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Legal Challenges of Imposing a Governmental Duty of Care for Adaptive Responses to Climate Change in the Global South: A Case Study of Nigeria

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Abstract

Our research study focuses on exploring the challenges of adopting Governmental Duty of Care as a legal framework for adaptive responses to Climate Change with special focus on the Global South using Nigeria as a case study. Although a global issue, minimising the impact of Climate Change requires domestic or national adaptive measures which requires a different approach from mitigation, hence a National Project Development and Implementation Framework in conjunction with International Environmental Agreements is desired. In comparison to the Global North, it seems that the Global South is lacking the political will to carry out their international environmental obligations. As citizens are no longer content with government inertia, holding these government accountable through the imposition a duty of care through litigation or as a consequence of ratifying international environmental agreements is a legal framework this research proposes. However, this approach is fraught with legal complexities, some of which this paper will highlight.

Keywords: Adaptation, Duty of Care, Climate Change, Global South, International Environmental Agreements, Justiciability, Nigeria, Separation of Powers, Standing.

1. Introduction

Climate Change Adaptation and Mitigation are both global issues; however, the Global South is experiencing adverse climate conditions with negative impacts on the welfare of millions of people [1]. A United Nations report identified the most vulnerable sectors to Climate Change in society as those dependent on natural resources such as farmers who are dependent on rain to feed their crops, shanty town dwellers who lack necessary infrastructure and live in flood prone areas and those living in extreme poverty of which the UN estimates 1.3 billion live on less than \$1 per day [2]. These characteristics are associated with people living in the Global South.

In a country highly dependent on agriculture, it has become evident that persistent droughts and flooding in Nigeria, off season rains and dry spells have sent growing seasons out of noted pattern. The adverse variation of weather patterns is no doubt as a consequence of Climate Change and has been scientifically proven and reported by many notably,

Intergovernmental Panel on Climate Change (IPCC) [3]. The vulnerability of countries like Nigeria and others in the Global South has a potential to reverse economic developments gained, hence the importance to ensure the impact of Climate Change is minimised through adaptive measures is of utmost importance and a matter of urgency.

The United Nations has taken the forefront in coordinating the efforts to adapt to Climate Change around the world through efforts of organisations such as IPCC, which has synthesised scientific reports and conclusively evidenced the existence of climate change [3]. Various International environmental agreements have been signed by countries around the world as part of the United Nations legal instruments. These include United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and the Paris Agreement. This entails financial obligations from all signatories irrespective of who are the main contributors to climate change.

The 'de minimis' contribution of Global South nations to Greenhouse Gases (GHG) emissions has always been a bone of contention in terms of financial obligations of combating climate change and commitment to international environmental agreements. However, Climate Change is here to stay as proven by science of attribution. This research hence argues that even if the governments in the South lack the financial capability and technical expertise to mitigate climate change, they have an obligation towards their citizenry to ensure that they adapt to the inevitable change.

It has been argued in some academic circles that Nigeria lacks the political will to implement environmental treaties [4] to the required standard, but adopting a legal framework as a part of a holistic approach is a possible solution to the problem. Lack of political will, lack of finances and technology know-how are few of the arguments explaining the slow progress in Climate Change Adaptation in the Global South. This research hence argues that even if the governments in the South lack the financial capability or technical expertise to mitigate climate change, they have an obligation towards their citizenry to ensure that they adapt to the inevitable change. Failure to do so will be in breach of their international environmental obligations and their State responsibilities. Hence, alternative solutions such as the law at national levels is needed, which will hold governments responsible for failure to

adapt to climate change, as scientists who have played a significant part over the years in conclusively proving and mitigating Climate Change do not have the power to write the prescription [5]. Greater ambitions in climate change action can be achieved through holding nations accountable for climate action, albeit mitigation or adaptation, through climate change litigation. As citizens are no longer content with government inertia as noted in the Global North, holding these governments accountable through establishing and imposing a duty of care is a legal framework this research proposes. However, this approach is fraught with legal complexities, of which this thesis will highlight and analyse.

High profile climate change cases in countries with significant judicial activity has been the focus of academic literature and there is a wealth of knowledge in terms of legislation and case law, and has been a “fertile ground for research, discussion and strategising”. Publicity of climate change cases in the Global South are not as robust as the attention-grabbing cases in the North, not to say they are of lesser importance.

The Leghari case [6] in Pakistan was the first of such cases in the Global South to attract worldwide scholarly and journalistic attention. The main contention of the plaintiff was the Federal Government of Pakistan and the regional State of Punjab inaction and lack of seriousness in tackling climate change. Leghari argued that the government should pursue climate mitigation or adaptation efforts, and that the government’s failure to meet its climate change adaptation targets had resulted in immediate impacts on Pakistan’s water, food, and energy security. Such impacts offended his fundamental right to life.

