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Climate Change and Inequality: Pushing the Boundaries of Judicialization

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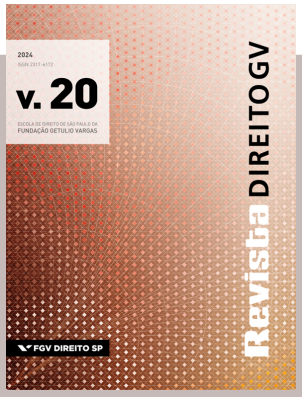

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MUDANÇA CLIMÁTICA E DESIGUALDADE: EXPANDINDO OS LIMITES DA JUDICIALIZAÇÃO

CAMBIO CLIMÁTICO Y DESIGUALDAD: AMPLIANDO LOS LÍMITES DE LA JUDICIALIZACIÓN

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Climate Change and Inequality: Pushing the Boundaries of Judicialization

Mudança Climática e Desigualdade: Expandindo os Limites da Judicialização

Cambio Climático y Desigualdad: Ampliando los Límites de la Judicialización

ABSTRACT

The increasing reliance on social rights in Latin America's climate litigation is often seen as reflecting the interplay between the climate crisis and the region's socioeconomic challenges. In light of this pressing convergence, this paper examines whether and how the intended outcomes of such litigation actually address the complex realities of the most vulnerable. Taking a nuanced understanding of the climate vulnerabilities exacerbated by Latin America's steep inequalities, it challenges the prevailing assumption that ensuring a healthy and safe climate is *de facto* and *sufficiently* beneficial for populations living in poverty and social exclusion. More specifically, it explores the potential of constitutional remedies, predominant in the region's climate litigation, to comprehensively redress the socio-ecological challenges faced by such groups, who disproportionately bear the brunt of climate change. Using Ecuador and Mexico as comparative case studies, the paper provides an overview of the legal opportunities and constraints of the remedial architecture within each country's constitutional protection mechanisms in realizing this vision. The analysis calls for a reimagined approach to constitutionalizing—and thus litigating—the climate crisis. It proposes adding a multidimensional perspective on the collective scope of remedies in line with the specific human rights duties being addressed—be it the duty to respect, protect, and fulfill. Through this exploration, the paper aims to broaden the ongoing legal horizons toward stronger remedies, leading to more equitable and comprehensive judicial responses to the climate crisis.

Keywords: Climate litigation; constitutional justice; inequality; integral reparations; Latin America; social rights.

RESUMO

A crescente ênfase nos direitos sociais na litigância climática da América Latina é frequentemente vista como um reflexo da interação entre a crise climática e os desafios socioeconômicos da região. Diante dessa convergência urgente, este artigo examina se e como os resultados pretendidos dessa litigância realmente abordam as realidades complexas dos mais vulneráveis. Adotando uma compreensão matizada das vulnerabilidades climáticas exacerbadas pelas acentuadas desigualdades da América Latina, questiona a suposição predominante de que

garantir um clima saudável e seguro é *de facto* e *suficientemente* benéfico para as populações que vivem em pobreza e exclusão social. Mais especificamente, explora o potencial dos remédios constitucionais, predominantes na litigância climática da região, para enfrentar integralmente os desafios socioecológicos enfrentados por tais grupos, que suportam desproporcionalmente as consequências das mudanças climáticas. Utilizando o Equador e o México como estudos de caso comparativos, o artigo oferece uma visão geral das oportunidades e restrições legais da arquitetura de remediação dentro dos mecanismos de proteção constitucional de cada país na realização desta visão. A análise defende uma abordagem reimaginada para a constitucionalização — e, consequentemente, litigação — da crise climática. Propõe adicionar uma perspectiva multidimensional sobre o alcance coletivo dos remédios em consonância com os deveres específicos dos direitos humanos que estão sendo abordados — seja o dever de respeitar, proteger e cumprir. Por meio desta exploração, o artigo visa ampliar os horizontes legais em curso em direção a remédios mais fortes, levando a respostas judiciais mais equitativas e abrangentes para a crise climática.

Palavras-chave: Litigância climática; justiça constitucional; desigualdade; reparações integrais; América Latina; direitos sociais.

RESUMEN

El creciente énfasis en los derechos sociales en los litigios climáticos de América Latina suele ser visto como un reflejo de la interacción entre la crisis climática y los desafíos socioeconómicos de la región. Ante esta convergencia apremiante, este artículo examina si y cómo las sentencias de dichos litigios abarcan las complejas realidades de los sectores más vulnerables. Adoptando una comprensión matizada de las vulnerabilidades climáticas sintomáticas de las pronunciadas desigualdades de América Latina, el análisis cuestiona la suposición predominante de que garantizar un clima saludable y seguro es *de facto* y *suficientemente* beneficioso para las poblaciones que experimentan pobreza y exclusión social. Más específicamente, explora el potencial de los remedios constitucionales, predominantes en los litigios climáticos de la región, para abordar de manera integral los desafíos socio-ecológicos que dichos grupos enfrentan, en quienes recaen desproporcionadamente las consecuencias del cambio climático. Utilizando a Ecuador y México como estudios de caso comparativos, el trabajo ofrece una visión general de las oportunidades y restricciones legales de la arquitectura remedial de los mecanismos de protección constitucional de cada país para concretar esta visión. El análisis aboga por un enfoque re-imaginado de la constitucionalización

—y, por ende, del litigio— de la crisis climática. Propone añadir una perspectiva multidimensional sobre el alcance colectivo de los remedios en consonancia con las obligaciones específicas de derechos humanos en juego—ya sea el deber de respetar, proteger y cumplir. A través de esta exploración, el trabajo aspira a ampliar los horizontes legales en curso hacia remedios más robustos, conduciendo a respuestas judiciales más equitativas e integrales ante la crisis climática.

Palabras clave: Litigio climático; justicia constitucional; desigualdad; reparaciones integrales; América Latina; derechos sociales.

