

homa

PUBLICA

REVISTA INTERNACIONAL DE  
**DIREITOS HUMANOS  
E EMPRESAS**

---

2 0 1 6 · N ° 0 1 | V O L U M E 0 1



FORDFOUNDATION

**Diagramação:** Alexandre Aguilár Santos  
**Capa:** edição e montagem de Arindo Augusto Duque Neto

---

*Homa Publica: Revista Internacional de Direitos Humanos e Empresas*

*Vol. 01 (Novembro de 2016)*

*Juiz de Fora: Homa, 2016. Semestral.*

*Direito – Periódicos*

*ISSN: 2526-0774*

---

*As opiniões expressas são de inteira responsabilidade de seus autores*



HUMAN RIGHTS  
AND BUSINESS  
CENTRE



FORDFOUNDATION

## TYPIFYNG THE EFFECTS OF LITIGATION IN COMPANIES AND SOCIAL MOVEMENTS | CRISTIANA LOSEKANN<sup>1</sup>

### ABSTRACT

In social movements, litigation is used to bring collective actions against transnational corporations. The effects of this strategy are discussed in the current paper. The main objective is to present a typology that advances research on this subject, as literature is scarce. A social scientific approach is adopted. Data is derived from the observations of a set of empirical studies concerning the use of legal strategies in environmental conflicts in Brazil over the last two decades.

**KEYWORDS:** Strategic litigation. Social movements. Legal mobilization. Effects. Socioenvironmental conflicts.

### RESUMO

O presente artigo problematiza os efeitos do uso que movimentos sociais fazem do litígio enquanto uma estratégia em processos de ação coletiva contra grandes empresas transnacionais. O objetivo central é apresentar uma tipologia que permita avançar nas investigações sobre o tema tendo em vista que este é pouco pesquisado. A abordagem é fundamentalmente teórica, inscrita no campo das ciências sociais, mas derivada de observações relativas a um conjunto de pesquisas empíricas sobre o uso de estratégias judiciais em conflitos ambientais no Brasil, nas últimas duas décadas.

---

<sup>1</sup> Master's Degree and Ph.D. in Political Science from the Federal University of Rio Grande do Sul (Universidade Federal do Rio Grande do Sul-UFRGS), Professor at the Federal University of Espírito Santo (Universidade Federal do Espírito Santo-UFES), Department of Social Sciences and Post-graduate Programme in Social Sciences; [cristiana.losekann@ufes.br](mailto:cristiana.losekann@ufes.br); <http://lattes.cnpq.br/6484935860818055>.

PALAVRAS-CHAVE: Litígio estratégico. Movimentos sociais. Mobilização do direito. Efeitos. Conflitos socioambientais

## RESUMEN

El presente artículo problematiza los efectos del uso que movimientos sociales hacen del litigio como una estrategia en acciones colectivas en contra de grandes empresas transnacionales. El objetivo central es presentar una tipología que permita avanzar en las investigaciones acerca del tema teniendo en vista que este tema es poco investigado. El abordaje es fundamentalmente teórico, en el área de las ciencias sociales, pero derivado de observaciones relativas a un conjunto de investigaciones empíricas sobre el uso de estrategias judiciales en conflictos ambientales en Brasil, en las dos últimas décadas.

PALABRAS CLAVE: Litigio estratégico. Movimientos sociales. Movilización del derecho. Efectos. Conflictos socioambientales.

## INTRODUCTION

In January 2016, Murilo Ferreira, CEO of the mining company, Vale, commented in an interview on the measures taken after the tragedy of the rupture of Samarco's tailings dam<sup>2</sup> that "[...] an agreement is always better than a legal dispute"<sup>3</sup>. This statement from the president of a large transnational company suggests that a legal dispute can be detrimental to a company's business.

---

<sup>2</sup> On November 05, 2015, a dam for the mining tailings of the company Samarco burst in the state of Minas Gerais in Brazil and created the largest disaster in mining dams, in terms of the amount of waste, in the last 100 years. The tailings mud killed people and animals, destroyed cities in the state of Minas Gerais and by following the course of the Rio Doce (the 5<sup>th</sup> largest river in Brazil), crossed the state of Espírito Santo and reached the sea.

<sup>3</sup> Source: <http://www.vale.com/brasil/PT/investors/information-market/press-releases/Paginas/vale-informa-sobre-acordo-alcancado-com-as-autoridades-brasileiras.aspx>

We know, however, that large companies, especially mining companies, invest considerably in the training of judges and other law professionals, which continues, in this case, to be a form of co-optation. In 2015, for example, the Association of Magistrates of Minas Gerais in Brazil promoted an event called First Minas Gerais Congress on Mining Exploration, the aim of which was to “promot[e] the improvement of judicial assistance.” Its target audience was “magistrates, assistant magistrates, lawyers, Prosecutor's Office staff members, public defenders, and other law professionals.” The mining companies Anglo American, and Anglo Gold Ashanti and the Brazilian Mining Institute sponsored the event.

