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The Tide of Climate Litigation Is upon Us in Africa

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The now-familiar Black Lives Matter chant, 'I can't breathe' brought me back to the small smoke-filled, apartheid-constructed village of my youth. Countless black children – in my village and others like it – developed respiratory problems as a direct consequence of their exposure to toxic pollution in their homes, which were placed near coal-fired factories as a result of apartheid planning. Some nights, as I struggle to breathe, I lie awake thinking about the inequality exacerbated by fossil fuel pollution, the harms generated by fossil fuel companies, and governments' obligations to protect the right to a healthy environment. Though environmental degradation and climate change dramatically impact the lives of Indigenous and local communities throughout Africa, the connection between human rights, climate change, and the protection of ecosystems has only recently gained more widespread recognition. In this chapter, I will offer some reflections on several key climate cases in Africa that highlight local community struggles and how the lines established by precedent have been drawn in this issue area. This chapter will emphasize these developments in the context of the current planetary crisis, and it will conclude with some thoughts on where climate litigation in Africa will go from here.

21.1 INTRODUCTION: SIMULTANEOUS CRISES EXACERBATE VULNERABILITY

A confluence of crises – namely, the climate crisis, the current economic and health crises, systemic racism, and patriarchy – are rocking countries and communities around the world and generating massive turbulence. The COVID-19 pandemic, in particular, has dramatically exacerbated existing inequalities and injustices in Africa and around the world, including poverty, hunger, unemployment, disease and illness, conflict, and climate vulnerability. At the onset of the COVID-19 pandemic, the UN estimated that half a

https://doi.org/10.1017/9781009106214.026 Published online by Cambridge University Press

billion people, or 8 per cent of the global population, could have been pushed into destitution by the end of 2020.[1] The World Food Programme predicted that the number of people facing hunger would double to over 250 million and the projected deaths due to hunger would rise to 30 million by the end of 2020.[2] The International Labour Organization reported recently that 1.6 billion workers in the informal economy – nearly half of the world's total workforce of 3.3 billion – 'stand in immediate danger of having their livelihoods destroyed'.[3] All of this is occurring on top of existing vulnerabilities. Many communities in Africa, for example, are already vulnerable for a host of reasons, including the decimation of ecosystems and high levels of extractive activities. Moreover, the COVID-induced economic collapse around the world, including in Africa, raises the risk that future debt and conditional loans will sustain and accelerate the extractive economic model common throughout Africa. This will increase the threat to communities and to the planet.

The climate crisis, thus, overlaps with and exacerbates existing crises, with mutually reinforcing results. As the world has awoken to the existential threat posed by climate change, advocates have increasingly turned to litigation to spur action on climate change. In Africa, climate litigation is a key and developing strategy that is gaining increasing traction. Communities that have relied predominantly on organizing and resisting economic development projects that harm communities and the environment are now also exploring litigation as part of a broader strategy to secure their rights and the protect the environment in which they sustain themselves. Litigation provides communities with hope and inspires other communities to take action, though the implementation of court decisions remains a massive challenge. This chapter explores some of the precedent-setting climate cases in Africa.

21.2 ENVIRONMENTAL RIGHTS AND SUSTAINABLE DEVELOPMENT: OVERVIEW

The protection and promotion of human rights, including, in particular, environmental justice, on the African continent faces a number of challenges.

[1] See Andy Summer et al., 'Estimates of the Impact of COVID-19 on Global Poverty' (2020) WIDER Working Paper 2020/43.

[2] Remarks by David Beasley, UN World Food Programme (WFP) Executive Director, at the UN Security Council on the Maintenance of International Peace and Security, see 'Protecting Civilians Affected by Conflict-Induced Hunger', World Food Programme, 21 April 2020, <https://www.wfp.org/news/wfp-chief-warns-hunger-pandemic-covid-19-spreads-statement-un-security-council>.

[3] 'ILO: As Job Losses Escalate, Nearly Half of Global Workforce at Risk of Losing Livelihood', ILO, 29 April 2020 <https://www.ilo.org/moscow/news/WCMS_743036/lang–en/index.htm>.

https://doi.org/10.1017/9781009106214.026 Published online by Cambridge University Press

Yet sustainable development is not possible without a rights-based approach that incorporates the right to a healthy environment and recognizes that climate change threatens human rights. Likewise, any approach to climate change mitigation and adaptation must incorporate a human rights–based approach.