INTRODUCTION

The climate crisis affects us all. The 8 billion individuals inhabiting our planet are susceptible to its myriad consequences; however, about half of them face heightened climate vulnerability due to poverty and social exclusion of which nearly 30% live in Latin America (GONZALEZ, 2021; WORLD BANK, 2023). These segments of the population, in addition to being exposed to climate change-related hazards, also lack the resources, services, and infrastructure necessary to withstand sudden meteorological events, such as heatwaves or floods, as well as slow-onset impacts like rising food prices or emerging diseases (CASTELLANOS et al., 2022; MAGRIN et al., 2014; MOSER et al., 2010).

The warming of our planet's temperature and the vast disparity in resource distribution that currently separates the haves from the have-nots are deeply entwined (UN GENERAL ASSEMBLY, 2022). Their interplay embodies complex socio-ecological challenges visible at the global and local levels. From a global perspective, Latin America is considered the most unequal region in the world (GASPARINI & CRUCES, 2021, p. 13). While accounting for only 8.3% of global emissions, it is particularly vulnerable to the impacts of climate change, especially the 33.7 % of its population living in poverty (BÁRCENA et al., 2020, p. 47; PAHO, n.d.). These differentiated global climate vulnerabilities become even clearer at the local level within Latin America's 33 constituent countries (CASTELLANOS et al., 2022; MAGRIN et al., 2014). Here, the richest households contribute more carbon emissions than those in the lowest deciles, accounting for over a quarter of the total national fuel expenditures (BÁRCENA et al., 2020, p. 60; BRUCKNER et al., 2022). However, those in the lowest deciles are hit hardest by climate change. They are more vulnerable, for example, to natural disasters because

they lack a cushion of assets or savings and do not have access to credit or insurance to cope with such catastrophic events (BÁRCENA et al., 2020, p. 95; MOSER et al., 2010).

Against this backdrop of pronounced vulnerability differentials, Latin American countries have witnessed a surge in climate litigation. Following the 2015 adoption of the Paris Agreement, climate litigation in this region has emerged in response to the perceived failures of the Executive and Legislative branches to address the causes and effects of the climate crisis through policy and legislation (AUZ, 2022b; RODRÍGUEZ-GARAVITO, 2020b). This has generated significant hope and momentum among civil society groups seeking climate action (AUZ, 2022b). Two aspects of this litigation wave are particularly notable in the regional context. Firstly, many commentators have highlighted the distinctive use of human rights within these lawsuits, emphasizing their connection with the region's ongoing social challenges (GLOPPEN & VALLEJO, 2013; SETZER & VANHALA, 2019; SETZER & BENJAMIN, 2020). Specifically, these lawsuits primarily anchor on the right to a healthy environment and other social rights, such as the right to health (AUZ, 2022; RODRÍGUEZ-GARAVITO, 2020; SAVARESI & AUZ, 2019; SETZER & BENJAMIN, 2020; VIVEROS-UEHARA, 2022; 2023). Secondly, there is a noticeable reliance in these lawsuits on constitutional protection mechanisms, which are remedies typically provided by most constitutions, offering expedient and accessible legal avenues (VIVEROS-UEHARA, forthcoming).

Notwithstanding the high expectations accompanying the recent surge in climate litigation, its novelty also means that there has been limited scholarly focus on assessing whether and how this judicial phenomenon addresses the complex realities faced by the most vulnerable (SETZER & VANHALA, 2019). The global implications of climate change, along with the international political agenda's heightened visibility of reducing greenhouse gas emissions to prevent further global warming (climate mitigation), articulate with the region's localized social challenges in the context of litigation (GLOPPEN & VALLEJO, 2013; SETZER & VANHALA, 2019; SETZER & BENJAMIN, 2020. Yet, an incomplete understanding of such relationship between climate change and inequality might led many to wonder: *How could ensuring a healthy and safe climate be anything but beneficial for populations living in poverty and social exclusion*? This assumption, often perceived as a given, is challenged by the present paper. Using a nuanced perspective on climate vulnerabilities as a foundational basis, the paper draws a link between the *intended* outcomes of climate litigation *as per indicated by the written judgments* and the realities faced by those at the lowest rungs of the inequality ladder. As such, this paper does not seek to ascertain the impacts of judicial

enforcement of social rights on either claimants or society at large. Such an endeavor to scrutinize the direct or indirect effects of rulings would necessitate evaluating their compliance (GLOPPEN, 2008, p. 26; RODRÍGUEZ-GARAVITO, 2011, p. 1679). Rather, the focus of the analysis is to determine whether the *expected* outcomes, as per the explicit content of court decisions, comprehensively addresses the socio-ecological complexities that exacerbate individuals' vulnerability to climate change—an anticipatory approach, not uncommon in the climate litigation literature (BATROS & KHAN, 2022; WEWERINKE-SINGH, 2018; 2019)

Although it may appear that the paper does not extend beyond written judgments, it avoids being confined to legal formalism. On the contrary. It explores the interplay between the remedial architecture of constitutional remedies and judgments, positioning this exploration as a necessary preliminary step in the multifaceted process of converting judicial rulings into tangible actions. The study specifically examines the legal architecture of constitutional remedies, which represents the starting point from which judges first conceive the possible extent of redress available to claimants (BRINKS & GAURI, 2014, p. 379; LANDAU & DIXON, 2019, p. 111). Scholarship on Latin American courts, rooted in the tradition of legal realism, has consistently highlighted the significance of this remedial structure as one of the several determinants of both the arguments of claimants and the deliberations of judges (BOTERO et al., 2022; BRINKS & BLASS, 2018; GAURI & BRINKS, 2008; GLOPPEN et al., 2010). For this stream of literature, the structure of remedies lays the groundwork that enables the transition from what the late legal scholar Roscoe Pound famously termed “law in the books” to “law in action” (POUND, 1910). That said, this paper does not simplistically assume that judgments are complied with exactly as written. Rather, it is based on the premise that the manner in which judgments are crafted is primarily facilitated by the structure of constitutional remedies, which forms the cornerstone for mandating specific legal obligations and thereby ensuring their implementation. Additionally, due to this well-defined focus, which does not encompass the study of litigators, the analysis will not consider the concept of strategic litigation as relevant.