Other aspects of this event also merit attention. Federal deputy defenders of mining interests were invited to discuss the regulatory and legal frameworks of mining activities. Among these individuals, Deputy Leonardo Lemos Barros Quintão is the rapporteur of the new mining code in progress in the Brazilian Congress; his own family interests are rooted in mining activity<sup>4</sup>.

These examples reveal that mining companies are interested in the performance of the courts and are concerned with influencing judicial institutions. Furthermore, the incentive in extrajudicial practices suggests that administering a litigious conflict is more costly than managing it extrajudicially.

The use of legal strategies in social movements has increased. Strategic litigation has been included in a repertoire of collective actions by social movements against companies. Various available resources in the law and legal institutions, in general, create legal opportunities. Moreover, the emergence and diffusion of cause lawyers provide support for social movements constitute this kind of repertoire.

Given the importance that courts and, in general, legal institutions have for these various actors, we pose the question, for whom is litigation strategic?

Although this question suggests the possibility of a direct response, few studies in fact adequately characterize legal strategies and their effects. Given this gap in the literature, the development of a typology that facilitates research on strategic litigation between social movements and companies and their effects, is proposed.

---

<sup>4</sup> The rapporteur's position was questioned by the Supreme Federal Court precisely because of the deputy's relationships with the sector. More information on this subject can be obtained at <https://www.socioambiental.org/pt-br/noticias-socioambientais/deputado-pede-afastamento-do-relator-do-codigo-da-mineracao>.

Analysis of the law beyond official initiatives can help determine how the legal norms and practices used by social movements can affect aspects of social and institutional change and interfere with the dynamics of mobilization. The spectrum of analysis must thus be expanded to incorporate non-institutional and distant elements with traditional legal actors.

Here, a theoretical discussion is presented that falls within the field of social sciences but is derived from empirical observations on the use of legal strategies in environmental conflicts in Brazil over the last two decades. A case study, FASE vs. Aracruz Celulose, is used to illustrate the principle. In this case, the institutional effects of intermediaries and legal reframing are examined. The main objective of this paper is to present a typology that advances research on the subject, given the scarcity of literature on the topic.

## CHARACTERIZING STRATEGIC LITIGATION

Jerome Frank is credited with the formulation of and theoretical reflection on strategic litigation, in the early 1930s. From the perspective of legal realism, Frank and other Americans created litigation clinics in the United States, a country that became a source of legal action and consideration of this approach. According to Contreras, “clinics of human rights and public interest are a space for the practice of litigation of public interest and legal reflection” (CONTRERAS, 2011, p. 10). In this context of the defense of social causes through law, litigation arises in a strategic or paradigmatic sense (CONTRERAS, 2011, p. 11). Thus, in law, strategic litigation arose not only to address specific causes of rights violations but also to produce legal and social effects.

With the establishment of treaties and international organizations, strategic litigation gained international and global influence. The theoretical development of this approach showed that, “the court is only one among several possible dimensions for defending a case” (CONTRERAS, 2011, p. 17).

For Evorah, strategic litigation is a specific use of the judicial system to achieve broader social change and is generally based on the choice of paradigmatic

cases (EVORAH, 2011, p. 366). Therefore, strategic litigation does not seek gains related to a specific demand, but involves effects that transcend the conflict itself. These effects occur not only by creating precedent but also by making cause visible, influencing public opinion, etc. The author has systematized many advantages and disadvantages of strategic litigation based on ERRC, Interights, and MPG (2004). This initiative broadens the understanding of effects, as proposed by the agenda of the Legal Mobilization Theory (LMT), but knowledge on the effects of the mobilization processes themselves—that is, on collective action—are lacking.

According to Evorah, the “litigation lifecycle” progresses similarly to the process Sikkink observed when analyzing the “judicialization of human rights politics in many countries in Latin America” (2005). The interactive elements of political and legal<sup>5</sup>, national, and international opportunities, together with national and international support structures—which broaden Epp’s (1998) explanation—open a process of human rights defense through the courts.

Diaz, Toro, and Ávila (2010) defined the concept of strategic litigation according to all approaches having their roots in the Anglo-Saxon concept of impact litigation. These scholars divided the existing approaches as follows: 1) those that emphasize the legal defense of human rights with a focus on legal instruments; 2) those that emphasize the broad results potentially generated by litigation; 3) those that emphasize the moment of the intervention (preventive or corrective); and 4) those established on specific issues. These authors distinguish between strategic litigation and other litigation:

---

<sup>5</sup> The concept of political opportunities has been extensively examined from the perspective of contentious politics and is generically understood as institutional or cyclical aspects that serve as “windows” to incite contentious processes. Legal opportunities are an extension of this concept to include litigation and the use of legal frameworks by social movements. This broadening of the concept was produced by Kitschelt (1986).

