



Nuovi Autoritarismi e Democrazie:
Diritto, Istituzioni, Società

The Impact of Transnational Regulatory Standards regarding the Control of Air Pollution on the Decisions of the US Supreme Court and the Supreme Court of Brazil in a Time of Populism

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Abstract

This scientific article analyses the arguments and opinions used by the US Supreme Court and the Supreme Court of Brazil about air pollution control and the influence of transnational legal foundations in times of populist governments. For the development of this research, the comparative method was used, operationalized by the operational concept techniques, bibliographic research, and jurisprudential analysis. The product of the succinct comparative analysis performed allows us to classify the decision-making standard in the case of *West Virginia v. EPA* completely uncharted to foreigner law, while the Direct Action of Unconstitutionality n. 6.148/2019, constantly mentions transnational legal agreements and, in the case of regulatory omission by the Brazilian State, indicates the prevalence of World Health Organization standards.

Keywords: Constitutional Courts – *West Virginia v. EPA*. ADI n. 6.148/2019 – Air Pollution Legal's Standards – Populism – Transnational Law.

CONTENTS: 1. Introduction. 2. Domestic Law regarding International Relations. 3. The US Supreme Court and the *West Virginia v. EPA* Case. 4. The Supreme Court and the Judgment of the Direct Action of Unconstitutionality no. 6.148/2019. 5. Final Considerations.

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1. Introduction

Starting from the premise that constitutional norms, in addition to governing sovereign States, together with rules of international law produce implications for transnational actors and claims, this article is dedicated to the analysis of the decision-making and persuasive reasons of the Constitutional Courts of the United States of America and of Brazil when considering the constitutionality of regulatory models on air quality and, consequently, on the environment, health and climate change.

Therefore, the function of the Courts responsible for guarding the Constitution also exceeds their territorial limits of jurisdiction. The Courts have effects in other States, in other Constitutional Courts or in other bodies of the State itself to which they are connected in the exercise of international attributions¹, impacting the law's transnational performance.

The first half of 2022 is marked by the discussion around the constitutionality control, in the Supreme Court (United States of America) and in the Federal Supreme Court (Brazil), of actions in which the normative standards of air pollution control are judged against the precepts of the Constitution. Both Courts recognize the material relevance of environmental protection, the need to take a stand about the challenges of climate change and the protection of the environment as a diffuse legal claim.

This article aims to analyse, in view of the thematic similarity of the judgments produced, by homonymous Courts, the impact of transnational normative standards in the debates and in the reasoning of decisions, considering that the countries in question are part of the same international legal agreements and have relationships deeply marked by transnationality/globalization, including an express recognition of transnationality in previous decisions.

Furthermore, the investigation is justified as a sampling of the Constitutional Courts' institutional capacity to base their decisions in scenarios marked by transnationalism and the emergence of transnational law, either by adopting arguments from different national spaces, or by seeking to refute the influence of foreign foundations.

2. Domestic Law regarding International Relations

The consolidation of globalization as behaviour, attacks the premise of the sovereignty's classical principle, according to which States are 'independent communities' in the exercise of their *imperium*.

This is the framework for the phenomenon that is immediately relevant: global, transnational, supranational and international organizations affect social interaction

¹ S. Baldin, P. Viola, *L'obbligazione climatica nelle aule giudiziarie. Teorie ed elementi determinanti di giustizia climatica*, in *Diritto pubblico comparato ed europeo*, Vol. 23, No. 3, 2021, 597-630.

in States in such a way, and with such autonomy, that sovereignty cannot assume the whole construct, but make it engraved with greater complexity, especially due to the multiplication of actors and demands with which the State relates or is impacted².

The recurrence of events related to economic, environmental, sanitary, humanitarian, and energetic crises, as well as the rise of risks stemming from the terrorist threat, accelerated the creation of polycentric clusters to manage and regulate these new manifestations.

As a result of this context, it becomes possible to set a standard guided much more by channels of communication and presentation of precepts endowed with greater effectiveness for each phenomenon, given its specialty. Even if, at times, juxtapositions and/or overlaps are observed, the means of communication contribute to the development of law, if faced in a substantial way. Consequently, the notion that normative prescriptions do not originate in formal, vertical, descending flows, in an up-down style, gains strength³. In the same way, political agendas are challenged to go beyond the domestic territorial space of each State as well as of its citizens.

