Lessons on "Adaptation Litigation" from the Global South

What the Law Can, Can't and Might Do to Help Us Cope with Climate Change

Elizabeth Donger

25.03.2022 doi: 10.17176/20220326-001236-0

In the most recent IPCC report, global climate experts warned "Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all." Much of the report focuses on the importance of adaptation efforts and the wide gap between current levels of adaptation and those needed. Still, adaptation is not prioritized in climate litigation. Of the more than 1,800 ongoing or concluded climate change cases worldwide, Setzer and Higham find only 180 touch on the issue of adaptation – 100 in the US and 61 before Australian courts. There is clearly a need for a greater focus on how the law can help our societies to cope with locked in climate harms. This is especially important in the Global South where adaptation litigation is not well developed or studied but the burden of adaptation is greatest.

First, a review of what "climate adaptation" means. The nature and extent of the damage that climate exposures like sea level rise and hurricanes cause is determined by a place's underlying capacity to adapt. A drought in rural Haiti causes more damage than a drought in rural California. So, climate adaptation is shorthand for the huge range of actions that strengthen this capacity to adapt, addressing environmental factors (like deforestation), infrastructure (like flood defenses and irrigation systems) and human governance and resourcing systems (like disaster response systems, migration systems and social safety nets). In communities experiencing extreme poverty and inequality, where adaptive capacity is at its lowest, efforts to meet basic needs are essential but also insufficient to withstand climatic risks.

Litigation that touches on adaptation is hard to define. It takes diverse forms at multiple scales. There is little consensus between scholars and databases around what counts, or consensus across jurisdictions around who bears which adaptation responsibilities and the priorities and mechanisms for adaptation. Capacity to adapt varies enormously within populations. So, while national governments play an important role in overseeing, mandating and resourcing adaptation activities, adaptation efforts must necessarily be localized and involve local state actors as well as businesses, communities and individuals, particularly those that are worst affected.

To date, the most common form of adaptation litigation and scholarship in this area has focused on land use and urban planning at the city or local government level. Plaintiffs have used environmental and administrative law to challenge individual developments, from the Keystone XL Pipeline Project in the US to residential development projects in Australia. Lower in profile and smaller in scale than mitigation-focused litigation, these cases have nevertheless led to some meaningful incremental changes in policy and practice, particularly in Australia. Tort law compensation claims for past failures to adapt are less common and have, till now, seen less success.

Still, there is more that the law can and will do to both facilitate and hinder climate adaptation. This blog describes some of the cases filed to date in the Global South that hint at this broader universe of adaptation litigation. These cases offer lessons for lawyers and practitioners seeking to define, document and advance this evolving category.

Litigation Seeking to Stop or Refine Adaptation-Related Projects

There have been very few project-based climate adaptation challenges brought in the Global South. One is a successful case in South Africa brought by a grassroots movement against a planned development adjacent to Cape South, located on farm land that hosts an aquifer. In 2020, the judge remanded approvals for the development to the municipality and asked it to consider water scarcity and supply in light of climate change, the first decision of its kind in the country. Unlike in the US or Australia, some project-based challenges have made rights-based arguments as well as procedural ones. This is true for a challenge to the proposed 1,445 km long East Africa Crude Oil Pipeline currently pending before the East African Court. Petitioners allege that the project not only fails to meet EIA requirements but also violates human rights by undermining local adaptive capacity: polluting water sources, destroying habitats, and displacing vulnerable communities.

Peel and Lin argue that these project-based challenges have not been widely replicated outside the Global North partly because their success depends on "a functioning planning law system, an EIA system that works effectively (and is not simply regarded as an exercise in checking boxes on a list), and more flexible locus standi and other procedural requirements." These questions of good governance, access to justice, and rule of law set the enabling environment for adaptation litigation of all kinds.

