THE JUDICIAL POSTURE TOWARDS ENVIRONMENTAL LITIGATION IN NIGERIA

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Abstract

Nigeria's environmental degradation presents considerable obstacles to sustainable development, impacting public health, livelihoods, and ecosystems. This article evaluates the judiciary's involvement in tackling environmental issues through litigation by studying legal principles, judicial decisions, and obstacles. Even though there are constitutional provisions and international commitments acknowledging environmental rights, Nigerian courts encounter various challenges when it comes to resolving environmental disputes. Issues such as delays in case resolution, and enforcement gaps are hindering the judiciary's ability to respond effectively. Furthermore, concerns like locus standi, the ability to access justice, and the effectiveness of legal solutions limit individuals looking to address environmental damage. There are opportunities available to strengthen the judiciary's involvement in environmental protection. Advocating for judicial activism and promoting public interest litigation could enhance environmental governance and accountability. This article highlights the significance of comprehensive strategies that combine legal, institutional, and societal initiatives to tackle environmental issues in Nigeria.

Keywords: *Environmental Justice, Environmental Litigation, Gas Flaring.*

1.0 Introduction

Environmental regulations are established to address the environmental challenges caused by human actions .[2] Failure to properly incorporate environmental and human rights principles into energy policy and laws is the first significant hurdle to an energy justice governance strategy to reducing gas flaring and maximizing gas use. This is the issue of whether and to what degree human rights concepts underlie or are included in the rules concerning oil and gas exploration and production, gas infrastructure projects and the deployment of carbon removal technology in the pursuit of environmental protection.[3]In other words, there needs to be substantial provisions for environmental protection in the Laws as well as judicial courage, to interpret the laws as intended.

The absence of an explicit constitutional acknowledgement of human rights that are enforceable in relation to the environment means that attempts to use human rights terminology in gas-flaring situations are inevitably susceptible to protracted and complicated litigation.

Recent case law and studies increasingly indicate that this provision, which recognises a right to a clean and healthy environment, is justiciable and enforceable in Nigerian courts[4] and can be invoked in gas-flaring cases, but the lack of a clear and express recognition means that enforcing such rights will, to a

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[2] Fagbemi SA, Akpanke AR. Environmental litigation in Nigeria: the role of the judiciary. Nnamdi Azikiwe University Journal of International Law and Jurisprudence. 2019 Feb 19;10(2):26-34.

[3] A A Babalola and D S. Olawuyi, Overcoming Regulatory Failure in the Design and Implementation of Gas Flaring Policies: The Potential and Promise of an Energy Justice Approach [2022] (14)*Sustainability*, 6800 < https://doi.org/10.3390/ su14116800> accessed 10 October 2022.

[4] *Centre for Oil Pollution Watch v NNPC* [2019] 5 NWLR (Pt. 1666) 518.

large extent, be contingent on successful litigation. Before examining the judicial posture towards environmental litigation it is important to delve into the laws guiding environmental justice.

2.0 Constitution of the Federal Republic of Nigeria, 1999 (as amended)[5]

In the Nigerian Constitution, there is no specific provision to regulate environmental rights and responsibilities. However, the basis from which environmental policy and regulation are derived is contained in Chapter 2 of the Constitution, under the Fundamental Principles of State Policy. The applicable section empowers the 'State to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.'[6] It is from this provision that the Nigerian environmental laws derive their legitimacy, and it is by this mandate that laws are enacted to fulfil environmental obligations.

It is also important to point out that, the Nigerian Constitution on its own, does not recognize and impute a duty on the government towards environmental protection. The foregoing stance might also be as regarded true about the guarantee of the Constitution in its duty to protect and improve the environment. This duty concerning the Constitution has generally been whittled down by section 6(6)(c) of the Constitution which states that.