Consequently, social dynamics, in addition to facing the problem of the place of production of the norm, under the aspect of national/international geography, create bases of hybridism regarding the sources of law, its methods and its place of production in times of globalization⁴. Such movements constitute scenarios for the political tension to also be resized, with the conversion of previously hermetic borders now into zones of porosity. Therefore, doing politics nationally involves positioning oneself politically in the face of transnationality⁵.

In this context, Sabino Cassese signalize that such political practice is governed by the domain of networks with fluid development and variable alliances, winning the one with the greatest ability to establish direct connections with civil society. In summary: verticalized relationships mediated by the State are minimized; channels for the circulation of legal models are facilitated; and the search for analogue functionalities for previously domestic challenges is encouraged⁶.

In general terms, globalization promotes a radical change in the powers

² S. Sassen, *Territorio, autoridad y derechos. De los ensamblajes medievales a los ensamblajes globales*, Katz, 2015.

³ M. Staffen, *Interfaces do direito global*, 2 ed., Lumen Juris, 2018.

⁴ A. Arnaud, *Governar sem fronteiras. Entre globalização e pós-globalização*. Lumen Juris, 2007.

⁵ A. Peters, *The American Law Institute's restatement of the law: bastion bastion, bridge and behemoth*, in *The European Journal of International Law*, Vol. 32, No. 04, 2021.

⁶ S. Cassese, *Chi governa il mondo?*, Il Mulino, 2013. In parallel, Alessio Lo Giudice presents the following thesis: «Quest'ultima considerazione permette un ulteriore chiarimento del concetto di postnazionalità: superamento del paradigma nazionalistico non equivale a destrutturazione degli Stati nazionali, né tanto meno equivale all'ideale istituzionale di un Superstato. Il postnazionale implica invece la costruzione di uno spazio istituzionale di unità politica che superi l'elemento nazionale come esclusivo fattore di coesione sociale. Per queste ragioni la dimensione postnazionale potrebbe rinviare alla costruzione di uno spazio pubblico entro cui articolare e sperimentare forme di solidarietà sociale denazionalizzate». A. Lo Giudice, *Istituire il postnazionale Identità europea e legittimazione*, Giappichelli, 2011.

operating at the most diverse levels, including ideological, institutional, and normative power, with the respective social interactions that are constantly finding new arrangements.

In this sense, an environment legal protection with all its capillarity (natural environment, cultural, digital, labour, health, climate changes), is an outstanding illustrative agenda for the clashes between domestic law and international relations⁷. Regardless of the level of maturity of national legal treatment, international negotiations, transnational actors, local social demands, and global public opinion make the defence of the environment an item of prime necessity for transnationalism that impacts national law. The recognition of the environment as a universal, diffuse, and transgenerational legal asset conditions the regulation of each State according to transnational parameters, treading directions for a political unit around environmental protection due to the possibility of continuity of life on Earth⁸.

On the other hand, this state of the art reveals the perception of the existence of legislatures without legislators, executives without rulers and dispute resolution without judicial courts, as Eric Posner⁹ publicises, prompting political reactions that seek to appropriate the feeling of popular frustration and configure a new pattern of populism that, opportunistically and selectively, elects the international, transnational or global dimension as a new enemy to be fought with fiery rhetoric.

The events of the last five decades that have marked an overflow of national political and legal guidelines to transnational spaces, in the last five years have been hampered by reactionary speeches and actions that intensify a dialectic that seeks to deny international relations in the name of nationalist priorities, even if contrary to the rule of law, which presents itself as a new type of populism, already report by Human Rights Watch¹⁰.

As ambiguous and polymorphic as the concept of populism could be, as Heike Krieger¹¹ reveal, rejecting the effectiveness of international mechanisms for the legal protection of relevant assets, delegitimizing public opinion coming from the press, civil society and non-governmental organizations, seeking to counterattack the manifestations of globalization, have become common actions in States under populist governments, in the style of Trump, Salvini, Duda, Orbán and Bolsonaro.

In common, these populist governments affect the nature and function of international law at two different levels: through politics, their practices change the general environment in which norms are interpreted and, in the legal sphere, in which populist governments guide changes in the interpretation of consolidated

⁷ L. Rajamani, J. Peel, *Reflections on a Decade of Change in International Environmental Law*, in *Cambridge International Law Journal*, 10(1), 2021, 6-31.

⁸ A. Atilgan, *Global Constitutionalism: A Socio-legal Perspective*, Springer, 2018, 43-45.

⁹ E. Posner, *The perils of global legalism*, University of Chicago Press, 2009.