This study employs climate lawsuits in Ecuador and Mexico as case studies, in which social rights have been articulated with climate change-related concerns.[1] Both countries belong to a group of seven Latin American nations experiencing an increase in climate change litigation since 2015. These lawsuits typically focus on reducing greenhouse gas emissions that contribute

[1] As a methodological note, this analysis is derived from the author's doctoral research on the right to health, drawing upon case records and interviews generously provided by actors directly involved in the selected cases during 2022 and 2023 (VIVEROS-UEHARA, 2023b).

to climate change or mitigating risks intensified by climate change (AUZ, 2022; RODRÍGUEZ-GARAVITO, 2020b). By October 2023, Ecuadorian courts had presided over two such cases, while Mexico had seen 27, of which all in Ecuador and 26 in Mexico had been brought using constitutional protection mechanisms: the *acción de protección* in Ecuador and the *amparo* in Mexico (AIDA, 2023; SABIN CENTER, 2023). The prominence of such mechanisms in these countries' climate litigation is not casual but symptomatic of the New Latin American Constitutionalism (NLAC) paradigm, a hallmark of both nations' legal systems.

The comparative inquiry of using both countries sheds light on the similarities and variances in their legal frameworks (ANDREASSEN, 2017, p. 244). While Ecuador and Mexico are influenced by NLAC and grapple with significant population inequalities, there are notable differences in their legal approaches. Ecuador's *acción de protección* offers a wider scope for legal recourse, enabling comprehensive reparations for social rights violations. Conversely, Mexico's *amparo*, while significant, provides more constrained opportunities for redress. This contrast creates a rich comparative space, reflecting each system's strengths and weaknesses, and illuminates the potentials and boundaries of their remedial architecture in addressing the socio-ecological challenges that contribute to vulnerability disparities. The findings thus point to how a comprehensive remedial design could be developed, namely by embedding a multidimensional perspective on collective remedies greatly facilitated by integral reparations.

The paper is structured as follows: Section 1 casts a socio-ecological lens on vulnerability within the context of the region's climate litigation, and situates this scholarly enquiry within the epistemic grounds provided by the socio-legal literature on Latin American courts and the judicial enforcement of social rights. Sections 2 and 3 delve into the cases of Ecuador and Mexico, spotlighting their climate lawsuits and the architecture of their distinct constitutional protection mechanisms. Section 4 provides a reflection on the potential and constraints of confronting the climate change-inequality nexus via judicial means. Lastly, Section 5 offers some concluding remarks.

1. CONNECTING THE DOTS: INEQUALITY, VULNERABILITIES, AND CLIMATE LITIGATION

The anthropogenic increase in the global temperature is closely tied to the unequal distribution of resources so characteristic of our era (UN GENERAL ASSEMBLY, 2022). A primary indication of how the climate crisis intertwines with inequality is the pronounced

vulnerability disparities across populations (GONZALEZ, 2021, p. 79; UN GENERAL ASSEMBLY, 2022, para. 47). As climate vulnerabilities are determined not only by exposure to climate change but also, critically, by the resources and infrastructure to prepare for and weather such impacts, the unequal distribution of these latter assets due to discrimination and exclusion makes some populations more vulnerable than others (UN GENERAL ASSEMBLY, 2022, para. 47). Specifically, people living in multidimensional poverty, characterized by low income and limited access to essential services, are more susceptible than those in higher deciles. For instance, urban-dwellers living in risk-prone areas or in houses made of weaker materials are less likely to withstand a typhoon unscathed compared to those who have the means to construct cement-based homes (MOSER et al. 2010). Thus, addressing this heightened vulnerability requires a twofold approach. Firstly, it involves our relationship with the natural environment, specifically through the ecological measure of halting the harmful emission of greenhouse gases to mitigate future temperature rises. Secondly, and equally important, it necessitates ensuring the availability and accessibility of social resources and infrastructure essential for both prevention and adaptation, to everyone.

Since 2015, Latin America has seen a significant increase in pro-climate cases where the human rights framework plays a pivotal role (AUZ, 2022). Notably, constitutional remedies have been widely used in tandem with social rights arguments, including the right to health. This right has been strategically invoked in nearly half of these lawsuits to gain standing and emphasize contextual social challenges, such as equitable access to quality healthcare (VIVEROS-UEHARA, 2022; 2023). A prime example, which drew significant media attention, is the case of *Future Generations v. Ministry of Environment and Others* case (DEJUSTICIA, 2018). Filed in 2018 by a group of children and youth before the District Court of Bogotá, the *tutela* (Colombia's hallmark constitutional remedy) targeted various Colombian government ministries as well as state and local authorities for their failure to protect the Amazon (SABIN CENTER, 2023).

The potential of the human rights framework to address the region's social challenges is not limited to the recent surge in climate litigation. In the 1980s and 1990s, many Latin American countries reformed their constitutions to include social rights provisions and constitutional protection mechanisms. They bestowed constitutional rank upon human rights treaties by incorporating them into a “constitutional block,” thereby enshrining the framework of duties to protect, respect, and fulfill that stem from the International Covenant on Economic, Social, and Cultural Rights (GÓNGORA-MERA, 2017, p. 238). These constitutional reforms

were driven by the hope that courts could counteract the entrenched exclusion of certain groups to the lowest tiers of inequality, a situation the standard political systems seemed incapable of addressing (COUSO, 2006; 2022; VON BOGDANDY, 2017). As a result of such constitutional transformation—referred to as the NLAC—there was a marked increase in the constitutional adjudication of social rights. Various civil society groups and NGOs mobilized to combat exclusion (COUSO, 2006; 2022; VON BOGDANDY, 2017). Given this socio-legal backdrop, it is thus unsurprising that the region has become a hotspot for a significant number of human rights-based climate cases, second only to North America and Europe (SETZER & HIGHAM, 2021, p. 32).