> 'The judicial powers vested by the foregoing provisions of this section - shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision conforms with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution; '[7]

This provision implies that the State organs constituted for the purpose of carrying out these duties mentioned above cannot based on the provision of the Constitution be challenged. Several legislative measures have been made to fight gas flaring, most notably sections 33(1) and 34(1) of the 1999 Constitution, which guarantee the right to life and human dignity. [8] The 1999 Constitution (as modified) does not directly provide for a comparable environmental right, although it does allow for environmental protection under Section 20, which is generally non-binding as stated previously. However, the usefulness of the legislative environmental right will depend on how the courts approach this protected right. [9] An example of such judicial interpretation can be seen in the case of *COPW v NNPC*[10]where, the Nigerian Constitution's environmental protection section, section 20, Chapter II, was found to be justiciable by the Supreme Court, contrary to popular perception. In *COPW v NNPC*, [11] the Supreme Court's arrived at a most significant step in greening the Constitution by its explicit

[5] Constitution of the Federal Republic of Nigeria, 1999 (as amended) Cap C23, LFN 2004.
[6]CFRN, s 20.
[7] Constitution of the Federal Republic of Nigeria 1999 (As amended). s 6 (6)(c)
[8] O J Olujobi, 'Analysis of the Legal Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector and the Need for Overhauling.' [2020] (9) (132) *Soc. Sci.*
[9] U. Etemire, 'The Future of Climate Change Litigation in Nigeria: *COPW v NNPC* in the Spotlight' [2021] (15)(2) *Carbon & Climate Law Review* 158 – 170.
[10] [2019] 15 NWLR 1666.
[11] *Ibid*

recognition, also for the first time, that section 33 of the Nigerian Constitution, which guarantees the 'right to life,' implicitly includes a fundamental right to a clean and healthy environment for all. Degrading the environment and threatening people's health also threatens their lives, which all others have a constitutional duty to defend. This derivation of an environmental human right from the classical right to life is a potentially valuable argument for environmental and climatic conservation and justice.

Prior to this explicit interpretation of the Constitution in this regard, recourse had to be made to the African Charter on Human and Peoples' Rights.[12] The charter is premised on the OAU charter which provides that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African people.' The provisions of the charter bind African countries which have ratified the charter, and the rights of citizens of such countries, may be enforced by municipal courts or through the African Commission on Human and Peoples Rights and the African Human Rights Court established for this purpose.[13]

The African Charter has been properly domesticated in Nigeria through the African Charter Act, in conformity with the Nigerian Constitution. A combined reading of the long title of the charter and Article 1 would find that it is part of the Nigerian *Corpus Juris.* [14]The Supreme Court and various lower courts have confirmed in much earlier non-environmental matters. The Supreme Court had the chance to affirm in the case of *Centre for Oil Pollution Watch v NNPC*[15] that, Article 24 of the African Charter, which states that '[a]ll peoples should have the right to a general satisfactory environment advantageous to their development,' is enforceable before Nigerian courts.

Also, in *Gbemre v SPDC and NNPC,*[16] the court determined, that (1) the rights to life and dignity of the human person guaranteed under sections 33(1) and 34(1) of the Nigerian Constitution, and reinforced by Articles 4, 16 and 24 of the African Charter Act, 'inevitably included the right to a clean, poison-free, pollution-free, and healthy environment'; and (2) that the actions of the Defendants in continuing to flare gas in the course of their oil production activities in the Plaintiff's community violated their rights to life (including healthy environment). [17]

The Supreme Court of Nigeria expanded the boundaries of *locus standi* to environmental litigation in the case of *Centre for Oil Pollution Watch v NNPC*[18] after reading together the provisions of sections 20 and 33 of the Nigerian Constitution[19] and Articles 16 and 24 of the African Charter on Human and Peoples' Rights. [20] The court held that the right to a clean and healthy environment to sustain life is a fundamental human right of citizens and the State, owes the community a duty to protect that right. The Federal High Court of Nigeria ruled in a much earlier case, *Jonah Gbemre v Shell, NNPC,* and AGF, [21]

[12] African Charter on Human and Peoples' Rights(Ratification and Enforcement) Act. Cap A9 LFN 2004.
[13] Amokaye O G, *Environmental Law and Practice in Nigeria* (2nd Edition, 2014 MIJ Professional Publishers).
[14] C T Emejuru, Human Rights and Environment: Wither Nigeria? [2004] (30) *Journal of Law Policy and Globalization.* 23.
[15] (2019) 5 NWLR pt. 1666
[16] (2005) FHC/B/CS/53/05.
[17] U. Etemire, 'The Future of Climate Change Litigation in Nigeria: *COPW v NNPC* in the Spotlight' [2021] (15)(2) *Carbon & Climate Law Review* 158 – 170.
[18] (2019) 5 NWLR pt. 1666, 518.
[19] 1999 Constitution, as amended).
[20] Cap. A9 Laws of the Federation of Nigeria, 2004.
[21] (2005) FHC/B/CS/53/05.

that oil companies must stop gas flaring in the Niger Delta due to the environmental pollution impact on the communities' collective survival and its contribution to adverse and potentially life-threatening climate changes, including acid rain. The court ruled that the IOC's practice of large and unending gas flaring violates citizens' fundamental rights to life and personal dignity protected by the Nigerian Constitution and the African Charter.

