

POLICY BRIEF

CLIMATE CHANGE LITIGATION AND ADVOCACY



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INTRODUCTION

Climate Change Litigation has become a powerful tool that is being used by communities, young people, children, women, activists, and civic society organizations to hold states and corporations accountable for climate change impacts as well as to raise the ambition of their commitments to addressing climate change. The focus of this briefing paper is to enhance the Zimbabwean community's understanding of climate litigation as a tool for environmental protection. The paper will also explore the potential of climate change litigation in Zimbabwe and make necessary recommendations.

BACKGROUND AND CONTEXT

The world is facing unprecedented environmental crisis. It is now beyond doubt that climate change is a global crisis. Climate change interacts with poverty, conflict, resource depletion and other factors to cause or exacerbate food insecurity, loss of livelihoods, infrastructure breakdown and loss of access to essential service including electricity water, sanitation, and health care. The human activities that have the largest impact on earth's climate are burning of fossil fuel and biomass, deforestation, and industrial agriculture. Human activities such as burning fossil fuel (coal, oil and natural gas, deforestation and industrial agriculture are changing the earth's climate, destabilizing the climate system. With continued economic growth, high energy and resource consumption in wealth nations and the world population expected to exceed nine billion by 2050, it is expected that these impacts will worsen.

Climate change is having a major impact on the realization of human rights. Among the human rights that are threatened and violated are the rights to life, health, food, water, sanitation, a healthy environment, an adequate standard of living, housing and property, self-determination, development, and culture. The adverse impacts of climate change disproportionately affect people living in poverty whose contribution to the problem is minimal and who lack the resources to protect themselves or to adapt to the changes. Unfortunately, the global crisis affects most the poor and already vulnerable communities. Economically privileged 50% of the countries are responsible for about 86% of the cumulative global carbon dioxide emissions, while the economically vulnerable economies are responsible for only 14%.

Groups, individuals, and non-governmental organisations are turning to court to influence the adoption of higher level of mitigation ambition, new rules and more effective implementation and compliance with the existing ones. This is because climate change litigation provides an avenue to address inadequate responses by governments and corporations to the climate crisis.



STATE OF GLOBAL CLIMATE CHANGE LITIGATION

According to the global climate change litigation report produced by United Nations Environment Program and Sabina Centre for Climate Change as of 31 December 2022 there are 2 180 cases that have been filed in 65 Jurisdictions, and international or regional courts, tribunals, quasi-judicial bodies, and other adjudicatory bodies. The majority of these cases have been filed in the United States of America. Only 658 cases have been filed in other jurisdictions combined.

Historically, climate change litigation was targeted at multinational companies in the oil and gas industries because of the role they play in producing greenhouse gas emissions. The initial claims that were filed before the courts were based on claims for damages against the big extractives industries companies in different parts of the United States of America. It was difficult to get results of these early cases filed due to the challenges of proving the causal link between the alleged harm and the company's greenhouse gas emissions. Over time, claimants, non-governmental organizations have found alternative ways of bringing about cases by changing cause of action and the relief sought.

Much of the success to climate change litigation around the world is accredited to the foundation that was laid by the Urgenda Foundation case against the government of Netherlands. This was a landmark case where the court delivered a remarkable judgement ordering Netherlands to limit its greenhouse gas emissions. These judgements influenced at least other four European countries to deliver judgements that hold states responsible for mitigating greenhouse gas emissions. The countries include Ireland, France, Germany, and Belgium. National courts in these countries have held that governments failed to implement climate commitments. Litigants have also proceeded to file cases against corporations to hold them accountable for their business activities which contributes to climate change impacts.

The global trends clearly demonstrates that citizens and groups are turning to climate change litigation to find solutions to climate change challenges. An analysis of the cases that have been before different adjudicatory bodies show the following trends as highlighted in the Global Litigation report of 2023.

Global Trends

- The use of climate rights in climate change litigation.
- Domestic enforcement.
- Keeping fossil fuel and carbon sinks in the ground
- Corporate liability and responsibility.
- Failure to adapt and the impact of adaptation.



CLIMATE CHANGE LITIGATION IN AFRICA

Climate change litigation has been defined as claims that expressly raise an issue of fact or law relating to the causes or impacts of climate change. The need to tackle climate crisis has seen an exponential increase in the number of climate change cases that have been filed globally. However, they are very few cases that have been filed to date in Africa. This is so even though Africa is one of the most vulnerable continents in Africa.

However, this is expected to change over the next few years as it predicted that they will be an increase on the number of cases that will be filed on the continent to hold companies and states accountable for climate change impacts. Few cases in the continent can be attributed to weak and functionally non-existent legislation frameworks in relation to climate change. Further, prospective claimants in Africa face many challenges such as standing and limited access to resources as well as reprisals from their governments. For instance, research done in Ghana revealed that climate change issues appear to be on the periphery and not at the centre of litigation, a trend generally that is within the global south.

