

Adopting an Eco-friendly Approach in the Settlement of Disputes in Africa

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Abstract

Awareness of the negative impact of climate change on the world’s ecosystem is increasing. Consequently, actors at the national and global levels are taking steps to combat the climate crisis. World leaders at the recently concluded COP 26 summit—a platform which brings together various countries to accelerate action towards the goals of the Paris Agreement and the United Nations Framework Convention on Climate Change—affirmed their commitment towards alleviating the negative effects of climate change on the environment. While climate change generally has a devastating effect on the world at large, African countries have particularly been affected by the crisis. Without a doubt, there is an urgency for everyone, including government leaders and professionals, to take steps towards achieving a clean environment soon. This paper seeks to explore the role that the mechanisms for dispute resolution in Africa can play in the quest for a clean environment in the continent.

Climate change as a global and African problem

Climate change is a global emergency currently threatening the stability and health of the environment and all that are in it. Intense weather events, for example, have become observable worldwide. Glaciers are

shrinking, ice on rivers and lakes are breaking up earlier than expected, and plant and animal ranges have shifted.¹ Importantly, sea-levels are rising due primarily to the expansion of water volume resulting from the warming of oceans, the melting of mountain glaciers, and mass losses from the Greenland and Antarctic ice sheets.² Climate change destabilizes the Earth's temperature equilibrium and has over-reaching effects on human beings as well as the environment. The direct consequences of climate change globally are rising temperatures and sea levels, higher ocean temperatures, increase in heavy rainfall, shrinking glaciers, and so on. Its indirect consequences, on the other hand, include the increase in world hunger, health risks, the spread of pests and pathogens, and loss of biodiversity.³

Africa is not excluded from these impacts of climate change.⁴ Climate change contributes to food insecurity, population displacement, and stress on water resources in the continent. Additionally, climate change has resulted in increased temperatures, rising sea levels, transformed precipitation patterns, and more extreme weather conditions threatening human health and safety, food and water security, and socio-economic development in Africa.⁵ In Mozambique, Malawi, and Zimbabwe, for example, devastating cyclones resulting from a change in atmospheric conditions affected 3 million people in the spring of 2018.⁶ In September 2021, the Kenyan government declared a state of emergency due to the overwhelming drought conditions pushing cattle herders, who were once prosperous, into poverty, thereby breaking up communities, and triggering new disputes over land rights.⁷ The United Nations's World Food Programme's Shelley Thakral has warned that four years of drought had laid the groundwork for the world's first climate change-induced famine in southern Madagascar.⁸ In Nigeria, there has been a rise in temperature levels, the

atmospheric weather conditions are unduly hot, and it seems as though the ozone layer over Nigeria is completely depleted. The country is also not spared from rising sea levels, flooding, drought, desertification, land degradation, and more frequent extreme weather events.⁹ These changes have affected freshwater resources and instigated a loss of biodiversity across Africa. More importantly, the general health conditions of African residents are being negatively impacted by the lingering climate crisis. The current health challenges being faced by the residents of these countries are worsened by an increase in temperatures and rainfall patterns. These changes also increase habitat suitability for biting insects and transmission of vector-borne diseases such as dengue fever, malaria, and yellow fever.¹⁰

African governments have begun to put measures in place to alleviate the effects of the crisis. Morocco, for instance, has built the world's largest concentrated solar facility to help achieve the country's goal of a 52% renewable energy mix by 2030.¹¹ The advanced 6,000-acre solar complex, Noor, serves as a clean energy source for around 2 million Moroccans and provides pivotal job opportunities as the country transitions from the fossil fuel industry.¹² Likewise, Nigeria has set a renewable energy target of 30% by 2030 and has announced its goal of having net-zero carbon emissions by 2060. In November 2021, Nigeria passed the Climate Change Bill into law with the overriding objective of providing a framework for achieving low greenhouse gas emission, inclusive of green growth, and sustainable economic development. In June 2019, South Africa passed its Carbon Tax Act which imposes specific levies on greenhouse gases from fuel combustion and industrial processes and emissions. It is anticipated that by 2035, the carbon tax could reduce the country's emissions by 33% relative to

the baseline.¹³

However, the responsibility of tackling the climate change crisis in Africa is not the exclusive preserve of governments. The next section will explore how dispute resolution mechanisms can play a role in safeguarding the environment.