The significance of this decision, lies in its interpretation of the constitutionally guaranteed right to life, the constitutional obligation of the State to protect the environment, and the right of all people to a generally satisfactory environment conducive to their development, as a basis for recognising the right to a clean and healthy environment and for establishing a variety of qualitative human rights. Because climate protection is a legal obligation under the Climate Change Act and a fundamental human right, such an interpretation can be applied to climate-related lawsuits.

Any action against the State relating to its failure or inadequate implementation of the Act in a timely manner may be construed as a violation of the constitutional fundamental rights to life (section 33), which includes the right to a clean and healthy environment (Article 24 of the African Charter on Human and Peoples' Rights), and the right to human dignity (section 34)

These fundamental rights must be read in conjunction with the State's constitutional duty to protect the environment from harm (section 20) and the principles of (i) equality of rights, obligations, and opportunities before the law (section 17(2)(a)); and (ii) independence, impartiality, and integrity of courts of law, and access to justice (section 17(2)(e)). These provisions should offer the court tools necessary to monitor the government's response to climate change, as required under the Act.

The arm of government vested with the responsibility of enacting legislation on the subject is the Nigerian National Assembly by virtue of section 4 of the 1999 Constitution. The various States' Houses of Assembly of the federation derive their competence to make laws for the peace, order and good governance from section 4(7) of the 1999 Constitution. Such powers to legislate are on matters contained in the concurrent list in Part II of the second schedule of the 1999 Constitution. The power to make and enter into international environmental agreements lies exclusively with the Federal Government.[22] By virtue of section 12 of the 1999 Constitution, the National Assembly is empowered to make laws to implement a treaty between Nigeria and other countries. It is by these constitutional powers that various legislation for the mitigation of climate change such as the Climate Change Act were enacted. [23]

3.0 Climate Change Act (CCA)

The Act was enacted in 2021 to encompass facets of the long-term discussion on environmental and climate change related issues. A further feature of the Act is its comprehensive scope of application as climate change is a problem that transcends varied sectors.[24] The Act applies to the Ministries, Departments and Agencies (MDAs) of the Federal Government of Nigeria, and to public and private

[22] *Abacha v Fawehinmi* [2000] 6NWLR (Pt 660) 710
[23] Climate Change Act 2021.
[24] S. 2 CCA

entities within the territorial boundaries of Nigeria for the development and implementation of mechanisms geared towards fostering low carbon emission, environmentally sustainable and climate resilient society.

In this light, the Act, under sub-section 24 and 25 applies not just to institutions and agencies of government but also to private and public entities and compulsorily mandates them to adhere to all governmental regulations on climate change.[25] The Act established the National Council on Climate Change.[26] The Council is chaired by the President of Nigeria, with members drawn from both the public and private sectors, inclusive of the civil society, women, youth and persons with disabilities; and empowers the Council with enormous powers to coordinate its mandated scope. The National Council on Climate Change "The Council", which has been vested with regulatory powers is a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.[27] This invariably means that a regulator created by this Act could be prime driver for environmental justice.

The CCA also provides that the Council will collaborate with the Federal Inland Revenue Service (FIRS) to develop a mechanism for "carbon tax and carbon trading" in Nigeria.[28] Under the terms of the agreement, the federal government is anticipated to establish a price that emitters would pay for each tonne of GHG produced over a certain period. In addition to generating income for the government, the tax is considered to encourage customers to embrace environmentally friendly fuels, innovative technologies, and emission reductions to avoid paying the tax. The provisions of the Act provide some grounds for environmental litigation.