The longstanding trajectory of judicial enforcement of social rights in Latin America has been a fertile area for scholarly research. This field has generated a substantial body of work—contrasting sharply with the relatively limited research on climate litigation—which has distinctively moved away from legal formalism. Scholarship on Latin American courts particularly provides multifaceted accounts of how judiciaries have become symbols of the transformative potential of constitutional law across the countries of the region, translating the written constitutional aspirations into broader cultural and societal changes (BOTERO et al., 2022; BRINKS & BLASS, 2018; GAURI & BRINKS, 2008; GLOPPEN et al., 2010). Early seminal works, such as those by Siri Gloppen, Bruce M. Wilson, Roberto Gargarella, and others in 2010, provided a conceptual framework for studying the exercise of judicial accountability, emphasizing the courts' socio-political and legal contexts as key factors beyond the mere analysis of judgments in setting the law into action (GLOPPEN et al., 2010, p. 11).

Cognizant of such contextual factors, particularly Latin America's pronounced inequalities, scholarship on this region's courts further embarked on examining the effects of judicial enforcement of social rights on inequality (BRINKS & GAURI, 2014). Within this academic realm, perspectives differ: some scholars contend that litigation of social rights has ameliorated the living conditions of marginalized groups, whereas others assert that it has exacerbated poverty (BERGALLO, 2011; GARGARELLA et al., 2006; RODRÍGUEZ-GARAVITO, 2011; PARRA-VERA, 2016; YAMIN et al., 2011; YAMIN, 2022; DA SILVA & VARGAS TERRAZAS, 2011; YAMIN & GLOPPEN, 2011). However, this paper does not evaluate the compliance with judgments, nor their broader societal effects (GLOPPEN, 2008, p. 26; RODRÍGUEZ-GARAVITO, 2011, p. 1679). Instead, it steps back to examine whether the remedial structures within constitutional protection actions permit the redressing of the intertwined ecological and social dimensions of climate vulnerability. This emphasis on

remedial architecture is consistent with a widely recognized view in the scholarship concerning Latin American courts, which regards such normative structure as a pivotal factor influencing judicial intervention outcomes (BRINKS & GAURI, 2014, p. 379; GLOPPEN, 2008, p. 26; LANDAU & DIXON, 2019, p. 111). It is important to note that, according to this body of literature, while the architecture of constitutional protection mechanisms is not *the* sole determinant, it is by no means secondary (GLOPPEN et al., 2010, p. 30). Bearing this in mind, this analysis avoids asserting that any particular architecture of remedies will always result in specific outcomes—as there are several other important socio-political factors mediating that relationship. Rather, it aims to investigate a spectrum of remedial options that might or might not immediately arise from the *status quo* architecture of protection mechanisms.

In assessing the implications of the legal architecture of remedies on inequality, social rights litigation scholarship tends to commonly adopt the measurement of collective redress as a positive indicator of reducing inequality. Put differently, lawsuits that result in remedies extending beyond a solely individual scope, benefitting not only claimants but also non-claimants, are perceived as more likely to circumvent the "anti-poor" bias of courts and thereby promote equality (BRINKS & GAURI, 2014, p. 379). The collective effects of lawsuits are typically observed in cases involving public goods, such as the climate and some environmental components, which pertain to the states' duties to *respect* and *protect* rights. For instance, litigation that seeks to compel government enterprises to restrain from, or to implement measures that prevent private projects from releasing, polluting particles into the air is considered to automatically benefit everyone's health. After all, if restraining from (duty to respect), or ceasing (duty to protect), activities that, induce climate change produces collective benefits, many wonder, *how could ensuring a healthy and safe climate be anything but beneficial for populations living in poverty and social exclusion?* However, when considering the social context underlying vulnerability disparities, as previously detailed, the collective scope alone seems insufficient to fully grasp the complexities inherent to the climate change-inequality nexus.

As this paper will further illustrate using the cases of Ecuador and Mexico, by solely focusing on the ecological dimension of climate vulnerability (mitigating carbon dioxide emissions), climate litigation may not *de facto* and *sufficiently* yield optimal outcomes for groups experiencing poverty and social exclusion. In essence, what is collectively beneficial does not necessarily bridge vulnerability disparities. In addressing climate change-related vulnerabilities in the Ecuadorian and Mexican contexts, the issue increasingly involves not only

the protection of public goods but also, *concurrently* and *complementarily*, the provision of either individual or collective goods. These include the recognition of property rights or access to medicines, which fall under the states' duty to *fulfill*. Consequently, the paper proposes incorporating a multidimensional lens into the "collective" scope of remedies, which emphasizes the significance of both ecological and social dimensions, namely, a safe environment and climate, as well as access to life-sustaining resources and infrastructure. Considering that the provision of such remedial possibilities depends, among other relevant factors, on the architecture of remedial measures (BRINKS and GAURI, 2014, p. 379), the paper explores how this multidimensionality can be facilitated. The comparative inquiry that follows will illustrate the potential of integral reparations toward achieving this aim. In other words, if constitutional protection mechanisms permit integral reparations, such provisions bring litigation closer to achieving robust remedies that align with the specific human rights duties being addressed, whether they concern protection, respect, or fulfillment (MUÑOZ ACEVEDO, 2023, p. 382; TUSHNET, 2008).

2. ECUADOR: THE UNTAPPED POTENTIAL OF INTEGRAL REPARATIONS

Despite constituting a mere 0.1% of global annual carbon dioxide emissions (WORLDOMETER, n.d.), the present and projected impacts of climate change on Ecuador are significant (CASTELLANOS et al., 2022; MAGRIN et al., 2014). Due to alterations in temperature, predominantly induced by the El Niño Southern Oscillation (ENSO), Ecuadorians currently face an increased vulnerability to disease outbreaks. The emergence of malaria and the proliferation of cholera bacteria are predominantly affecting coastal regions (MAGRIN et al., 2014, p. 1535). Furthermore, a projected 1.5°C temperature increase is expected to result in a threefold surge in hydrological hazards across the nation, such as floods and landslides, thereby jeopardizing human lives and infrastructure (CASTELLANOS et al., 2022, p. 1693).