¹⁰ Human Rights Watch, *World Report 2017. A perigosa ascensão do populismo*, in: hrw.org/pt/world-report/2017/country-chapters/298540.

¹¹ H. Krieger, *Populist governments and international law*, in *European Journal of International Law*, No. 30, 2019, 971-996.

international legal standards¹².

It should also be noted that the agenda of populist governments chooses classic arguments from international law to justify their actions and options, frequently resorting to discourses that praise sovereignty, non-intervention, and people's self-determination. As a result, they do not just make use of the practice of «cherry picking»¹³ but reduce international law to useful purposes for State reasons and refute the institutions that guide the legal dimension that comprises international law with a humanist foundation, transnational law, and global law, described by part of its administration as «globalism»¹⁴. In summary, the main target is not in international law, but in the transnationalization of law and in its global dimension, as it is seen as a threat because it relativizes the totalizing claims of production of legal norms by the State¹⁵.

The crusade against the transnationalization of law and against the configuration of its actors, transits through the refutation of transnational dialogue networks, through the new configurations of social representations and the denial of the emergence of new rights. In line with the precepts of Heike Krieger¹⁶, contemporary populism inhibits full democratic participation, excluded civil society from public debates, and empties control functions, including the control of external observers.

Therefore, populism encourages the rupture between local and global levels of politics, representation, and standardization. It does so in the name of defending traditional values, defending the sovereign homeland and the originalism of its institutions with the purpose of removing the effectiveness of transnational legal precepts, delegitimizing the validity of human rights, attacking democracy, discrediting the role of non-governmental organizations and transnational corporations, denying concern for the environment and climate change.

In the focused approach proposed by this article, the sphere of environmental protection is seen, by such governments, as a simple figure of a globalist elite that intends to intervene in domestic affairs, when not sabotaging the sovereign State. Environmental protection results in a competitive lag in the global market. The circulation of non-governmental organizations interested in the environmental agenda is understood as a breach of national sovereignty and, as such, the presence of these institutions must be controlled. The assumption of transnational environmental protection commitments is an ideological manifestation that attacks the State.

¹² H. Krieger, *Populist governments and international law*, in *European Journal of International Law*, No. 30, 2019, 996.

¹³ A. Friedman, *Beyond Cherry-Picking: Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence*, in *Suffolk University Law Review*, Vol. 44, No. 4, 2011, 977.

¹⁴ E. Araújo, *Globalismo: uma visão a partir do pensamento de Nietzsche*, in *Cadernos de Política Exterior*, Vol. 5, No. 8, 2019.

¹⁵ D.S. Silva, C. Derani, *A ordem transnacional como fato de relativização de pretensão totalizante de produção de normas jurídicas pelo Estado*, in *Revista Novos Estudos Jurídicos*, Vol. 02, No. 26, 2021, 508-529.

¹⁶ H. Krieger, *Populist governments and international law*, in *European Journal of International Law*, No. 30, 2019, 979-982.

Also, the combination of denialist and bellicose populism against international relations and the environmental protection agenda finds an even more complex variable, which puts environmental protection at risk, that is, the aversion to science¹⁷. Populist narratives and their appeals to civil society set public opinion against science. Thus, not only are international organizations and their normative precepts attacked, but they are also forced to doubt their validity and effectiveness. With each discredit sown, a delay in environmental protection.

However, the dialectic that intensifies between transnational normative standards and national legal precepts, potentiated by populist rulers in societies that do not believe in political projects, also spreads to decisions of the respective Constitutional Courts. As a result, the courts guarding the Constitutions assume a position in the face of norms that escape the hegemony of the State, whether at a national or transnational level, as their decisions result in a paradigm for other courts and/or rulers. Constitutional Courts, in such a way, do not remain neutral in the face of the transnationalization of Law and the populist expedients of national rulers.

3. *The US Supreme Court and the West Virginia v. EPA Case*

Globalization supposes the transforming force of each national reality, capable of bringing with it an element of integration and development at the local level, which is carried out through the rules of a universal legal language, within the cultural framework of each constitutional order.

In the context of the Supreme Court of the United States of America, in matters of the environment, this perception was manifested with emphasis in the case of *Massachusetts v. Environmental Protection Agency* (n. 05-1120/2007)¹⁸.

In the dispute in which the competences of the American environmental agency to regulate greenhouse effect gas emission, air quality and terrestrial heating with sea level rise were discussed, the Supreme Court in a narrow vote decided on the duty of Environmental Protection Agency to adequately and objectively regulate the greenhouse gas emission limits and the possibility of member states of the federation to sue the Agency for its inaction or deficient protection.

