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Climate Change Litigation on the African Continent

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Over the past decade climate change litigation is increasingly utilised to influence policy outcomes and sway corporate and societal behaviour.² Whilst the majority of litigation to date has taken place in developed countries, there has been a significant increase and expansion in scope and geographical coverage over the past five years now with some 1727 cases documented worldwide,³ many of which are in developing countries.

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² Peel & Osofsky *Climate Change Litigation Regulatory Pathways to Cleaner Energy*, (2015) Cambridge: Cambridge University Press; Bouwer 'The unsexy future of climate change litigation', *Journal of Environmental Law* (2018) 30(3), 483-506.

³ More than 50% have been brought since 2015. See www.climate-laws.org.

Introduction

The nature and types of climate change litigation cases is diverse, but it has been particularly popular with activist groups using litigation to drive ambition in climate action, taking a longer term view beyond the immediate wins and losses of individual cases.⁴ In particular, climate groups are turning to courts, to spur the adoption of higher levels of mitigation ambition, new rules and more effective implementation of and compliance with existing ones. This form of litigation is also contributing in innovative ways to transnational climate governance, by complementing the implementation of the Paris Agreement at a national level.⁵

Most recently, on 29 April 2021, in a case brought by a group of environmental activists and individuals, the Germany Federal Constitutional Court ruled that the 2019 Climate Change Act was partially unconstitutional on the basis that its climate protection measures for the period after 2030 were inadequate to protect future generations.⁶ The Court ruled that future generations would be required to reduce their GHG emissions significantly more than the current generation and that "one generation should not be allowed to consume large parts of the CO₂ budget under comparatively mild reduction burdens, if this would at the same time leave a radical reduction burden to the following generations and expose their lives to comprehensive losses of freedom."⁷ Accordingly, it found that "more urgent and shorter term measures" were required. A week later, the German government announced it would accelerate its transition to net zero to meet the goal by 2045 and that it would reduce its emissions even further to 65% by 2030.

This case follows on from a series of cases brought by activists across the world, including youth for climate groups, seeking to compel governments to revisit their mitigation targets and how these targets are achieved. The most famous of these is the *Urgenda* case,⁸ in which the Netherlands Supreme Court found that there was a legal duty to prevent dangerous climate change, and that the Netherlands needed to reduce its emissions by a minimum of 25% before 2020. A year later, the Irish Supreme Court, found in favour of the an activist organisation, that Ireland's National Mitigation Plan violated statutory law on the basis that it did not provide sufficient information on how Ireland would achieve its 2050 goals.⁹ In February 2021, in a case brought by a coalition of NGOs, the Administrative Court of Paris found that the French Government was failing to meet its own 2020 emission reduction targets and recognised that the Country's inaction on climate change had caused ecological damage.¹⁰ The court awarded the plaintiffs the requested one euro for moral prejudice caused by the inaction, and government was ordered to report to the court on the steps it was taking to meet its Paris targets. Most recently, on 17 June, the Court of First Instance of Brussels found the Belgian authorities had failed to act in a prudent and diligent manner when it developed the climate policy by not taking all possible measures to prevent serious and foreseeable climate impacts.¹¹ The case was brought by Klimaatzaak and joined by 58000 Belgian citizens.

⁴ Kim Bouwer and Joana Setzer "Climate Litigation as Climate Activism: What Works?" The British Academy Copy 26 Briefing Series (2020).

⁵ Wegener, L. (2020). Can the Paris Agreement Help Climate Change Litigation and Vice Versa? *Transnational Environmental Law*, 9(1), 17-36. doi:10.1017/S2047102519000396.

⁶ Neubauer, et al. v. Germany, Germany Federal Constitutional Court, 2020.

⁷ Ibid.

⁸ Supreme Court of the Netherlands, 20 December 2019, ecli:NL:HR:2019:2006.

⁹ Friends of the Irish Environment v. Ireland 2017 No. 793 JR.

¹⁰ *Notre Affaire à Tous and Others v. France*, No. 1904967, 1904968, 1904972, 1904976/4-1, Paris Administrative Court (3 February 2021).

¹¹ See France24 "[Belgian court finds government negligent on climate in landmark decision](#)" 17 June 2021.