Globally, the need for an environmental rights–based approach to sustainable development, founded on principles of equity, has received increasing attention. Nevertheless, substantial impediments continue to hamper the full development of this approach. Private and government actors are still at significant odds with environmental human rights activists, and threats made to the lives of environmental defenders continue to grow. Additional roadblocks include states' corruption, ineffective institutional coordination, lack of policy coherence at the international and local levels, improper policy and legal implementation at the domestic level, and the ongoing and unprecedented rate of natural resource degradation and depletion.

The need to incorporate environmental rights into sustainable development discussions mirrors the need to broaden discussions of human rights to include the right to a clean and safe environment, the right to act to protect the environment, the right to information, and the right to participate in decision-making.

There is, moreover, a growing recognition that climate change is a human rights issue, given that climate change threatens people's rights to life, natural resources, culture, basic social services, and development, particularly in developing countries. If business continues as usual and the global community continues to take grossly inadequate action on climate change, the unprecedented threat posed by climate change to human rights will only grow. Climate action must be prioritized.

Given the monumental threat to human rights posed by climate change, the approach adopted to address the climate emergency (now, more than ever) must be based on a global rights perspective that considers obligations, inequalities, and vulnerabilities and seeks to redress discriminatory practices and unjust distributions of power. This approach must address adaptation to the impacts of climate change as well as mitigation, as it is becoming increasingly clear that certain climate impacts are inevitable regardless of carbon emission reductions. Priority areas for climate adaptation include ecosystem-based adaptation, traditional knowledge, analysis and networking, and access to adaptation finance.

Integrating human rights into action and policies on climate change and empowering people to participate in policy formulation will help states promote sustainability and ensure the accountability of all duty-bearers.

And yet achievement of these twin aims has been hampered by the fact that states have not made their adaptation and mitigation plans sufficiently available to the public. Successful rights-based climate change mitigation and adaptation efforts will depend on accurate and transparent measurements of greenhouse gas emissions and climate impacts, including human rights impacts.

21.3 ENVIRONMENTAL AND HUMAN RIGHTS: THE AFRICAN CONTEXT

In Africa, generally, environmental human rights at the regional level are defined by the poor management of resources, unequal access to and ownership of resources, weak environmental laws that are subject to manipulation by the executive, lack of implementation of these laws, inability to integrate legal obligations into public policies and programmes, and lack of state accountability in the use of natural resources and political power to frustrate environmental policies and programmes.

In addition, African states continue to deny people decision-making authority over their resources, marginalize pastoral and rural communities, and fail to acknowledge the role of women as environmental managers and/or include women in the conceptualization, development, and execution of programmes. This is in spite of the fact that domestic and international tribunals in the region have concluded that the failure to protect the environment may violate human rights and the collective rights of Indigenous people over their ancestral land and resources.

These specific challenges to a rights-based approach to environmental and climate management are compounded by structural features of African society. Patriarchy, for example, is deeply entrenched structurally and enforced. Women are burdened by unpaid care work, the costs of healthcare, unequal pay, and lack of access to the means of production. These disproportionate burdens are often entrenched through tradition and by state laws and practice. Indigenous communities, moreover, continue to struggle to reclaim their land or avoid expulsion from their land for the purpose of economic exploitation. Indigenous communities also continue to push for recognition for themselves and for the traditional knowledge they carry.

In Africa, much work needs to be done to integrate rights into environmental and climate frameworks. This work can't wait, as this is no ordinary time. We are in the midst of the sixth mass extinction of life on Earth, which therefore necessitates bold, transformative cooperation and collective organizing to protect people's rights, ecosystems, and the planet.

Communities in Africa have increasingly turned to courts as part of their strategy to stop rights violations and to protect their territories. They have also looked to international legal frameworks for relief. The next several sections explore certain relevant international legal frameworks and examine several African cases related to rights-based environmental and climate management.

21.3.1 *International Legal Frameworks*

In a number of instances, communities have limited success in protecting their rights and the environment as a result of challenges with domestic laws and the implementation of those laws by governments. In these cases, Indigenous peoples and local communities have fought hard to secure their rights at the regional and international levels. This section will focus on environmental or climate-focused international legal frameworks and how they impact Indigenous communities. Decades of commitment, tenacity, personal sacrifice, and well-executed negotiating strategies have led to important rights gains and legal recognition, including, perhaps most significantly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) and the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (2018). While securing these legal frameworks at the international level was undoubtedly an achievement, the challenge now often lies at the national level, where many communities are still not recognized and land dispossession has, too frequently, not been addressed.

