

The Third Annual Judicial Training on Climate Justice

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Theme: Understanding Climate Change and Exploring the Role of the Judiciary in Promoting Climate Justice

Session: Climate Litigation as a Tool for Promoting Climate Justice – Some Observations on the Approaches Adopted by the Global North and the Global South

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1. Introduction

- Climate change still remains a significant challenge currently facing humankind.
- This is despite the fact that the Covid-19 global pandemic has quickly become the world's number one crisis at the moment.
- It is widely predicted that climate change challenges will continue to be a major problem not only due to its complex and pervasive nature but also because of its long term impact on human health and the environment.
- The UNFCCC requires States to achieve stabilisation of greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.
- The Paris Agreement of 2015 acknowledges the threat of climate change and accordingly requires States to undertake ambitious efforts to combat climate change.
- Climate change has had an adverse effect on human rights by worsening of the existing inequities that afflict a world already riven with inequality, poverty and conflict.

Introduction cont'd...

- Surprisingly, many States have done very little to comply with such international obligations aimed at addressing climate change.
- Uganda as a country has also not been spared from the drastic effects of climate change such as drought, unpredictable weather patterns which negatively impact agricultural activities, destructive floods, rising lake levels and mud slides.
- Climate change subsequently highlights issues do to with equity, fairness and justice with respect to its actual and potential adverse effects on human kind.
- Climate change affects everyone, but it disproportionately strikes those who have contributed least to it and who are also, for a variety of reasons, least well placed to respond.
- By contrast, those that have the largest carbon footprint are by virtue of their wealth and vast resources are most insulated from it.

Introduction cont'd...

- The International Bar Association (IBA) Task Force on Climate Change Justice & Human Rights in 2012 notes that climate justice:
 - ‘Ensures that communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights.’*
- Thus, climate justice seeks to combine the climate change discussion with human rights in a way that is equitable for the most climate-vulnerable groups.
- Climate litigation is considered as one of the governance mechanisms suited for addressing climate change and achieving climate justice.
- Through climate litigation, the judiciary is considered as an important ally in achieving climate justice.

Introduction cont'd...

- This is premised on the fact that the courts do not only enforce existing legislation, but also, they establish new goals by interpreting existing legislation to require additional climate considerations.
- It is also important to note that climate litigation cases could be international (i.e. state v state) or domestic (i.e. individual/NGO v state/individual/corporations) in nature. However, this presentation shall focus on the domestic perspectives.
- Whereas climate litigation is mainly by way of public interest litigation (PIL), the term climate litigation also includes civil and administrative procedures brought in the pursuit of private interests, which may not necessarily involve activist intent.
- Undoubtedly, the global north and the global south have adopted different approaches with regard to climate litigation for the purpose of attaining climate justice.
- This presentation will therefore, discuss or give an insight into the approaches which have been adopted by the global north and global south in climate litigation.

2. Background and Evolution of Climate Litigation

- Climate litigation started out in the United States of America (USA) and to date, a total of over 1600 cases have been identified globally as being brought between 1986 and the end of May 2020.
- It is important to note that unlike the global north where climate litigation has gained impressive momentum, the situation in the global south including, Africa is different as climate litigation is still evolving.
- The most prominent climate litigation case in the European and probably in the global context is the case of *Urgenda v the Netherlands* ([2015] HAZA C/09/00456689). In this case The Hague District Court agreed with petitioners that the Dutch government should take more action to combat climate change in keeping with its obligations under the UNFCCC. The court further made an order directing the Dutch government to reduce its greenhouse emissions by at least 25 per cent by the end of the year 2020. It is suggested that the Urgenda court decision has been considered to be not only a 'landmark' judgment on climate change but also a global precedent.

Background and Evolution of Climate Litigation cont'd...

- In Africa it is mainly in South Africa and Nigeria where court cases which primarily focused on climate change have been successfully litigated.
- In the South African case of *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others* (65662/16), the High Court of South Africa, Gauteng Division, agreed with the petitioners by stating that when granting an environmental authorisation to the Thabametsi Power Project, the director of the Department of Environmental Affairs did not properly consider the climate impacts of the project. This judgment highlighted the significance, place and principles of climate change impact assessments in South Africa.
- In the Nigerian case of *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others* (FHC/B/CS/53/05), the court agreed with Gbemre by stating that sub-national gas flaring in the Niger Delta did not only amount to localised pollution but also contributed to the supranational problem of climate change.