In his dissent, for example, Justice John Glover Roberts Jr. referred to the impossibility of judicial protection by the Supreme Court due to problems of legitimacy and ability to quantify environmental damage, given the diffuse nature of the legal interest and the conduct of China and India that it considers more harmful, therefore, it makes no sense to allow US administrative limitations if the harmful agents are outside the limits of the Court's jurisdiction.

¹⁷ D. Ventura, J. Martins, *Between Science and populism: the Brazilian response to COVID-19 from the perspective of the legal determinants of Global Health*, in *Revista de Direito Internacional*, Vol. 17, No. 02, 2020, 67-83.

¹⁸ United States Supreme Court, *Decision n° 05-1120. Massachusetts. Environmental Protection Agency: Certiorari to the United States Court of Appeals for the District of Columbia Circuit*, Washington DC, available in: supremecourt.gov/opinions/06pdf/05-1120.pdf.

In the case of *Massachusetts v. Environmental Protection Agency* (no. 05-1120/2007), Justice Antonin Scalia recorded divergence to, in addition to recognizing the illegitimacy of the claim, analyse the degree of uncertainty about scientific studies related to climate change and greenhouse gases, from the National Research Council and the Intergovernmental Panel on Climate Change (IPCC/WMO/UN)¹⁹.

For the present article, *Massachusetts v. The Environmental Protection Agency* is relevant because of the environmental issue it faces and, mainly, because of the recurrence of arguments that reflect the Supreme Court's performance in the face of transnational precepts, whether in terms of opinion of the Court or in dissent. Although, since 1973 (*United States v. SCRAP*) the Court was already dealing with environmental law, the *Massachusetts v. Environmental Protection Agency* episode is a pioneer in contextualizing environmental protection with transnational models and consequences.

Starting with the Syllabus, the Court already delimits its position towards the planetary emergency of climate change, recognizes the extent of the problem and the need for analysis at a global level, although the core of the claim lies in the normative competences of the Environmental Protection Agency.

Concerning the winning reasons (Opinion of the Court), nine references to the Intergovernmental Panel on Climate Change (IPCC/WMO/UN) are counted, adding to its argumentative importance for the outcome of the claim. In the judgment, the adherence by then President Bush to the United Nations Framework Convention on Climate Change is considered, because of the Rio-92 Convention (1992) and the norms stemming from the Kyoto Protocol (1995) and how such alignments resonated in the Congress and US diplomacy.

As a product, it is possible to envision a movement by the Court towards taking a position outside the walls, constituting channels of communication, and claiming transnational protagonism in environmental matters. The consolidated contrast in the Supreme Court between originalists and textualists²⁰ takes on new contours by seeking to create conditions for coordination between domestic spheres (Congress, Federal Administration and Judiciary) with external commitments and claims. Even though Roberts Jr.'s vote has a consequentialist/pragmatist streak, its prognosis expands abroad, with mentions and concerns about China and India.

In 2022, the Supreme Court again faces an agenda involving the regulatory functions of the Environmental Protection Agency and control of greenhouse gas emissions. In the case of *West Virginia v. Environmental Protection Agency*, the provocation took place because of the powers granted by the Clean Air Act to the Environmental Protection Agency to set parameters for greenhouse gas emissions to the detriment of state legislatures and the Federal Congress. The plaintiffs (from States governed by Republicans) claim the absence of express delegation from

¹⁹ United States Supreme Court, *Decision n° 05-1120. Massachusetts. Environmental Protection Agency*: Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Washington DC, available in: supremecourt.gov/opinions/06pdf/05-1120.pdf, 59-62.

²⁰ L. Tribe, M. Dorf, *On reading the Constitution*, Harvard University Press, 1991, 35.

Congress to the Agency, the disrespect for the autonomy of States and the economic consequences of regulation in the coal, oil and gas production chain.

It was up to the Justice Roberts Jr. to write The Opinion of the Court. In contrast, Justice Kagan, accompanied by Justices Breyer and Sotomayor, drew up the manifestation of disagreement. Completely, the decision in *West Virginia v. Environmental Protection Agency* spans 89 pages in which it restricts the powers of the Environmental Protection Agency, conditioning its regulatory power to the express delegation of Congress and the defence of federalism.

