Courts and Horizontal Accountability in Climate Change Litigation

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Abstract

In *La Oroya v Peru*, the Inter-American Court of Human Rights, in its quest to protect the "interest of future and present generations" based on the facts before it, suggested that the right to a healthy environment should have the status of a peremptory norm of general international law. The European Court of Human Rights has been at the centre of debates over its judgments, such as *Verein Klimaseniorinnen Schweiz v Switzerland*, where it established positive obligations with regards to climate change under Article 8 of the European Convention on Human Rights. Under the African human rights system, regional courts have long sought to hold states to account for activities of state and multinational corporations that infringe on the right to a healthy environment. These developments reveal an emergent cadre of judges that are alive to the need to develop concrete normative standards on climate change litigation. To the untrained eye, these recent decisions suggest an erasure of the Global North–South divide that has stymied climate change negotiations. Consequently, this article examines the critical role of judge-made law in the potential cross-fertilization or "judicial globalization" of a normative body of climate change jurisprudence. It adopts a comparative approach by analysing recent jurisprudence emerging from regional courts in Africa and juxtaposing them with emerging trends in other international courts.

Keywords: climate change litigation; judge-made law; horizontal accountability; peremptory norm; *jus cogens*; African, European and Inter-American human rights system.

[A] INTRODUCTION

Courts remain critical to the generation of norms for the ordering of society. At the national level, courts by virtue of their function of interpretation and application of established constitutional provisions play a central role in establishing accountability in the process of governance. They are especially critical to the stabilization of democratic regimes by contributing to the rule of law and creating an environment conducive to economic growth. National courts act as centrepiece institutions that make power-holders accountable to the laws of the constitution and ensuring the protection of human rights (Gloppen & Ors 2004: 1). In a well-functioning democratic system, the expectation is that the courts are independent. This entails that the courts shall ensure *transparency*; obliging public officials to justify that their exercise of power is in accordance with their mandate and relevant rules (*answerability*); and imposing checks if government officials overstep the boundaries of their power as defined in the constitution, violate basic rights or compromise the democratic process (*controllability*) (Donnell 2022: 29-51). The accountability function of power is a well-contested concept of a modern democratic system at the intersection of law and political theory.

Under international law, states have long been considered the primary objects of the international law system. However, international courts at various levels have encountered contrasting fortunes. The role of courts in environmental law serves a cautionary note on their relationship with states. In the area of climate change, courts have increasingly been utilized at municipal and international level by litigants seeking to hold states and corporations to account. Climate change litigation is a budding practice that demands astute judges that are abreast with the intricacies of climate change and the varying interests of litigants. It is therefore inevitable that courts will be perceived as veritable tools in identifying climate change norms emanating from actions brought before them. However, international courts are limited procedurally and otherwise. Governments may consider the courts as encroaching too much on the role of the legislature and executive. Corporations may consider the courts are increasing the costs and risks of business unnecessarily. Based on the premise above, this article analyses the role of judges in climate litigation, particularly as it pertains to norm generation and their duty as instruments of accountability within the municipal law and international law. After this introduction, the second part of the article underlines the theoretical framework of accountability which is considered hotly debated across disciplinary boundaries. The third part examines the centrality of the modern judge in developing climate change norms and standards.

The fourth part briefly tracks the ascertainable patterns in climate change litigation in national courts. The fifth part analyses key emerging trends from international courts, chiefly the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) where recent jurisprudence helps paint a picture on approaches that are open to judges based on questions presented by climate litigants, and how they may apply legal norms towards entrenching legal accountability over states. The sixth part examines the current perspective from the African human rights system, while the final part concludes.

Theoretical framework

The concept of accountability has been interpreted in a myriad of ways by scholars across disciplines. The increase in the attention given to the concept of accountability in public debate has been attributed to the increasing complexity of policymaking, the impact of the transnational level of norms produced far beyond the control of democratic assemblies, and the mainstream of the new public management diffused among domestic policymakers and international experts (Caddy & Ors 2007; Piana 2010). From a purely legal perspective, the concept of accountability is also applicable in different ways. The concept is often related to the process of democratic governance within a constitutional democracy, and more specifically applied as a framework for ensuring that the independence of the judiciary does not mutate into a net negative due to lack of scrutiny in the procedural, substantive and institutional aspects of judicial lawmaking.