At the same time, over the past decade, Ecuador has experienced a surge in inequality, leading to reduced life expectancy, income indicators, and access to vital resources—such as education and healthcare—which has mostly impacted 33% of the country's population that resides in multidimensional poverty (UNDP, 2022; WORLD BANK, n.d.). While this segment contributes to just one-tenth of global carbon emissions (BRUCKNER et al., 2022), they bear the most significant risk from climate change due to their limited resources to manage its effects. For instance, in the context of healthcare access, a conspicuous geographical pattern has been identified within the country, exhibiting a robust correlation with the unequal

distribution of such essential social infrastructure and marginalized populations. This tendency is especially prominent in the Amazon, central Andean highlands, and the north-central coastal regions of the country, which are primarily inhabited by Indigenous and ethnic groups that have historically faced discrimination (PERALTA et al., 2019, p. 10).

Ecuador's well-documented inequalities are not unknown to the country's constitutional system, which adopted a new constitution in 2008 with the express purpose of advancing the realization of social rights, especially for its most marginalized populations (SALAZAR, 2022, p 179). In line with the broader NLAC, the Ecuadorian constitution affords international human rights law a prominent place within its framework, introducing several mechanisms for guaranteeing rights (LÓPEZ ZAMBRANO, 2018, p. 158). One of the most innovative mechanisms is the *acción de protección* (protection action), enshrined in Article 88, which serves to safeguard fundamental rights through an accessible, expeditious, and efficient process.

Crucially, the protection action ensures integral reparations in line with Article 86, para. 3 of the nation's constitution. Every judicial authority—from local first-instance judges to provincial appellate courts and the Constitutional Court—is inherently empowered to preside over such actions (SALAZAR, 2022, p. 199). Hence, they possess the mandate to order comprehensive, tangible, and intangible reparations (AGUIRRE CASTRO & ALARCÓN PEÑA, 2018). Leveraging this unique remedial framework, domestic courts have rendered rulings with profound ramifications for social rights protection, notably in addressing violations in impoverished scenarios (MANIGLIO et al., 2020, p. 153). For instance, in judgment No. 074-16-SIS-CC concerning the non-adherence to the acción de protección No. 139-2010, a representative for a group of children sought the defense of their health rights due to a rare disease diagnosis. Here, the Constitutional Court, acknowledging the infringement of the claimants' rights, directed the furnishing of health services, medical treatment, and medication distribution as comprehensive reparative actions (AGUIRRE CASTRO & ALARCÓN PEÑA, 2018, p. 138).

In Ecuador, the *acción de protección* is a significant tool in the realm of climate litigation. Claimants in the two cases presented to Ecuadorian courts by 2023, have utilized this instrument (AIDA, 2023; SABIN CENTER, 2023). These cases targeted various governmental entities over the climate change-inducing and environmentally harmful effects tied to the extractive and fossil fuel sectors. Of note, among the two prevailing suits (with one being dismissed), the *Herrera Carrion and others v. Ministry of the Environment* case is remarkable for its emphasis on social rights, underscoring the nexus between climate change and inequality.

In February 2020, a group of girls brought forth a protection action against the Ministries of Energy and Environment and the Attorney General's Office at the Cantonal Court of Lago Agrio. They contested the approval of gas flaring in their living vicinities. Grounding their argument on the right to a healthy environment, the right to water, and other social rights, such as the right to health and food, they asserted that such operations considerably intensified climate change and negatively affected public well-being (HERRERA CARRION v. MINISTRY OF THE ENVIRONMENT, 2021, para. 6.1). Though their claims were initially rejected by the primary court in 2021, the Sucumbíos Provincial Court of Justice eventually provided the petitioners with comprehensive redress for the violation of their rights.

The progression of this case distinctly illustrates how arguments grounded on social rights in claimants' pleas reflects the complex interrelation between climate change and inequality. Gas flares, which the young challengers opposed, not only intensify global warming, affecting all, but also pose a higher risk to nearby inhabitants. The young petitioners highlighted their heightened vulnerability to the cumulative effects of climate change and the direct contamination from such extractive endeavors due to their socioeconomic status and age. The testimony of the Ecuadorian Anthropologists' Collective during the trial further corroborated this claim (HERRERA CARRION v. MINISTRY OF THE ENVIRONMENT, 2021, para. 6.3.3):

> “We see that the flare stacks affect the rights of children and adolescents […] The venting and burning of gas do not take into account the polluting repercussions of both practices, which impact six indigenous nationalities and more than 30,000 settler individuals. These activities stand in stark contrast to the high poverty rates in the area. Sucumbíos and Orellana are the poorest provinces in the country, despite being the source of the nation's greatest wealth […] Furthermore, there is limited investment in healthcare, with only two hospitals lacking oncology specialists. When people have cancer and go to the doctor, they are immediately referred to Quito […] In addition to cancer, there are other associated diseases related to respiratory issues, skin problems, and a range of issues affecting children and adolescents [who] cannot receive treatment in the area and generally have to travel to Quito, especially for oncological cases, incurring significant expenses.”

Relevant to this analysis is claimants' assertion that their right to health had been violated due to the government's inability to both *protect* and *fulfill* this right—omissions that heightened their vulnerability in both the ecological and social dimensions. They contended that these violations emerged not just from the harmful effects of pollutants released by gas flaring operated by a private entity (ecological dimension), which the responsible Ministries did not prevent through proper regulation, but also from the state's failure to enact positive measures in the social landscape that underscored existing inequalities. Such initiatives would encompass providing essential health services to address ongoing health problems exacerbated by these climate change-inducing activities. The claimants highlighted the disparity in their access to quality healthcare compared to urban centers like Quito.

The Sucumbíos Provincial Court of Justice determined that the Ecuadorian state had infringed upon the claimants' rights to a healthy environment and health. As a result, it directed the government to enforce six remedial actions, with four pertaining to the duty to protect in relation to the ecological aspect of vulnerability, and only one addressing the obligation to fulfill concerning the claimants' differentiated social circumstances (HERRERA CARRION v. MINISTRY OF THE ENVIRONMENT, 2021, para. 9.9). In terms of the duty to protect, the court ordered the defendants to progressively eradicate gas flaring and to curtail the issuance of new permits. Pertaining to the duty to adopt positive measures, the court mandated the Ministry of Health to lead research and undertake a health study to gauge the degree of impact of hydrocarbon activities on populations residing in nearby areas. If this study identifies a significant number of affected individuals, it decreed the establishment of a clinical oncology unit.