The decision mandated that a Climate Change Commission be created urgently to tackle the impact of Climate change in Pakistan. It can be argued that the Judge in this case was meddling in policy decisions reserved for implementation by the government, however Barrit and Seditti [7] opined that the judge was played the role expected of the courts in cases where there is a lancing role that we expect courts to play in constitutional arrangements, particularly where there is constitutional protection of fundamental rights. The court’s ruling was deemed transformative in the pursuit of climate justice and symbolic of the rights turn in climate change litigation. However, there is a need for the development of academic literature in countries where climate change litigations are not a common occurrence. Hence, this research interests lie in the challenges of establishing a duty of care in countries where there is smaller scale or no litigation. These countries are suffering the impacts of climate change now and will continue to do so in the future.

2. Discussion: Duty of Care - Public Interest Litigation Approach

Most judicial approaches around the world tend to hold private companies responsible for Climate Change. However, Urgenda case [8] shifted the onus onto governments to protect its citizens due to the Duty of Care (DoC) owed.

DoC is rooted in the case of *Donoghue v Stevenson* (1932) [9] where it is defined as the responsibility of an individual to ensure that his neighbour is not brought to harm because of his carelessness. Duty of Care is premised on the principle that a legal obligation is owed if a person is reasonably expected to have foreseen the other person would suffer personal injury, property damage or death if care is not taken.

The legal principle of duty of care is one of the four elements of Negligence. Other elements include breach, causation, and damage. A tortfeasor must have a duty of care due to a relationship of proximity, which is breached, causing a foreseeable loss.

The duty element can be seen to imply two separate questions:

- To whom is the duty owed? And
- What does the duty entail?

In other words, a successful plaintiff must demonstrate that the State is obligated to its citizens to take care to avoid causing injury as a result of its actions or omission to adapt to climate change. This can be deemed an implicit responsibility held by the State towards its citizens in the form of a social contract. Prior to the landmark decision in *Urgenda*, there has been limited success in holding governments or individuals responsible for the emission of greenhouse gases (GHGs) that are considered the primary cause of anthropogenic climate change. The decision in *Urgenda* however broke this tradition where it was held that Dutch government had breached a duty of care pursuant Book 6, Section 162 of the Dutch Civil Code, which was informed *inter alia* by article 21 of the Dutch Constitution, and various international obligations and legal principles.

The duty of care approach was also adopted in *Sharma v Minister for the Environment* [10] where eight teenagers and a nun sought an injunction (class action) to prevent the Minister of Environment from approving extension to a coal mine in New South Wales (NSW). The significance of the decision was that the judge ruling the Minister has a common law duty of care to protect children against future harm from Climate Change, although an injunction was not granted.

Similarly, the case of *Milieudefensie et al. v. Royal Dutch Shell* [11] demonstrated the importance of duty of care as a legal approach in public interest litigations against private corporations. The Court held that Shell's policy and the groups' ambition at large amount to rather intangible, undefined and nonbinding plans for the long-term (2050).

The Supreme court's decision in *R (Plan B Earth and Others) v The Secretary of State for Transport* [12] illustrates how differences in interpretation of a statutory provisions can lead to different judicial outcomes. The England and Wales Court of Appeal upheld the applicants appeal, holding that the Minister did not take into consideration Paris Agreement when designating the Airports National Policy Statement (ANPS). However, the Supreme Court contended that when the ANPS was developed, it did not amount to government policy, as the "Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development".

The *Urgenda*, *Shell* and *Sharma* rulings however took place in relatively wealthy and technologically advanced nations; hence the research will explore approaches by courts in the poorer Global South if such a duty of care is to be imposed.

The duty of care approach to climate change litigation is not without its critics as noted by Arcanjo [13] who opined that shifting the onus onto to States to ensure duty of care is not breached is a false narrative. He argued that due to the large number of actors participating in the Climate Change dilemma, nation states cannot be viewed as stand-alone actors, hence the traditional label of state may not provide a frame of reference for climate change. Eckersley [14] suggests that outside intervention should occur when there is grave environmental danger, including situations in which deliberate state inaction has led to the endangerment of human life. This raises the question of Westphalia societies and the impact of Climate Change on their sovereignty. Assuming this occurs, it can be argued that the state should have foreseen this, and if found to have breached its duty of care, then there is a possibility of the state being found negligent.

Access to justice is a challenge in most jurisdictions for anyone seeking redress for wrong done. Some of the likely challenges to be faced whilst developing a duty of care as a legal framework can be found in some precedents around the globe, especially in the Global North. Whether a court has the jurisdiction to hear a case or the person seeking redress has the right to do so, are some of the procedural challenges that have to be overcome. Cost of litigation can be prohibitive especially in countries where legal aid is minimal or non-existence, making access to the judicial system an illusion [15]. Furthermore, a causal link must be established

between an act or omission that has resulted in harm, amounting to a breach of a legal obligation.