The notion of accountability inherently embodies the character of control. For instance, at national level, the process of selection to fill critical institutions in a modern state and a means of interaction between the government and the governed is fraught with a fundamental problem of power. Earlier classical theorists appreciated that power exists side-by-side with the need to control it, as expressed by James Madison who argues that "in framing a government … the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself" (The Federalist Papers, No 51: cited in Schedler 2022: 13). From the time of the early philosophers, political thinkers have worried about how to keep power under control, how to domesticate it, how to prevent its abuse, and how to subject it to certain procedures and rules of conduct (ibid). Ultimately, the term accountability encapsulates the existential concern for checks and oversight, for surveillance and institutional constraints on the exercise of power. The term has become widely applicable, utilized by international financial institutions, party

leaders, grassroots activists, journalists, political scientists, and legal theorists all of whom make reference to accountability in their respective disciplines.

Schedler alludes to the likeness of accountability to answerability as related characteristics of properly placed power in society. On one side, exercising accountability demands inherent mechanisms for monitoring and oversight. These include fact-finding and generating evidence. As a normative quality, accountability subjects power not only to the rule of law but also to the rule of reason. Power should be:

> bound by legal constraints but also by the logic of public reasoning. Accountability is antithetical to monologic power. It establishes a dialogic relationship between accountable and accounting actors. It makes both parties speak and engages them both in public debate (Schedler 2022: 15).

Conversely, accountability implies the matter of controllability and its product of enforcement. Hence, in addition to its informational dimension (asking what has been done or will be done) and its explanatory aspects (giving reasons and forming judgments), it also contains elements of enforcement (rewarding good and punishing bad behaviour). It implies the idea that accounting actors punish contravening behaviour and, accordingly, that accountable persons not only tell what they have done and why, but bear the consequences for it, including eventual negative sanctions.

To the purely legal mind, accountability is a constitutional principle. This is so when it is considered that there is an intrinsic failure embedded in any human action. Thus, the idea of accountability is co-terminus with constitutionalism and the rule of law. This is why judges are critical actors as interpreters of the law vis-à-vis holding other actors within the state to account. From a historical point of view, the emergence of the era of judicial activism and the judicialization of politics (Malleson 1999), where judges and judiciaries have expanded their judicial review into areas hitherto considered the reserve of politics, and where political life itself has become more judicialized, underscore the centrality of accountability as a judicial tool to gauge the transparency, answerability, and controllability functions of other arms of government under a constitutional democracy. The new judiciary is considered activist and bearing new responsibilities in the field of lawmaking and even policymaking (Voermans 2007). There is no gainsaying that the courts and justice system are the constitutional embodiment of the law enforcement machinery of the state that guarantee constitutional accountability.

The accountability function of the modern judge vis-à-vis states is more apparent under international law, particularly in the area of climate change where a combination of the sovereign nature of states, the transnational and fluid personality of corporations, and the lack of consensus on the normative make-up of climate change as a transboundary phenomenon make holding these actors to account an existential problem that needs urgent answers. Courts are therefore important actors in the quest to develop norms and standards that may be widely accepted by climate litigants (Nwankwo & Mukoro 2025). Factors such as the growth of international (human rights) law, the need to empower the judiciary vis-à-vis other arms of government, and the legislative attitude to rely more and more on the judiciary to decide on controversial issues in order to develop a balanced case law has entrenched the globalization of judicialization (Piana 2010). This judicialization underscores the much needed normative intervention of international courts in the area of climate change as litigants increasingly engage the courts for interpretation.

Bovens (2006) suggests five types of accountability, namely: 1) legal accountability; 2) managerial accountability; 3) institutional accountability; 4) societal accountability; 5) professional accountability. Legal accountability is related to the mechanism of legal control. It is guaranteed by judicial review of statutory law, by the mechanism to the higher courts, by the procedural guarantees of due process, and by the formal relationships that exist among the norms embedded in a legal system. At international level, for this legal accountability to become more widely ascertainable particularly in the area of climate change litigation, international courts are an indispensable variable in norm-generation. Therefore, within the context of this article, horizontal accountability refers to the capacity of international courts to hold states to account. States are the contracting parties to the instruments establishing these international courts.

[B] CLIMATE CHANGE LITIGATION AND JUDGE-MADE LAW: WHY IS THE MODERN JUDGE CRITICAL TO DETERMINING CLIMATE CHANGE STANDARDS?