At first glance, the Provincial Court's verdict in favor of the claimants might depict this case as a successful one, bearing collective benefits that seemingly position it as favorable to, or abstract it from, the question of inequality. By mitigating global temperature rise through halting climate change-inducing gas flaring, the Court's directives appear to benefit both the claimants and the broader non-claimant population collectively. This could lead some to quickly negate any chance of the case amplifying vulnerability differentials. However, does this "collective" measuring stick consider the disproportionate vulnerability faced by the claimants and the local community due to entrenched poverty and exclusion? A nuanced assessment through the socio-ecological vulnerability lens reveals that the collective is neither *de facto* nor *sufficiently* in favor of those who lack essential resources and infrastructure.

Even though the Provincial Court recognized the state's infringement on social rights, it primarily mandated actions related to the duties to protect. The obligation to fulfill, crucial for addressing deprivations stemming from poverty, was not comprehensively addressed. The Court directed the state to take positive steps to ascertain the health ramifications of gas flaring. If these consequences were found to be significant, the state would then oversee the establishment of an oncology unit in the affected area. However, these redress measures were contingent upon a "significant" number of cancer diagnoses, effectively overlooking the state's immediate obligation to ensure non-discriminatory provision of essential healthcare services. Such services would tackle other respiratory and skin conditions, notably affecting younger demographics, in alignment with international human rights law.[2]

From this perspective, the authority the Ecuadorian constitution bestows upon domestic courts, allowing them to prescribe comprehensive, tangible, and intangible reparations as articulated in Article 86, is not being fully utilized to mitigate local inequality patterns that exacerbate the claimants' vulnerability to climate change. Unlike judgments on social rights unrelated to climate change, which have dictated reparations in relation to the state's duty to fulfill essential services to broad population segments (AGUIRRE CASTRO & ALARCÓN PEÑA, 2018; MANIGLIO et al., 2020), such reparations in climate litigation remain largely uncharted territory.

3. MEXICO: PUSHING THE BOUNDARIES OF SOCIAL RIGHTS ADJUDICATION

Mexico accounts for 1.23% of the world's annual carbon dioxide emissions, ranking it among the top 15 global emitters and second in Latin America, with Brazil in the lead (WORLDOMETER, n.d.). However, a significant disparity exists in the carbon footprint among the Mexican population. Approximately 43.9% of its population (55 million people), primarily Indigenous groups, live in poverty, facing greater challenges in accessing quality education, healthcare, and adequate housing than the national average (CONEVAL, 2020). This segment represents a portion of the global populace which, in total, contributes to only up to 16% of global emissions (BRUCKNER et al., 2022). Yet, their precarious social conditions heighten their vulnerability to the impacts of climate change.

[2] Particularly, claimants referred to Article 12 of the International Covenant on Economic, Social and Cultural Rights, and Article 10 of the San Salvador Protocol, where the right to health is enshrined (HERRERA CARRION V. MINISTRY OF THE ENVIRONMENT, 2021, para. 6.1.7). Ecuador ratified both of these international instruments in 1969 and 1993 respectively.

Socioeconomic inequalities among the Mexican population have been linked to the distribution of vector-borne diseases such as dengue and chikungunya. Climate change exacerbates the prevalence of these diseases, causing poorer and less-educated individuals to face twice the risk of infection (HICKLE et al., 2022, p. 1969; PARRY et al., 2019, p. 6). Moreover, impoverished urban areas, unlike their wealthier counterparts, often suffer from a lack of public services and are typically situated in flood-prone areas. Limited mobility and information access in these areas further hinder effective responses to climatic extremes (HICKLE et al., 2022, p. 1953; ROMERO-LANKAO et al., 2014, p. 232).

The vulnerability differentials evident in the Mexican population have their roots in persistent inequality patterns, dating back to 1917 when the nation's Constitution was put into effect. This charter—Mexico's fifth and its prevailing legal compass—sought to redress economic marginalization and severe land monopolization by initiating redistribution and establishing social rights in the aftermath of the Mexican Revolution (1910-1917) (POU GIMENEZ, 2022, p. 204). In line with the NLAC, the Constitution has experienced gradual amendments since the late 1990s, integrating a range of rights associated with indigenous communities, third-generation rights, and environmental issues (POU GIMENEZ, 2022, p. 207). Notably, the “2011 human rights reform" introduced transformative shifts in the realms of constitutional interpretation and safeguarding.[3] It granted ratified treaties an interpretative stature on par with rights delineated in the Constitution. Furthermore, it reformed the writ of *amparo*—a constitutional defense mechanism encapsulated in Articles 103 and 107. This mechanism empowers citizens to lodge grievances with federal judges when they believe public authorities have infringed upon their constitutional rights.

While such 2011 reform was intended to relax the *amparo's* standing rules and simplify other procedural requirements, the legal architecture of this mechanism remains restrictive and intricate. As a result, it does not yet serve as an "effective mechanism" for rights protection (LARA CHAGOYÁN, 2020, p. 65; POU GIMÉNEZ, 2022, p. 223). Various commentators point out that this complexity is a primary obstacle in providing comprehensive remedies during the adjudication of social rights—position that contrasts with more progressive regional counterparts like Colombia and Ecuador (ACUÑA, 2019, p. 45; BRINKS & BLASS, 2018, p. 36; TORRES DOMÍNGUEZ, 2022).

[3] The reference to the "2011 human rights reform" encompasses two constitutional amendments published in the Official Journal of the Federation on June 6 and June 11, 2011.