The United Nations Declaration on the Rights of Indigenous Peoples provides for the protection of land and natural resource rights. The UN Convention on Biological Diversity's (CBD) Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits seeks to ensure the sustainable use of biodiversity's components and the fair and equitable sharing of the benefits of genetic resources. The Paris Agreement of the United Nations Framework Convention on Climate Change (UNFCCC) highlights (in its preamble) that climate action should respect and promote human rights and the rights of Indigenous peoples.[4] These legal frameworks have been successfully incorporated into legal challenges and negotiations with governments who have signed onto these conventions and protocols. They provide an additional layer of accountability and protection

[4] See Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, TIAS No. 16-1104, Preamble.

and are used in particular to support people's rights and environmental protections provided under state constitutions.

South Africa, for instance, voted for UNDRIP and has signed and ratified CBD, UNFCCC, and the Paris Agreement. The South African government is therefore obliged to comply with these instruments, namely, by incorporating these international obligations into their national laws.[5] In the larger Southern African context, Indigenous communities currently face drastic social change, extreme marginalization, and poverty.[6] These communities tend to have the lowest health and nutritional outcomes, the highest rates of unemployment, illiteracy, and mortality, the shortest life spans, the lowest incomes, and the lowest degrees of political participation.[7] The COVID-19 pandemic is, in manifold ways, exacerbating these issues for Southern Africa's Indigenous peoples, some of whom are already struggling for state recognition and grappling with issues around access to their land and the natural resources and benefits that derive from it.

21.4 EXAMPLES OF CLIMATE-RELATED CASES IN AFRICA

21.4.1 Save Lamu & Five Others *v.* National Environmental Management Authority & Another

On 26 June 2019, the National Environment Tribunal delivered an important decision revoking an Environmental Impact Assessment (EIA) License issued to Amu Power Company Limited for the development of Kenya's first coal-fired power plant – a 1050MW plant to be located on the seashores of the climate-sensitive Lamu County. The long-awaited decision followed an appeal first filed on 7 November 2016 by Save Lamu, a community-based organization, and five Lamu residents, together representing the interests of the vibrant and diverse community that has called Lamu Island home for centuries. Lamu was previously declared a World Heritage site.

The judgment asserts the centrality of community voices in decision-making processes, emphasizing in particular the participation of those communities

[5] See Cath Traynor et al., 'Protecting and Promoting Indigenous Peoples Rights in Academic Research Processes', Natural Justice, February 2018 <https://naturaljustice.org/wp-content/uploads/2018/06/Protecting-Promoting-Indigenous-Peoples-Rights-English.pdf>.

[6] See Jennifer Hays and Megan Biesele, 'Indigenous Rights in Southern Africa: International Mechanisms and Local Contexts' (2011) 15 *International Journal of Human Rights* 1.

[7] See Robert K. Hitchcock and Lola Garcia-Alix, 'Report from the Field: The Declaration on the Rights of Indigenous Peoples: Implementation and Implications' (2009) 4 *Genocide Studies and Prevention* 99.

that are most affected by such harmful development choices. It equally highlights key aspects of effective public participation, underscoring the importance of access to information and the role played by the environmental regulator in facilitating participation and ensuring that environmental licences contain adequate measures to mitigate harmful environmental impacts.

Notably, the Appellants argued that the project would breach Kenya's obligations under the UNFCCC's Paris Agreement and that the project was inconsistent with Kenya's low-carbon development commitments. Amu Power, on the other hand, argued that it had included climate mitigation and adaptation measures in its Environmental and Social Impact Assessment (ESIA) Study. Amu Power further argued that the Appellants had not shown exactly how the Kenyan government would violate its international obligations and that the Paris Agreement only came into force after the ESIA Study had been concluded and the ESIA License issued, therefore rendering it inapplicable.

