

**CLIMATE CHANGE LITIGATION AND CORPORATE ACCOUNTABILITY IN  
NIGERIA: THE PATHWAY TO CLIMATE JUSTICE?**

by

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the degree of Master of Laws

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## **Abstract**

Oil and gas is the linchpin of the Nigerian economy. However, oil exploration and exploitation processes of petroleum products, particularly in the Niger Delta, have generated unpleasant social and environmental challenges ranging from oil spill, gas flaring and discharge of waste and effluents which have wreaked havoc on the health of the Niger Delta people and the ecosystems upon which they depend. This thesis is particularly concerned with gas flaring: the burning of associated natural gas found with oil deposits. Nigeria is currently ranked as the world's fifth-largest gas flaring country in the world. This wasteful practice of burning non-renewable energy results in the release of greenhouse gases into the atmosphere which cause extreme climatic changes. Climate change is said to be the current greatest environmental and social threat to sustainable development. Although no region of the world will be entirely spared, scientific research has shown that there are uneven effects of these challenges and vulnerabilities to these challenges across world territories. Some continents, more than others, are vulnerable to the catastrophic effects of climate change. For instance, it is feared that African countries like Nigeria might experience the most severe impacts of climate change compared to other continents in the world and they are the least prepared to handle these impacts as a result of poverty and low technological development. Litigation has been heralded as a promising, effective, and alternative path to encourage climate change mitigation and victim compensation. This thesis analyzes the core assumptions that guide current scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm based on the experiences in the United States of America and Australia and contrasts that with the unique contextual factors that have impeded the overarching success of climate change litigation in Nigeria. The current state of climate change litigation in Nigeria reveals the lack of political will to enforce the court's judgment because of

the economic importance of the Oil and Gas Industry, lack of judicial independence, the lack of gas conservation infrastructure and the Joint Venture arrangement between the state and the Transnational oil companies.

## **Lay Summary**

There is scientific consensus that swift and profound actions are needed to mitigate and adapt to the impending dangers of climate change. Climate advocates have employed litigation as a strategy to catalyze action and galvanize support on climate change. There are several documentations of how litigation can be used to fill regulatory gaps, help build social movements, and shift corporate behavior around issues that affect the climate in the US and Australia.

Despite the scholarly enthusiasm for climate change as an effective tool to reduce environmental harm in the US and American experiences, climate change litigation has had limited success in Nigeria as a result of the lack of political will to address oil-related environmental issues. Therefore, I argue that for litigation to compel reformative actions, there must be in existence the political will to implement the changes.

## **Preface**

This thesis is the original, unpublished, independent work by the author, Princess Duruike.

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## **List of Abbreviations**

EPA Environmental Protection Agency

FGN Federal Government of Nigeria

GHG Greenhouse Gas

IPCC Intergovernmental Panel on Climate Change

JV Joint Ventures

NNPC Nigerian National Petroleum Corporation

TNC Transnational Oil Corporations

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And finally, I would like to thank my parents, Alex (Snr) and Jane Duruiké whom I love deeply for their love, support and wise counsel.

## **Dedication**

To my one and only darling sister, Ifeoma Duruike. I could never have done it all without you.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Overview

Global climate change may indeed signal “the end of nature.”<sup>1</sup> Such a profound moral issue demands a profound response from law. Although no region of the world will be entirely spared, scientific research has shown that there are uneven effects of these challenges and vulnerabilities to these challenges across world territories. Some continents, more than others, are vulnerable to the catastrophic effects of climate change and environmental degradation.<sup>2</sup> For instance, it is feared that African countries like Nigeria might experience the most severe impacts of climate change compared to other continents in the world and it is the least prepared to handle these impacts

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<sup>1</sup> Bill McKibben, *The End of Nature* (New York: Random House Trade Paperbacks, 2006). In this book, McKibben argues that the survival of the globe is dependent on a fundamental, philosophical shift in the way we relate to nature. McKibben writes about earth’s environmental cataclysm, addressing such core issues as the greenhouse effect, acid rain, and the depletion of the ozone layer.

<sup>2</sup> The Intergovernmental Panel on Climate Change, “Climate Change 2007: Working Group II: Impacts, Adaptation and Vulnerability” (2007) at 434, online: <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter9.pdf>>.

because of poverty and low technological development.<sup>3</sup> Some of which are already being experienced in Nigeria.<sup>4</sup>

Nigeria has been labelled a gas province with significant oil accumulations, due to her colossal natural gas reserves. A large volume of associated gas is found along with crude oil during oil exploration in the Niger Delta. Most of Nigeria's oil fields lack the infrastructure to either re-inject associated natural gas for conservation or to harness such gas for domestic or commercial utilisation.<sup>5</sup> This has given rise to an incessant practice of burning off associated natural gas in a

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<sup>3</sup> Anuh Shah, *Climate Change and Global Warming, Global Issues* (02 February, 2015), online: <<http://www.globalissues.org/issue/178/climate-change-and-global-warming>>.

<sup>4</sup> For example, the Southern part of Lake Chad (which lies inside the North-eastern region of Nigeria) used to cover 40,000 square kilometers, now merely covers 1,300 square kilometers. See Jumoke Beyioku, *Climate Change in Nigeria: A Brief Review of Causes, Effects and Solution* (Federal Ministry of Information and Culture) September, 19, 2016, online: <<http://fmic.gov.ng/climate-changenigeria-brief-review-causes-effect-solution/#>>. Also, the loss of 63.83% of the farmlands in Nigeria to desertification and the decline of rain days by 53% in the North-Eastern part of Nigeria have been attributed to climate change. The Niger Delta is particularly vulnerable to sea level rise. In recent times, the low-lying marshy lands of the Delta have been gradually subsiding and this has been exacerbated by oil and gas extraction. See Andy Rowell, James Marriott & Lorne Stockman, *The Next Gulf: London, Washington & Oil Conflict in Nigeria* (United Kingdom: Constable, 2005) 235.

<sup>5</sup> Mary Agboola et al, "Gas Flaring in Nigeria: Opportunity for Household Cooking Utilization" (2011) 2:2 69 at 69 – 70.

process that is commonly referred to as ‘gas flaring’. About 17 % of Nigeria’s total daily gas production is re-injected, while 33% is utilised commercially and the remaining 50% is wasted through flaring.<sup>6</sup> This practice has been a major cause of environmental pollution in the oil-producing areas of the Niger Delta with devastating impacts on the health of indigenous people and their source of livelihood.<sup>7</sup> Additionally, the practice of gas flaring constitutes a waste of non-renewable resources which has also caused huge revenue losses for the country.<sup>8</sup> The National Oceanic and Atmospheric Administration estimates that Nigeria flared 536 billion standard cubic foot (SCF) of natural gas in 2010, making Nigeria the second highest gas-flaring country in the world.<sup>12</sup> While Nigeria produces about 7% of the Organization of Petroleum Exporting Countries natural gas production, it contributes about 40% of the organisation’s flared gas.<sup>9</sup> Gas-flaring emissions contribute significantly to global warming and climate change.<sup>10</sup> Several green house gases that affect the climate are released into the atmosphere when gas is being flared. These toxic

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<sup>6</sup> Uchenna Jerome Orji, “Moving from Gas Flaring to Gas Conservation and Utilisation in Nigeria: A Review of the Legal and Policy Regime” (2014) 38:2 OPEC Energy Rev. 149 at 150.

<sup>7</sup> Eferiekose Ukala, “Gas Flaring in Nigeria’s Niger Delta: Failed Promises and Reviving Community Voices” (2011) 2:1 Wash. & Lee J. Energy, Climate, & Env't 97 at 102.

<sup>8</sup> In 2011, NNPC claimed that Nigeria lost an estimated revenue of US\$ 2.5 billion due to gas flaring by oil-producing companies. See Uchenna Jerome Orji, *supra* note 6 at 150.