Not all the developments at issue in these cases weaken adaptative capacity. Many are designed to *help* society cope with climate change, for example by building defenses against sea level rise. In the US and Australia, this "anti-regulatory" litigation typically involves a clash between private property rights and adaptation goals. In the Global South, however, such cases have sought to protect indigenous peoples land tenure. One involves a challenge to the implementation of the REDD+ program in Nepal on indigenous land. In another, French nonprofits on behalf of the Mexican indigenous Zapotec community are challenging a large-scale wind farm built by the energy company Electricité de France (EDF) on their land. The suit, brought under France's Duty of Vigilance law, alleges that EDF did not adequately consult with the Zapotec prior to construction. Petitioners suggest that EDF should cancel the project, or at minimum take measures to identify and reduce risks to human rights defenders and obtain a free, prior, and informed consent by the community.

These two indigenous rights cases emphasize procedural fairness in climate-related decision-making and equitable distribution of impacts – this kind of "just transition litigation" is likely to grow in importance. Participation of affected communities in adaptation is a key element of a just transition and widely considered essential for effective action. To that end, litigation elsewhere has begun to make use of regional treaties for environmental democracy, the Escazú Agreement and the Aarhaus Convention.

Litigation Seeking Enforcement of Existing Adaptation Law or Policy

In Nepal in 2017, litigation resulted in the creation of a national legislative framework to govern adaptation where none existed. This kind of overarching legislation sets the national adaptation agenda, creates an institutional architecture for action and enables further policymaking. Given most countries now have such frameworks, several cases have sought to enforce what is already there. The most famous example of this is the case of *Leghari v. Federation of Pakistan*, in which a Pakistani farmer won suit in 2015 to enforce the country's abandoned Climate Policy Framework. The judge ordered several ministries to nominate "a climate change focal person" to oversee implementation and present a time-bound list of action points. The court took active steps to monitor the implementation of the framework over three years, establishing a Climate Change Commission to hold periodic hearings.

As a result of another successful rights-based climate case, Colombia's Supreme Court of Justice in 2018 (among other remedies) ordered several municipalities in the Amazon to update and implement their

Local Land Management Plans, including action plans to reduce deforestation. Local land use plans are an important adaptation framework that can keep new development away from critical ecosystems, minimize flood risks, and influence the magnitude and type of polluting activities.

More of these enforcement actions remain pending. Two cases in Brazil seek compliance orders for national funds for directing resources to adaptation efforts, which have been inoperative since 2019 – the National Climate Change Fund and the Amazon Fund. In Uganda, a pending case seeks effective implementation of Article 249 of the Ugandan Constitution, which mandates a Disaster Preparedness and Management Commission to deal with natural and man-made disasters. The case is brought on behalf of victims and their families, who were not resettled from a designated high-risk area before a deadly landslide hit.

Where underenforcement of adaptation responsibilities is egregious, these top-down cases have potential to disrupt gridlocked political systems. Yet they also face steep challenges. One year after the Colombian judgment, for example, not one municipality had updated their Local Land Management Plan. These legal outcomes can have little bearing on the underlying causes of ineffective local implementation, which are at turn political, social and economic. Critically, estimated adaptation costs in developing countries are five to ten times greater than current public adaptation finance flows.

Litigation Seeking Specific Adaptation Solutions

Many adaptation cases seek specific solutions, perhaps most obviously the financing of adaptive measures. Numerous negligence–based suits by cities and municipalities in the US seek money from fossil fuel companies to meet adaptation costs. Still, litigation is limited in its ability to compensate for adaptation harms in a comprehensive and equitable way. While climate change harms by their nature disregard national borders, jurisdictional rules in national and international courts generally bar claims by foreign individuals and States who are disproportionately affected. While the costs of adaptation failures are diffuse, standing requirements demand individualized harm. And representation is generally inaccessibile and costly for the most vulnerable.

Other plaintiffs have attempted to enforce national adaptation solutions using international and constitutional law, even in the absence of a national legislative or policy framework. For example, indigenous plaintiffs from the United States and Canada have for decades brought complaints against those states in quasi-judicial human rights forums seeking more ambitious adaptation. The climate petition by Inuit peoples at the Inter-American Court of Human Rights, ruled inadmissible in 2005, requested (among other things) a recommendation that the US provides assistance for the Inuit to adapt.