In summary, this position of the Court ends up undermining the foundations of US regulatory administrative law, makes environmental protection a by-product in legal protection priorities, expands the notions of non-intervention of the State in the economy and internalization of populist discourses, as in the case of the argument of Justice Gorsuch that is based on people's opinions and their capacity to disagree or the exorbitant costs of changing the energy matrix. So much so that it uses the metaphor «hide elephants in mouseholes» to illustrate the Agency's practices²¹.

Especially for the scope of the present investigation, the argumentative and persuasive turn used by the Supreme Court in the *West Virginia v. Environmental Protection Agency* case. Preliminarily, in a system marked by the force of precedents, the absence of references to *Massachusetts v. Environmental Protection Agency* in the Syllabus and Opinion of the Court is innate, ruled on similar factual and normative grounds in 2007, primarily with members of the Court in full exercise of jurisdiction in both cases. The precedent *Massachusetts v. Environmental Protection Agency* appears only in the divergence to emphasize the Agency's role and the importance of substantial environmental protection and greenhouse gas control to mitigate climate change effects.

Equally peculiar in the decision of the *West Virginia v. Environmental Protection Agency* case is the total absence of mention and/or reference to the transnational system of environmental protection, pollutants control and *lato sensu* international treaties. It silences the Supreme Court through the agreements and commitments signed by the US Government in terms of reducing greenhouse gases and reducing the earth's temperature, for example. Unlike the earlier *Massachusetts v. Environmental Protection Agency*, nothing was mentioned about the Rio 92 Convention, the Kyoto Protocol, or the Climate Conferences.

Even the manifestations of dissent were silenced when substantiating their positions from external legal mechanisms, except for a single reference to the Intergovernmental Panel on Climate Change. For rhetorical purposes, the judgment was generically restricted only to a search in transnational scientific authorities, the use of expressions such as better control system for polluting gases and the global crisis related to the planet's warming, but this was due to dissent.

Blank slate for what is presented was the Supreme Court's intention for the *West*

²¹ United States Supreme Court, *Decision n° 20-1530. West Virginia v. Environmental Protection Agency et al.* Certiorari to the United States Court of Appeals for the District of Columbia Circuit Washington DC, in: supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

Virginia v. Environmental Protection Agency case for the purposes of attributing new meanings to regulatory, environmental, and international law, in an unequivocal legal setback. The Court to a certain extent validated the speech of the Trump administration, as denounced by Justice Kagan²² – moreover, the turnaround is due to the recomposition of the Supreme Court by appointments sponsored directly by President Trump.

The Supreme Court, by limiting the authority of the Environmental Protection Agency, promoted a genuine stealing of transnational precepts and normative influences, excluding them from their persuasive bases. From this option, it is assumed: the attempt to justify the autonomy of US law in the face of any connection (optional or not) arising from transnational spaces; the proposal to ward off any “invasion” of other normative models in the Court’s tradition; to correspond to the populist pressure that sees in international relations and in its legal institutions ways of decomposing the national order and its values and; the decline of cooperation and governance objectives in matters of global interest by the delegitimization of transnational law, international law and their institutions.

In summary, the outcome of *West Virginia v. Environmental Protection Agency*, in addition to breaking with the force of the tradition of precedents that gives solidity to the Supreme Court, sets up a clear setback in terms of environmental protection and, notably, denies any relevance to the law when it is not produced domestically by the authorities of the United States of America. In addition to the national effects, the recent US court decision conveys a dangerous lesson to homonymous courts, as previously warned by Anne Peters²³.

4. *The Supreme Court and the Judgment of the Direct Action of Unconstitutionality no. 6.148/2019*

Before discussing the judgment of the Direct Action of Unconstitutionality n. 6.148/2019, it is important to contextualize the recent Brazilian past in terms of environmental policy. Over the last five years indicates Brazil’s priority in environmental protection indicators²⁴, reduction of the effectiveness of environmental protection, repeal or relaxation of environmental norms, withdrawal or non-acceptance of international commitments, persecution of environmental activists and defenders, and recurrence of disasters resulting from man’s action in nature.

Before, however, despite the extractive past that marks the construction of the

²² United States Supreme Court, *Decision n° 20-1530. West Virginia v. Environmental Protection Agency et al.* Certiorari to the United States Court of Appeals for the District of Columbia Circuit Washington DC, in: supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

²³ A. Peters, *The American Law Institute’s restatement of the law: bastion bastion, bridge and behemoth*, in *The European Journal of International Law*, Vol. 32, No. 04, 2021, 1390.

²⁴ Instituto Nacional de Pesquisas Espaciais (INPE), *Relatório Anual do Projeto de Monitoramento do Desmatamento na Amazônia Legal por Satélite (2021)*, in: obt.inpe.br/OBT/assuntos/programas/amazonia/prodes.