*“Strategic litigation, by its definition and its consequences, is an action of social projection; however, it is important to note that not every action of social projection is strategic litigation. As is well known, strategic litigation or public interest law as a transforming instrument centers on and emphasizes the right itself and seeks to select cases of high public impact and influence the debates on rights and the formulation of proposals for regulatory change, etc. In contrast, the actions of social projection by themselves constitute a group strategy of social mobilization to achieve cohesion, visibility, and impact because many of the requirements and needs are not being met (Diaz, Toro and Ávila, 2010: 54).*

After this brief review on the central concept of the article, it is noteworthy that, in sociological treatment that focuses on social movements, litigation occupies a strategic position even when it does not involve a select and exemplary case, as described by Diaz, Toro, and Ávila. Litigation as a collective action strategy involves goals and a very complex interaction routine and can be understood as a specific repertoire of collective action. According to McCann, strategic litigation is “legal mobilization politics” (2010).

We agree with Vanhala’s definition that “when an organization purposefully turns to the courts to pursue its goals, its action can be classified as strategic” (Vanhala: 2011: 7). Thus, the LMT allows us to comprehend many other effects and meanings of litigation, especially from the perspective of social movements.

In general, legal mobilization occurs by perceiving the existence of certain opportunities, strategic openings through which collective action can achieve its goals. This process is connected with the gradual construction of institutions that have expanded and democratized access to justice. This process also includes the strengthening of citizenship and the complexification of forms of collective action. Moreover, the growing protagonism of the courts in contemporary democracies has encouraged the use of legal strategies, which amplify the perception of legal opportunities<sup>6</sup>.

We begin from the perspective of LMT, which is already well developed in the United States. This theory can help us define a research path and ask the necessary questions to understand the effects of using this type of strategy. By combining an agenda of socio-legal studies with social movements theories—

---

<sup>6</sup>Some studies have attempted to explain and differentiate legal mobilization as a specific repertoire of collective action, for example, Maciel (2011) and Losekann (2013).

especially the contentious political perspective developed by Tilly, Tarrow, McAdam (2001) and others—this theoretical approach observes the more subtle and less institutional aspects of strategic litigation.

#### FOR A TYPOLOGY OF THE EFFECTS OF LEGAL MOBILIZATION

According to McCann, a consideration of the symbolic aspects of legal mobilization can facilitate an understanding of how the legal norms and practices social movements use can affect aspects of social and institutional change and, in particular, interfere with the very dynamics of mobilization. Thus, the spectrum of analysis must be expanded by incorporating non-institutional and more distant elements with traditional legal actors (McCann: 1991).

To contribute to the development of this agenda, we propose a differentiation between the types of uses and types of effects of legal strategies. Regarding the types of uses, it is initially necessary to differentiate the actors that use them, such as NGOs, local associations, community groups, indigenous groups or “traditional populations” and individuals. In addition, there are actors that support the use or act as “support structures,” as Epp (1998) argued, or elite allies (Tarrow, 2009). These elite allies are often prosecutors, public defenders, and engaged lawyers, among others. Thus, it is key to understand the roles that each social actor plays and the networks built in the construction of the repertoire of legal mobilization. Nowadays, much litigation in Brazil involves individuals searching for their “social name.” These actions constitute an important part of repertoire development in recent years for the LGBT movements.

Furthermore, we must progress in our understanding of the formal institutional aspects in use and the symbolic and interactional aspects in use in legal strategies. Effects also must be considered over time, as short, medium, or long term. As McCann (*ibid*) argues, each of these effects is related to contingent dynamics; only empirically-based analyses can provide us with the answers we seek.

The effects of strategic litigation have been insufficiently studied, and litigation against large companies even less so. In some case studies, the strict sense

of strategic litigation has prevailed (Diaz, Toro, and Ávila, 2010). Analysis of paradigmatic cases elucidates successes and failures. Although in-depth case studies are important, we still do not know for certain who uses the courts most often, which legal instruments they use, or the resulting effects.

The proposal that follows consists of a typology of the possible effects of litigation between social movements and companies from a sociological perspective and focuses on social movements. First, we present a classification system to characterize the litigation. Subsequently, we present cross-sectional dimensions of the effects. Finally, we present an outline of the main effects observed in the analyzed litigation.

**Table 1. Types of use of legal strategies by social movements and companies**

Public interest litigation	Substantive and/or tactical claim	Innovative or defensive expected effect	Generally against companies
litigation to criminalization			Generally against social movements
Reactive litigation			More commonly against companies

Source: Author's preparation.

This classification was developed from the literature review initially presented, together with some empirical notes<sup>7</sup> and the “native” categories of social movements in Brazil.