<sup>9</sup> *Ibid.* at 150.

<sup>10</sup> Eferiekose Ukala, *supra* note 7 at 101.

gases include: sulfur dioxide, carbon dioxide (CO<sub>2</sub>) and methane.<sup>11</sup> Due to the high emission rate, the impact of the flared gases is substantial. On a national and global scale, gas flares are a significant contributor to global warming and climate change.<sup>12</sup> Thus, they not only affect the Niger Delta community but also contribute to global greenhouse emissions. In fact, Nigeria's gas flaring produces almost 25% of Africa's greenhouse gases.<sup>13</sup>

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<sup>11</sup> The Climate Justice Programme & Environmental Rights Action/Friends of The Earth Nigeria, *Gas Flaring In Nigeria: A Human Rights, Environmental, And Economic Monstrosity* (2005), online: <<http://www.climatelaw.org/media/cases/case-documents/nigeria/gas-flaring-in-nigeria.pdf>>.

<sup>12</sup> Globally, gas flaring releases over 400 million metric tonnes of carbon dioxide equivalent (CO<sub>2</sub>) emissions every year. This is comparable to the annual emissions from 125 medium-sized (63 gigawatt) coal plants in the USA. At the national level in Nigeria, flaring accounts for over a third of the country's total CO<sub>2</sub> emissions. See International Council on Clean Transportation, "The Reduction of Upstream Greenhouse Gas Emissions From Flaring and Venting" (2014), online: <[https://ec.europa.eu/clima/sites/clima/files/transport/fuel/docs/studies\\_ghg\\_venting\\_flaring\\_en.pdf](https://ec.europa.eu/clima/sites/clima/files/transport/fuel/docs/studies_ghg_venting_flaring_en.pdf)>. See also Bronwen Manby, Human Rights Watch, *The Price Of Oil: Corporate Responsibility And Human Rights Violations In Nigeria's Oil Producing Communities* (1999), online: <<http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf>> (noting that gas flaring is a significant contributor to greenhouse gases).

<sup>13</sup> United Nations Integrated Regional Information Networks, Nigeria: *Should Stopping Gas Flaring be a Priority?* (September 3, 2008) online: <<http://allafrica.com/stories/20080904007.html>>.

This research analyses the effectiveness of litigation as a tool to address gas flaring and climate change in Nigeria. Several scholars have proposed that litigation is an effective method for victims of climate change to seek redress against corporations and possibly states that are responsible for large greenhouse gas emissions.<sup>14</sup> Litigation has been heralded as a promising, effective, and alternative path to encourage climate change mitigation, adaptation, social change and victim compensation. The essence of climate change litigation is to apply legal rights so as to affect the outcomes that would either mitigate, reduce or improve alternation to climate change.

Most climate change litigation to date has proceeded in courts in developed countries like the US, Australia and New Zealand.<sup>15</sup> However, litigants in Nigeria and other countries in the Global South

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<sup>14</sup> Jacqueline Peel & Hari Osofsky “Litigation’s Regulatory Pathways and the Administrative State: Lessons from U.S. and Australian Climate Change Governance” (2013) 25:1 *Geo. Intl. Evt’l L. Rev.* 207 at 216, Michal Nachmany, et al, “Global Trends in Climate Change Legislation and Litigation” *Grantham Research Institute on Climate Change and the Environment* (May 2017), online: <<http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2017/04/Global-trends-in-climate-changelegislation-and-litigation-WEB.pdf>> and Jolene Lin, “Climate Change and the Courts” (2012) 32:1 *Legal Studies* 35 at 38.

<sup>15</sup> United Nations Environment Program, “The Status of Climate Change Litigation: A Global Review” (2017) at 5.

have started to make use of burgeoning climate change litigation theories and know how.<sup>16</sup> The *Gbemre v. Shell* case was the first Nigerian case to focus specifically on the practice of gas flaring in the Niger Delta. It is the only climate change litigation instituted in Nigeria. It, therefore, offers a unique lens to analyse the contextual factors that make climate change litigation of limited utility in Nigeria. In 2005 Jonah Gbemre on behalf of himself and other members of his community living near some of the flare sites citing climatic changes and other environmental impacts of gas flaring on their community, instituted an action against Shell, the Nigerian National Petroleum Corporation, and the Attorney General of the Federation in the Federal High Court of Nigeria. The plaintiffs claimed that gas flaring was a violation of their fundamental rights to life and dignity guaranteed under the Nigerian constitution. In a ruling on November 14, 2005, the Federal High Court of Nigeria agreed and ordered Shell Petroleum Development Company of Nigeria Limited (SPDC) and the Nigerian National Petroleum Corporation to take immediate steps to stop the further flaring of gas in the plaintiffs' community.<sup>17</sup> It held that Shell's flaring of gas in the community amounted to a gross violation of the Applicants' fundamental rights to life including their rights to a healthy environment and dignity of human person. However, this ruling has had no practical impacts as gas is being flared 24 hours a day in the region as it has been since 1958. In fact, some of these flare sites are still very close to the homes and farmlands of the indigenous people of the Niger Delta. The executive arm of government is majorly concerned with oil revenue maximisation - any perceived factor that will interrupt oil production is usually treated as a

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Gbemre v Shell Petroleum Development Corporation* (2005) Suit No. FHC/B/CS/53/05 (Unreported).

hindrance to the fiscal survival of the state. In this state of affairs, it is apparent that issues affecting the sustainable exploitation and management of petroleum resources have taken a back seat. In the thirteen years since this decision, there have been no attempts to enforce the decision by the Nigerian government.<sup>18</sup> The enforcement of the decision of the Federal High Court could have had the effect of compelling Shell to commence the development of gas gathering or re-injection facilities in the community. However, as gas flaring is generally a cheaper option, the decision of the court was apparently unfavourable to Shell and the Nigerian National Petroleum Corporation.

This thesis argues that the lack of concrete corporate accountability measures to stop gas flaring and its resultant excessive emissions of greenhouse gases in Nigeria is not due to lack of regulation. Rather, it stems from the lack of political will to enforce environmental regulations due to three unique contextual factors in Nigeria: the influence of the state on the judiciary; the lack of gas conservation infrastructure and the Joint Venture arrangement between the state and the transnational oil companies.

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<sup>18</sup> Kaniye Ebeku, “Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v Shell Revisited*” (2007) 16:3 RECIEL 312 at 316.

## 1.2 Approach and Outline of Thesis

This thesis focuses on litigation in the US and Australia and can be useful to those researching and initiating climate change litigation in other countries in the Global South. The purpose of the research is to identify and analyse the core assumptions that guide current scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm based on the experiences in the United States of America and Australia and contrast that with the unique contextual factors that have impeded the overarching success of climate change litigation in Nigeria. Scholarly contribution on the effectiveness of climate change litigation in US and Australia both offer important insights into how climate change has impacted human health and the environment and how the courts have been used as arenas to restrain activities that cause climate change impact.

To understand the importance and effect of climate change litigation, chapter two of my thesis will provide an overview of climate change litigation in the US and Australia. It will also categorize and discuss current scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm. Chapter three and four uses the Nigerian experience to qualify the scholarly assumptions in climate change literature provided in chapter two. Chapter three will use the *Gbemre* case as the lens through which I highlight two contextual factors about the Nigerian context that make the assumptions identified in the American and Australian literature of limited utility in the Nigerian context: the influence of the state on the judiciary; the lack of gas conservation infrastructure. Chapter four discusses why an understanding of the Joint Venture arrangement between the state and the Transnational oil companies is important in understanding the context of climate change litigation and the potential of its success in Nigeria.