There have been a few significant cases that have been filed in Africa that are related to climate change. The cases filed mainly focuses on environmental impacts assessments and a human rights-based approach. The environmental impact assessments climate change disputes centre around the construction of coal fired plants. In the Save Lamu the applicants argued that the respondents failed to conduct a proper environmental impact assessment and such conduct would contribute adverse impact on human health and biodiversity loss caused by climate change. The Tribunal ordered the Power company to conduct a new environmental impact assessment that takes into consideration climate change. In South Africa in the Earth life Africa Johannesburg challenging a new coal fired project license authorisation the applicants argued that the environmental impact assessment failed to take into consideration climate change related consequences of the project.

Cases in Africa are likely to be subsumed within broader environmental litigation cases. Climate change cases will find traction in the continent if they are rights-based cases. This is essential because countries that lack an enforceable climate framework, courts have been asked to bring other norms to bear including constitutional and human rights.

In Africa there are very few cases that have been reported. Most the cases on the online databases are from South Africa, Kenya and a few from Uganda and Nigeria.

Trends in Africa

- Environmental Impact Assessment Challenges over construction of coal fired plants
- Constitutional and Human Rights based approach relying on the Bill of rights.
- Compensation against the state for violation of obligations
- A new trend on using shareholders in emerging in South Africa

POSSIBILITIES AND POTENTIAL FOR CLIMATE CHANGE LITIGATION IN ZIMBABWE

Environmental Impact Assessment

Environmental Impact Assessment process in Zimbabwe is governed by the Environmental Management Act. The Act stipulates a number of projects which requires an impact assessment before implementation of the project. The process itself is provided for in section 97 of the Environmental Management Act. In carrying out the assessment several factors should be considered including the social, economic, cultural, and environmental impact of the project. Failure to properly consider the climate change impact of a prospective project can be challenged using the provided avenues. This is an avenue that has not yet been explored in Zimbabwe even though over the past few we have had many coals fired projects that have been commissioned in the country. Hwange for instance is one area in Zimbabwe where the government has been issuing out special grants for investors to mine coal. Recently the government of Zimbabwe commissioned two extension stations to the Hwange thermal power station. This was not in any way challenged by individuals and non-governmental organisations in the country. Green Governance proposes to establish an environmental impact tracker in Zimbabwe which will enable the organization to follow up on all the upcoming projects with a view of assessing if climate consideration is being given due weight.

HUMAN RIGHTS BASED CLIMATE CHANGE LITIGATION

Human rights approach is one of the most promising avenues that can be used to tackle climate change challenges in Zimbabwe. The Constitution of Zimbabwe provides a comprehensive bill of rights which can be utilized in climate change litigation. They are several rights in the Constitutional that can be used by non-governmental organizations and individuals to hold corporates and states accountable. Some of the rights that are relevant to climate change includes environmental rights, right to life, right to food, right to water, procedural rights such as access to information and administrative justice. The potential that these rights possess is enormous in climate change litigation.

CLIMATE COMMITMENTS

Zimbabwe is signatory to the climate change regime including the United Nations Framework Convention on Climate Change, Kyoto Protocol and Paris Agreement. These multilateral environmental agreements create obligations and commitments for the country. Failure to comply with these commitments can be used as avenue for climate change litigations. The source of Zimbabwe 's climate change commitments for state is nationally determined contributions(NDCs). These are targets that country sets for itself and should held accountable for implementation and enforcement of the contributions. It is also imperative to check Internally Displaced People and Disaster Management

In recent years the country has suffered disasters like floods due to the climate change. This has resulted in loss infrastructure, human lives, and properties. It can be argued that the state has obligations to put in place measures to evacuate and warn people to vacate before the disaster strikes. In situations where the state fails to discharge its mandate properly cases of this can be filed. There is a pending case in Uganda that relies of this argument, and this can also be used in Zimbabwe.

DELICTUAL CLAIMS

Zimbabwe civil law provides for remedies in case of negligence on one part. This can formulate a course of action in cases where the state or private company conducted itself in a negligent manner result in harm induced by climate change. Delictual damages are well established in Zimbabwe however, they have not been tested when it comes to climate change litigation.

CONCLUSION

The socio-economic development plan for Zimbabwe sets it to be an upper middle-income country by 2030. This process means the country must invite investors and improve different sectors that have climate change impacts. To that end, the room for climate change impact will only improve. The impact of climate change by both state and private business activities creates room for more climate change litigation. In the case of Zimbabwe climate change litigation is an unchartered route that needs to be explored.

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