Over the past few years, climate change and the threat it poses to our common existence have gained increased attention in national and international legislative assemblies, courts, the mass media, and public discourse. Intergovernmental institutions such as the Intergovernmental Panel on Climate Change (IPCC) and the Conference of the Parties (COP)

have been established to midwife the process of developing rules and standards on climate change. The functions of these intergovernmental organizations include scientific research, international political negotiations, and development of law and policy to restrict and guide the international community on activities that negatively impact the climate (Colby & Ors 2020). The IPCC has suggested that a failure to restrict temperature increase to 2° Celsius above pre-industrial levels will lead to irrevocable and serious harm to the planet. Consequently, political campaigns and governance debates globally are increasingly being shaped by climate change, but many insist that national policies by themselves have been insufficient in tackling the problem to any degree of impact (Dryzek & Ors 2011).

However, courts may play a critical role in establishing agreed normative standards for climate change policy and governance. As a natural consequence of the existential nature of the phenomenon, the issue of climate change has moved from being a subject exclusive to political battlefields and policy think-tanks to judicial institutions. This is due to the increasing number of litigants searching for avenues to hold corporations and governments accountable. In *Stichting Urgenda v Netherlanden* (2015: paragraphs 3.1 and 5.1) a district court in the Netherlands found that the Dutch Government had violated a duty of care towards the people and ordered more ambitious emission reduction targets. Since that judgment in 2015, climate change public interest litigation has emerged as an alternative method to push for climate policy goals and encourage social change (Colby & Ors 2020).

At the time of writing this paper, the Grantham Research Institute on Climate Change and the Environment places the number of global climate litigation cases at 2666 (Setzer & Higham 2024).[1] These actions are being filed mostly to establish responsibility to mitigate and respond to the dangers of climate change, indicating an increasing appreciation by litigants on the need for a fundamental right to a healthy environment (Burgers 2020). As these cases continue to increase, what is clear is the multidimensional ways through which an action by an individual, group, or civil society is presented as a climate change action. These suits permeate virtually every area of a court's work. They traverse issues of legislation, direct claims for damages for climate-related harms, suits pertaining to climate change as financial risk, cases brought by activists, human rights actions, youth claims, environmental law and

[1] 87% of these cases were brought in national courts in the Global North, 8% of them were brought in national courts in the Global South, while 5% were brought before international and regional courts.

treaty obligations of states, and cases seeking to protect indigenous people's rights (Glazebrook 2020). This underscores the increasing need for judges to acquaint themselves with the scientific (*Thomson v Minister for Climate Change Issues* 2017; Peel & Osofsky 2017),[2] technical, and policy labyrinth that climate change actions present.[3]

The law may provide a bridge between the uncertain position in which communities and societies currently find themselves in the face of manifest climate change impacts, and the sense of direction that will be required in the near future. The expectation is that judges can offer some of the building-block principles for the law's response to climate change. With regards to how judges view the challenge before national courts across jurisdictions, three significant areas of overlap exist. To start with, international norms such as the 2015 Paris Agreement (the Agreement) play a significant role in the adjudication of complex climate litigation. The Agreement projects global objectives regarding the maximum acceptable temperature rise and the necessity for the international community to reach net zero greenhouse gas (GHG) emissions during the second half of the century. Though not directly enforceable in national courts, and with the international level having rather weak compliance and dispute settlement provisions, the treaty makes it possible for litigants to place the actions of their governments or private entities into an international climate change policy context. This makes it easier, in turn, to characterize those actions as for or against both environmental needs and stated political commitments (Peel & Osofsky 2017).

Consequently, judges are likely to find themselves presented with cases that argue for an alignment between international and domestic objectives. In addition, judges acknowledge that, because climate change is a complex and global phenomenon, it does not respect existing legal boundaries. Lastly, there is an appreciation of climate consciousness, or an awareness of the climate crisis and its potential to inform a court's choices in finding, interpreting, and applying the law. Along this vein, there is a strong possibility of decisions from national courts to influence courts in other parts of the world (Carnwath 2022).

[2] The *Thomson* decision of New Zealand's High Court (finding that the country's domestic climate legislation required the Government to review its 2050 emissions reduction target in light of the latest scientific findings of the Intergovernmental Panel on Climate Change). The court found that the results of New Zealand's election, installing a Labour Coalition Government, rendered the decision moot as the new Government has pledged to review and reduce the country's 2050 target.

[3] As Justice Noer notes: "Courts must be aware of the long-term consequences of our rulings." Judges must "strike the right balance and appeal to the trust that is needed in societies", ensuring "the protection of nature and future generations" and working towards "a sustainable future". To achieve this balance, it is imperative that judges are "climate literate": that is, that they are as well informed on all issues surrounding climate change as possible Carnwath 2022).