4.0 Environmental Litigation

The Supreme Court, in the case of *Unipetrol Nigeria Plc. v Edo State Board of Internal Revenue*,[29] has held that the phrase "sue and be sued" is wide enough to include civil and criminal actions." [30]This means that, the Council can use its staff in the legal department offences, to prosecute persons, the private or public entity that acts in a manner that negatively affects efforts towards mitigation and adaptation measures made according to this Act, or commits an offence and is liable to a penalty to be determined by the Council.[31] The prayers it could seek from the Court as stated in Section 34 (2) regarding environmental matters are, to make an order to, prevent, stop or discontinue the performance of any act that is harmful to the environment; compel any public official to act to prevent or stop the performance of any act that is harmful to the environment; compensate victims directly affected by such acts that are harmful to the environment.[32]

This provision may very well be innovative as it can be interpreted as it could encompass injunctions from gas flaring. The observation by the US Supreme Court in the case of *Amoco Production Co. v*

[25] O. M. Atoyebi, ''The Nigerian Climate Change Act 2021: Nigeria's Antidote to the Global Climate Crises''
< https://Omaplex.Com.Ng/Wp-Content/Uploads/2021/12/The_Nigerian_Climate_Change_Act_2021-1.Pdf > Accessed 29 March 2022.
[26] Climate Change Act 2021, s 3(1).
[27] CCA, s 3(1) (2)
[28] CCA,S4(i)
[29] (2006) 8 NWLR (Pt. 983) 625 or (2006) 4 CLRN 28.
[30] I U. Ibe, 'An Analysis of the Legal Framework for the Administration of Companies Income Tax in Nigeria' [2021] (6)(1) *Chukwuemeka Odumegwu Ojukwu University Law Journal* 32-44. 1
[31] CCA, S34
[32] CCA, s 34 (2)

Village of Gambell, Alaska, [33]that environmental injury, given its nature, can rarely be adequately remedied by monetary compensation and is frequently permanent or long-lasting. This is instructive for Nigerian courts, and thus the issuance of an injunction is critical to protecting the environment.

Prior decisions would find that the Nigerian courts have, as a tendency, prioritized the economic interests of the oil and gas sector above the need to achieve environmental justice regarding company's activities. For example, in *Chinda v Shell-BP*[34] (a common law tort of negligence lawsuit), the Plaintiff's petition for a court order prohibiting the Defendant from carrying out future gas flaring operations near his hamlet was denied. Even though gas flaring had led to the loss of Plaintiff's property, residences, and trees, the court determined that the claim was absurdly and unnecessarily broad.'[35] The verdict, in this case, served as an example of Nigerian courts' reluctance to issue an injunction against oil and gas companies polluting activities to prevent impeding their economic output, while only being willing to order (relatively light) compensation for the plaintiff's damages in some deserving cases.[36]

The *Oronto Douglas v Shell Petroleum Development Company Nigeria Limited and Ors.*[37]*of* 1997 regarding the Nigeria Liquified Natural Gas (NLNG) Project is another example of a environmental-related lawsuit that was unsuccessful because the court adopted an unreasonably restrictive standing criterion. In 1989, the Nigerian government and several multinational oil companies formed a joint venture company to develop the NLNG project, with production beginning in 1999. The goal of the project was to turn the associated gas that would have been flared during the extraction of crude oil into more environmentally friendly Liquified Natural Gas (LNG) and Natural Gas Liquids (NLG), which could then be exported and sold.

The NLNG project is widely seen as Nigeria's most important action in response to climate change, with reports indicating that it has dramatically reduced the country's flare profile. A civil society plaintiff brought a lawsuit against the defendants (a group of oil firms and the Nigerian government) for failing to follow the necessary procedures in the Environmental Impact Assessment process, among other things.[38]

The Federal High Court dismissed the complaint because the plaintiff lacked *locus standi*. The court dismissed the claim on the basis that the plaintiff failed to provide sufficient prima facie evidence that his private right had been impacted or that he had suffered any direct damage as a result of the defendant's violation of the Environmental Impact Assessment Act (EIA Act).[39] The court rejected Douglas's contention that he had both a private and public interest in the lawsuit since he was a resident of a community that would be negatively impacted by the project.

Although the Court of Appeal eventually ordered a retrial of the case for other grounds, it did not occur since the project had already been finished by the time it rendered its decision.

[33] 480 US 531 (1987).
[34] (1974) 2 RSLR 1. 14
[35] (1974) 2 RSLR 1. 14
[36] *Allar Irou v Shell BP Development Company (Nigeria) Ltd* (Unreported, Suit No W/89/71, 26 November, 1973).
[37] Unreported Suit No: FHC/L/CS/573/96, 17 February 1997.
[38] Unreported Suit No: FHC/L/CS/573/96, 17 February 1997.
[39] 1992 Cap E12, LFN, 2004.

