Barroso. In fact, the documents attached to the case file show systematic omissions that indicate the lack of allocation of resources for a Fund that is an essential instrument in the policy of combating climate change. More than that: as the Rapporteur rightly pointed out, "the results objectively ascertained indicate that the country is, in fact, moving in the opposite direction to the commitments made and to the mitigation of climate change, and that the situation has worsened substantially in recent years". Therefore, His Excellency Min. Roberto Barroso is right in determining that the Federal Government refrain from omitting to make the Climate Fund work or to allocate the competent resources for it to perform its function, as well as in prohibiting the contingency of the revenues that are part of it.

However, in view of the structural nature of this claim and the evidence found at the highly relevant public hearing convened by the Rapporteur, I believe it is necessary to adopt other determinations so as to allow the use of resources to be aligned with the guidelines of the National Policy on Climate Change and the other instruments listed in Law 12,187 of 2009.

In particular, I believe that the plaintiffs are legally justified when they also request that the Federal Government publish a quarterly statistical report prepared by IBGE/MCTI that shows the percentage of expenditures of the Climate Fund in the five segments (energy, industry, agriculture and cattle raising, LULUCF and waste), i.e., the same segments adopted by the National Inventory, an instrument of the National Policy; and to formulate, with reasonable periodicity, the National Inventory of Greenhouse Gases Emissions and Removals, with mandatory segmentation by States and Municipalities, giving wide publicity to data and statistics consolidated in the document.

It is well known that inventories are tools used by the United Nations Climate Change Panel to account for gas emissions. They are used to follow and monitor emission trends and without them it is practically impossible to develop adequate mitigation strategies. In consultation with the website of the Panel on Climate Change, which, by decision of the Conference of States Parties, publishes the national inventories every year, it is not verified that the Brazilian State has submitted this information. That is, the necessary order of

he release of resources for the Climate Fund runs the risk of becoming ineffective, because there are no instruments to monitor the effectiveness of the measures taken.

In light of the foregoing, I agree with the Rapporteur to (i) recognize the omission of the Federal Government, due to the failure to fully allocate the resources of the Climate Fund for 2019; (ii) order the Federal Government to refrain from omitting to make the Climate Fund work or to allocate its resources; and (iii) prohibit the contingency of the revenues that make up the Fund.

I request Your Excellency's permission to, accepting the request made by the petitioners, also determine (iv) that the Federal Government publish a quarterly statistical report prepared by IBGE/MCTI that evidences the percentage of expenditures of the Climate Fund in the five segments (energy, industry, agriculture and cattle raising, LULUCF and residues); and (v) that the Federal Government prepare, with reasonable periodicity, the National Inventory of Emissions and Removals of Greenhouse Gases, with mandatory segmentation by States and Municipalities, giving wide publicity to the data and statistics consolidated in the document.

It's like voting.

Plenário Virtual - minipalestra