[C] ASCERTAINABLE PATTERNS FROM CLIMATE LITIGATION IN NATIONAL COURTS

As already noted, climate change actions give courts the opportunity to influence discourse on climate change. In the Global North, climate change issues are aired in public due to the fundamental principle in constitutional democracies of open justice and the requirement that courts provide reasoned judgments on cases before them. This power of discourse which could be developed through climate change action procedure has been judicially acknowledged in national courts, even in cases where claimants are unsuccessful. Take for instance the statement of the United States court in *Juliana v United States* (2020) where the dissenting judge Staton underlined the considerable rhetorical force of court orders thus:

> The majority portrays any relief we can offer as just a drop in the bucket. In a previous generation, perhaps that characterization would carry the day, and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing bucket. These final drops matter. *A lot* [original emphasis]. Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm (paragraphs 45-46).

This American ideation of discourse which represents the constant exchange between the judiciary and the legislature as reflected in *Juliana* parallels the Commonwealth Model of Rights Protections (Gardbaum 2012). It can be argued as being particularly valuable in Westminster systems where courts lack the power of judicial review to overturn legislation. That notwithstanding, the kernel of the value of dialogue lies mainly in its quality as a catalyst for legislative response to stands taken by courts. This is bound to be a useful tool in constitutional democracies where there is a need to consolidate international obligations of states through legislation. This is even more needful in Global South countries where the rule of law is tenuous, and the legislature and judiciary are often operating under the hegemony of the executive arm of government (Akinkugbe 2025: 381).

Along this line of discourse, the doctrine of separation of powers, with its divisions of the three branches of government (legislative, executive, and judicial) as a vital ingredient of the democratic ordering of states has called the justiciability of climate change matters into question. To this end, a bifurcation has occurred in analysis on the application of separation of powers to solving the climate crisis. On one end stand

advocates who argue for a judicial role in climate crisis. On the other end are scholars that favour legislative policy discretion. Proactive climate change litigation, which focuses on engendering policy change, especially raises the question as to what extent the judiciary can oblige the other branches of government to take urgent preventative action and to implement or adjust climate policies. As the doctrine of the separation of powers can be, and has proven to be, an impediment to judicial engagement, climate change litigation faces a dilemma between urgently needed measures against the serious threats of climate change on the one hand and compliance with the doctrine of the separation of powers on the other (Alogna & Ors 2024: 272).

The bifurcation above remains so due to the limitations of courts in climate governance. While it is true that courts fulfil a vital climate change governance role by ensuring that laws are observed, and that redress is granted where governments and private parties act outside the law, the role of courts are limited in a *stricto senso* governance sense. For instance, as Judge Glazebrook notes, courts are by their nature reactive rather than proactive (Glazebrook 2020). In addition, courts are limited in the sense that they mostly adjudicate on past events and, except for specialist environment courts, are not usually involved in assessing the future impact of current actions or in assessing scientific evidence in this regard. Furthermore, courts mostly rely on material, evidence and arguments presented before them by litigants which makes them institutionally unsuited to general policy design. The judicial process is by its very nature adversarial and does not allow for the views of all affected stakeholders to be presented.

One critical feature in the approach of national courts is the limitation to cases within their own borders. However, climate change has a transnational or transboundary effect and what is ideally required is global rather than purely national solutions. In this wise, some national courts have adopted a global approach towards climate action cases before them. In *Neubauer v Germany* (2021) the German Government pledged to swiftly adjust its climate change laws in response to the court's ruling. The court on its part agreed that, while Germany's 2% share of worldwide CO_2 emissions is only a small factor, it also stated that "if Germany's climate action measures are embedded within global efforts, they are capable of playing a part in the overall drive to bring climate change to a halt" (paragraph 2020).

While some have questioned the efficacy of climate change litigation as an effective tool in influencing policy outcomes and changing societal

behaviour (corporate, government, or otherwise), there have been notable instances of climate litigation moving the needle in governance (Glazebrook 2020; Bouwer & Setzer 2021). For instance, in *EarthLife Africa Johannesburg v Minister of Environmental Affairs* (2017), which was South Africa's first climate change-related judicial decision, the court considered the quality and form of climate change impact assessment required when a competent authority assesses an application for environmental authorization in South Africa. Notwithstanding the lack of an express legal obligation to conduct a focused climate change impact assessment, the court ruled that climate change is a relevant consideration when granting an environmental authorization, and a formal expert report on climate change impacts is the best evidentiary means to consider climate change impacts in their multifaceted dimensions. The court has so far made a meaningful contribution to climate change litigation, and also influenced governance in South Africa (Humby 2018; Chamberlain & Fourie 2024).