Activist groups are not only challenging governments and their climate ambitions, but increasingly private corporations too. Multiple suits by both NGOs and increasingly local and regional governments, have been brought against large emitters, including the so called “carbon majors”,¹² such as Total, BP and Royal Dutch Shell, seeking compensation for damages caused and costs incurred by climate change.¹³ In what is becoming a string of losses for Shell in the courts this year, several NGOs filed suit against it in the Dutch court arguing that it, together with 25 carbon majors were responsible for causing more than half of global GHG emissions in the past three decades.¹⁴ The court ordered Shell to reduce its emissions by 45% by 2030 from 2019 levels. Although the success of cases against the carbon majors has been mixed, they are growing in number driven by advances in climate attribution science, the consolidation of and consensus around the credibility of IPCC research, and research on the extent to which the carbon majors have contributed to climate change.¹⁵

Cases are, however, becoming more diverse in nature in a fast evolving field. Whilst initially most cases across the world were administrative in nature,¹⁶ such as inadequate consideration by government of climate risks when approving coal mines or coal fired power plants, they are now increasingly including more novel private suits. These include actions by shareholders against corporate leadership, for example for failing to adequately disclose climate transition risks or adapt investment strategies, securities fraud, and greenwashing claims. Adaptation cases are also on the rise and include cases brought against government for a failure to plan for and adapt to the impacts of climate change, as well as climate change insurance cases.¹⁷

In Africa, there is a relative paucity of research and low levels of reporting on climate change cases. Websites that aggregate cases¹⁸ indicate that only a handful have been finalised on the continent, mostly in South Africa and Kenya. Of these, they have primarily involved administrative requirements, in particular a failure to consider climate change impacts when approving coal fired power plants. Most likely, the trajectory seen globally towards a move to more complex and novel causes of action, including shareholder activism and damages claims against carbon majors, will also unfold in the region. This is likely given increasing levels of shareholder activism and NGO activity in some African countries. In this short note we discuss some of the climate cases documented to date and we discuss potential drivers that are likely to provoke increased levels of litigation.

African Climate Litigation

The two most well-known cases on the continent relate to administrative decisions to approve a coal fired power plant in South Africa and Kenya. In the case of Kenya, the appellants, Save Lamu, challenged the issuance of an Environmental Impact Assessment License to Amu Power to establish an

¹² Research estimates that 63% of the carbon dioxide and methane emitted between 1751 and 2010 can be attributed to only 90 entities, known as the ‘carbon majors’. Heede, R. 2014. Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010. *Climatic Change* 122.

¹³ Bouwer and Setzer & Vanhala (2019) ‘Climate change litigation: A review of research on courts and litigants in climate governance’, *WIREs Climate Change* (Published Online: 4 March 2019). Markell & Ruhl, (2012) ‘An empirical assessment of climate change in the Courts: A new jurisprudence or business as usual?’ *Florida Law Review*, 64(1), 15–86.

¹⁴ Financial Times “[Shell to Speed up Energy Transition Plan after Dutch Court Ruling](#)”, 9 June 2021.

¹⁵ Maryam Golnaraghi, Joana Setzer, Nigel Brook, Wynne Lawrence, Lucia Williams “Climate Change Litigation – Insights into the evolving global landscape” (April 2021) *The Geneva Association*.

¹⁶ Golnaraghi (supra).

¹⁷ Golnaraghi (supra).

¹⁸ See for example the well reputed Climate Case Chart by Columbia University: <http://climatecasechart.com>.

1050MW Coal Power Plant in Lamu County. The planned \$2 billion coal plant was in close proximity to a UNESCO World Heritage, Lamu Island. In 2019, Kenya's National Environment Tribunal revoked the licence, finding that the National Environment Management Authority had failed to comply with legal requirements for the environment and social impact assessment (EIA).¹⁹ The case was primarily decided on the lack of public participation, but the Tribunal also found the omission of a climate change assessment in the EIA to be a material flaw and set the decision aside on that ground as well.

In a similar ruling in 2017, the South African High Court found that a climate change impact assessment was a "relevant" consideration, under South African environmental laws for the assessment and approval of coal fired power plants.²⁰ The case was brought by an NGO, Earthlife Africa, represented by the Centre for Environmental Rights and concerned a proposed 1200MW coal-fired power station in the Limpopo Province. The court found that a failure to require and take into account a climate change impact assessment prior to the grant of an environmental authorisation for the Thabametsi Coal Fired Power station was legally flawed and sufficiently material to set aside the environmental authorisation issued to it. A similar ruling was handed down by the Water Tribunal in relation to the proposed Khanyisa coal fired power plant in 2020, which found that the authorities had not adequately taken the water and climate related impacts into account when they issued the water use licence to the project.²¹ As a result of these decisions, as well as civil campaigning on the issue, various lending institutions have withdrawn finance from both projects, and it appears highly unlikely that either will proceed.