Thus, we differentiate “public interest litigation” as part of a collective action process aimed at a broad effect on society (apart from the concrete conflict) and

<sup>7</sup> Our research group has been conducting various studies on the use of legal strategies as a repertoire of collective action by social movements. In addition to the specific studies, we have performed continuous work by monitoring the legal action that is relevant to collective causes through observation. The monitoring of legal action is performed as part of an extension and research project, and the legal action is updated every three months by the Fellows of the Law and Social Sciences course. This work can be accessed on the site of <http://organon.ufes.br/aco-es-judiciais/> and was funded by the MEC. Several publications where we present the data from our research include Losekann (2013) and Losekann and Bissoli (2015).

that generally arises against companies; criminal litigation<sup>8</sup> is generally brought by companies against social movements. In addition, it is important to differentiate one type of litigation that arises as a reaction to the criminal litigation initiated by a company against social movements. This type of litigation is relevant because it refers to a sequence of legal and strategic actions that enter the judicial domain as a reaction and a defense, not as an attack<sup>9</sup>.

Vanhala typified the various “legal actions” that separate strategic litigation from passive litigation; passive litigation corresponds to what we call criminal litigation. This author indicated that, “if the organization takes this [passive litigation] opportunity to pursue policy or other goals, this type of litigation then falls under the strategic category” (VANHALA, 2011, p. 8). Thus, there is a transition from the moment at which the movement is the defendant to the moment at which the movement becomes the plaintiff.

We agree with this possible trajectory of the litigation process; however, given the need to understand the mechanisms that operate in this process, we suggest a categorical differentiation for these different types of litigation.

In another approach to classification, it should be noted that, in this litigation, some substantive claim might be involved because its very content is the subject of the claim, but a tactical dimension might also be at stake because an effect is expected beyond the content of the claim. In environmental conflicts, for example, the use of a specific aspect of environmental legislation to protect the communities affected by a particular company is very common. This fairly common tactical use produces important effects concerning the expanding of its own meanings and interpretation of the laws. However, this use can potentially strengthen the environmental laws that impose restrictions on these communities. It is an important problem to social movements against the system which claims core is related to State. Jasper called this a “dilemma of cultural innovation,” when the movement uses tactical elements they in fact oppose (JASPER, 2011, p. 14.9).

---

<sup>8</sup> The LMT literature does not include this definition. Litigation to criminalization is a “native” category that is used by social movements and engaged lawyers but has already been significantly studied in the Brazilian context.

<sup>9</sup> Harlow and Rawlings (1992) have a different meaning for “reactive litigation” where what is at stake is the strategic use of civil disobedience to produce effects (prison, for example), which reveals the laws that are considered to be unjust. This type of litigation is more common when the antagonist is the state itself and in more acute moments of confrontation, such as the wave of protests that occurred in Brazil in 2013.

Another typological aspect involves the potential innovative or defensive effects of the litigation. In conflicts with companies, we generally address a right that has been violated and, therefore, the effect is defensive. However, some litigation involves innovative claims, such as litigation that demands the labeling of genetically modified foods (BISSOLI, 2016), the end of scientific testing on animals by the cosmetics industry, etc.

The need for separation here concerns the analytical implications of these different types of litigation. In defensive litigation, for example, we can observe the effectiveness of justice or the process of effectively losing rights formerly won. However, in offensive litigation, we can analyze how the scope of rights and justice expands (or not) through litigation.

However, the analytical approach does not stop here. We must still specify the time dimension, the magnitude of the effects, the quality of the effects and their field of implications, as shown in the table below:

**Table 2. Elements for a typology of effects**

<b>Time</b>	Short-term	Medium-term	Long-term
<b>Amplitude</b>	Direct	Indirect	
<b>Predictability</b>	Expected	Unexpected	
<b>Quality</b>	Positive	Negative	
<b>Field of implication</b>	Field of law	Field of conflict	Diffuse

Source: Author's preparation

Finally, we have the "legacy" effects, suggested by McCann (2006). The legacy phase is an effect that transcends the result of the litigation itself; that is, the diffuse effects of the litigation are observed in several fields of implication. One can observe a complex and contextual set of aspects affected in the mobilization process (MCCANN, 2006, p. 34). These effects might impact companies or social movements and can cause wide social or institutional changes. In the table below, we summarize this explanation:

**Table 3. Types of effects**

<b>Effects on mobilization</b>	Contribute to mobilization or demobilization Changes the collective action framework (legal frame) <sup>10</sup> Changes the structure of alliances Discloses causes Gains supporters Generate an unwanted reaction (criminalization)
<b>Effects on companies</b>	Interferes with business (impacts stocks, for example) Generates operational costs (lawyers) Affects the company's image in public opinion Generates financial gains or losses
<b>Institutional effects</b>	Changes laws Creates new laws Changes the use of laws (legal reframing)
<b>Effects on demand</b>	Wins (fully or partially) Loses (fully or partially)
<b>Social effects</b>	Alter behaviors Affect the thoughts and ideas on common issues Affects the development of the problem or conflict Affects the environment

Source: Author's preparation

Some of these aspects are well known and have been discussed in exemplary empirical case studies. Others are less well studied. Overall, the effects of strategic litigation on social mobilization have been insufficiently studied. Many assumptions have already been made concerning these effects, but there are no systematic studies on this aspect (Jasper 1997; Polletta, 2000). Similarly, the analyses of the institutional effects of strategic litigation have especially emphasized the legal field but have not clarified the effects on the growth of institutions that result from the creation of new laws or the innovative use of existing laws.