This case is one of the examples that showcases the potentials of climate litigation to affect the outcome and ambition of climate governance (Shukla & Ors 2022). It challenges states' responses and enforcement of climate commitments (Setzer & Higham 2022: 3). While climate litigation is not a silver bullet, it is a veritable tool, as its increasing use demonstrates, to peel back the uncharted terrain of creating universally agreed norms that will form the crucibles of accountability. Central to horizontal accountability at a government-to-government level are vibrant national courts that lean on each other's know-how. Judges in national courts may cross-fertilize ideas with each other. In this wise, Slaughter identifies an emerging cadre of global judges that realize the importance of cross-fertilization to address common problems plaguing a globalized world (Slaughter 2005: 66). Describing the phenomenon of "global judicialization" it is argued thus:

> One result of this judicial globalization is an increasingly global constitutional jurisprudence, in which courts are referring to each other's decisions on issues ranging from free speech to privacy rights to the death penalty. To cite a recent example from our own Supreme Court, Justice Stephen Breyer recently cited cases from Zimbabwe, India, South Africa, and Canada, most of which in turn cite one another. A Canadian constitutional court justice, noting this phenomenon, observes that unlike past legal borrowings across borders, judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue. … Chief Justice William Rehnquist now urges all US judges to participate in international judicial exchanges, on the ground that it is "important for judges and legal communities of different nations to exchange views, share information and learn to better understand one another and our legal systems".

As judges continue to interact and cross-fertilize to generate norms for their climate change action, at national and international level, it is expected that they acquire a practical understanding with which to determine existential problems particularly in the area of environmental governance and climate change. The environment and the complexity of its ramifications to the livelihood of the human being and the economic interests of governments and corporations continues to present unimaginable difficulties that are challenged in courts (Nwankwo & Mukoro 2025).

[D] EMERGING TRENDS FROM INTERNATIONAL COURTS: THE IACtHR AND THE ECtHR

Regional courts around the world are increasingly being viewed as platforms where climate litigants can seek remedy. In the past, these courts were approached by litigants from a purely human rights perspective. However, litigants have come to understand the power of a human rights framework as a tool to ensure the adherence of states to questions over the right to a healthy environment and most recently the quest for intergenerational equity to save the planet for future generations. In *La Oroya v Peru* (2023), the city of La Roya, which is populated by some 30,000, filed a suit challenging the activities of the metallurgical complex Complejo Metalúrgico de La Oroya (CMLO) which has been operating in this city. The applicants claimed that since 1922 its metallurgical activities have affected 30,200 hectares of vegetation, as well as the air, soil and water in La Oroya, causing it to be one of the 10 most contaminated cities in the word (paragraphs 76-84).[4] Out of the 80 alleged victims that filed the complaint case two of them lost their lives as a consequence of these health complications. Due to these claims established before the court, the State of Peru was found responsible for the violation of the rights to a healthy environment (RHE), health, personal integrity, life, access to information, political participation, children's rights, and the obligation of progressive development of Article 26.

In its landmark decision, the IACtHR applied an ecocentric approach by reinforcing the right to water free from pollution and the right to breathe clean air as substantive rights to a healthy environment. Furthermore, the court stated that the RHE should have the status of a

[4] Since at least the 1970s, several reports have warned about the dangers and risks that the activities of the CMLO meant for the health of La Oroya's population and environment, including the prevalence of respiratory diseases.

peremptory norm (Article 53 Vienna Convention on the Law of Treaties) of general international law (*La Oroya*: paragraph 129). According to the court, several states have recognized the right to a healthy environment on several occasions, which entails an obligation of protection for the international community as a whole. Flowing from the reasoning of the court, the international protection of the environment requires the progressive recognition of the prohibition of conducts that negatively affect the environment as a peremptory norm of general international law—a *jus cogens* norm.

Also noteworthy is the reference of the court on the importance of the legal expressions of the international community, whose superior universal value is indispensable to guarantee essential or fundamental values. Since the protection of "the interests of future and present generations", as well as the conservation of the environment against its degradation, are fundamental for the survival of humanity, the court suggests that the RHE should be considered as a *jus cogens* norm (Vera 2024).

