

SYMPOSIUM ON JACQUELINE PEEL & JOLENE LIN, “TRANSNATIONAL CLIMATE LITIGATION: THE CONTRIBUTION OF THE GLOBAL SOUTH”

CLIMATE CHANGE LITIGATION IN GHANA: AN ANALYSIS OF THE ROLE OF COURTS IN ENFORCING CLIMATE CHANGE LAW

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Jacqueline Peel and Jolene Lin note that a “transnational understanding of the nature, significance and effects of climate litigation is incomplete if it fails to encompass the Global South experience.”¹ This is especially important because the broader aim of climate litigation—namely, to provide redress to victims for climate harms—requires a collective global effort.² Peel and Lin thus call for a broadening of our understanding of climate change litigation to include the experiences of the Global South. The term “Global South” has been used to refer to the collection of mostly developing countries with similar agendas that have often collaborated in environmental negotiations.³ These countries form a significant bloc in climate change negotiations. However, the experiences and views of many of the countries of the Global South differ in the way climate change matters are conceived and tackled. This essay demonstrates as much by examining climate change litigation in Ghana.

Climate Change Litigation in Ghana: To Be or Not to Be

Ghana attained its independence in 1957 and runs a unitary system of government based on a republican constitution. As a former colony of Britain, its legal system is closely framed on the British common law system, with differences centering on the written nature of its constitution. Ghana is also a middle-income developing country and one of the most democratically stable countries in its region.⁴ The country has often taken a strong lead in international law and regional affairs, a tradition that dates back to its first president, Kwame Nkrumah, who championed a pan-African approach to international affairs. Ghana is therefore a good example of the experience of similar Anglophone African countries from the common law tradition, such as Nigeria, Kenya, and The Gambia. It is also a country that is yet to develop a body of climate litigation cases. For this reason, examining the available legal avenues and potential barriers within Ghana’s existing legal framework is important both for legal scholars and practitioners.

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¹ Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AJIL 679, 700 (2019).

² *Id.* at 713.

³ See Sjur Kasa et al., *The Group of 77 in the International Climate Negotiations: Recent Developments and Future Directions*, 8 INT’L ENVTL. AGREEMENTS 113, 127 (2008); Antto Vihma et al., *Negotiating Solidarity? The G77 Through the Prism of Climate Change Negotiations*, 23 GLOBAL CHANGE, PEACE & SECURITY 315, 334 (2011).

⁴ *The World Bank in Ghana: Overview*, WORLD BANK.

In June 2017, the government of Ghana announced that it had signed a memorandum with China to explore Ghana's deposits of bauxite—the primary ore in aluminum.⁵ The memorandum included a plan for China to finance US\$2 billion worth of infrastructure projects in exchange for bauxite mining concessions in locations including the Atewa Forest Reserve, located in the eastern region of the country. The Reserve, which Ghana listed as a Globally Significant Biodiversity Area, is habitat to a number of important bird species and is also hydrologically significant as a watershed source for a number of rivers and their tributaries. The decision to grant the concessions in this forest has elicited strong protests from local communities, civil society groups, and even international environmental groups. Four environmental civil society organizations—the Green Livelihoods Alliance Ghana, Friends of the Earth-Ghana, A Rocha Ghana, and the Concerned Citizens of Atewa—have led the chorus of disapproval. They have petitioned parliament, organized protests, and run a media and public awareness campaign.⁶ The Atewa Forest situation is particularly poignant because a key thrust of Ghana's climate change policy is the protection of forests as a mitigation tool.⁷ But in all the uproar around the government's actions, what has been noticeably absent is any attempt to secure judicial intervention. In this way, the Atewa Forest situation is indicative of the state of climate litigation in Ghana and the obstacles to the intervention of Ghanaian courts in climate matters.