However, one may argue that a retrial would not have changed the verdict if the plaintiff had failed to demonstrate that his private legal right had been infringed.

This strict standing rule is a major impediment to environmental litigation in Nigeria, as it does not permit public interest litigation or any action that is not entirely based on an individual's private legal rights, even when it is evident that an environmental law has been violated in a way that negatively impacts the environment.

Over the years, the ability to pursue environmental justice has been impeded by the absence of an acceptable climate legislative framework, an overly restrictive standing rule, and a discouraging court stance towards environmental claims. It was also made clear that several reforms are necessary to foster the emergence of (successful) climate change litigation in Nigeria and to achieve its climate change mitigation and adaptation potential more completely and effectively.

The judicial posture seems to be changing as can be seen in the case of *Centre for Oil Pollution Watch v NNPC*[40] Where it was held that the Centre for Oil Pollution Watch had *locus standi* to file the action, according to the court's judgment. The court acknowledged that NGOs, as public-spirited organizations, had the authority to bring legal actions on behalf of the general public or to defend the interests of the general public, particularly in matters involving environmental concerns. The court took into account the value of preserving the environment, the public interest in addressing environmental pollution brought on by oil operations, and the fact that the affected communities were unable to successfully seek redress on their own because of several factors, including poverty and a lack of legal resources.

The court's ruling, in this case, indicates an expansion of the idea of locus standi in Nigerian Courts, acknowledging the importance of non-governmental organisations in defending the environment and public interest. It is also consistent with the worldwide trend of providing NGOs and other civil society groups standing to initiate environmental claims since environmental concerns often have far-reaching effects and need a collaborative effort to be effectively resolved. The Nigerian Climate Change Commission (NCCC) being the regulator of the CCA is in charge of organising and carrying out climate change initiatives in Nigeria. The council has been granted the authority to bring legal action, likely to push them to take action.

Indeed, a person's ability to successfully sue an organization for violation of the EIA Act or any other environmental or climate change-related legislation is limited by the very stringent and widely implemented standing requirement, which has thwarted several environmental claims in Nigeria. To clarify, according to the past judicial standard, standing will only be granted to a plaintiff who demonstrates that his/her 'civil rights' have been, is at risk of being infringed or negatively impacted by the conduct complained of. Without a doubt, the past established *locus standi* criterion had a significant impact as it shields a crucial aspect of governmental authority from legal scrutiny as well as liability for environmental breaches.

[40] [2019] 5 NWLR (Pt. 1666) 518

5.0 Conclusion

A more preventive and proactive approach to environmental protection, emphasizes the responsibility of the State to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.' *Simpliciter* as contained in Section 20.[41] It is recommended that the Constitution incorporates provisions that acknowledge and safeguard the right to a healthy environment for all individuals, including posterity, which constitutes an essential aspect of environmental rights while expunging any provision that counters the attainment of this right. Prioritisation of climate change mitigation and adaptation efforts can be ensured through this approach.

Amidst increasing environmental challenges and the pressing call for decisive measures to safeguard the environment, it is crucial for the judiciary to adopt a proactive stance in environmental litigation cases. Interpreting and applying the law to address pressing societal issues, even in the absence of clear legislative guidance. In the field of environmental law, where the stakes are significant, and the repercussions of inaction are severe, judicial activism can be instrumental in promoting environmental protection and sustainability. Advocating for judicial activism can help guarantee that these rights are maintained and safeguarded by enforcing environmental laws and regulations vigorously.

Often, legislative frameworks may be insufficient or outdated to tackle emerging environmental challenges. Interpreting existing laws in a way that promotes environmental conservation and sustainability is made possible through judicial activism, allowing the courts to fill these gaps. Courts possess the authority to establish precedent through their rulings, which have the potential to impact policy and legislative changes. By being proactive in environmental litigation, judges can lead to the development of innovative policies that focus on environmental protection and tackle complex issues like climate change.

Activism in the judiciary acts as a safeguard against government actions or inactions that could negatively impact the environment. Courts have the authority to require government agencies to meet their responsibilities in enforcing environmental laws and regulations, promoting accountability and transparency in environmental governance.

For optimal results in environmental litigation matters, it is crucial for the judiciary and litigants to work together and support innovative interpretations of the law. Parties should be motivated to present environmental cases that highlight important legal and policy matters, and the courts should be ready to thoroughly address these issues and use their judicial discretion to ensure just and equitable outcomes.

[41]CFRN, s 20.