Brazilian State, the last four decades and, particularly the promulgation of the Federal Constitution of 1988 and the construction of the Environmental Rule of Law, consolidated the progressive normative protection in environmental matters that put Brazil in a vanguard position and material reference for the other States, becoming clear from the Rio-92 Convention and the comparison on the constitutionalization of the environment from the Brazilian Constitution.

It turns out that such progress was not enough to ensure a change in the popular imagination that, regardless of the economic conditions of each individual or social class, usually sees in environmental protection causes for economic crises, delay in national progress, competitive damage in the external scenario, increase in production costs and inflation to the final consumer, systematization of corruption and international intervention in Brazil's domestic affairs. This scenario becomes more complex when it involves topics about indigenous peoples, traditional peoples, and the Amazon rainforest.

In terms of diplomacy and international organizations, changes were clear in Brazilian behavior at the Climate Summits (COPs), in the management of the Amazon Fund and in the Free Trade Agreement between the European Union and MERCOSUR. In common, the Brazilian government denied its protective and promotional shortcomings of environmental protection and highlighted nationalist criticism of foreign countries, making personal attacks on other heads of state a reason to please their voters and a parliamentary base of support in the National Congress.

However, the biggest confrontation with the rhetoric and the populist and derogatory government measures of the environmental rule of law in the Bolsonaro government are on the agenda of the Federal Supreme Court, the highest Court of the Brazilian Judiciary that reconciles the competences of constitutional control with the defence of the federation.

The Supreme Court focused on the Federal Government's actions against the environment as a strategy to obtain greater effectiveness and efficiency. Called the "Green Package", the seven agendas, arising mostly from the Executive under the leadership of President Bolsonaro, involve deforestation in the Amazon, limiting the autonomy of the Brazilian Institute of the Environment and Renewable Natural Resources (Ibama), standards of adequacy to the World Health Organization recommendations on air quality and the exclusion of environmental policies and being mostly under the rapporteurship of Justice Cármen Lúcia²⁵.

²⁵*Arguição de Descumprimento de Direito Fundamental n. 760/2020*, calls on the government to resume the Plan to Prevent and Combat Deforestation in the Amazon. The action was filed in November 2020 by the PSB, REDE, PDT, PT, PSOL, Pcdob, and Partido Verde parties, in conjunction with 10 other entities in the environmental segment; *Ação Direta de Inconstitucionalidade por Omissão n. 54/2019*, action submitted by the Rede Sustentabilidade which alleges unconstitutional omission of the President of the Republic, Jair Bolsonaro, and the then Minister of the Environment, Ricardo Salles, in curbing the advance of deforestation in the Amazon; *Ação Direta de Inconstitucionalidade n. 6.148/2019*, which questions Resolution 491 of the National Council for the Environment, which does not satisfactorily regulate acceptable air quality standards; *Arguição de Descumprimento de Direito Fundamental n. 651/2020*, calls for the declaration of

At the beginning of the trial, Justice Cármem Lúcia maintained that the Federal Government is a confessed defendant in the practice of environmental transgressions. Creating a metaphor with termites, she set out that institutions are being destroyed from within. Inefficient public policies, processes of destruction, are promoted. Clear-cutting does not destroy anymore, but what began to happen was destruction from within.

In her vote, she denounced the existence of the Unconstitutional State of Things in the actions and she defended the existence of an Unconstitutional State of Things in the actions of the Federal Government, which means that she sees generalized and systemic violations of fundamental rights and the environmental rule of law, since the institutional termite infestation' leads to the breach of structures put in place to guarantee human rights, including the rights to an ecologically balanced environment perpetrated by the government, meaning that she sees generalized and systemic fundamental rights violations, as well as of the environment law State, considering that the institutional termitization leads to the smash of the structures positioned to safeguard human rights, including the ecologically balanced environment rights.

With this position, which inaugurates the simultaneous trials, Justice Cármem Lúcia seeks to align the Court's own precedents to recognize the constitutional limits to the actions of the Brazilian government and ensure the principle of environmental non-retrogression, compelling the federal Executive to promote environmental protection and to abstain from generalized violations, causing populism and denialism by the President of the Republic to be inhibited by the connection with the Federal Constitution.

In the same sense, Justice Cármem Lúcia's statement refers to the United Nations' Agenda 2030, the Sustainable Development Goals and the Agreements signed at the Climate and Climate Change Summits, highlighting the contradictory approach taken by the Brazilian government.