Most recently, in 2024 the ECtHR had its hand forced by litigants seeking a clear and decisive statement on the impact of climate change, not just on current generations, but future ones too. In *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (2024), the ECtHR justified granting legal standing to the applicant non-profit association partially on the basis of the necessity to guarantee that future generations do not suffer from an absence of timely reaction today. The ECtHR emphasized that "members of society who stand to be most affected by the impact of climate change" are "at a distinct representational disadvantage" (paragraph 484). Consequently, collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes. Also, the detailed and interventionist European Convention on Human Rights Article 8-related positive obligations imposed on Switzerland in *KlimaSeniorinnen* were designed with an eye to avoiding a disproportionate burden on future generations. For that very reason, the ECtHR declared that "immediate action" ought to be taken and adequate intermediate reduction goals ought to be set for the period leading to neutrality (paragraph 549).

The submissions of the ECtHR in its judgment above has two implications. First, by attempting to clarify the importance of protecting future generations, the ruling of the court had two major implications: 1) the legal standing of non-profit associations, and 2) the positive

obligations under Article 8. Second, despite being a welcome development in climate change case law in the European region, the judgment by no means constitutes a ground-breaking change in future generations' legal situation (Brucher & De Spiegeleir 2024).

In *Duarte Agostinho and Others v Portugal and 32 Other States* (2024), six Portuguese youth filed a complaint with the ECtHR against 33 countries. The complaint alleges that the respondents have violated human rights by failing to take sufficient action on climate change and seeks an order requiring them to take more ambitious action. On 9 April 2024, the European Court declared the application inadmissible. With respect to extraterritorial jurisdiction, the court found no grounds to expand the judicial application as requested by the applicants. Territorial jurisdiction was therefore only established in respect of Portugal, and the complaint was declared inadmissible against other respondent states. Nonetheless, because the applicants had failed to exhaust domestic remedies in Portugal, the complaint against Portugal was also deemed inadmissible.

Perhaps, this is the most obvious proof of the ECtHR's attempt at self-preservation in the three 9 April rulings. The ECtHR decided simply not to address the individual applicants' victim status, as it was a complicated matter and that the ECtHR did not need to look at it. It has been argued that the reason why future generations received only slender room in the 9 April decisions was that these cases were never intended to be the panacea for all current and future generations' fate in the face of climate change. The court skilfully avoided the temptation to be viewed as a heroic figure of a saviour-like global climate change court (Brucher & De Spiegeleir 2024: 4). In reality, the ECtHR remains only one among many actors with a potential role to play in addressing climate change. Furthermore, while it is hard to disagree with the argument that future generations deserve equitable treatment, the first priority is to start to fine tune the practical implementations of this broad argument in the here and now.

[E] AFRICAN HUMAN RIGHTS SYSTEM AND AFRICAN STATES

Despite the emerging trends in other international courts, there is a paucity of jurisprudence from African regional courts. Spurred by international instruments, climate litigation continues to evolve in other jurisdictions. This is possible because judicial and quasi-judicial bodies at national, regional and United Nations (UN) levels are increasingly approached to

rule on various issues, including the relationship between climate change and the human rights of vulnerable populations and the adequacy or otherwise of states' efforts to adopt or implement domestic climate laws (Setzer & Benjamin 2019).

Under the African Human Rights system (AHRS), Article 60 of the African Charter on Human and Peoples' Rights (African Charter) lists the sources of African human rights law by providing that the African Commission on Human and Peoples' Rights (ACHPR) shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the UN, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialized agencies of the UN of which the parties to the African Charter are members. This serves as a statutory guide for courts and quasi-judicial treaty-monitoring bodies.

In addition to the African Charter, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention 2009), the African Charter on the Rights and Welfare of the Child (ACRWC 1990), and Maputo Protocol (2003) are significant. The treaty-monitoring bodies of the AHRS are the ACHPR, the African Court on Human and Peoples' Rights (African Court), and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Under this system, individual and interstate communications are possible before the Commission by applicants, including communities vulnerable to climate change under Article 56 of the African Charter; before the African Court under Article 6 of the African Court Protocol (1998), and before the ACERWC under Article 44 of the ACRWC.