Nevertheless, in the realm of Mexico's climate litigation, the *amparo* has risen to prominence. It has been used in 26 out of 27 cases filed up to October 2023 (AIDA, 2023; SABIN CENTER, 2023). Of the ten cases adjudicated thus far, seven have resulted in favorable outcomes for the claimants. In the majority of these cases (four of which have publicly accessible records), both litigants and courts underscored the right to a healthy environment and social rights, especially the right to health. However, even with the emphasis on social rights, these cases predominantly address the ecological aspects of vulnerability without delving into the inherent inequalities of the climate crisis. Instead, they challenge regulatory oversights in energy production. For example, in the *Greenpeace Mexico v. Ministry of Energy* case, analyzed by VIVEROS-UEHARA (2023), the international environmental NGO contested two policies in the electricity sector that could curb renewable energy sources. Greenpeace Mexico posited that diminishing reliance on renewable energy would boost polluting emissions, adversely affecting public health, and thus infringing on the right to health. The argument underscored the state's duties to respect and protect such a right but did not allude to the state's obligation to fulfill the conditions whose absence makes specific groups more vulnerable to climate change impacts.

In addressing regulatory failures—as in Greenpeace's case—the *amparo* provides redress either in the form of restitution, when positive duties are violated, or by mandating authorities to respect the infringed rights in the case of negative duties (Article 77 of the Amparo Law). That is, when regulations do not align with human rights standards, suggesting that the state neglects its duty to respect the rights emphasized by claimants, the effects of the amparo include rendering such laws and policies null and void. While the nullification of regulations that contribute to climate change may seem to offer collective benefits by mitigating the rise in global temperature, key cases in Mexico's climate litigation landscape have not yet tackled the heightened vulnerabilities faced by marginalized communities. To address the deep-rooted socioeconomic disparities contributing to these vulnerability disparities, the fulfillment of social rights is essential. This involves taking positive measures to offer the resources and infrastructure necessary to cope with the repercussions of climate change. Nonetheless, the *amparo's* ability to provide comprehensive redress in this pivotal direction is still restricted, even if it is gradually and incrementally improving (POU GIMÉNEZ, 2021).

Mexico's past experiences with social rights litigation unrelated to climate change provide valuable insights in this regard, given the limited role that social rights have played in Mexico's climate litigation thus far. This trajectory clearly illustrates the current limitations of

the *amparo* to redress differentiated vulnerabilities. For example, Torres Domínguez (2022) notes that many cases involving these rights, despite granting collective redress to claimants, prove to be ineffective due to a lack of mechanisms for integral reparations. While Pou Giménez (2021, p. 673) has noted that a literal exegesis of the Amparo Law, particularly of articles 74 and 77, does not actually impede strong remedies, the Supreme Court has established in some instances the impossibility of decreeing integral reparations in amparo cases—as illustrated by the Supreme Court's thesis 706/2015 (TORRES DOMÍNGUEZ, 2022, p. 133).

Furthermore, the systematic inadmissibility of indirect amparo lawsuits due to the lack of standing of petitioners, despite their legitimate interest as members of vulnerable communities, also presents challenges in social rights litigation in Mexico (TORRES DOMINGUEZ, 2022). A prime example illustrating both obstacles—the impossibility of integral redress and issues regarding standing—is the amparo filed by members of the Mini Muma Indigenous community against the state's failure to provide essential health services. In 2007, with the support of the *Centro de Derechos Humanos de la Montaña Tlachinolla*n (a local NGO), claimants from a community in the southern state of Guerrero, affected by poverty-related diseases, filed this constitutional protection mechanism against the state's refusal to provide a healthcare facility, the absence of which had led to numerous deaths. After the adjudicating district court made significant efforts to justify the claimants' standing, it ruled in their favor, mandating the construction of the health facility (ACUÑA, 2019, p. 37). However, the court did not extend its ruling to mandate immediate healthcare or award pecuniary compensation to those community members already experiencing health concerns.

Such prevalent limitations are not insurmountable. The Supreme Court's adoption of remedial innovations for *amparo* cases pertaining to social rights in recent years, especially following the 2011 human rights reform (POU GIMENEZ, p. 673), indicates that expanding the boundaries of judicialization often hinges on surmounting interpretative challenges. Notably, in the cases of *Laguna del Carpintero* (AR 307/2016) and *Rio Sonora* (AR 640/2019), the Court offered strong remedies that addressed the Mexican government's duty to take positive measures to respect and fulfill social rights. In the *Laguna del Carpintero* case, residents of the Tampico Municipality opposed in 2016 a Municipal project which threatened local mangroves (AIDA, 2023). The Supreme Court not only instructed Municipal and Federal environmental authorities to refrain from continuing with the project (duty to respect) but also mandated the restoration of the ecosystem and its environmental services, offering detailed guidelines for execution (duty to fulfill) (LCCP & DPCP v. MINISTRY OF THE

ENVIRONMENT, 2018, p. 76). In the *Rio Sonora* case, communities impacted by a toxic mining spill in 2013 argued that they had not been consulted about the remedial measures enacted by the Executive branch. In its ruling, the Supreme Court set forth several explicit positive actions to compensate the plaintiffs for their infringed rights, including the organization of a public meeting to listen to the testimonies of the aggrieved parties and the release of a new directive pertaining to the remedial actions (LARES DOMÍNGUEZ v. MINISTRY OF THE ENVIRONMENT, 2020, para. 147).

Nevertheless, while forging an interpretative path toward stronger remedies, particularly in line with the human rights duty to fulfill, the intermittent nature of these innovations by the nation's apex court underscores the rigorous process a case must undergo to yield such outcome. Considering the formalist and centralized legal culture in Mexico, lower-tier courts are unlikely to pursue groundbreaking interpretations that extend beyond the explicitly permitted scope of the amparo's remedial structure (LARA CHAGOYÁN, 2020, p. 67), unless such explorations are directly facilitated by the amparo framework itself. Thus, it remains an unconventional approach. This implies that for climate litigation through the *amparo* to innovatively address the socioeconomic challenges central to the nation's vulnerability disparities, a protracted journey to the Supreme Court is frequently deemed unescapable.

4. CLIMATE CHANGE LITIGATION REIMAGINED: EMBRACING MULTIDIMENSIONAL REMEDIES

The vulnerabilities arising from the convergence of the climate crisis with Latin America's deep-rooted inequalities become evident in climate litigation. This means that advocating for climate action in each countries' courts is rarely detached from the localized social challenges that make certain population groups more vulnerable. Within this unprecedented and complex legal landscape, social rights stand out as indicators of significant vulnerability disparities. Claimants not only demand the cessation of activities that induce climate change or pollution but also, crucially, seek access to remedies in line with, particularly, the states' positive obligation to fulfill previously inadequate—or even missing—individual or collective goods, namely, essential services and infrastructure.