In terms of domestic climate legislation, Kenya had passed the Climate Change Act in 2016. In its decision, the Tribunal stated: 'Climate Change issues are pertinent in projects of this nature and due consideration and compliance with all laws relating to the same. The omission to consider the provisions of the Climate Change Act 2016 was significant even though its eventual effect would be unknown.'[8]

The Tribunal applied the precautionary principle and explained that where there is a lack of clarity on the consequences of certain projects, it behooves regulatory bodies to reject those project proposals as a precaution. Amu Power conceded that while they had sections on climate change, they had not considered the provisions of the Climate Change Act, which was in force by the time that they were preparing the ESIA. They argued, however, that the consequences of their failure to consider the Climate Change Act and Kenya's obligations under the Paris Agreement would be unknown (especially because the Paris Agreement was only concluded in November 2016, and Save Lamu had not demonstrated how the coal plant might impact these commitments). The Tribunal nevertheless rejected the argument that it was acceptable to omit detailed climate impact assessments due to the uncertainty around impacts.

21.4.2 Earthlife Africa Johannesburg *v.* Minister of Environmental Affairs & Others

This case was brought by Earthlife Africa, as represented by the Centre for Environmental Rights, and challenged the construction of a coal plant on

[8] *Earthlife Africa Johannesburg* v. *Minister of Envtl. Affairs* 2017 (2) All SA 519 (GP) (S. Afr.).

https://doi.org/10.1017/9781009106214.026 Published online by Cambridge University Press

climate change grounds. The Chief Director of the Department of Environmental Affairs authorized, under the National Environmental Management Act, 107 of 1998, the construction of a 1,200MW coal-fired power station (Thabametsi) near Lephalale in the Limpopo Province without the benefit of a climate impact assessment to inform his decision. The application raised concerns about the environmental impacts of that decision.

Earthlife pursued judicial review of the decisions of the Chief Director and the Minister of Environmental Affairs. Earthlife argued that the Chief Director was obliged to consider the climate change impacts of the proposed power station before granting the authorization, which he failed to do. Coal-fired power stations are the single largest national source of greenhouse gas emissions in South Africa. Thabametsi's own reports indicate that the power station, if it proceeds, would have an operational lifespan of forty years. It would emit 8.2 million tons of carbon dioxide equivalent each year, thereby contributing up to 2 per cent of South Africa's total GHG emissions by 2020 and up to 3.9 per cent by 2050.

On 8 March 2017, the High Court in Pretoria confirmed that climate change poses a substantial risk to sustainable development, which is enshrined in the South African Constitution as an environmental right. The Court also found that adequate consideration of climate change forms part of the principle of intergenerational justice. The decision-maker should thus have given proper consideration to the climate change impacts of the proposed coal-fired power station before making a decision on the application. The case sets an important precedent, challenging decisions that rely on outdated energy policies to support new coal development and applying international agreements in the local context. While the decisions are being challenged, the construction of the plant, and the emissions associated with its operation, has been suspended.

21.4.3 Philippi Horticultural Area Food & Farming Campaign & Another *v.* MEC for Local Government, Environmental Affairs & Development Planning: Western Cape & Others

The Philippi Horticultural Area (PHA) is a 120-kilometre radius of farmland and wetland that has been the city of Cape Town's primary source of fresh produce for over a century. The success and climate resilience of the PHA is due, in part, to the Cape Flats Aquifer, which makes the area cooler and more resistant to drought.

For a long time, the city did not approve any developments that encroached into the PHA. However, as urban sprawl increased, the city's resolve

diminished. Relying upon misguided and inaccurate studies, the city of Cape Town approved development proposals that would move its urban edge to incorporate productive farmland. The two proposed developments would eliminate one-third of the farmland, resulting in a loss of 4,000 jobs and 150,000 tons of annual vegetable and flower production, not to mention millions of rand in economic losses.

The PHA Food & Farming Campaign, a grassroots organization, took the matter to the Western Cape High Court. That court determined that, while there were groundwater, freshwater, and stormwater impact assessments, there was no specialized aquifer impact assessment. Moreover, the impact assessments already completed were outdated. Judge Savage, in her judgment, stated: 'What was required was a more recent assessment of the health of the aquifer and the impact that the proposed development will have on the aquifer given climate change and water scarcity in the area.'[9]

This case marks the first time a judge has instructed a city or a municipality in South Africa to take into account water scarcity and the importance of the water supply in light of climate change for development planning. The court determined that neither the city of Cape Town nor the Western Cape provincial government considered the full impact of the development projects on the Cape Flats Aquifer. The High Court suspended and sent back the development decisions for reconsideration, specifically instructing reconsideration of the rezoning permission and the environmental authorization.[10]

[9] *Philippi Horticultural Area Food & Farming Campaign* v. *MEC for Local Gov't, Envtl. Affairs Dev. Planning* 2020 ZAWCHC 8 (High Court Western Cape Division) (S. Afr.).