2.1 Causation

One of the complexities of proving negligence in law of tort is one of causation. It has to be established that the loss suffered by the claimant was caused by the defendant. This question is resolved in most cases by the 'but for' test where it has to be proved that but for the action of the defendant, the claimant would not have suffered the loss. The inability of claimants to prove or satisfy courts that there is a causal link between government policy and Climate Change has meant that many Climate Change litigations at the national level and in United States in particular have been unsuccessful [16]. Bringing cases for compensation against governments based on the principles of state responsibility under international law has proved tricky in the past. This has been attributed to the challenge of establishing a causal link between climate change and fragmentation of responsibility between countries implicated [17]. In *Urgenda*, the court cleverly addressed the issue of causality by claiming that it is less of an issue as the call was to order the implementation of an issue rather than a claim for damages. However, evaluating causation issues has been aided and influenced by the state of attribution science. This has also help establish foreseeability of weather events which were regarded as unpredictable previously [18]. Furthermore, an increase in the number of rights-based climate cases where litigations are framed along the lines of the obligation of governments to protect its citizens human rights against the impact of climate change [19]. The *Urgenda* case also raised the question of causation, where the Dutch government argued there are no obligations on the state in Article 2 and 8 of European Convention on Human Rights (ECHR) to offer protection against the risks of climate change. The State posited that the risks of climate change is global in nature, hence the responsibility cannot be attributed to Netherlands alone. In addition, the government also argued that the environment was not protected under ECHR. The Court however drew on the no-harm principle which obligates a state to prevent activities in their jurisdiction that cause cross boundary environmental damage [20].

2.2 Separation of Power

The doctrine of Separation of Power was strongly influenced the French jurist, Montesquieu who put forward the theory that "everything would come to an end if the legislative, executive and judicial powers of government were to be exercised by the same person or authority". The government powers

should be exercised by legislative, executive and judicial, within their own limitations and should also check each other.

Separation of powers between the three branches of government is a time-honoured achievement of modern democracy. However, one of the arguments put forward by governments defending their failings in Climate Change litigations stems from a “perceived normative conflict—between the litigation and an overarching ideal of separation of powers” [21]. The reliance on courts to resolve contentious moral matters and public policy issues in the United States for example has global repercussions. In the *Urgenda* case, the court rejected the State’s argument that a judicial reduction mandate would conflict with the separation of powers, as it requires the Court to apply EU treaty provisions with direct effect (including Articles 2 and 8 of ECHR). The Court affirmed that its decision does not amount to an “order to enact legislation”, rather it has an obligation to decide whether the government is abiding by the law in making political decisions [22]. In a revolutionary decision, the Irish Supreme Court refused the argument of the Government to consider the issue to be one of executive matter only, stating that constitutional rights and obligations and policy matters do not fall into hermetically sealed boxes and that the court can and must act to vindicate such rights and uphold the Constitution, effectively throwing out the separation of power argument. The Court held in the *Friends of the Irish Environment v Government of Ireland* in 2020 that the National Mitigation Plan, which was the mainstay of the Irish Climate Change Policy, was ‘vague and imprecise’ [22].

2.3 Causation

The causation doctrine has been described as a question of whether a dispute is suitable for judicial resolution and whether the question is capable of being resolved through the application of legal standards [23]. To overcome this complex hurdle in climate litigation, it requires ‘a “break” in the doctrinal approach of “business as usual” of existing legal practices [24]. Although justiciability doctrine differs from one jurisdiction to another, there are commonalities, which cut across boards—claimant must have a standing to bring the case to court. In *Juliana et al v United States of America* (2020), where the governments inaction of climate change was the bone of contention, the US Ninth Circuit Court of Appeal stance was not to order the government to formulate policies to combat climate change. The decision was premised on a reluctance of the court to be involved in policy issues which would be better entrusted to the ‘wisdom of the executive and legislative branches of government’ [25]. Similarly, a challenge by Plan B Earth and

Others on the implementation of UK Climate Change Act 2008 claiming it violated their human rights as enshrined in Articles 2 and 8 of ECHR and Human Rights Act 1998 failed on the grounds of justiciability. The High court held that ‘the executive has a wide discretion to assess the advantages and disadvantages of any course of action both domestically and internationally’. The difficulty of jumping the justiciability hurdle was also present in the Canadian case of *LLho’imggin et al v Her Majesty the Queen* in 2020 where the claimants sought the Canadian Government to amend each of its environmental assessment statutes that applies to projects that involve high greenhouse gas emissions. Excusing itself from executive decisions, the Court noted that in terms of policy decisions on economics, foreign issues, trade, it must leave these decisions to others [26].