Role of dispute resolution mechanisms in the fight against climate change in Africa

The primary dispute resolution mechanisms include litigation, arbitration, mediation, and conciliation. Litigation refers to the process of settling disputes by submitting and responding to a case before a court. As a neutral adjudicator, the judge(s) then determine(s) the rights and liabilities of the parties after considering the evidence and the relevant laws. Arbitration, mediation, and conciliation are alternatives to litigation. Arbitration is the resolution of disputes by submission to an independent third party or parties — specifically an arbitral tribunal that is designated by the parties for that purpose and who agree in advance to comply with the final decision of the tribunal. Mediation refers to the settlement of a dispute between parties with the help of a neutral third party known as a mediator who only facilitates the process of settlement. Conciliation also involves the resolution of disputes by a neutral third party who merely suggests solutions to the parties in dispute. The conciliator comes up with an opinion which is reduced to terms of settlement to be signed at the discretion of the parties.

A common feature of the above-mentioned dispute resolution mechanisms in Africa is the excessive use of papers to establish the parties' arguments and legal positions and to deliver procedural guidelines and final decisions. The papers being used are mostly produced from trees, thereby encouraging

deforestation. Deforestation, in turn, has a major impact on the environment, as it leads to other forms of environmental changes like global warming, soil erosion, depletion of the ozone layer, amongst others.¹⁴ Research has shown that as a result of the processes involved in dispute resolution, particularly arbitration, around 20,000 trees would need to be planted to offset the carbon emissions being caused by deforestation which is an indirect result of dispute resolution.¹⁵ In addition, dispute resolution proceedings, especially litigation, are usually conducted indoors. All participants involved in the dispute are required to either travel by road or by air to arrive at the location of the resolution. By the very nature of such proceedings in Africa, these participants may be required to make several trips to the destination given that there may be several adjournments due to the attitude of litigants towards delaying the proceedings, the volume of courts' dockets, and so on. Indeed, driving and flying are associated with fuel consumption by automobiles.¹⁶ The exhaust of most vehicles releases hydrocarbons, nitrogen oxides, carbon monoxide and carbon dioxide.¹⁷ Hydrocarbons and nitrogen oxides together react with the sunlight and cause an increase in ground-level ozone. Furthermore, carbon monoxide and carbon dioxide threaten human health and contribute significantly to global warming.¹⁸ Hence, the procedures for settling disputes in Africa contribute to the damage of the environment and it places a responsibility on stakeholders involved in the settlement of disputes in Africa to play a key role in the transition towards clean energy.

Prospects for an eco-friendly dispute resolution regime in Africa

The journey to a completely 'green' dispute resolution regime in Africa requires concerted effort from all and sundry. There are several measures that can help promote

dispute resolution in Africa in an eco-friendly manner. First, the various rules of procedure governing the proceedings in court and other alternative dispute resolution mechanisms can be amended to reflect eco-friendly steps in the process of dispute resolution. For example, the International Chamber of Commerce (ICC), through their recently promulgated Arbitration Rules 2021, recognises the concept of “greener arbitration,” which supports the resolution of disputes in an eco-friendly manner. Article 26.1 of the ICC Arbitration Rules 2021 provides that the arbitral tribunal may decide, after consulting with the parties and based on the specific circumstances of the case in hand, that a hearing will be conducted remotely by videoconference, telephone, or other appropriate means of communication (as opposed to by physical attendance). Similarly, Article 19.2 of the London Court of International Arbitration Rules 2020 embraces virtual hearings which is a positive step in the preservation of the environment. It provides that hearing may take place in person or virtually by conference call, videoconference, or using any other communications technology. The Chartered Institute of Arbitrators Arbitration Rules 2015 also recognises the taking of the testimony of witnesses virtually. Article 28.4 allows the arbitral tribunal to direct witnesses, including expert witnesses, to be examined through means of telecommunication that do not require their physical presence at the hearing.