3. Climate Litigation in the Global North

- Within the global north, climate litigation cases are abundant, mainly in the United States (1,213 cases) followed by Australia (98 cases), United Kingdom (62 cases) and the European Union (57 cases) as of May 2020.
- In the United States, the case of *Massachusetts v Environmental Protection Agency (EPA)*, 549 U.S. 497 (2007) was a landmark decision which triggered and inspired further climate litigation all over the world. In this case, the State of Massachusetts sued the EPA over its failure to regulate GHG emissions from new vehicles as per the provisions of section 202 of the Clean Air Act. The Supreme Court ruled that the EPA had a duty to reduce emissions from new vehicles regardless of the fact that the GHG emissions from new vehicles caused insignificant harm to human health and the environment. In response to the Supreme Court's ruling, the EPA on 7 May 2010 issued a regulation establishing greenhouse gas emission standards for light-duty vehicles.
- It is important to note that in the global north, climate change arguments are at the 'centre' of the legal arguments or the primary basis upon which the case is based.

Climate Litigation in the Global North cont'd...

- In other words, in many of the cases in the global north, there is explicit reference to climate change.
- However, in such cases litigants often rely on other grounds to call for climate-related behaviour change, such as air pollution (e.g. *ClientEarth v. Polska Grupa Energetyczna*), protection of forests (e.g. *Vimal Bhai v. Ministry of Environment and Forests*), companies' obligations under emissions trading schemes (e.g. *INEOS Köln GmbH v. Bundesrepublik Deutschland*) or risks to coastal developments resulting from sea level rise (e.g. *Taip v. East Gippsland Shire Council*).
- Some scholars have argued that the failure by the UNFCCC in 2009 at COP 15 in Copenhagen reignited the prospects for climate litigation in the global north with environmental activists turning to courts to challenge climate inaction by States.
- Furthermore, the years following the Paris Agreement of 2015 have also seen an increase in climate-related cases filed in the courts.

Climate Litigation in the Global North cont'd...

- A climate change 'centred' approach to climate litigation in the global north has also been attributed to the fact that a number of countries have a legal regulatory framework specifically tailored at addressing climate change.
- Climate change 'centred' approach to climate litigation has further been catalysed by the fact that a legal regulatory framework specifically tailored at addressing climate change is not a perfect indicator of actual implementation on the ground.
- Within the context of the global north, it is evident that the relationship between a legal regulatory framework specifically tailored at addressing climate change and climate litigation is one of interdependence.
- Whereas climate litigation in the global north is used as an enforcement mechanism of legal regulatory frameworks specifically tailored at addressing climate change, climate litigation is also used to compel governments to implement more ambitious policies in countries with limited or perceived-to-be inadequate climate change action.
- Availability of scientific evidence on the impacts of climate change and experts who guide courts in interpreting this evidence has also played an important role in climate 'centred' litigation in the global north.

4. Climate Litigation in the Global South

- By comparison to the global north, fewer climate cases have been litigated in the global south.
- In the global south climate cases which are climate change 'centred' have been litigated or are being litigated in countries such as Pakistan, India, Brazil, Philippines, Colombia, South Africa, Kenya, Nigeria, etc.
- Lagging substantially behind these and other regions in the world is Africa. This is surprising considering the continent's size and the high levels of vulnerability of its people and ecosystems to climate change.
- Nonetheless, the number of climate cases being litigated in the global south especially in Africa has been growing in importance and quantity although, these are yet to receive the much needed scholarly attention.
- This is, however, not to say that courts in in the global south have not been playing an important and often active role in mediating environmental conflicts.

Climate Litigation in the Global South cont'd...

- According to the Sabin Centre for Climate Change it is estimated that there are 37 cases of climate litigation in the Global South, of which 16 are in Asia, seven in Africa and 14 in Latin America. More than half (21) of these cases were brought in the five years between 2015 and 2019.
- Unlike the global north where climate change is a 'central' issue in court cases, in the global south, climate change is a 'peripheral or incidental' issue in court cases.
- In other words, most of the climate litigation cases in the global south make no specific reference to climate change but rather make reference to practical implications for climate change mitigation or adaptation i.e. 'incidental' climate change litigation.
- It is worth noting that such 'peripheral or incidental' climate change litigation as mentioned above is often not included in climate litigation data bases.
- 'Peripheral or incidental' climate litigation often focuses on enforcement of human rights, compliance with environmental legal framework and seeking of remedies such as damages, injunctions, environmental restoration orders, improvement notices, etc.

Climate Litigation in the Global South cont'd...

- It has been argued that litigation cases where climate change is incidental or peripheral can also have important strategic, policy or governance implications. Moreover, these cases may be filed for the express purpose of addressing climate change, but litigants might opt to actively exclude issues of law or fact regarding the science of climate change, or climate change mitigation or adaptation efforts, from their argument for strategic reasons.
- Many of the environmental cases that have been litigated in the Ugandan courts for instance, have adopted the 'peripheral or incidental' approach to climate change litigation. For instance many of the environmental cases in Uganda have focused on issues such as the public trust doctrine, precautionary principle & EIA, access to environmental information, public participation in environmental decision-making, clean & healthy environment and the right to life.
- Notably, the case of *Mbabazi & Others v Attorney General & NEMA* which highlighted the intergenerational equity principle is the first climate change 'centred' case that was filed in the Ugandan courts. This case was filed in 2012 and it was expected to commence in 2018 but it is still pending to date.