Despite these robust treaties, African regional climate litigation focusing on human rights has been slow to emerge. There is no pioneering case on climate change at that level of accountability from the lenses of human rights. The future of this possibility is uncertain largely due to the history of clawback clauses and the disposition of African states to enforcement of the decisions of these judicial and quasi-judicial bodies (Mapuva 2016: 1-16; Jegede 2024: 57). Some of the critical provisions of instruments, such as Articles 6 (liberty and security of the person and freedom from arbitrary arrest), 8 (freedom of conscience), 9 (freedom of expression), 10 (freedom of association), 11 (freedom of assembly), 12 (exit and return to own country), 14 (right to property) and 24 (right

to satisfactory environments) of the African Charter all affect the right of African people to enjoy a healthy environment and the obligation on the part of states to respect, protect, promote and fulfil these rights. Other rights under the AHRS include Articles 7 (freedom of expression), 8 (freedom of association and peaceful assembly), 9 (freedom of conscience), 11 (education) and 13 (socio-economic rights of disabled children) of the ACRWC. These provisions, that may be relevant in climate litigation, are limited by clawback clauses which subject human rights provisions to the limitations of national laws and goals. This could serve as a stumbling block for potential climate change litigants (Jegede 2024).

As Jegede argues, human rights provisions under the AHRS accommodate clawbacks which may shape the application of litigants' climate claims, depending on the approach of the complaint mechanisms (Jegede 2024: 109). The purport of clawback clauses is to subject regional human rights provisions to the laws enacted by the parliament of a state party (Killander 2010: 388-413; Chirwa 2011). Furthermore, these clauses entail restrictions built into human rights provisions, most notably the African Charter. Thus they have the effect of permitting a state party to limit the relevant human rights provided for in a regional instrument to the extent permitted by a state party's domestic law (Singh 2010).[5]

The *acquis* of the AHRS contain several clawback clauses significant to climate change. For example, Article 6 of the African Charter on the right to liberty and security of the person and freedom from arbitrary arrest is to be enjoyed "except for reasons and conditions previously laid down by [national] law" of a state. Article 9(2) on the freedom of expression and the right to disseminate one's opinion is to be enjoyed "within the law" of a party. Freedom of association under Article 10(1) and the right to leave any country and to return to one's own country in Article 12(2) are guaranteed with a provision that one "abides by the law" of the relevant state party. Article 11 on the freedom of assembly is "subject only to necessary restrictions provided for by law, in particular, those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others".

In the same vein, the right to property under Article 14 of the African Charter is enjoyable only "in accordance with the provisions of appropriate laws". Regarding the ACRWC, Article 7 provides that the right of a child to freedom of expression is "subject to such restrictions as are prescribed

[5] Examples of these clawback clauses in other human rights regimes include clawback provisions found in Article 29(2) of the Universal Declaration of Human Rights on general limitations of rights, imposed by law; Article 19(3) of the International Covenant on Civil and Political Rights on the right to freedom of expression; and Article 10(2) of the ECHR on the right to freedom of expression.

by law". The right of the child to freedom of association and peaceful assembly under Article 8 is subject to "conformity with the law", and Article 9 on freedom of thought, conscience and religion is subject to "national laws and policies". Social economic rights of disabled children under Article 13 of the ACRWC are subject to available resources of state parties. The right of children to education under Article 11 is subject to minimum standards laid down by the states. The above provisions are likely to find application in climate litigation at the IACtHR. For instance, the right to liberty and security of the person and freedom from arbitrary arrest, the right to freedom of conscience, the right to freedom of expression, the right to disseminate one's opinion, and the right to freedom of association are useful for protests relating to climate change action or inaction of states in Africa (Jegede & Stoffel 2022; Jegede 2024).

It should be noted that some national courts have emerged to fill the gap of the regional system on climate change litigation. The database of the Sabin Center for Climate Change Law shows that African states have a minute number of climate change litigation cases. The database lists just 18 cases, with most from South Africa (10 cases), Nigeria three, Kenya two, Uganda two and Namibia just one case (Sabin Center 2025). With Africa as one of the most vulnerable regions in the world to climate change, it is expected that climate litigation would have proliferated considerably there, but this is not the case as African climate change litigants face various obstacles. These obstacles include, but are not limited to, weak legislative frameworks, procedural issues such as *locus standi*, slow judicial processes, and limited financial resources that stifle access to justice for climate litigants (Nwankwo 2019; Ekhator & Okumagba 2023)

Such situations typically impede prospective litigants from exhausting domestic remedies, not to mention the AHRS. Also, climate change in the African context has most probably been a secondary consideration compared to broader and more commonplace environmental disputes placing more emphasis on natural resources, land or property rights (Suedi & Fall 2024: 146-159), conservation and environmental protection in general. A recent example is the Ogiek case before the African Court (*African Commission on Human and Peoples' Rights v Republic of Kenya* 2017). On 26 May 2017, the court issued the historic judgment that the Kenyan government (the state) had violated seven articles of the African Charter by evicting the indigenous Ogiek people from their ancestral land in the Mau Forest. That decision ordered the Government to take all appropriate measures to remedy the violations and stipulated that the issue of reparations would be decided separately. After multiple delays

owing to the Covid-19 pandemic, on 23 June 2022, the court issued a final decision on reparations.