## CHAPTER TWO

### CLIMATE CHANGE LITIGATION: LEARNING FROM THE EXPERIENCE OF CURRENT SCHOLARSHIP

*“After all, social justice is achieved not by lawlessness process, but legally  
tuned affirmative action, activist justicing and benign interpretation within the  
parameters of Corpus Juris”<sup>19</sup>*

#### 2.1 INTRODUCTION

Courtrooms have become a key battleground in the public debate over climate change around the world. Judicial adjudication on climate change disputes have proliferated over the last decade.<sup>20</sup>

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<sup>19</sup> Justice V. R. Krishana Lyer, *In Search of Social Justice*, cited in Gozie S. Ogbodo, “The Role of the Nigerian Judiciary in the Environmental Protection Against Oil Pollution: Is It Active Enough?” (17 January 1980), online:

<http://www.nigerianlawguru.com/articles/environmental%20law/THE%20ROLE%20OF%20THE%20NIGERIAN%20JUDICIARY%20IN%20THE%20ENVIRONMENTAL%20PROTECTION%20AGAINST%20OIL%20POLLUTION,%20IS%20IT%20ACTIVE%20ENOUGH.pdf>.

<sup>20</sup> From 1986 to 2007 there were 95 cases filed in the U.S. and only 12 filed outside the U.S. See The Sabin Center for Climate Change Law at Columbia Law School & Arnold & Porter LLP,

As of the writing of this paper, 1,068 climate change law suits had been initiated in 27 countries including international tribunals.<sup>21</sup> The U.S. database included 807 cases and non-U.S. database had 261 cases.<sup>22</sup> Recently, in March 2017, the South African government lost the country's first climate change lawsuit after the high court ruled against its plan for a coal-fired power station.<sup>23</sup> The number of climate change cases often varies depending on how climate change litigation is defined.<sup>24</sup> Climate change is a complicated and multidimensional phenomenon "that cuts across multiple levels of governance, areas of law, and sectors of the economy."<sup>25</sup> Osofsky and Peel use a spectrum of definitions to cover climate change litigation. One end of the spectrum comprises of cases where climate change is pivotal to litigation and the other encompasses cases where climate change is either an ancillary issue or is not raised but the cases have implications for climate change mitigation and adaptation.<sup>26</sup> I find the spectrum by Osofsky and Peel helpful in defining climate change litigation and will adopt it in my thesis. All climate change litigation cases mentioned in

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"U.S. Climate Change Litigation database: About," online: Columbia University <<http://wordpress2.ei.columbia.edu/climatechangelitigation/about/>>.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58 (2017) 65662/16.

<sup>24</sup> Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge: Cambridge University Press, 2015) at 6-7.

<sup>25</sup> *Ibid.* at 4.

<sup>26</sup> *Ibid.* at 6-8.

my thesis fit comfortably within one of the two ends of the spectrum. Regardless of how climate change litigation is defined, several cases that relate to climate change have been instituted.<sup>27</sup> Three core assumptions guide current scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm: First, litigation can be an effective tool to bridge the regulatory gaps in between the treaty regime on the international level and the policies on the national level. Secondly, it is believed that litigation can influence corporate behavior and social norms; and lastly climate change litigation has been promulgated as a tool to demand compensation for the victims for personal injury and/or property damage recoveries. In subsequent chapters, the effectiveness of these existing assumptions will be analysed and challenged against the backdrop of the political realities of Nigeria.

This chapter proceeds as follows: the second part explains the reason for the introduction of climate change litigation: climate change has been characterized as a super wicked problem and this has thus caused the slow action of the international community, thereby giving room to the introduction of alternative measures such as litigation to tackle this global phenomenon. The second part examines why treaties and other international instruments (which are the conventional and preferred machinery for tackling global issues) have so far not concretely dealt with climate change. The third part explains the three core assumptions that guide current scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm. These assumptions provide a backdrop for the close analysis of the Nigerian context which follows in chapters three and four.

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<sup>27</sup> The Sabin Center, *supra* note 20.

## 2.2 CLIMATE CHANGE LITIGATION AS A SUPER WICKED PROBLEM

Greenhouse gas (GHG) emissions are on the rise, thereby putting people everywhere in peril.<sup>28</sup> Due to the global nature of climate change, the orthodox use of treaties and international conventions seems to be the preferable option to require states to reduce their greenhouse gas emissions. This approach is an attractive option: “it would permit states to design a system that creates the most efficient incentives for reducing greenhouse gases, while taking account of differences in local capacity and economic development, international equity, and other relevant factors.”<sup>29</sup> Despite broad scientific consensus on the anthropogenic emissions of GHG and the risks of climate impacts to human communities, international solutions to the climate change problem has been slow.<sup>30</sup> The 1997 *Kyoto Protocol* established binding emissions reduction targets for participating developed country parties (which did not include the United States) over the first commitment period running from 2008 to 2012.<sup>31</sup> At the United Nations Framework Convention

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<sup>28</sup> The Intergovernmental Panel on Climate Change, “Climate Change 2014 Synthesis Report Summary for Policymakers” (2014) at 2, online:

<[https://www.ipcc.ch/pdf/assessmentreport/ar5/syr/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/pdf/assessmentreport/ar5/syr/AR5_SYR_FINAL_SPM.pdf)>.

<sup>29</sup> Eric A. Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal" (2007) 155:6 U. Pennsylvania L. Rev. 1925 at 1925.

<sup>30</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 52

<sup>31</sup> The *Kyoto Protocol* includes does not include binding emissions reduction targets for developing countries even though some such countries, including China and India, have emerged as major emitters. China – the country with the highest CO<sub>2</sub> emitter- emits 30% of the world’s total CO<sub>2</sub>

on Climate Change (UNFCCC) Conference of the Parties (COP) meeting in 2012, parties to the Protocol agreed to institute a second commitment period for 2013 to 2020, but the necessary treaty amendment has not yet received sufficient support to come into force.<sup>32</sup> The 2015 Paris Climate Conference, also known as COP21, represented the culmination of a decade of meetings and negotiations. *The Paris Agreement* builds upon the UNFCCC with the aim to fundamentally keep global temperature rise this century below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C.<sup>33</sup> 170 countries out of the 197 parties have ratified the COP21 agreement and committed to lower their greenhouse gas emissions.<sup>34</sup> The COP21 agreement lacks the teeth needed to force change, as it does not make countries legally obligated to meet their emissions reduction targets. The binding part of the agreement, however, requires countries to set emission reduction targets, develop the policies to meet them, publicly

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and India- 4th highest CO2 emitter- emits 7%. See United States Environmental Protection Agency, *Global Greenhouse Gas Emissions Data*, (13 April 2017), online: <<https://www.epa.gov/ghgemissions/global-greenhouse-gasemissions-data>>.

<sup>32</sup> The amendment requires support from three-quarters of the Protocol's parties to enter into force. As of November 2017, only 95 out of the Protocol's 192 parties have ratified the amendment: see Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 11.

<sup>33</sup> Nations, "Paris Agreement" (2016) at 3, online: <[https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf)>.

<sup>34</sup> Coral Davenport, "Nations Approve Landmark Climate Accord in Paris" *New York Times* (12 December 2015), online: <<https://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html>>.

report their progress every 5 years starting in 2023, and update and enhance their targets after each review. But what the agreement does not dictate is the size of those emissions reductions, or the tactics that countries should adopt to reach them.<sup>35</sup>

The international community has encountered difficulty in dealing with the phenomenon of climate change because, it is a “super wicked” policy problem.<sup>36</sup> It is characterized as a “super wicked” problem because of three key exacerbating features. First, the issue of climate change becomes less tractable over time. That is, the longer it takes to address the problem, the harder it will be to do so. The more GHGs we emit, the more committed we are to continuing emissions, the more severe the problem becomes and the less likely we are to find an acceptable solution.<sup>37</sup> As greenhouse gas emissions continue to increase, exponentially larger, and potentially more economically disruptive emissions reductions will be necessary in the future to bring atmospheric concentrations down to desired levels.<sup>38</sup> Future technological advances, therefore, would likewise have to be able to achieve those exponentially greater reductions to make up for lost time. The climate change that happens in the interim may itself cause sufficient economic disruption, for

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<sup>35</sup> *Ibid.*

<sup>36</sup> Richard J. Lazarus, “Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future” (2009) 94:5 Cornell L. Rev. 1153 at 1160. See also Kelly Levin, et al, “Overcoming the Tragedy of Super Wicked Problems: Constraining Our Future Selves to Ameliorate Global Climate Change” (2012) 45:2 Policy Sci. 123 at 124.