At present there are no cases against any Carbon Majors, but this may well happen in future. In 2021, the Hague Court of Appeal handed down three judgments relating to a long-standing community led battle against Shell's oil polluting operations in Nigeria.²² The court ordered Shell to pay compensation for damage caused in Nigeria, thereby establishing a precedent for a court based in Europe to grant damages for harm by a multinational in a developing country. Such a precedent may open the gateway for litigation regarding African climate change impacts and/or damages in other jurisdictions which may have more favourable outcomes than in courts of the impacted state where there maybe concerns around judicial capacity or unsupportive legal frameworks.

Although there is considerable potential for a rise in litigation on the continent, analysts have cautioned that the broader regulatory framework may not be sufficiently enabling.²³ For example, a review of the potential for climate litigation in Ghana has suggested that climate concerns appear to be on the periphery and not at the centre of litigation, a trend also highlighted in litigation generally within the Global South.²⁴ This may be attributable, to a lack of legally enforceable climate policies and climate change laws (an issue prevalent in many African countries), and more broadly, a lack of funding for environmental litigation.²⁵ As a result, climate cases are likely to be subsumed within broader environmental issues, should they proceed to the courts. That notwithstanding, analysis have suggested that climate lawsuits may find traction on the continent particularly if they are grounded in a

¹⁹ Tribunal Appeal Net 196 of 2016.

²⁰ Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017).

²¹ Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another (WT06/11/2015) [2020] ZAWT 1 (18 July 2020).

²² See the judgments saved at:

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:134&showbutton=true&keyword=Milieu%20defensie>

²³ Bolanle Erinosh, 'Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law' (2020) 114 AJIL Unbound 51.

²⁴ Ibid.

²⁵ Ibid.

rights-based approach to climate litigation. This is because in countries that lack an enforceable climate framework, courts have been asked to bring other norms to bear, including constitutional and human rights.²⁶ The potential for such cases in Sub-Saharan Africa is further supported by Article 24 of the African Charter on Human and Peoples' Rights, which recognizes the right to a satisfactory environment.²⁷

As a promising example of a broadly based human rights litigation, an application on behalf of four minors was filed in the Ugandan High Court in 2012. The applicants were seeking declaratory and injunctive relief for damage and loss of life as a result of climate change.²⁸ The parties argued that Article 237 of the Ugandan Constitution requires the government to act as a public trustee of the nation's natural resources, including its atmosphere, and that it required it to preserve it for present and future generations. The case sought a declaration that the government's conduct had failed to address the impact of climate change and was thereby a breach of this duty. Although the case was filed in 2012 it did not proceed further after 2017 when the judge ordered a 90 day mediation process. Whilst the case was not finalised on the merits, it may possibly be a precursor to similar constitutional and rights based litigation on the continent.

Drivers of litigation

The rise in climate litigation, including litigation on the African continent, is driven by a complex number of factors. A firm foundation was initially laid through the practice of public interest law, research and judicial activism regarding constitutional rights and socioeconomic rights.²⁹ Rodriguez-Garavito, for instance, cites historic rulings by South African courts on the rights to housing and health as having laid a firm basis for activist climate change jurisprudence in the country.³⁰ In the last decade, there have been a number of additional drivers that have propelled the spate of cases, including:

- national commitments under the Paris Agreement;
- higher levels of physical and transition risk;
- greater levels of public awareness;
- stronger climate commitments from governments, corporates and investors;
- higher levels of funding for climate litigation;
- new and evolving legal duties;
- advances in climate change attribution science; and
- the implications of COVID-19 on economic recovery and climate-related actions.³¹

In addition to the above, in Sub-Saharan Africa, two particularly prominent factors are likely to shape the future of litigation, namely NGO activism, as well as shareholder activism.

²⁶ John H Knox and Christina Voigt, "Introduction to the Symposium on Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation": the Contribution of the Global South" (2020) 114 AJIL Unbound 35

²⁷ The African Commission on Human and Peoples' Rights has affirmed that the right to a clean environment in Article 24 of the African Charter imposes a clear obligation on the state to take reasonable measures to "prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources."