Similarly, the effects of company legal strategies have not been the subject of rigorous study in the social sciences. However, some evidence suggests important research paths.

<sup>10</sup> For a more thorough understanding of the *legal frame*, see Hilson, 2009.

In the examples presented in the introduction, the interest of large mining companies in the judiciary branch is evident. In addition, we note a clear intention to prevent the judicializing of conflicts with affected communities. For example, some studies have presented data from corporate reports and other surveys that show that litigation costs are among the largest expenses of mining companies (Giffone, 2015). This was illustrated by a survey by Davis and Fracks (2011), which investigated the “costs” of conflict between communities and extractive industries in several countries. In the analysis of companies’ conflicts with communities, litigation is one of the procedures used. Expenses for “administrative proceedings or litigation” are the second main business expenditure.

In addition to the analysis of the effects on companies, it is important to note the defendants in legal actions. When companies present themselves before the government as defendants, we can extract important data on how the government is implicated in the conflicts; that is, whether it is being generally dismissive of rights violations or is promoting human rights.

Finally, we present a case of the strategic use of litigation, an important process of oppositional mobilization against the cellulose industry in the state in the Espirito Santo, Brazil. Following is a discussion of several of the observed effects.

## ANALYZING SOME EFFECTS FROM THE CASE FASE VS. ARACRUZ CELULOSE<sup>11</sup>

The Public Civil Action<sup>12</sup> proposed in 2005 by the NGO FASE against Aracruz Celulose and various state office agencies and federal governments accused the

---

<sup>11</sup> Nowadays is called *Fibria*.

<sup>12</sup> In Brazil, the Constitution of 1988 is an important milestone in the consolidation of both diffuse rights and forms of judicial control to promote these rights. This point in time is when the Public Prosecutor's Office gained independence from the executive to become the main agent responsible for defending collective rights, thereby channelling this type of conflict to the judicial sphere (Arantes, 1999). In addition, the environment was the inaugural issue in the regulation of diffuse rights through the National Environment Policy of 1981. Here, we highlight two new legal instruments: the legitimacy of the Public Prosecutor's Office in filing lawsuits for civil and criminal liability due to environmental harm; and the public civil suit, which can be brought not only by the Public Prosecutor's Office but also by the federal government, states and municipalities, regional authorities, public companies, joint foundations and societies, and, particularly for our purpose,

company of extensive environmental damage as a result of planting eucalyptus in the Espírito Santo. The company was also accused of illegal actions against indigenous communities and quilombolas<sup>13</sup> in the region.

In addition to the company, environmental authorities were also accused of granting them the environmental permit and of a lack of supervision of the activities of the company.

The petition elaborated the indigenous rights complaint, extending it to the decrease in fauna and flora, based on press and technical documents such as the report of the Parliamentary Inquiry Commission (CPI) of Aracruz Celulose held in 2002 and the Environmental Impact Report (EIR) of the project to build the complaint. The charge against the government derives from the licensing concession and the omission of indigenous peoples of the region in the technical document (EIR).

However, despite all the efforts of the author, the action had not yet judged its merits. Until 2008, the discussion revolved around its legitimacy to Public Civil Action. The initial decision of the discussion about the legitimacy of the author dismissed the case based on the fact that, in the case of an educational entity, this would not be configured as "environmental protection," the requirement item II of art. 5 of Law No. 7.347/85 the Public Civil Public Civil Action instituted. In 2008, however, the court (TRF2) favorably judged the appeal phase, according to the menu:

*"In the event, despite not the main purpose of the Association to protect the environment, this purpose is implicit in its purpose, which legitimates the filing of the public civil action to this end. Precedents of the Supreme Court. A feature provided to determine the remits the case to rise to the regular processing done (TRF-2-AC: 372744 ES 2005.50.01.001768-3, p.12)."*

---

associations with over one year of existence that include among their goals the protection of the environment, the consumer, and/or historical and cultural heritage.

<sup>13</sup> Maroons community.

Although the merits of the action have not yet been widely judged, the debate on the legitimacy of the Public Civil Action author led a significant symbolic effect to mobilize to assert their legitimacy to act in defense of the environment, but also generated a concrete effect on jurisprudence, understood as an institutional effect by the change in the use of the Public Civil Action law. In short, you can expand the possibilities of using this legal instrument.

Nevertheless, the analysis of procedural texts observes other elements that can be characterized as scathing of the dispute over the institutions. In the analysis of the author's decision, legitimacy aspects are important: the MPF, called to give an opinion, manifests itself in favor of FASE, claiming "it would not be necessary that the primary purpose of the association was the defense of the environment, but yet so that this purpose was implicit in the statutory object of the association, citing case law of the Supreme Court" (TRF-2-AC: 372744 ES 2005.50.01.001768-3, p.12).