<sup>37</sup> United Nations Environment Program, *supra* note 15 at 7.

<sup>38</sup> *Ibid* at 7. See also The Sabin Center *supra* note 20.

instance, by slowing growth rates, to make it much harder to accomplish the necessary technological innovation.

Another problematic characteristic of climate change is that, those who are best positioned to address climate change are those who are primarily responsible for causing it—and who lack incentives to act. This problem is made worse by an important asymmetry. Those with incentives not to mitigate climate change, such as the companies that own leases to extract coal or other fossil fuels, tend to have concentrated interests and good access to relevant information. Meanwhile, those most likely to bear the burdens of adaption, including the many millions of individuals who live in coastal communities, have diffuse incentives, and generally lack pivotal information such as the costs and benefits of alternatives to fossil-fueled approaches to energy and transportation.<sup>19</sup> The major sources of greenhouse gas emissions include many of the world's most powerful nations, such as the United States, which are not only reluctant to embrace restrictions on their own economies but are least susceptible to demands by other nations that they do so. In addition, by a perverse irony, they are also the nations least likely to suffer the most from climate change that will unavoidably happen in the nearer term.<sup>39</sup> At the national level, the United States' (U.S.) historic and recently revived ambivalence about addressing climate change stands out as an especially consequential example of political coalitions struggling toward and falling short of policy change. The prospect of federal climate change regulation in the US has grown dimmer with the results of the 2016 election. The current U.S President, Donald Trump, and several key members of his administration have expressed doubt about the reality of human caused climate

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<sup>39</sup> Richard J. Lazarus, *supra note 36* at 1160.

change.<sup>40</sup> Most recently, President Trump announced his intention to withdraw the US from the *Paris Agreement* on climate change.<sup>41</sup>

A third feature is the absence of an existing institutional framework of government with the ability to develop, implement, and maintain the laws necessary to address a problem of climate change's tremendous spatial and temporal scope. No institution has legal authority aligned with the global scope of the problem. Therefore, climate change mitigation—and to a lesser degree adaptation—efforts are often seen as expensive, unnecessary, futile, and remote from policies that yield immediate and politically popular economic benefits.

Climate change is a prime illustration of a collective action issue that has many possible burden allocation strategies and no societal consensus on the most fair or appropriate way to allocate the burden. One clear example is the fraught international debate over the relative responsibilities of developed and developing countries to reduce carbon emissions and mitigate climate change. A large block of developing countries have consistently maintained that developed countries must

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<sup>40</sup> Alexandra Wilts, “Trump’s Top Environment Official Refuses to Say If President Believes in Climate Change,” *The Independent* (2 June 2017), online: <http://www.independent.co.uk/news/world/americas/uspolitics/trump-climatechange-paris-agreement-scott-pruitt-epa-refuses-answer-president-believes-latesta7770291.html>.

<sup>41</sup> Statement of President Donald Trump, (1 June 2017), as posted by The White House, Office of the Press Secretary, online: The Whitehouse <https://www.whitehouse.gov/the-press-office/2017/06/01/statementpresidenttrump-paris-climate-accord>.

take on the lion's share of emissions reductions, as well as provide assistance for developing countries, because industrialized nations are largely responsible for manmade climate change and they have superior economic resources.<sup>42</sup> Developed countries have been resistant to such arguments, contending that some "developing" countries have become quite wealthy and emit quite a large portion of GHGs.<sup>43</sup> Such disagreement arose once again in 2015 during the negotiation of the *Paris Agreement* on climate change,<sup>44</sup> underscoring the continuing lack of societal consensus on who should bear the burden of mitigating climate change. The failures of the international climate treaty regime in adequately reducing emissions<sup>45</sup> and improving adaptive capacity<sup>46</sup> have focused attention and hope on regulatory efforts at the sub-global and even subnational levels,

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<sup>42</sup> Wolfgang Obergassel et al, "Phoenix from the Ashes—An Analysis of the *Paris Agreement* to the United Nations Framework Convention on Climate Change" (Wuppertal Institute for Climate, Environment and Energy, 2016) at 8.

<sup>43</sup> *Ibid.* at 8. 25.

<sup>44</sup> *Ibid.* at 8

<sup>45</sup> Emissions are steadily growing, and according to the International Energy Agency, current energy consumption puts the world on track for a long-term global average temperature rise of at least 3.6°C, far more than the 2.0°C aim. See International Energy Agency, *World Energy Outlook 2013* (2013, OECD/IEA, Paris).

<sup>46</sup> The Intergovernmental Panel on Climate Change Working Group II, *supra* note 2.

especially in countries that are major carbon emitters.<sup>47</sup> The next parts will provide an overview of climate change litigation in the US and Australia.

### **2.3 Climate Change Litigation in The United States of America**

There is a relatively long history of climate change litigation in the United States of America (U.S.).<sup>48</sup> The first case was *City of Los Angeles v. National Highway Transportation Safety Administration (NHTSA)*. It was decided by the DC Circuit Court of Appeals in 1990.<sup>49</sup> In that case, several cities, states, and environmental groups challenged the NHTSA's failure to prepare an environmental impact statement under the National Environmental Policy Act (NEPA) given the adverse climatic effects of reducing fuel economy standards for motor vehicles. The case has become a "porotype" for subsequent US climate change cases.<sup>50</sup> In 2007, seventeen years after that first case, the US Supreme Court issued an unprecedented decision in *Massachusetts v.*

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<sup>47</sup> See Kirsten H. Engel & Scott R. Saleska, "Sub global Regulation of the Global Commons: The Case of Climate Change" (2005) 32 *Ecol. L. Q.* 183; Ann E. Carlson, "Iterative Federalism and Climate Change" (2009) 103 *Northwestern Univ. L. Rev.* 1097; Daniel Farber, "Carbon Leakage versus Policy Diffusion: The Perils and Promise of Sub global Climate Action" (2013) 13 *Chicago J. Intl. L.* 359; and Hari M. Osofsky, "Suburban Climate Change Efforts: Possibilities for Small and Nimble Cities Participating in State, Regional, National, and International Networks" (2012) 22 *Cornell J. L. Public Policy* 395.

<sup>48</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 19.

<sup>49</sup> *Ibid.* at 19.

<sup>50</sup> *Ibid* at 19.

*Environmental Protection Agency*. Ever since then climate change litigation in the U.S has gained steam and grown exponentially.<sup>51</sup> The failure of the U.S to pass comprehensive climate change legislation, has been particularly important in the use of litigation as regulatory approach to climate change.<sup>52</sup> The increased number of climate change cases came with a diversity in claims. These various climate change cases have been analysed and categorized by several scholars.<sup>53</sup> The Sabin Center for Climate Change Law’s U.S. Climate Litigation database categorizes climate change cases into federal statutory claims; constitutional claims, state law claims; common law claims; public trust claims; claims brought pursuant to securities and financial regulation; claims arising in relation to trade agreements; adaptation claims; and claims related to climate change protesters and scientists.<sup>54</sup>

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<sup>51</sup> Samvel Varvaštian, “Climate Change Litigation, Liability and Global Climate Governance—Can Judicial Policymaking Become a Game-changer” (2016) at 2, online: [http://www.diss.fuberlin.de/docs/servlets/MCRFileNodeServlet/FUDOCS\\_derivate\\_000000006631/Varvastianxclimatexchangelitigation.pdf](http://www.diss.fuberlin.de/docs/servlets/MCRFileNodeServlet/FUDOCS_derivate_000000006631/Varvastianxclimatexchangelitigation.pdf).