The very joining of the judgments, an unusual fact in the tradition of the Federal Supreme Court, demonstrates the position of the Court before the behavior and speeches of the President of the Republic and the Parliament, which launches itself as a diplomatic agent and a provider of spaces for new governing laws of international relations, aiming to deter systematic violations of the environmental protection legal duty and the populist rhetoric of the Executive, indicating a correctional standard inherent to the Environmental Rule of Law and an

unconstitutionality of a decree that does not provide for the participation of civil society in the National Environment Fund; *Arguição de Descumprimento de Direito Fundamental n. 735/2020*, states that a federal decree and an ordinance of the federal government limit the autonomy of Ibama to promote surveillance by defining that the Ministry of Defense coordinates Operation Green Brazil; *Ação Direta de Inconstitucionalidade por Omissão n. 59/2020*, questions the federal government's non-availability of R\$ 1.5 billion to the Amazon Fund, which provides for environmental preservation projects; *Ação Direta de Inconstitucionalidade n. 6808/2021*, contests the law that provides for automatic concession and without analysis of operating permits to environmental licensing for companies, within the National Network for the Simplification of registration and legalization of Companies and Business (Redesim).

institutional capacity preserved for foreign States and international organizations.

This is especially clear when analysing the Direct Action of Unconstitutionality no. 6.148/2019, proposed by the Attorney General's Office against the content of Resolution 491, of the National Council for the Environment. Although the contested act was produced during President Temer's government, its inclusion in the so-called "Green Agenda" occurs due to the repeated behavior of the current government and the mischaracterization that the Council suffered by order of President Jair Bolsonaro, who replaced technical personnel with political names.

The Direct Action of Unconstitutionality no. 6,148/2019, in its initial claim, alleges the emptying of air protection, in the face of previous standards of the Council itself and, also, of the World Health Organization (WHO), seeking to insert itself in the debate about the express Brazilian abandonment of international commitments and use of precarious normative sources produced unilaterally by the Executive to regulate matters involving the right to health, access to information, social security and the environment. For these reasons, it defends the violation of the Federal Constitution and the urgency of returning to WHO standards.

It also maintains that CONAMA Resolution 491/2018 conveyed air quality standards – a component intrinsically related to the protection of fundamental rights to a balanced environment, health, and life, with vague, deficient control levels that are out of step with the standards established by WHO. The contested normative act, in turn, replaced the previous one (CONAMA Resolution No. 5, of June 15, 1989), edited about 30 years ago with retrogression situations.

The point of criticism that most affected the Court was the fact that, without fixed deadlines for progress in relation to air quality standards; and without mechanisms that operated in the implementation of these same standards – especially in the case of omission or failure on the part of the federated entities – the model recommended by CONAMA Resolution 491/2018 proved to be incapable of generating the desired adhesion effect²⁶. Command without sanction would be emptied in its aptitude to induce conduct – and therein would lie the harm to constitutionally protected values.

The decision issued by the Constitutional Court involved the dismissal of the request for recognizing the Resolution's conformity with CONAMA's institutional competences delimited by the Constitution. However, it consigned a determination to the regulator to revise the rule discussed within a period of 24 months, with the objective of dealing with the matter of setting air pollution control standards to include the duties of effective environmental protection, in line with the Constitution and international standards.

Afraid that CONAMA will not undertake the adjustments guided by the decision being constructed, the Plenary – at this point, driven by the insistence of Justice Ricardo Lewandowski – decided to establish consequences for this eventual omission or delay. This led to the return to old substitutive practices, with the prediction that CONAMA's failure to deliberate within 24 months will result in the

²⁶ Brasil, *Ação Direta de Inconstitucionalidade n. 6808/2021*, 14-15.

immediate application of the new guidelines established by WHO.

It is necessary to point out that, in harmony, even with different conclusions, all the Justices of the Federal Supreme Court in the presentation of their votes (despite pending publication) brought to the debate normative precepts deriving from transnational legal obligations. Thus, even the dissenting votes presented by Justices appointed by President Bolsonaro reported influences from abroad, signalling the persuasive impact that transnationality causes, different from what was observed in the *West Virginia v. Environmental Protection Agency* case.

Along the same lines, the current Attorney General of the Republic, Augusto Aras, in his oral argument, who, when differing from his predecessor, responsible for filing the action, on repeated occasions highlighted the normative role of the World Health Organization in terms of air quality. He notes that the World Health Organization has global authority, Brazil recognizing such prevalence since 1990, when the first regulations were made, that the Ministry of the Environment replicates the Organization's reference standards. He ends by mentioning that the World Health Organization is a «body that reaches out to the planetary community».