²⁸ Mbabazi and Others v. The Attorney General and National Environmental Management Authority Civil Suit No. 283 of 2012

²⁹ Cesar Rodriguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 AJIL Unbound 40

³⁰ Ibid.

³¹ Golnaraghi (*supra*).

NGO Activism

The escalation in the use of litigation by activists has now been recognised as a new development changing the context of environment and climate advocacy.³² As the previous cases illustrate, NGOs were the drivers behind most if not all of the litigation in Africa, and they are likely to remain a vibrant and active sector in years to come. In the Lamu Coal case, for example, the community campaign joined with groups across various sectors both locally and internationally, including Save Lamu, the Katiba Institute, Natural Justice, Heinrich-Böll-Stiftung, 350 Africa, Centre for Human Rights and Civic Education, Sauti Ya Wanjiku, Muhuri – Muslims for Human Rights, Natural Resources Alliance of Kenya, American Jewish World Service and the Center for Justice Governance and Environmental Action. These relationships and networks provided legal, financial and other resources to the local activists, facilitated information exchange and provided the local with tools and influence to achieve their objectives.³³ The applicants also attribute their success to a highly informative and transparent media campaign.³⁴ Similar networks and grassroots organisations, particularly youth led organisations such as the African Climate Alliance, are likely to build on this foundation, and may inspire more climate litigation on the continent.

Shareholder Activism

In South Africa, there has been an increase in environment-focused investor advocacy groups, such as Just Share and the RAITH Foundation. These groups have driven a boardroom campaign to force debates on shareholder resolutions, by filing climate risk-related shareholder resolutions within two national banks.³⁵ These resolutions have called for, amongst other things, an assessment of the bank's exposure to climate-related risks in its lending, investing and other financial intermediary activities, and the adoption and public disclosure of policies on lending to fossil fuel industries. These actions have, amongst related national and international pressures, prompted other South African banks to voluntarily commence with shareholder votes on climate risks, and in some instances to table net-zero targets. Not all banks have acquiesced on the requests, however, and it is possible that further litigation may ensue relating to shareholders rights to table resolutions under the Companies Act, 2008. As noted earlier, activism by the investor advocacy groups is also partially behind the withdrawal of funding by institutional lenders for the Thabametsi and Khanyisa coal fired power plants. These organisations have also increased public attention towards the risks and liabilities for directors relating to climate change within private corporations, and have driven an agenda on the fiduciary legal responsibilities of pension fund trustees, particularly as they relate to fossil fuel investments.³⁶ Whilst shareholder litigation on climate change is not yet common place on the continent, it may well be in future and certainly shareholder activism is likely to be more prominent, particularly for companies that are operating within but are not necessarily headquartered in Sub-Saharan Africa.

Conclusion

³² Bouwer (supra).

³³ <https://www.unep.org/news-and-stories/story/lamu-coal-plant-case-reveals-tips-other-community-led-campaigns>

³⁴ Ibid.

³⁵ See <https://justshare.org.za/>

³⁶ Pension fund trustees are obliged under Regulation 28 of the Pension Funds Act to ensure that the companies they invest in are managing environmental and social governance (ESG) risks responsibly.

The impacts of climate litigation extend beyond the courts, but have a broader public impact. Global trends illustrate a cross-pollination of litigation types across jurisdictions, and it is likely that increasingly novel and ambitious climate litigation will be forthcoming on the African continent. Experts have suggested that cases will vary based on the physical geography of each country and how that geography translates into greenhouse gas emissions and adaptation risks.³⁷ For that reason, it may well be that many African cases have less of a focus on GHGs, in light of the relatively low emissions profile of the continent, but that such cases will certainly continue in relatively high emitters such as South Africa. More likely is that Sub-Saharan Africa will enjoy a greater diversity of cases relating to adaptation, mindful of the continent's extreme vulnerability to climate change. The latter may entail challenges to water allocations and related impacts; water use planning and shared transboundary basins; reforestation and afforestation activities and land clearance; the rights of indigenous peoples; as well as challenges to new developments that are vulnerable to climate change impacts.

³⁷ Hari M Osofsky, 'The Geography of Emerging Global South Climate Change Litigation' (2020) 114 AJIL Unbound 61.

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