<sup>52</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 19.

<sup>53</sup> *Ibid* at 35.

<sup>54</sup> The federal statutory claims include: claims brought under the Clean Air Act, the Endangered Species Act and other wildlife protection statutes, and the Clean Water Act. About fifty-five percent of climate change cases fall under the federal statutory claims. Almost thirty percent of the claims in the database are brought under state law. The rest of the other claims are rarely made. See the Sabin Center *supra* note 20.

This shows that climate advocates in the U.S have various claims and litigation strategies to draw from. For example, several climate change cases have been instituted as attempts to force or prevent federal and state governmental regulation of greenhouse gas emissions under different environmental statutes; for the consideration of climate change in the review of power plant projects, and for the portrayal of climate change as a public nuisance. Although there are many different types of climate lawsuits, the overarching trend in US climate change litigation involves the challenge of government action than the conduct of private parties.<sup>55</sup> Much of the climate change litigation in the US began as progressive action to compel or spur regulatory reform by governments or behavioral change by polluters. However, in recent years, an increasingly substantial body of antiregulatory cases seeking to delay, limit, or invalidate climate regulatory actions by the government have emerged.<sup>56</sup> Both pro- and antiregulatory climate change litigation in the United States has been predominantly focused on mitigation rather than adaptation. They are usually concerned with “stopping coal-fired power and tightening regulatory requirements applicable to fossil fuel energy sources.”<sup>57</sup>

## **2.4 Climate Change Litigation in Australia**

Besides the United States, Australia is another country that has experienced a significant amount of climate change litigation. There are 96 cases, found in the Sabin Center for Climate Change

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<sup>55</sup> *Ibid* at 19-20.

<sup>56</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 20.

<sup>57</sup> *Ibid* at 20.

Law’s Australia Climate Litigation database.<sup>58</sup> The first climate change litigation case in Australia was in the 1990s just like in the United States. In 1994, Greenpeace Australia challenged a development consent issued for the Redbank Power Station in New South Wales based on the plant’s greenhouse gas emissions and its “contribution to the human enhanced greenhouse effect.”<sup>59</sup> Although the case was unsuccessful, it provided a model for much of the Australian climate change litigation that followed. Like the US, climate change cases have focused predominantly on greenhouse gas-intensive energy sources, with challenges to coal-fired power and coal mining proposals. “Australia’s rejection of the Kyoto Protocol during the ten-year tenure of the Howard federal government (1997–2007), coupled with resistance to mandatory national regulation to reduce domestic greenhouse gas emissions over that period, provided drivers for Australian climate change litigation like those in the United States.”<sup>60</sup> However, compared to the US, Australia has a far more developed jurisprudence on climate change adaptation that has “significantly shaped government policies and the behavior of actors in the land use and development sector.”<sup>61</sup> Given the gap between scientific consensus on the existence and immediacy of the threat of climate change and the national action by the US and Australian government scholars have documented how litigation can be used to provide direct regulation;

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<sup>58</sup> The Sabin Center for Climate Change Law at Columbia Law School & Arnold & Porter LLP, “Australia Climate Change Litigation,” online: Columbia University <<http://climatecasechart.com/non-us-jurisdiction/australia/>>.

<sup>59</sup> *Greenpeace v. Redbank Power Company* (1994) 86 LGERA 143.

<sup>60</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 21.

<sup>61</sup> *Ibid* at 21.

generate media coverage, help catalyse social movements, and shift corporate behaviour around issues concerning climate change. The next part discusses the three core assumptions that guide current scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm.

## **2.5 CORE ASSUMPTIONS THAT GUIDE CURRENT SCHOLARLY ENTHUSIASM FOR CLIMATE CHANGE LITIGATION**

This part highlights the three core scholarly assumptions that support climate change litigation: 1) a belief that climate change litigation is an effective tool to respond to gaps in the international treaty regime and national legislation, 2) a belief that litigation influences corporate behavior and norms, and 3) an assertion that climate change litigation is a tool for helping compensate victims. This section focuses predominantly on the United States and partly on Australia because these two countries are where most of the domestic climate cases have emerged. As two common law systems with a wealth of natural resources, these are two useful comparator nations for this study of Nigeria.<sup>62</sup> The core assumptions for the promotion of climate change litigation by scholars in the US and Australia will be contrasted with the current state in Nigeria where there is only one recorded case of this nature and where the judgment that was given in favour of the applicant in 2005 is yet to be enforced.

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<sup>62</sup> Except for the state of Louisiana in the United States of America.

### 2.5.1 Litigation as A Regulatory Approach

As a matter of orthodoxy, common law countries treat litigation as a forum for the interpretation and enforcement of laws rather than an avenue for the advancement of regulation. The court is, therefore, said to be unconcerned with deciding on public policy matters. Public policy issues are to be left to the legislature and executive.<sup>63</sup> Climate change litigation is said to be a double-edged sword: “It can be used to facilitate climate regulation and hold policymakers to account, by driving, enforcing, and clarifying climate policies and legislation – or in some cases substituting for absent or insufficient national legislation.”<sup>64</sup> On the contrary, litigation can also be used to oppose or weaken climate regulation. For example, corporations can use the courts to question what they consider to be excessively stringent standards or requirements.<sup>65</sup> However, a recent assessment of existing climate change cases indicates that courts have so far been more inclined to enhance, rather than hamper, climate regulation.<sup>66</sup> Governmental and non-governmental actors, that aim to

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<sup>63</sup> Jolene Lin, *supra* note 14 at 38.

<sup>64</sup> Michal Nachmany, et al, *supra* note 14.

<sup>65</sup> *Ibid.*

<sup>66</sup> A report by the Grantham Research Institute on Climate Change and the Environment, the Centre for Climate Change Economics and Policy (CCCEP) and the Inter-Parliamentary Union (IPU) revealed that out of a total of 241 cases analysed, 132 cases (55 per cent) were categorised as enhancing climate regulation and 24 cases (10 per cent) were judged as neutral; 85 cases (35 per cent) were judged as hindering tighter climate policies. (The remaining 12 cases in the database are ongoing.) This suggests that so far climate litigation has had a constructive influence on

achieve greater regulation, use litigation to “clarify an agency’s regulatory authority under a statute, to change how an agency exercises that authority or to enforce that authority.”<sup>67</sup> Plaintiffs often hope that their claim will fill a governance gap in the short term and spur legislation and regulation in the long term.<sup>68</sup>

Some scholars believe that climate change litigation currently has value as a regulatory mechanism only because of the gaps in the treaty regime and national policies and if those were corrected, litigation would be used less.<sup>69</sup> For example, Carol Browner, director of the White House Office of Energy and Climate Change Policy, stated “the courts are starting to take control” of climate change.<sup>70</sup> However, some other scholars opine that climate change litigation has value as a regulatory mechanism whether policy steps are taken or not, and the implementation of stronger

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regulation in general, including on climate regulation. The report which was released in 2017 covers legislative activities in 164 countries. See *Ibid*.

<sup>67</sup> Jacqueline Peel & Hari Osofsky *supra* note 14 at 216.

<sup>68</sup> Bill Sampson & Scott Kaiser, “Climate Change Litigation” June 2011, online: <[whoswholegal.com/news/features/article/29096/climate-change-litigation-soon-now](http://whoswholegal.com/news/features/article/29096/climate-change-litigation-soon-now)> accessed 12 December 2017.

<sup>69</sup> Eric A. Posner, *supra* note 29 at 1925.