The issue of standing is not limited to the Global North as demonstrated in the case of *Chinda v Shell-BP* (a common law of tort action). An injunction to restrain the defendant from carrying out gas flaring was rejected for being absurdly and needlessly wide [26]. The outcome in this case was emblematic of the ‘inexcusable reluctance’ of Nigerian courts in general find in favour of plaintiffs against the Nigerian government.

Standing is the term used to set the criteria used in determining whether a party satisfies the perquisites to be a party to a legal proceeding. Many climate litigation cases have failed due to standing. Prominent amongst such cases is *Comer v. Murphy Oil USA* [28] the court rights were landowners harmed by Hurricane Katrina lacked standing and causality to sue fossil fuel and chemical companies because injuries suffered were not fairly traceable to the defendants’ conduct. This stance was similarly seen in the case of *Oronto Douglas v Shell Petroleum Development Company Nigeria Limited and Ors* [29] where the court applying the restrictive Nigerian standing rule to discard the Plaintiff’s claim, held that the Plaintiff could show no prima facie evidence that his private rights were affected or that any direct injury had been caused to him by non-compliance with the EIA Act.

A lack of understanding of contemporary environmental issues the part of the Nigerian judiciary is a plausible explanation of the rigid economy-over-environment posture. However, in *COPW v NNPC* [30], the commentary from the Supreme court was contrary to previously held postures. Nigerian judges were urged to apply new principles such as sustainable development to issues in a way that goes beyond an unflinching devotion to the principles of nuisance, negligence, and trespass [30]. The case demonstrates a paradigm shift in the attitude of the judiciary to climate change litigations and could engender the growth of such cases in Nigeria as this precedent binds the entire judiciary in

Nigeria. *Massachusetts v EPA* [31] also had a different outcome on the question of standing, where the US Supreme court held plaintiff states' special status as quasi-sovereigns within the federal system, and on their sovereign rights and responsibilities vis-à-vis prospective loss of coastal land meant that they had standing for their case to be heard. The standing obstacle was also overcome in *Urgenda* on the basis of Dutch law which allows non-governmental organisations to bring a court action to protect the general interests or collective interests for other persons.

3. Intended Contributions and Impacts

Our study will contribute to the academic body of knowledge of using Duty of Care to adapt to Climate Change in the Global South. It will also informally make recommendations for policy making purposes by competent authorities in the Global South and Nigeria in particular. It is intended to improve the welfare of millions of people who will be affected by Climate Change if governments in the Global South do not take proactive steps to adapt to Climate change. The study intends to contribute to the growing global narrative that the impacts of climate change can be addressed legally and through coherent domestic climate policies. It is advocating for adaptation to be set on an equal footing with mitigation and enlighten legal personnel of the possible hurdles whilst challenging government climate change policies in the global south, with a focus on Nigeria with the ultimate aim of better laws, regulations, and their implementation.

4. Conclusion

Science of Attribution has proven beyond doubt that Climate change is here, and the impacts have begun to be felt across the globe. The Global South will undoubtedly bear the brunt of the impact of climate change, hence along with mitigation countries need to adapt to the impact of climate change. However, despite numerous international environmental agreements signed by most countries around the world to combat climate change, the will to effectively implement these legal instruments is still lacking. The perennial argument about who is responsible for financing climate change mitigation does not take away the fact that climate change is here to stay. Countries in the Global South that are more likely to bear the brunt of climate change, hence their governments have a responsibility towards their citizens to ensure that they are not brought to harm due to the impacts of climate change. Citizens in the Global North have resorted to climate change litigations to ensure that their governments adhere to laws and regulations, albeit

national or international legal instruments. The leading case was taken by a Dutch NGO, *Urgenda*, where the courts found that the government owes its citizens a duty of care which imposes a responsibility on the government to shield *Urgenda* and Dutch people from harm caused by negligent behaviour. However, this approach of imposing a duty of care on the government is fraught with legal challenges. The cost of dragging the State to court can be costly and timely. The issue of separation of powers, where the courts have been accused of judicial activism as they are intruding into the powers of the executive branch of government. Whether the courts can hear the case as in *Justiciability*, is also identified as another hurdle which a claimant has to jump. This has successfully been used as a defence in many cases, especially in USA. Closely linked to justiciability is the question of standing. The research identifies that determines whether a party satisfies the prerequisites to be a party to a legal proceeding. Many climate litigation cases have failed due to standing. Proving negligence in tort law can prove to be difficult due to causation. Claimants may find it difficult to find a causal link between government policy and impacts of climate change. Litigations in the global North are begging to overcome these challenges through various ingenious approaches to law, and the Global South is also beginning to catch up, as the attitude of the judiciary towards environmental cases is beginning to change.

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