The rapporteur judge makes an even greater impact, reframing the effect of the law, thereby asserting their favorable attitude to the phase position and expanding the understanding of "the purpose of protection of the environment." She writes:

*In the case, I understand that, just as the distinguished representative of the MPF, there would be no need for the purpose of compliance with the requirement item II of art. 5 of Law 7.347/85, that the defense of the environment, were stated in explicitly the association's object so that it possessed active legitimacy to this demand, just as happens in the case, that it had, among its purposes, environmental protection, which gives, in the present case by education3 (TRF-2-AC: 372744 ES 2005.50.01.001768-3, p. 12).*

By stating that environmental protection can be achieved through education, the decision was weakened by his own understanding of civil society, which expands the meaning of "environmental," and is consistent with the elaborations of "environmental justice" that include humans and their activities as part of the "environmental" (Acselrad, 2010).

Moreover, this confers on the law a flexibility that fits the sense of displacement produced in society and is consistent with the proposal of the new law

of the Public Civil Action (PL 5,139/2009)-prepared by civil society and the Ministry of Justice, still under consideration in Congress-in which the specific and thematic character of associations is removed and the list of legitimated Public Civil Action propositions widened. In this position, the judge also supports STJ case law that supports the legitimacy of neighborhood associations in Public Civil Action institutes. The argument for this is based on the understanding that there is “active legitimacy to propose civil action, association when one of the statutory objectives is the protection of interests of neighborhood residents, lying covered in this context the protection of the environment healthy, quality of life” (TRF-2-AC: 372744 ES 2005.50.01.001768-3, p.12).

Reframing the law to include a sense of “environmental justice” from the use motivated by social movements was strengthened in 2014 by an unprecedented decision by the Supreme Court, widely hailed as a historic decision by environmentalists. In the decision, Minister Herman Benjamin not only ruled against the polluting company (Ajax), but his judgment was based on environmental injustice:

*“Unfortunately, Brazil is shown to be lavish in the discriminatory distribution of environmental risks. Not only that the material misery of urban and rural pockets of the population, a phenomenon that still plagues us and embarrassed as a nation after the Second World War and in the wake of the industrialization process that gained momentum from then aggregate and impinges this multitude of social outcasts (= social injustice) the stain of environmental pariahs (= environmental injustice). Replaced or overlaid, racial and social segregation-legacy of discrimination against slave quarters, of the poverty and slums-segregation by pollution, i.e., due to the geography of industrial and mineral contamination, the open sewers and landscape dehydrated its beauty attributes. (SPECIAL FEATURE No. 1310471-SP)”*

After the dispute to settle as a legitimate entity in defense of the environment in this lawsuit, FASE was the first decision on the merits in 2012, which held that Ibama is not a legitimate party among the liability poles in action, decided by the extinction of the process concerning this federal environmental agency. This decision formed the process of decline jurisdiction, which means it “fell” to the state level.

The lawyer who drew up this and various other litigations in the context of legal mobilization in ES, explains that “we wanted the Federal Court precisely because there we know that the company has less power to postpone or take a favorable decision” (Lawyer-activist of Network Alert Against the Green Desert. Interviewed in 2013). The activist thus mobilizes the law, seeking to direct the dispute to the best judgment in its assessment in a clear demonstration of evaluative and strategic reflection on the judiciary's performance in its various scales.

Evaluating the gains and losses, in this case, is complex. Symbolic elements may be considered “successes” for the movement, but there are also other elements that are strategic and do not merely reflect final decisions. They are intermediate decisions or even effects from which the company suffers owing simply to being a defendant in a lawsuit.

In the words of prosecutors and civil society activists, the lawsuit is perceived as a strategic resource of very large effects. It is used as a mechanism to inhibit new ventures in a locality or to have a negative effect on the company, such as financial losses by the depreciation of its shares on the stock exchange, owing to the increased risk the court case brings to the investor. The strategic dimension, therefore, should not be analyzed only in terms of end gain or cause loss, although it is clear to the players that it is difficult to win in the court of a large company.

Over the course of a decade, the defendant, Aracruz Celulose, has ceased to exist. In 2009 he merged with Votorantim Celulose e Papel, becoming Fibria. The projects continue to advance and conflict with people still in the area. Nevertheless, even without this substantive Public Civil Action decision, favorable to the applicant to date, analysis of Fibria's management reports indicate the significant relevance of the legal proceedings in the company's business, which suggests that the judicial process impacts of some form on the company's results. Here is an excerpt from that document:

*Every three months, the Legal department forwards the accounting report of all civil, labor, and environmental demands, indicating the likelihood of success of each of the amounts involved and the amounts to be accrued. The report is endorsed by external auditors in the accounting aspects. As regards the procedural information inserted in the GR-5 system, the Legal department is also undergoing an external audit to check compliance with the Sarbanes-Oxley Act (SOX), which protects corporations against fraud and minimize business risks (Fibria, 2011: 45).*

In terms of expanding legitimacy, there is a gain for the movement that transcends this particular case and generates symbolic and strategic effects.