<sup>70</sup> Markell David, and Ruhl, J. B “An Empirical Survey of Climate Change Litigation in the United States,” (2010) 40:1 *Env’tl. L. Reporter* 10644 at 10646.

policies should not forestall litigation.<sup>71</sup> Treaties, even if they are the most important approach to climate change regulation, are thereby viewed as “only one piece of a regulatory puzzle”<sup>72</sup> that leads to an inquiry of other approaches such as climate change litigation. Nevertheless, “climate litigation has had a constructive influence on regulation in general, including on climate regulation.”<sup>73</sup>

A favourable court decision (such as a court order to the government to take actions to prevent climate change or compensation to victims of climate change) allows national or sub-national government to regulate GHG and implement climate policies even where there is no legislation. In such jurisdictions, where the government has not taken adequate steps to address climate change, such as the refusal to ratify the *Kyoto Protocol*, domestic actors such as NGOs have taken to the courts because they have not been able to work the regular political or bureaucratic machinery successfully or they hope to use the courts to complement their lobbying campaigns in the hallways of legislative chambers and executive agencies.<sup>74</sup> Alternatively, these social actors perceive the courts to be more reputable, impartial and effective decision making bodies than bureaucratic

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<sup>71</sup> Hari M. Osofsky, “Climate Change Legislation in Context” (2008) 102:1 *Northwestern U. L. Rev. Colloquy* 245, at 249.

<sup>72</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 14 at 215.

<sup>73</sup> Michal Nachmany, *supra* note 14.

<sup>74</sup> Jolene Lin, *supra* note 14 at 37.

agencies or biased majoritarian political arenas.<sup>75</sup> Factors such as state refusal to ratify the *Kyoto Protocol*, the presence of an active civil society, well-funded environmental groups and a tradition of public interest litigation have facilitated the resort to litigation in jurisdictions such as the US and Australia.<sup>76</sup> In the US, the refusal of the Bush Administration (January 2001–January 2009) to undertake climate change regulation under existing environmental laws or to support the promulgation of any new climate change laws caused deep frustration and undeniably prompted action through the courts to put pressure on the executive branch to act on climate change. Action through the courts is deemed necessary because the Congress has tied US acceptance of binding emission reduction targets, inter alia, to developing countries accepting such targets too.<sup>77</sup> Similarly, the Howard Government’s refusal to ratify the *Kyoto Protocol* and its lacklustre

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<sup>75</sup> Ran Hirschl “The New Constitutionalism and The Judicialization Of Pure Politics Worldwide” (2006) 75:2 Fordham L. Rev. 721 at 724.

<sup>76</sup> As Charles Epp suggests, “judicialization from below” is largely contingent upon the existence of a support structure for legal mobilisation, such as a nexus of rights-advocacy organisations, rights-supportive lawyers and law schools, and legal aid schemes, and, more generally, hospitable socio-cultural conditions; See generally, Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

<sup>77</sup> Ran Hirschl *supra* note 75 at 724.

domestic efforts to address climate change were an impetus behind climate change litigation in Australia.<sup>78</sup>

To a certain extent, the USA illustrates the situation where litigation is driven by the absence of a comprehensive federal legislation that addresses climate change. The judgment of *Massachusetts v. Environmental Protection Agency*<sup>79</sup> by the Supreme Court in 2007 had a significant impact on US climate policy. It is the first US Supreme Court decision on climate change, which provided the basis for federal regulation by the US Environmental Protection Agency (EPA) of motor vehicle and power plant greenhouse gas emissions. This decision may be “the most important environmental case of the century, if ever,”<sup>80</sup> issued by the US Supreme Court. It established that the *Clean Air Act* provides the US government with the authority to regulate greenhouse gas pollution which is the major contributor to climate change.<sup>81</sup> This case was also the basis for the United States of America’s bilateral deal with China and for Paris climate commitments under the Obama administration.<sup>82</sup> The EPA has since engaged in a number of rulemaking exercises in response to this decision, including issuing an Endangerment Finding regarding the public health

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<sup>78</sup> Jacqueline Peel, “The Role of Climate Change Litigation in Australia’s Response to Global Warming” (2007) 24:2 *Env’tl. & Planning L. J.* 90 at 92.

<sup>79</sup> *Massachusetts v. Environmental Protection Agency*, [2007] 549 U.S. 497.

<sup>80</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 46

<sup>81</sup> *Ibid.* at 2.

<sup>82</sup> Lord Carnwath JSC, “Climate Change Adjudication After Paris: A Reflection” (2016) 28:1 *J. Env’tl. L.* 5 at 6.

and welfare impacts of motor vehicle emissions, establishing greenhouse gas emissions standards for light- and heavy-duty vehicles, and creating limits on emissions from stationary sources such as power plants.<sup>83</sup> These regulations make up the bulk of climate change law at the federal level in the United States and have put the nation firmly on a path of administrative regulation of emissions levels rather than one of adopting a market-based cap-and-trade approach through comprehensive climate change legislation.<sup>84</sup> In *American Electric Power (AEP) v. Connecticut*<sup>85</sup>, several states, New York City, and several non-profit organizations, sought a court order requiring several large electric utilities to reduce their GHG emissions because they were a public nuisance. The Court found that Congress had entrusted the regulator, the EPA, in the first instance to determine how GHGs should be regulated, further bolstering the agency's authority in the area.<sup>86</sup> In this context, court decisions play a supplementary role where there is inadequate or defective executive action by a government agency.

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<sup>83</sup>Markell David, and Ruhl, J. B., *supra* note 70 at 10646.

<sup>84</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 41-42.

<sup>85</sup> *American Electric Power v. Connecticut*, (2011) 131 S. Ct 2527.

<sup>86</sup> Lisa Vanhala & Chris Hilson, "Climate Change Litigation: Symposium Introduction" (2013) 35:3 L. & Pol. 141 at 142.

## 2.5.2 Indirect Regulation Through Climate Change Litigation

Lin argues that the goals of climate change litigation include indirect effects beyond litigation's specific claims.<sup>87</sup> The purpose of climate change litigation goes beyond persuading courts to determine greenhouse gas emission policy or provide the victims with compensation, but more importantly, it is a means to attract public attention, galvanize ordinary citizens and pressure governments to reach political solutions via treaties and domestic laws.<sup>88</sup> In other words, climate change litigation aims to not only advance regulation but also to influence the public debate. Litigation's most significant impacts may be achieved via indirect pathways that harness the activities of non-state actors, such as not-profit environmental groups and corporate actors, and the legal profession. Indirect pathways that mobilize such actors are also likely to be an important factor in producing the cultural and behavioral shift to the long-term use of sustainable, clean energy.<sup>89</sup> Therefore, "litigation could serve not only to fill gaps in national policy that allow for better participation in the international treaty regime, but also to fill gaps that the treaty regime (even if more successful) might still leave. In addition, litigation across jurisdictions may, like agreements among sub-national governments that have no international legal regulatory significance, help to produce important changes in norms and behavior regardless of the existence of gaps."<sup>90</sup> This stems from the arguments of some social scientists that the most pivotal aspects of social movements seeking change involve the indirect effects and uses of litigation. For

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<sup>87</sup> Jolene Lin, *supra* note 14 at 38.

<sup>88</sup> *Ibid* at 38.

<sup>89</sup> Jacqueline Peel & Hari Osofsky, *supra* note 14 at 249.

<sup>90</sup> *Ibid* at 241.

example, Mezey posits that litigation by itself may not always result in instantaneous and extensive results, but it can be part of an effective political strategy to achieve social change.<sup>91</sup> To this end, Lobel has argued that courts not only function as adjudicators in cases for the implementation of social reforms, but also as forums to garner support for varied legal and political agendas.<sup>92</sup> Therefore, the objective of litigants is beyond obtaining remedies such as injunctions or damages.