[10] *Sustaining the Wild Coast and others* v. *Shell*. In November 2021, Shell made its announcement that it would commence seismic surveys off the wild coast, covering an area of about 6,011km^2 on the East Coast of South Africa. At the end of 2021, various civil society organisations and Indigenous and local communities brought two court applications challenging Shell's plans to undertake seismic surveys off the east coast of South Africa. Natural Justice and others challenged the government of South Africa and Shell based on the current climate crisis, the impact on the ecosystem and on communities who are culturally and spiritually connected to the land and the ocean. On 28 December 2021, the Grahamstown High Court ordered Shell to stop the seismic surveys. Shell has been interdicted pending the finalisation of Part B of the application. This was a massive victory for the communities. Some of the key issues were the legality of conducting a seismic survey without environmental authorisation, violations of communities constitutional rights, inadequate public consultation and the point that the ocean is common heritage. In the judgment, free prior informed consent, the precautionary principle, understanding of meaning participation, and the cultural and spiritual connection were all reinforced. The legal teams from Richard Spoor Attorneys, Cullinan and Associates, Legal Resources Centre and Natural Justice worked together to stop Shell.

21.4.4 *Sustaining the Wild Coast and Others v. Shell*

In November 2021, Shell announced that it would commence seismic surveys off the Wild Coast, which comprises an area of about 6,011 km2 on the East Coast of South Africa. At the end of 2021, various civil society organizations and Indigenous and local communities filed two court applications challenging Shell's plans to undertake these seismic surveys. Natural Justice and others specifically challenged the South African government and Shell using arguments based on the current climate crisis and the impacts on ecosystems and communities who are culturally and spiritually connected to the land and the ocean. On December 28, 2021, the Grahamstown High Court ordered Shell to halt the seismic survey plans, pending the finalization of part B of the application to the Court.

This was a massive victory for the communities involved. The key issues included the legality of conducting a seismic survey without environmental authorization; violations of communities' constitutional rights; inadequate public consultation; and the common heritage of the ocean. The Court, in its judgment, reinforced the importance of free, prior and informed consent; the precautionary principle; participation; and the cultural and spiritual connection of local and Indigenous communities with the land and ocean.

21.5 CONCLUSION

These cases and a few others are beginning to set precedents that give hope to communities as they challenge and win battles against multinational corporations and governments. In the case of *Baleni & Others* v. *Minister of Mineral Resources & Others*, for example, the Pretoria High Court ruled in favour of the Xolobeni community. The High Court ruled that the Minister of Mineral Resources must obtain the full and formal consent of the Xolobeni community before granting mining rights.

Communities in Africa, like those throughout the rest of the world, are living through very uncertain times. Economies are collapsing, unemployment rates are skyrocketing, hunger is increasing exponentially, and the current droughts and anticipated cyclones continue to endanger communities. It is past time for transformed, people-centred solidarity economies that finally address this injustice and inequality.

Communities in Africa have, moreover, been inspired by climate litigation victories around the world, including more recently in Colombia, New Zealand, Pakistan, India, South Africa, Kenya, and the Netherlands, and the momentum for climate litigation is starting to grow across Africa.

Strategic climate litigation is one avenue communities can pursue to challenge corporations and governments. While it is time- and resource-intensive, it draws a line in the sand and helps create a barrier to stop rights violations and fossil fuel extraction. Each victory produces a ripple effect that reaches communities in Africa and the boardrooms of multinational companies. As communities become more aware of the law, they are better positioned to use it, shape it, and challenge it. Court victories, moreover, make a difference in people's lives when attention is paid to implementation. Though times are uncertain, we can be sure that people, when equipped with the right tools, will stand up for their rights.

As the importance of human rights and a rights-based approach within climate and sustainable development discourse is increasingly recognized, climate litigation is more and more seen as a critical part of the strategy for climate action in Africa. As coal, oil, and gas extraction continues to be supported by financiers and facilitated by governments in Africa, communities are increasingly supported by human rights and environmental lawyers in Africa, with the knowledge that the tide will eventually turn. On the 8th of October 2021, the UN Human Rights Council adopted resolution 48/13 recognizing the right to a clean, healthy and sustainable environment as an international human right. This is a breath of fresh air for the environmental and human rights movement: the air we breathe, the food we eat, the water we drink, and our health, wellbeing, and survival all depend on a clean, healthy and sustainable environment.