The Domestic Legal Framework

Much of the current legal framework on climate change in Ghana is centered on a number of policies, chief of which are the National Climate Change Adaptation Strategy 2011 (NCCAS) and the National Climate Change Policy 2013 (NCCP). The NCCAS is intended to “ensure a consistent, comprehensive and a targeted approach to increasing climate resilience and decrease vulnerability of the populace.”⁸ It aims to improve awareness of the critical role of adaptation in national development efforts, as well as to facilitate the mainstreaming of climate change and disaster risk-reduction into national development. The NCCAS also seeks “to enhance Ghana's current and future development to climate change impacts by strengthening its adaptive capacity and building resilience of the society and ecosystems.”⁹ Implemented across various levels of government, with an emphasis on the local and district government levels, and with oversight retained by national agencies led by the Ministry of Environment Science and Technology and a National Climate Change Committee, the NCCAS provided the foundation for the subsequent NCCP. The NCCP establishes the fundamental principles and actions for addressing climate change in five priority areas of agriculture and food security; disaster preparedness and response; natural resource management; equitable social development; and energy, industrial, and infrastructural development. The policy also promotes effective adaptation, social development, and mitigation to ensure a climate-resilient and climate-compatible economy while achieving sustainable development through equitable low-carbon economic growth for Ghana.

Notwithstanding these policies, climate litigation in Ghana faces serious challenges. The NCCAS and NCCP do not establish any legally enforceable commitments. Legislation and regulations on climate change are absent. And litigation on environmental matters is generally limited. In addition to the challenge of establishing the right to sue, litigation in Ghana is notoriously slow, with some cases dragging on for years. In the absence of legal aid funding

⁵ Karin Strohecker, *Ghana Signs \$10 Billion MOU with China for Bauxite Project: Senior Minister*, REUTERS (June 28, 2017).

⁶ See, e.g., *Minister Responds to a Petition Against Mining in Atewa Forest*, GHANA NEWS AGENCY (June 21, 2019).

⁷ The Reducing Emissions from Deforestation and Forest Degradation (REDD+) program is an important component of the National Climate Change Policy.

⁸ *National Climate Change Adaptation Strategy* 5 (2011).

⁹ *Id.* at 8.

for such suits, aggrieved parties must rely on private financing, which may be unaffordable.¹⁰ As many of the civil society organizations focus on public awareness, education, and community and governmental engagement, few parties are willing and able to approach the courts on environmental matters, and those that do are often focused on pollution, particularly in Ghana's extractive industries.

The cumulative effect of these factors is that any potential climate litigation is likely to be subsumed within wider issues of environmental protection, land-use, or natural resource conservation, with climate impacts a secondary consideration. Incorporating climate change into wider environmental issues is perhaps a more practical way of tackling climate change concerns within the existing legal and political situation in the country as well as reinforcing the need for climate governance to be part of, rather than separate from, broader global environmental governance. This strategy, however, risks weakening any efforts to develop a body of climate change litigation.

The Problem of Treaty Non-Self-Execution

Ghana has engaged with climate change issues since the 1990s. It ratified the UN Framework Convention on Climate Change in December 1995, the Kyoto Protocol in May 2003, and the Paris Agreement in September 2016. It has also played an active role in the international climate negotiations for many years, particularly within the G77 negotiating bloc. These efforts raise the question of whether Ghana's treaty commitments might serve as a separate basis for litigation.

The answer is that they do not. Because the 1992 Constitution of Ghana stopped short of affording automatic internal recognition to international treaties, domestic implementation of Ghana's international commitments requires parliamentary approval by an act (legislation) or resolution. Indeed, in *Ghana and NML Capital Limited (joining) v. Attorney-General and Argentina (joining)*, the Supreme Court stated that while customary international law is generally part of Ghanaian domestic law by means of the common law, even ratified treaties are not part of domestic law "until they are incorporated into Ghanaian law by legislation."¹¹ This reinforced the view that Ghana is a dualist nation in the same way as many other common law countries that are former British colonies.¹² The absence of legislation on climate change therefore has consequences not just for the national implementation of international climate law commitments, but also for potential climate litigation. As the courts have noted, they will be unable to enforce treaty obligations without legislative backing.

A Rights-Based Approach to Climate Change Litigation

A more effective strategy may be for litigants to invoke human rights as a basis for judicial intervention on climate change. A human rights approach to climate litigation involves recasting or extending constitutionally guaranteed rights to include an environmental dimension. In Ghana, these rights—which are civil, political, social, and economic in nature—draw their inspiration from the various international human rights declarations and treaties. In summarizing fundamental human rights enshrined within the Constitution, Article 33(5) notes that those "rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned . . . shall not be regarded as excluding others not specifically mentioned which are considered to be

¹⁰ The Legal Aid Scheme Act of 1997 (Act 542) restricts assistance for legal representation in civil matters to juvenile justice, family, and labor issues.