In view of the type we suggest it possible to summarize the characterization of this as public interest litigation with substantive and tactical claim whose content is intended to produce an expected defensive end, but unexpectedly produces innovative effects without achieving the expected effects. The actors involved are an articulate NGO networking with indigenous and maroons, with strong support from local lawyers engaged against a transnational company.

In terms of evaluating the main effect, we can say that, in the short term there were no effects on the process of mobilization that suggested ties between actors and the opposition to the company. The construction of alliances Public Civil Action occurred through a link between environmental law and perceptions of the injustice of local communities, producing a mutual diffusion of causes and exchanges of collective action frames. In addition to interactional aspects, the Public Civil Action contributed to the dissemination of the causes in question and to the supporters of conquest such as the Federal Public Ministry, which later joined with other Public Civil Actions using the same basic allegations of the NGO FASE. However, the whole process of mobilization of the struggles against forestry especially against Aracruz Celulose was also detrimental to activists. Many indigenous people, environmentalists, and maroons were persecuted, prosecuted, and suffered police violence during the dispute process. However, this cannot be considered an immediate reaction to this Public Civil Action.

Most claims of this particular action, or even of all mobilization, remained unconquered. Today, the company is still in operation. However, the dispute has undeniably affected the business, generating legal and other operating costs that

may have reduced financial gain. The main negative effect for the company was the linking of its image as a major responsible for the injustices against the indigenous and maroons in the Holy Spirit aspect that contributed to the gain of important supporters, such as national and international environmentalists, journalists, promoters, prosecutors, and public defenders. These negative elements of the company cannot, however, be attributed to the Public Civil Action alone, but rather to a wide repertoire of collective action that lasted for years and formed the Alert Against the Green Desert.

Institutional effects in this case are those we can assign more specifically. As noted, there were changes in the interpretation and use of the Public Civil Action law and design of environmental protection expressed in decisions. These changes meant gains in view the demands of the movements fighting for environmental justice.

However, the service from the point of view of the substantive demands in Public Civil Action loss was the oppositional actors. Even today, this has not been judged on merit.

Of course, the strategic litigation beyond the lawsuit itself must be understood. There is a whole set of interactions that develop in these contexts involving several other forms of action and even other lawsuits. It is in this sense that one can also frame the broader social effects.

The mobilization process expressed in the Alert Against the Green Desert was significantly marked by interactions with institutions and actors in the justice system, constituting a right of mobilization repertoire with intense strategic use of litigation. This element produced changes in the behavior of communities affected by the former Aracruz, manifesting itself in a continuous presence of this collective action repertoire, even after the decline in the network mobilization Alert Against the Green Desert. In this sense, one can also envision an effect on forms of development of the common problems of the region. However, the broader social effects remain, as certain assumptions are simply unobservable.

## CONCLUSION

In this article, we problematize the use of litigation by social movements as a strategy in collective actions against transnational corporations. We presented a typology to advance research on the subject. The approach was fundamentally theoretical and falls within the social sciences.

We indicated the need for systematic, interdisciplinary, in-depth studies that analyse how legal strategies affect causes, movements, and companies and the design and operation of legal institutions. Through the case study of the case of *phase vs. Aracruz Celulose*, we raise some empirical evidence supporting our typology. Important challenges remain; above all, methodological. Effects should thus be measured in multiple dimensions.

In conclusion, for a broader review of strategic litigation, it is necessary to consider social, institutional, economic, and political elements, in addition to strictly legal aspects. Disputes are engendered in the social dynamic, and are therefore affected by variables external to the legal field as well as produce effects that cross the boundaries of the law and can be configured by the collective causes as benefits or harms.

## REFERENCES

ACSELRAD, Henri. (2010), "Ambientalização das lutas sociais-o caso do movimento por justiça ambiental." Estudos Avançados, São Paulo, v. 24, n. 68.

BISSOLI, Luiza. O CAMPO DE MOBILIZAÇÃO DO DIREITO CONTRA OS TRANSGÊNICOS: repertórios, atores e enquadramentos. 2016, 120p. Dissertation of Master degree in Social Science at Programa de Ciências Sociais da UFES.

BURSTEIN, Paul. Legal mobilization as a social movement tactic: the struggle for equal employment opportunity. American Journal of Sociology, v. 96, n. 5, p. 1201-1225, 1991.

CARDOSO, Evorah. Ciclo de vida do litígio estratégico no sistema interamericano de direitos humanos: dificuldades e oportunidades para atores não estatais. Revista Electrónica del Instituto de Investigaciones "Ambrosio L. Gioja, v. 5, p. 363-378, 2011.

CONTRERAS, Juan Carlos G. Modelo para armar: litigio estratégico en derechos humanos. México DF: Comisión Mexicana de Defensa y Promoción de los Derechos Humanos AC, 2011.