Much more specific responses have also been requested. A case filed in 2020 in Argentina seeks to protect the Paraná Delta, a UNESCO designated wetland area, through a variety of remedial measures including a declaration that the area is essential for both climate adaptation and mitigation, orders for the design of new land use plans, a designated “guardian” of the rights of the Paraná Delta to oversee conservation, and measures for public participation in future decisions. A pending rights-based case in Peru, filed in 2019, seeks an order requiring the suspension of new permits for deforestation.

These requests for specific solutions face difficulties in part because international environmental law does not mandate discrete adaptation responsibilities. The Paris Agreement’s treaty objectives in Article 2 include the increasing of adaptation capacities and climate resilience, and Article 7 establishes a Global Goal on Adaptation (GGA) that “each Party shall, as appropriate, engage in” adaptation planning processes. Efforts to make the GGA an operational, quantitative and qualitative goal at the UNFCCC Conference of Parties (COP), especially by African nations, have been unsuccessful. It remains to be seen if this or other domestic courts will interpret these very broad provisions as justiciable.

Finally, several cases have sought legal migration status for those displaced by climate change. Migration in this regard is the result of state failures to adapt to

climate change and can itself be an adaptation strategy. Over the next thirty years, an estimated 1.2 billion people will be displaced from their homes by climate change. International law does not currently guarantee them a right to migrate. Two cases in New Zealand have used rights-based arguments to seek residency for people from small island states. One of these, involving a family from Tuvalu, was successful. Yet the court's decision was narrowly based on exceptional circumstances and explicitly avoided creating a widely applicable "climate refugee" status, based on the concern that this would throw open the nation's borders. Advocates in the future may rely on a 2020 decision by the UN Human Rights Committee (HRC) that found climate change *may* expose individuals to violation of their right to life and therefore *may* create obligations for states to offer legal residency to migrants leaving these precarious situations. Still, the HRC set the threshold for this obligation very high. The Committee found that there was no obligation in the case before it – New Zealand had legitimately denied refuge to a family from Kiribati, in spite of substantial evidence of harm related to climate change.

The Road Ahead

This short review makes clear that adaptation litigation is not only a tool to better prepare infrastructure through tort and administrative law. It is a more ambiguous and creative category, drawing on everything from refugee law to human rights and legal provisions recognizing the rights of nature. While adaptation litigation in the Global North has largely focused on infrastructure, litigation in the Global South has addressed a broader range of factors that contribute to adaptive capacity, from environmental factors like deforestation, to human governance and resourcing systems like disaster response and migration systems.

Undoubtedly, adaptation litigation will expand in the years to come as climate change devastates global economic, social and ecological systems. It is easy to imagine adaptation litigation in the areas of education and health, or, in trade, competition and international investment. Legal advocacy of this kind will also be necessary to challenge growing "maladaptation"– what the IPCC calls actions that (often inadvertently) increase risks of adverse climate-related outcomes, such as green energy projects that amplify climate vulnerability and inequality in local communities. Opportunities for adaptation litigation will grow as two big challenges that have stymied past cases are addressed: the underarticulation of state obligations to adapt under international and national law, and weak scientific links between failures to adapt and discrete harms.

Importantly, the potential scope of problems that adaptation litigation addresses and the remedies it offers just scratch the surface of the adaptation needs of the world's most marginalized. For example, none of the approaches outlined above directly address the links between capacity to adapt and social welfare, access to healthcare or to food. However, lawyers can support climate adaptation not just through litigation but also legal empowerment approaches that equip those worst impacted with the tools to know, use and shape the law, to gain access to existing services and influence the services that are provided.

Adaptation litigation has been described as a niche trend that is unlikely to scale up significantly. A look to the Global South makes clear instead that adaptation litigation encompasses a wide range of approaches that demand greater international cooperation and study.

ABOUT THE AUTHOR

Elizabeth Donger
Elizabeth Donger is a Senior Legal Associate at the Climate Litigation Network, and an Affiliate at the Harvard FXB Center and NYU Law Global Justice Clinic.

SUGGESTED CITATION

Donger, Elizabeth: Lessons on "Adaptation Litigation" from the Global South: What the Law Can, Can't and Might Do to Help Us Cope with Climate Change, Verfassungsblog, 25.03.2022, doi: 10.17176/20220326-001236-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220326-001236-0.