These provisions play a positive role in reducing the amount of time spent travelling by parties for the purposes of arbitral hearings. Dispute resolution proceedings can be held virtually to reduce the amount of environmental pollution that would be caused by the transportation of parties, legal practitioners, judges, arbitrators, and mediators to the various venues used for dispute resolution. Consequently, the contribution by

parties to the release of carbon dioxide, carbon monoxide and other harmful gases into the environment would be minimal, as parties can now attend hearings from the comfort of their homes or offices without the need to travel in an automobile. It is recommended that African dispute resolution institutions adopt and implement these laudable initiatives. Specifically, African institutions should encourage video and telephone conferencing as an alternative to travelling for hearings, and fact-finding and witness interviews. It is important for parties to always question the need of flying or travelling. The use of technology saves time spent travelling and, more importantly, prevents the further carbon emissions associated with flying or travelling.

Second, African lawmakers, politicians, courts, and arbitral institutions need to update policies, regulations, and foreign investment treaties on environmental change. Notable changes can include eliminating the use of hard copy filings and promoting the use of electronic bundles at hearings. Priority should be given to electronic correspondence unless hard copy correspondence is inevitably needed, while also being mindful that email has a carbon footprint.¹⁹ Thus, technological tools can be deployed in ensuring effective adoption of an eco-friendly dispute resolution system in Africa. Dispute resolution documents can be filed and served via email as opposed to the traditional use of paper. Further, steep penalties could be implemented for violation of these provisions in a bid to enforce compliance.

Third, dispute resolution professionals can commit to reducing their environmental footprint. For instance, an English, global law firm, Linklaters, recently outlined its plans to cut its carbon emissions over the next ten years. It undertook that by 2030, it will reduce its “Scope 1 & 2” emissions, primarily related to energy use, by 70% and

its “Scope 3” emissions, which are primarily related to the purchase of goods, services, and travel, by 50%.²⁰ This is a laudable initiative which African law firms, lawyers and judges can emulate. The benefits are not far-fetched given that the reduction in the emission of greenhouse gases will automatically decrease the negative impact of climate change and reduce the threat of global warming.²¹

Fourth, adequate funding is crucial, as migration to the electronic regime will not come cheap. An effective migration from the traditional regime to the electronic regime would require provision of adequate training for all those involved in the dispute settlement process, especially in relation to litigation because most African judges, registrars, and other administrative aides in the court system are not technologically literate. Moreover, adequate funding would be required to purchase the relevant facilities needed to ensure this transition. If the adjudicator is required to be present in the courtroom to attend the virtual proceedings without disturbance, there would be a need to provide for effective internet facilities as well as uninterrupted power supply. Whilst there has been a cost reduction regarding travel and accommodation, online platforms with new standards will signify a new line of costs as highlighted above. Funds will also be needed to raise awareness and sensitize the citizens of African countries on the existential threats posed by climate change. Therefore, the governments of African countries need to step in to bridge the gap in funding. This could be done by an inclusion or allocation of funds targeted at helping to attain eco-friendly resolution of disputes in the national budget of African countries. In addition, well-meaning citizens of Africa and other countries can collaborate with governments and dispute resolution stakeholders by sponsoring this migration.

Conclusion

Climate change has become a global concern for many African countries, especially due to its impact on the living conditions, health, and safety of the environment. The efforts of all concerned stakeholders are required to mitigate the adverse effects of the exposure to climate change. In contributing to the transition of an eco-friendly environment, dispute resolution professionals must take concrete steps towards resolving disputes in a “greener” or more eco-friendly manner. These steps would include making deliberate efforts to overhaul the traditional processes involved in dispute resolution and replacing them with eco-friendly alternatives.

Legal professionals can take reformative steps towards ensuring disputes are resolved in an eco-friendly manner. Such steps include eliminating the use of excess paper and travelling less (whether by road or air), as these are significant contributors to the emission of greenhouse gases and, consequently, to the climate change crisis. Also, new legislation and the implementation of new rules designed to protect the environment would be required. Finally, awareness should be raised and there should be a consciousness of actions that contribute to climate change, among the citizens. Although these reformative steps will surely change our traditional approach to dispute resolution, this paper reveals their many benefits in protecting Africa and the world from the devastating impact of climate change.

Endnotes

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