Climate Litigation in the Global South cont'd...

- A climate change 'incidental or peripheral' approach to climate litigation in the global south has been attributed to the fact that a number of countries have no legal regulatory framework specifically tailored to address climate change. For instance, Uganda does not have a climate change law although, there is a National Climate Change Bill of 2020 which is before Parliament. Currently, Uganda relies on the National Climate Change Policy of 2015 to address climate change.
- Furthermore, it is suggested that the 'incidental or peripheral' approach to climate litigation in the global south has been attributed to the fact that litigants often opt to actively exclude the complex issues of law or fact regarding the science of climate change. Such complex issues concerning the science of climate change usually pose an uphill task for litigants to precisely explain and elaborate before the courts during climate litigation.
- Thus, the global south has concentrated on the use of human rights i.e. constitutional and socio-economic (e.g. human dignity, health, life, property, clean environment, etc) as a basis for climate litigation so as to oblige States to reduce GHG emissions and also hold major emitters such as corporations accountable.

5. Supplementing Policy and Legislative Efforts Through Climate Litigation: Exploring the Role of the Courts in the Global South

- As stated earlier in this presentation, the courts of law are an important ally in the fight against climate change.

- According to Fisher & Scotford:

Climate change is inevitably the business of courts. Courts do many things: they uphold the rule of law, they interpret and apply the law, they resolve disputes, they attribute responsibility and determine liability, they hold decision makers to account, they ensure that laws and other forms of binding agreements are implemented and they delineate the boundaries of legitimate authority and lawful executive action. Climate change issues can be involved in all these tasks.

- Courts act as collaborators in the regulatory process, interpret and engage with strong government - led efforts to mitigate climate change.
- Courts have issued orders in the areas of socio-economic development to ensure more climate - friendly outcomes.

Supplementing Policy and Legislative Efforts Through Climate Litigation: Exploring the Role of the Courts in the Global South cont'd...

- Dynamic judicial and legislative interactions exemplify how courts can advance climate action in highly vulnerable countries such as Uganda. Through judicial oversight the public is afforded a legitimate political voice to confront aspirational 'symbolic regulation' that 'lacks regulatory bite', while endeavouring to fill governance gaps left by the legislature.
- Courts are building a jurisprudence around 'rights of nature', declaring the environment to be a subject of rights.
- Not only do courts enforce existing legislation, but also they establish new goals by interpreting existing legislation to require additional climate considerations. For example: a government could be forced through judicial means to address climate change where its policies, laws and actions are deemed non-existent or ineffective
- The courts also provide an independent, non-political public forum to voice concerns and to have claims heard and determined.

6. Conclusion

- Climate litigation is a fairly recent addition to the broader portfolio of environmental judicial dispute resolution but it is nonetheless, an effective strategy in addressing climate change.
- Undoubtedly, the courts play an important role in addressing climate change through climate litigation. However, the courts should help with eliminating barriers or limitations to climate justice such as costs, security for costs, undue delays or expeditious hearing of cases, etc.
- It is evident that the global north and the global south have adopted varying approaches with respect to climate litigation. The global north has adopted a climate change 'centred' approach to climate litigation whereas the global south has adopted a climate change 'incidental or peripheral' approach to climate litigation.
- Human rights arguments have played a pivotal role in climate litigation cases especially in the global south mainly because, most of the countries do not have elaborate climate change legal regulatory frameworks and also suffer most from the adverse effects of climate change
- Lack of climate change legislation should not be an impediment to climate litigation.

Conclusion cont'd...

- Climate change litigation at the international level faces barriers which are common for international environmental disputes. There are no adequate international organisations that have compulsory jurisdiction. However, the ECJ & the AfCHPR play an important role in ensuring that States comply with their regional and international legal obligations.
- During climate litigation courts should be willing to be guided through science and other authoritative and uncontestable sources of evidence on climate change. Courts should also guide litigants to simplify climate science by making it as clear as possible since it is evident that climate change issues tend to be complex.
- Courts should give real and effective remedies such as compensation to those that have been harmed by climate change.
- If the other arms of government such as legislature and executive are taking their time to act on climate change, the judiciary should step up and taken on the task.
- The Covid-19 pandemic is also poised to hinder climate litigation in the Global south especially in Africa. The Covid-19 public health measures have greatly affected the filling of new cases and hearing of ongoing cases.