The examined lawsuits in Ecuador and Mexico highlight two factors relevant for the legal architecture of constitutional protection mechanisms to comprehensively address the complex challenges faced the most climate-vulnerable groups through litigation. Firstly, conceiving comprehensive redress for such challenges entails embedding a multidimensional

perspective into collective remedies. By adopting a detailed understanding of the socio-ecological dimensions of vulnerability, this paper has shown that, while the collective scope of remedies—often presented in social rights literature as a proxy most likely to circumvent the courts' anti-poor bias—is significant, it does not, *de facto* and *sufficiently*, minimize vulnerability disparities. Although securing judicial mandates that promote climate change mitigation may advantage the collective, even on a global scale, this approach can overshadow the significance of addressing more localized social challenges. This is particularly evident in relation to the duty to fulfill, as demonstrated in the case of *Herrera Carrion and others* in Ecuador. In this case, the court's ruling, which mandated only the discontinuation of gas flares and the provision of water, failed to fully restore the wellbeing of the claimants. While these measures are important, they barely addressed the severe health conditions already suffered by the affected parties which were compounded by the long-standing state's failure to fulfill healthcare access without discrimination in the claimants' Sucumbíos and Orellana provinces. Significantly, the ruling did not mandate such urgent medical attention.

Secondly, the comparative analysis of Ecuador's and Mexico's constitutional protection mechanisms demonstrates that the explicit embeddedness of integral reparations within their legal architecture appears to bring litigation *closer* to a more collective and multidimensional remedial outcome. This particular remedial feature, intrinsic to Ecuador's *acción de protección* but notably absent in Mexico's *amparo*, guides cases in the former country towards more robust redress measures that engage a wider array of state duties, unlike those achieved in Mexico. At the same time, the comparison cautions that the remedies granted by the Sucumbíos Court in the Ecuadorian context are not yet comprehensive enough to significantly lift claimants out of their positions on the vulnerability spectrum. It therefore suggests that the mere availability of integral reparations within the legal structure does not invariably lead to the desired collective and multidimensional remedies. This is because, consistent with scholarship on Latin American courts, various other socio-political factors mediate the connection between the remedial framework and the actual outcomes delivered by the courts.

Yet, although not *the* only factor in how litigants and courts materialize "law in action," the embedding of integral reparations is certainly not entirely *meaningless*. This multifactor interplay, on the one hand, prompts for Ecuador a deeper examination of why, despite possessing a broad remedial architecture, courts may still show reluctance to fully tap into such potential and deliver comprehensive remedies that address the intricate socio-ecological complexities intertwined in the climate change-inequality nexus. On the other hand, in Mexico,

where the limitations of climate litigation stem from the outset due to the *amparo*'s structure—as it does not readily accommodate the complex and emergent needs of the most vulnerable—it is imperative that the unprecedented realities created by climate change and inequality are first acknowledged and integrated within the framework of legal remedies. Here, the current remedial structure must evolve for the *amparo* to serve as an effective tool in both curbing harmful gas emissions and, *simultaneously* and *complementarily*, ensuring that impoverished populations gain access to previously unmet social rights. The Supreme Court of Mexico has made gradual, yet promising, advancements towards remedial innovation through interpretation, indicating a departure from the amparo's restricted explicit structure and a shift towards stronger remedies. However, the sporadic nature of these innovations and their occurrence only when a case reaches the apex court highlights the challenges in ensuring that such remedies become commonplace in climate litigation in lower courts. Therefore, in Mexico—unlike Ecuador—if climate vulnerabilities, which still disproportionately affect a significant portion of the population living in poverty, are to be addressed through judicial means, the first obstacle is the *amparo*'s current remedial architecture.

5. CONCLUDING REMARKS

This paper has offered a preliminary view on one specific aspect that influences the outcomes of climate litigation, namely the remedial architecture within constitutional protection mechanisms. As such, it has illuminated relevant avenues for future research and raised pertinent interconnected questions. Given the increasingly unprecedented, intricate, and pernicious interplay between the climate crisis and inequality, it has underscored the need for reimagining remedial possibilities and, consequently, also the currently constrained remedial architectures. Surely, this alone will not invariably lead to outcomes that consistently address the complex vulnerabilities engendered by climate change and inequality. As just one among the myriad determinants that influence the outcomes of the litigation process, it is plausible to consider potential backlashes against rights, even when collective and multidimensional remedies are facilitated by the architectures of constitutional protection mechanisms. However, even amidst conflicts between interest groups and the most vulnerable—a fundamental aspect of democratic societies—the expanded array of substantive rights could serve as a baseline that judicial decisions should not undermine. With this assured, it is more advantageous to establish remedial architectures that enable the realization of these rights through the use of constitutional protection mechanisms, rather than restrictive structures that hinder the translation of such law

in the books into tangible actions. The critical issue then becomes how the doctrinal interpretation of substantive rights stands up to the maelstrom of interest tensions.

Finally, as with all innovative endeavors, the notion of collective and multidimensional remedies might initially seem implausible within certain legal traditions. Established debates offer various arguments against such progress, including the counter-majoritarian critique of judicial power and the perception of judicial remedies as empty promises. While these perspectives contribute valuable insights that warrant consideration as the dialogue expands, it is crucial to recognize that the ways climate change intersects with the longstanding socioeconomic disparities in several Latin American countries are unprecedented and were, therefore, not foreseen in the crafting of constitutional tools. However, this mismatch is not foreign to the spirit of the NLAC, which aimed to evolve the law to materialize the participation and life of dignity for historically marginalized groups. Therefore, in confronting emerging and highly interwoven challenges like the climate crisis and escalating inequalities, such aspirations can serve as the guiding light in steering climate litigation as a means to achieve climate justice.

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Os dados subjacentes estão contidos no próprio artigo.

DECLARAÇÃO DE CONFLITO DE INTERESSES
A autora declara não haver conflito de interesses.

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