The representative of the Attorney General's Office also supports his arguments in defence of the constitutionality of CONAMA Resolution 491/2018 with topics arising from transnational instruments and influences. However, when considering that it is up to governments to consider local circumstances before conforming them to a legal standard it is possible to see a strategy like the case considered in 2022 by the Supreme Court of the United States of America.

In summary, in addition to the strict control of constitutionality, in the face of such judgments, the Federal Supreme Court throws itself into the vacuum of the Brazilian Government, to constitute itself as guarantor of intergenerational legal and political obligations that cannot be set back²⁷, finding a possible institutional solution to inhibit the populism established in the current Brazilian government.

The recurrent mentions of the World Health Organization, the international commitments and obligations previously assumed by Brazil and the dynamics of globalization and global legal interests translate into behavior of the Federal Supreme Court of Brazil in importing the need to align national law with transnational norms.

By recognizing the supplementary condition of WHO standards, in case of inertia of the national Executive, the Brazilian Constitutional Court imposes a strong pattern of adoption of foreign regulatory authorities for national demands that escapes the dual system of internalization of international norms, with the purpose of safeguarding the content of the rule of law and mitigating possible effects of a deliberate abandonment of Brazil from the international system.

²⁷ I. Sarlet, T. Fensterseifer, *Guardian of the Amazon: On the Brazilian Supreme Court's "Climate Fund Case" Decision*, in *VerfBlog*, in: verfassungsblog.de/guardian-of-the-amazon/.

5. *Final Considerations*

Populism, from the perspective of the study, is dynamic to consolidate instruments for authoritarianism and mechanisms of disruption with global flows. This is not an expedient that simply calls into question the transnational legal order as a whole. On the contrary, it moves with chameleonic purposes, taking advantage of essential concepts of classical International Law, potentiated in populism, such as the idea of national sovereignty, non-intervention, and self-determination of peoples.

In this space, the Constitutional Courts enjoy new institutional attributions, which oscillate between the overvaluation of national sovereignty to the defence of non-national norms as a material reference to domestic law. Although they defend the hegemony of national law, the Courts end up inducing transnational behavior, assuming a leading role in the transnational mobilization of law.

The United States Supreme Court, in the *West Virginia v. Environmental Protection Agency* case, by the arguments presented, marked a clear position of denial of non-national normative grounds for determining standards on air pollution, emphasizing the idea of national sovereignty and local interest. It is a rupture that aligns with the populist discourses shaped in the recent policy of that State. Such closure demonstrates the lack of interest in cooperating at a transnational level, even if registering the situation of environmental crisis.

In Brazil, the Supreme Court invokes the condition of a true bastion, or guarantor of transnational legal claims and international law as a brake on this negationist populism of international law, covering the prevalence of the protection of human rights, democracy, the environment and of the rule of law, adding, therefore, the prevalence of non-national normative standards.

However, the denialist populism of environmental protection does not only impede the effectiveness and efficacy of international, transnational and/or global legal mechanisms. To weaken the transnational legal order over sensitive and diffuse interests is to weaken Constitutional Law.

Faced with the scenario of populism and denialism through International Law and International Organizations (Public, Private and/or Transnational), associated with the movements of the National Congress, the Brazilian Constitutional Court found a domestic and emergency solution to compensate for the opposition and/or the inaction of the Brazilian State in relation to International Law and its institutions, seeking to constitute resistance from the domestic sphere so as not to deteriorate the Environmental Rule of Law and national political and legal institutions.

The Brazilian Supreme Court presents itself as a bastion and trench to avoid the disruption of the Brazilian State with the institutions and with the idea of the Rule of Law coming from the international, transnational and global order. It follows that the Federal Supreme Court, in the exercise of its constitutional attributions, in addition to mitigating populist leaps and preserving the assumptions of the rule of law, ensures Brazilian adherence to the collection of rights, guarantees and

obligations that make up the current complex legal regime.

In the US case, it is possible to see consequences that stretch from the normative fragmentation and the federative conflict between the respective member States, passing through the absence of substantial normative protection for the population and difficulty in adapting to the global order of public and private entities. However, there is an immediate risk that is foreseen, the mirroring of the decision-making behavior of the Supreme Court of the United States of America by other Courts, considering the exchange that exists between members of the judiciary.