Promisingly, the global climate litigation movement before regional and international courts and tribunals is likely to arrive on Africa's doorstep in the near future. In December 2024, about 100 countries and 12 international organizations presented oral arguments before the International Court of Justice (ICJ) at The Hague on the question of the legal responsibility of states in matters of climate change. The ICJ is being asked to issue an opinion on what the legal obligations are of states to safeguard the climate system from GHG emissions, and the legal consequences when these emissions cause significant harm. Each country, regional group and organization that made written submissions was invited to make a 30-minute statement, with hearings spanning 2–13 December 2024. The African Union (AU) made a regional submission, with individual state submissions submitted by the Democratic Republic of Congo, Tonga, Sierra Leone, Namibia, Madagascar, Cameroon, Ghana, South Africa, Mauritius, Egypt, Kenya, Seychelles, The Gambia, and Burkina Faso (Rumble 2024).

The case was led by the Pacific island nation of Vanuatu, who were able to persuade members of the UN General Assembly to pass a resolution calling for an advisory opinion from the ICJ in 2023 (Setzer & Higham 2024).[6] The request for an opinion asks the court to consider the full suite of international law, including both treaty law like the Paris Agreement and UN Framework Convention on Climate Change, as well as "customary international law" and how it applies to all states across the world in a myriad of different contexts. The AU asked the court to recognize that states have preventative duties under customary international law not to harm the climate system. The AU also argued that states have a customary international law "due diligence" duty to urgently phase out fossil fuels and ensure a just transition. There is also a duty to allocate the burden of emissions reductions asymmetrically and fairly between them. The court is due to make a ruling during the course of 2025. Although not itself legally binding under international law, the advisory opinion will likely be cited in climate lawsuits around the world, including in regional and

[6] The ICJ, the world's highest court, was asked to consider the question of climate change. The request for an advisory opinion was made by a group of 18 states led by the small island nation of Vanuatu. It took above three years to be tabled, in part because standing rules mean that requests for such opinions can only be brought by public international bodies, and therefore require a broad base of support among member states. On 29 March 2023, the UN General Assembly unanimously adopted a resolution to ask the ICJ for an advisory opinion on climate change. The resolution asks the ICJ to clarify the duties of states to protect the climate system and the rights of present and future generations from climate-induced harms, as well as the legal consequences for states that have caused significant climate harm to the planet and its most vulnerable communities.

national courts, and would carry strong precedential weight before any judge. The above reflects a new dawn for the regional climate change litigation system and even at national level.

[F] FUTURE OUTLOOK AND CONCLUSION

Courts and judges serve an important purpose as a "rhetorical" force for climate change litigants. Crucial cases at the international, regional and national levels have brought important developments in climate change mitigation and adaption. A lot of these cases can be classified as being "strategic", meaning that they are filed with the aim of influencing the broader debate around decision-making with climate change relevance. The climate litigation trend positions judges and courts as governance actors in a just transition. It has sparked a flurry of analytical and archiving activity, including legislation and case law databases offering a novel approach to change and impact the dynamics in the battle against climate change. The rapidly developing theory and practice of climate litigation holds out that courts and other quasi-judicial forums provide an independent, non-political public forum to ventilate concerns and allow for claims to be heard and determined. Proponents of the climate litigation trends hold out that legal advocacy can provide a mechanism for dialogue and awareness, draw attention to regulatory options and debates, and push policymakers and regulators to fill gaps in climate change policies, laws and actions.

The climate litigation trend opens up a new legal terrain, encouraging courts to hold their governments and corporate actors to account to ensure that climate change commitments are given practical and enforceable effect. Key actors (the executive branch of the state and, to some degree, multinational corporations) are now held accountable for climate mitigation or adaptation failures. Courts are increasingly being approached by climate litigants and that may augur well for defining standards and norm generation. As such, judges may be required to draw on a wide collection of legal principles to adjudicate climate litigation, taking inspiration from other areas of law and applying old law in new ways. International courts in Europe and North America have the highest potential. Regional courts under the AHRS may be hamstrung by clawback clauses, nonetheless national courts can fill the gap by being braver. It should, however, be noted that courts can be limited too, so judges have an important role in leveraging activism as Africa is a promising regional venue for climate change-related complaints—not least because it is distinctively vulnerable to climate harms.

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