Litigation serves “. . . to expose the conflict between the aspirations of the law and its grim reality, or to put public pressure on a recalcitrant government or private institution to take a popular movement’s grievances seriously. What is crucial is that judicial relief not be viewed as all encompassing; such relief is important but is not the sole goal of the litigation.”<sup>93</sup> Positive effects in climate change litigation go beyond winning the cases in the courtroom. More often than not, these cases are filed with little doubt that they will be unsuccessful in the courtroom, but the raising the public profile of climate change by keeping the issue on the political agenda can help influence social perceptions of the risks of climate change and the importance of dealing with it.<sup>94</sup> The legislators’ and agencies’ interaction with climate change decisions is controlled by public attitudes and their own perspectives on climate change. Public support for climate action and positive court

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<sup>91</sup> Susan Gluck Mezey, *Pitiful Plaintiffs: Child Welfare Litigation and the Federal Courts* (Pittsburgh: University of Pittsburgh Press, 2000) at 5–6.

<sup>92</sup> Jules Lobel, “Courts as Forums for Protest” (2004) 52:1 *University of California L. Rev.* 477 at 479.

<sup>93</sup> *Ibid.* at 480.

<sup>94</sup> Jolene Lin, *supra* note 14 at 38.

rulings will embolden others to push harder in their climate regulatory initiatives. Furthermore, shifts in public opinion can influence the courts and their decisions can sometimes reveal changing perceptions of the science.<sup>95</sup> For example, the US Supreme Court was more skeptical about engaging climate change science in *American Electric Power v. Connecticut*<sup>96</sup> than in *Massachusetts v. Environmental Protection Agency*,<sup>97</sup> paralleling the shift in public opinion in the period between those two cases.

Some scholars believe that climate change cases have resulted in changes in norms and values surrounding climate change. They believe that these changes may result from the desire of a corporate actor to avoid further reputational damage or because of the publicity for climate change impacts generated by a case.<sup>98</sup> One example of this phenomenon is the Australian case of *Drake-Brockman v. Minister for Planning*,<sup>99</sup> concerning the approval for the redevelopment of a large prominent site in central Sydney was challenged. In that case, the developer won the case. However, during the litigation process expert evidence revealed the significant carbon footprint of the proposed development as a proportion of the total Green House Gas (GHG) emissions from the City of Sydney local government area. Subsequently, the site was sold to a new developer who was devoted to address sustainability issues, including GHG emissions. A new concept plan for

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<sup>95</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 223.

<sup>96</sup> *American Electric Power v. Connecticut*, [2011] 131 S. Ct. 2527.

<sup>97</sup> *Massachusetts v. Environmental Protection Agency*, [2007] 549 U.S. 497.

<sup>98</sup> Jacqueline Peel & Hari M. Osofsky, *supra* note 24 at 223.

<sup>99</sup> *Drake-Brockman v. Minister for Planning* [2007] 158 LGERA 349.

the development was submitted, including measures for GHG emissions' reduction and a target of 100% carbon neutrality in the operational phase.<sup>100</sup>

Another good example of the reputational leverage secured by litigation, is the case of *Wildlife Preservation. Society of Queensland Proserpine v. Minister for the Environment and Heritage*<sup>101</sup>

This Australian case was ostensibly unsuccessful but it still had some subsequent regulatory impact.<sup>102</sup> The case involved the challenge of the federal approval issued for two new coal mines due to the claim that emissions from burning the coal harvested would contribute to global warming, thereby endangering the World Heritage-listed Great Barrier Reef area. The complainant's claim was, however, dismissed by the Federal Court and this illuminates the narrow scope of the federal environmental legislation to deal with climate change impacts.<sup>103</sup> An independent review of the legislation took this concern into consideration and thereby recommended reforms to the Act to address climate change issues.<sup>104</sup> In spite of the act that the recommendation were not implemented, the government eventually enacted amendments to the

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<sup>100</sup> Brian J. Preston, "The Influence of Climate Change Litigation on Governments and the Private Sector" (2011) 2 Climate L. 485 at 505.

<sup>101</sup> *Wildlife Preservation. Society of Queensland Proserpine v. Minister for the Environment and Heritage* [2006] 232 ALR 510.

<sup>102</sup> Brian J. Preston, *supra* note 100 at 488.

<sup>103</sup> Godden Lee & Jacqueline Peel, "The Environment Protection and Biodiversity Conservation Act 1999" (2007) 31:1 Melbourne U. L. Rev. 106 at 145.

<sup>104</sup> Jacqueline Peel & Hari Osofsky, *supra* note 24 at 252.

legislation that require environmental assessment of "large coal mining developments with significant impacts on water resources."<sup>105</sup> Climate change litigation also serve to empower nonstate actors beyond the corporate sector in ways that may amplify the prospects for positive behavioral change. For example, litigation may lead to the creation of pathways for citizens and other community actors to oppose the energy choices of major corporations by reducing conventional hurdles of public interest litigation such as justiciability, standing and costs, or hurdles.

Furthermore, the large volume of cases over coal-fired power plants may increase the cost of emitting GHGs for large corporations. Thus, climate change cases can also give rise to indirect regulatory pathways by making projects which would involve high levels of GHG emissions a little more expensive. For example, for the first time in Australia, the New South Wales Land and Environment Court in the case of *Hunter Environmental Lobby Inc v. Minister for Planning*<sup>106</sup> indicated the imposition of conditions on a mine expansion approval to mandate the mine to offset its direct emissions.<sup>107</sup> Also, in the State of Victoria, a challenge by non-governmental environmental organizations to a new dual gas coal-fired power station<sup>108</sup> led to provision by the Victorian Civil and Administrative Tribunal that for the power station to be approved, it had to replace or displace existing brown coal capacity in the state thereby leading to a net reduction in

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<sup>105</sup> *Ibid.* at 252.

<sup>106</sup> *Hunter Environmental Lobby Inc v. Minister for Planning* [2011] NSWLEC 221.

<sup>107</sup> Hari Osofsky & Jacqueline Peel, *supra* note 24 at 253.

<sup>108</sup> *Ibid.* at 253.

the overall GHG emissions from electricity generation in the state.<sup>109</sup> This condition has essentially made it more difficult for the project to secure financial backing which resulted in a decision by the Australian government to withdraw its \$100 million grant to the proposal and thus, casting doubt over the continued viability of the new power station. The threat of litigation over the climate change impacts of emitting activities may also impose additional costs on such activities through the necessity to obtain liability insurance and the potential for rising insurance premiums.

### **2.5.3 Compensation for Victims of Climate Change**

The Intergovernmental Panel on Climate Change (IPCC) in its Third Assessment Report (TAR), concluded that "[t]here is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities."<sup>110</sup> Increased carbon dioxide (CO<sub>2</sub>) concentrations are the biggest factor in this warming.<sup>111</sup> About three-quarters of the anthropogenic emissions of carbon dioxide to the atmosphere during the past twenty years have been from fossil fuel burning; the rest have been predominantly due to land-use change, especially deforestation.<sup>112</sup> At this point, a significant degree of global warming is inevitable<sup>113</sup> (and has already started to occur) regardless

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<sup>109</sup> *Dual Gas Property Limited & Ors v. Environment Protection Authority* [2012] VCAT 308.

<sup>110</sup> United Nations Environment Program, *supra* note 15 at 7.

<sup>111</sup> *Ibid.* at 7.

<sup>112</sup> *Ibid.* at 7.