DAVIS, R. FRANKS. D. The costs of conflict with local communities in the extractive industry. First International Seminar on Social Responsibility in Mining. Santiago, Chile. Outubro de 2011. Available from: <[http://shiftproject.org/sites/default/files/Davis%20&20Franks\\_Costs%20of%20Conflict\\_SRM.pdf](http://shiftproject.org/sites/default/files/Davis%20&20Franks_Costs%20of%20Conflict_SRM.pdf)>

DÍAZ, Ana Milena Coral; TORO, Beatriz Londoño; ÁVILA, Lina Marcela Muñoz. El concepto de litigio estratégico en América Latina: 1990-2010. Universitas, v. 59, n. 121, p. 49-76, 2010.

EPP, Charles R. The rights revolution: Lawyers, activists, and supreme courts in comparative perspective. Chicago: University of Chicago Press, 1998.

ERRC, Interights (2004). Strategic Litigation of Race Discrimination in Europe: from Principles to Practice. European Roma Rights Centre–ERRC, Interights, Migration Policy Group–MPG

FIBRIA. Relatório de Sustentabilidade, 2011.

GALANTER, Marc. The radiating effects of courts. Empirical theories of courts, p. 117-42, 1983.

HARLOW, Carol; RAWLINGS, Richard. (1992). Pressure through law. Routledge.

JASPER, J. (1997), The art of moral protest. Culture, biography, and creativity in social movements. Chicago: University of Chicago Press.

JASPER, James M. Las emociones y los movimientos sociales: veinte años de teoría e investigación. *Revista latinoamericana de estudios sobre cuerpos, emociones y sociedad*, v. 3, n. 10, p. 48-68, 2012.

KRIESI, Hanspeter (Ed.). (1995). *New social movements in Western Europe: A comparative analysis*. University of Minnesota Press, 1995.

LOSEKANN, Cristiana. Mobilização do direito como repertório de ação coletiva e crítica institucional no campo ambiental brasileiro. *Dados*, p. 311-349, 2013.

MACIEL, Débora Alves. "Ação coletiva, mobilização do direito e instituições políticas: o caso da campanha da lei Maria da Penha." *Revista brasileira de Ciências Sociais*, São Paulo, v. 26, n. 77, Oct. 2011.

MCADAM, Doug.; TARROW, Sidney; TILLY, Charles. *Dynamics of contention*. 2001.

MCCANN, Michael. "Legal mobilization and social reform movements: Notes on theory and its application." *Studies in Law, Politics, and Society*, v. 11, p. 225-54, 1991.

MCCANN, Michael W. *Rights at work: Pay equity reform and the politics of legal mobilization*. University of Chicago Press, 1994.

MCCANN, Michael. (2010), "Poder Judiciário e mobilização do direito: uma perspectiva dos "usuários." *Anais do Seminário Nacional sobre Justiça Constitucional. Seção Especial da Revista Escola da Magistratura Regional Federal da 2ª. Região/Emarf*, pp. 175-196.

MCCANN, Michael. (2006a), "Law and Social Movements: Contemporary perspectives." *Annu. Rev. Law Soc. Sci.* 2006. 2:17-38

POLLETTA, Francesca. "The structural context of novel rights claims: Southern civil rights organizing, 1961-1966." *Law and Society Review*, p. 367-406, 2000.

PINTO, Raquel Giffoni. *As ciências sociais e a profissionalização da gestão empresarial do "risco social."* 2015. Available em: [http://biblioteca.clacso.edu.ar/gsd/collect/clacso/index/assoc/D9199.dir/informefinalgiffonipinto11\\_12.pdf](http://biblioteca.clacso.edu.ar/gsd/collect/clacso/index/assoc/D9199.dir/informefinalgiffonipinto11_12.pdf)

SCHEINGOLD, SA. (1974). *The Politics of Rights: Lawyers, Public Policy, and Political Change*. New Haven, CT: Yale Univ. Press

SIKKINK, Kathryn. La dimensión transnacional de la judicialización de la política en América Latina. IN: SIEDER, Rachel, SCHJOLDEN, Line e ANGELL, Alan. *La judicialización de la política en América Latina*. Centro de Investigaciones y Estudios Superiores en Antropología Social, México, 2011.

TARROW, Sidney. *O poder em movimento: movimentos sociais e confronto político*. Vozes, 2009.

VANHALA, Lisa. *Making rights a reality?: Disability rights activists and legal mobilization*. Cambridge University Press, 2011.

Jurisprudência:

TRF-2-AC: 372744 ES 2005.50.01.001768-3, Relator: Desembargador Federal RALDÊNIO BONIFACIO COSTA, Data de Julgamento: 19/02/2008, OITAVA TURMA ESPECIALIZADA, Data de Publicação: DJU-Data::March 03, 2008–Página::199

RECURSO ESPECIAL Nº 1.310.471, SP (2011/0293295-2), RELATOR: MINISTRO HERMAN BENJAMIN, Data do Julgamento: 13/06/2013. Segunda Turma.



FORDFOUNDATION



HUMAN RIGHTS  
AND BUSINESS  
CENTRE