¹¹ *Ghana & NML Capital Ltd. (joining) v. Attorney-General & Argentina (joining)*, 2013 Ruling para. 2, Civil Motion No J5/10/2013 (Sup. Ct. Ghana 2013).

¹² Countries such as India, Nigeria, and Kenya all adopt a similar position. See Nihal Jayawickrama, *India*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (David Sloss ed., 2009).

inherent in a democracy and intended to secure the freedom and dignity of man.”¹³ In the *New Patriotic Party v. Attorney-General*,¹⁴ the Supreme Court noted that this provision can operate as a gateway for the incorporation of relevant principles from international instruments relating to fundamental human rights. Justice Atuguba explained:

As to the enforceability of international instruments relating to fundamental human rights, I think that the matter can easily be resolved by recourse to article 33(5) It cannot be contended that the principles of those instruments do not fit into this provision, and they are therefore to that extent enforceable.¹⁵

A similar view was expressed in *New Patriotic Party v. Inspector General of Police*, where Justice Archer stated:

Ghana is a signatory to th[e] African Charter and member states of the [Organization of African Unity] and parties to the Charter are expected to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.¹⁶

Further support for this view was expressed by Justice Akuffo in *Adjei Ampofo v. Attorney-General*, where the judge sought to utilize Article 33(5) to recognize the reproductive rights of women.¹⁷

From these decisions, a rights-based approach to climate litigation, based on the incorporation of the African Charter’s right to a satisfactory environment, may be a necessary extension of the existing constitutional rights and a credible pathway.¹⁸ In *SERAC v. Nigeria*, the African Commission on Human and Peoples’ Rights decided that the right to a clean environment in Article 24 of the African Charter imposes a clear obligation on the state to take reasonable measures to “prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.”¹⁹ This decision placed a positive obligation on governments to desist from activities that may threaten the health and environment of their citizens.²⁰ The African Commission has also outlined a number of procedural rights included in its conception of the right to a clean environment, such as the right to information concerning hazardous activities as well as the right of communities to participate in decision-making on matters concerning their environment.²¹

In addition to being a more viable pathway to climate litigation, the human rights approach has the advantage of raising the profile of climate challenges in the same way as other fundamental human rights guaranteed within the Constitution. Further, because human rights obligations are imposed on the government and its agencies as well as

¹³ [CONSTITUTION OF GHANA](#) art. 33(5).

¹⁴ *New Patriotic Party v. Attorney-General*, S.C.G.L.R. 729 (Sup. Ct. Ghana 1996-97).

¹⁵ *Id.* at 788.

¹⁶ *New Patriotic Party v. Inspector General of Police* [1993-94] 2 G.L.R. 459 (Sup. Ct. Ghana 1993-94).

¹⁷ *Adjei Ampofo v. Attorney-General*, S.C.G.L.R. 676 (Sup. Ct. Ghana 2007-08).

¹⁸ Article 40 obliges the government, inter alia, to “promote respect for international law, treaty obligations and settlement of international disputes by peaceful means,” and to adhere to the principles enshrined in the treaties of all international organizations of which Ghana is a member. [African Charter on Human and Peoples’ Rights](#) art. 40, 1520 UNTS 217 (1981).

¹⁹ [Decision Regarding Communication 155/96](#) (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1, para. 52.

²⁰ In Article 36(9), the 1992 Constitution also recognizes a duty to “take appropriate measures needed to protect and safeguard the national environment for posterity as well as a duty to co-operate to protect the global environment.” [CONSTITUTION OF GHANA](#) art. 36(9).

²¹ [Decision Regarding Communication 155/96](#), *supra* note 19, at para. 53.

all natural and legal persons in Ghana, they may afford an opportunity for litigation against corporations and businesses involved in climate-impacting activities.

This essay has attempted to examine climate litigation in the context of Ghana's legal system. Although the examination is specific to the Ghanaian context, the issues identified are likely to be replicated in many other African countries. The absence of relevant climate legislation in Ghana, limits on access to justice, and national implementation challenges are obstacles to litigating climate issues in the courts.