<sup>113</sup> See E.D. Hawkins et al, "Estimating Changes in Global Temperature Since the Pre-Industrial Period (2017) 98:9 *Bulletin of the American Society* 1841 at 1841 arguing that if we were to stop emitting GHG, the temperature would continue to rise. In order to stop the accumulation of heat,

of the mitigation efforts. Therefore, according to some scholars, it is only fair for the victims<sup>114</sup> of climate change to be compensated.<sup>115</sup> They believe that the nature of anthropogenic climate change suggests the appropriateness of applying tort principles to the problem to hold companies and possibly the government liable for some of the harms caused by climate change. The application of tort principles to climate change is deemed appropriate because of the anthropogenic nature of

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we would have to eliminate not just carbon dioxide emissions, but all greenhouse gases, such as methane and nitrous oxide. We'd also need to reverse deforestation and other land uses that affect the Earth's energy balance (the difference between incoming energy from the sun and what's returned to space). See also Richard B. Rood, "If We Stopped Emitting Greenhouse Gases Right Now, Would We Stop Climate Change" *The Conversation* (4 July, 2017), online: <<https://theconversation.com/if-we-stopped-emitting-greenhouse-gases-right-now-would-we-stop-climate-change-78882>>.

<sup>114</sup> Popovski and Mundy classify climate change victims into primary, secondary, and tertiary. Primary climate change victims are individuals whose secure behavioural space has been violated by series of environmental assaults and consequently they can no longer function independently. Secondary victims are "first responders", dependants, relatives and other persons who experience significant physical, social, economic, and/or psychological damage due to environmental assaults on the primary climate change victim(s). Tertiary victims are those whose secure behavioural space is affected but not violated by environmental assaults. See Vesselin Popovski & Kieran G. Mundy, "Defining Climate-Change Victims" (2012) 7:5 *Sustain Sci* 5 at 8.

<sup>115</sup> See Eduardo M. Penalver, "Acts of God or Toxic Torts Applying Tort Principles to the Problem of Climate Change" (1998) 38:1 *Cornell L Faculty Publication* 563 at .569-570.

the problem. Many of the effects of global climate change will take the form of damage to persons and property produced due to human activity - a central concern of tort law.<sup>116</sup> Further, due to the uneven nature and distribution of the effects of climate change, some localized groups (e.g., those living in coastal areas or at high latitudes) are bearing, and will continue to bear, the brunt of global warming's harms and costs. It is believed that the victims should not be left to bear the costs but such costs should be transferred to those responsible for the harm.

Tort analysis, thus, provides the potential for a policy response to anthropogenic climate change that is sensitive to the diversity of *individual* losses likely to result from the human emission of greenhouse gases. It also provides a useful framework for analyzing the best ways to allocate costs associated with similar-looking harms that, in fact, result from a series of different sources.<sup>117</sup> David Grossman opines that the goals of tort make it a useful method for the allocation of the cost of global warming. The goals are: (1) reduction of the cost of accidents, and (2) providing corrective justice.<sup>118</sup> He postulates that if the victims of climate change are left to bear its costs, this would lead to a proliferation of climate changing activities and consequently higher "accident" costs because victims of climate change for their main reasons are unable to effectively bargain

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<sup>116</sup> *Ibid* at 569.

<sup>117</sup> *Ibid.* at 570.

<sup>118</sup> David A. Grossman, "Warming Up to A Not So Radical Idea: Tort Based Climate Change Litigation" (2003) 28:1 Columbia J. Env't'l. L. 1 at 4.

with or force producers of fossil fuels to reduce its use.<sup>119</sup> First, climate change has global consequences and a vast number of victims will be impacted. Therefore, organizing these victims will involve immense transaction cost. Second, as earlier stated, the effects of climate change are unequally distributed. The transaction costs of organizing victims in more localized areas may be lower. However, such local organization may lack sufficient economic influence and knowledge to bargain meaningfully with fuel companies.

The lack of organization and imperfect consumer knowledge ensures that the activities causing climate change to occur at higher than optimal level. Further, the fossil fuel companies have engaged in activities aimed at preventing collective public action to combat the threat of climate change.<sup>120</sup> Therefore, if the victims bear the cost, the price of fossil fuel will not include the costs of harms caused by anthropogenic missions due to the producer's legal assignment of entitlement. The costs of accidents should, thereby, be allocated to the party with the lowest transaction costs, that is, the party in the best position to carry out the required cost benefit analysis and then act on it which is said to be the fossil fuel corporations. Compared to the consumer public, the fossil fuel

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<sup>119</sup> *Ibid.* at 4.

<sup>120</sup> Geoffrey Supran & Naomi Oreskes, "Assessing ExxonMobil's climate change communications" (2017) *Environ Res Lett* 12. The authors assessed whether ExxonMobil Corporation had in the past misled the general public about climate change. They concluded that ExxonMobil contributed to advancing climate science—by way of its scientists' academic publications— but promoted doubt about it in advertorials. Given this discrepancy, they conclude that ExxonMobil misled the public.

companies are said to possess large amounts of resources which they can use to gain access to information.<sup>121</sup>

## 2.6 CONCLUSION

The slow response of international action to address climate change coupled with clear scientific evidence of the catastrophic impacts of climate change has led to scholarly suggestions for alternative means to deal with the problem. Climate change litigation is one of those solutions promoted by several scholars. It has been publicized as a means to compensate climate victims, attract public attention, galvanize ordinary citizens and pressure governments to reach political solutions via treaties and domestic laws. It is believed that the attention surrounding climate change litigation can shape regulation in the countries where they are instituted directly through mandate and indirectly through influencing corporate behaviour and social norms. The next chapter will analyse these core assumptions against the backdrop of climate change litigation in Nigeria.

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<sup>121</sup> David A. Grossman, *supra* note 118 at 4.

## CHAPTER THREE

### GAS FLARING AND CLIMATE CHANGE LITIGATION IN NIGERIA:

#### *THE PATHWAY TO CLIMATE JUSTICE?*

“The flames of Shell are flames of hell  
We bask below their light Nought for us serve the blight  
Of cursed neglect and cursed Shell.”<sup>122</sup>

### 3.1 INTRODUCTION

Nigeria’s climate litigation based on gas flaring in the Niger Delta offers an instructive example that undermines the ambitious claims made by climate litigation scholars that were the focus of chapter two. Gas flaring in Nigeria continues to generate cataclysmic environmental, social, and economic consequences for the people of the Niger Delta. It results in the release of greenhouse gases into the atmosphere which can cause extreme climatic changes. Several scholars have advocated litigation in which victims of the climatic effects of greenhouse gas emissions would seek legal redress against corporations and possibly states that are responsible for the emissions. It has been said that litigation “can be used to facilitate climate regulation and hold policymakers to account, by driving, enforcing, and clarifying climate policies and legislation – or in some cases substituting for absent or insufficient national legislation.”<sup>123</sup> In 2005, Jonah Gbemre on behalf of

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<sup>122</sup> Ima Niboro, “Death on A Sea of Oil,” *African Guardian*, (4 October 1993).

<sup>123</sup> Michal Nachmany, et al, *supra* note 14.

himself and other members of his community living near some of the gas flare sites in the Niger Delta instituted Nigeria's only climate change litigation against Shell, the Nigerian National Petroleum Corporation, and the Attorney General of the Federation in the Federal High Court of Nigeria. The plaintiffs claimed that gas flaring was a violation of their fundamental rights to life and dignity guaranteed under the Nigerian constitution. In a ruling on November 14, 2005, the Federal High Court of Nigeria agreed and ordered Shell and the Nigerian National Petroleum Corporation to take immediate steps to stop the further flaring of gas in the plaintiffs' community.<sup>124</sup> Despite this ruling, the case has had little practical impacts as Shell has continued its gas-flaring activities unabated.<sup>125</sup>

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<sup>124</sup> The Court also found that the gas-flaring laws were unconstitutional and ordered the Attorney-General of the Federation to immediately set in motion, after due consultation with the Federal Executive Council, necessary processes for the enactment of a bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Regulation Act and the Regulations made thereunder to quickly bring them in line with the provision of Chapter IV of the Constitution, especially in view of the fact that the Associated Gas Regulation Act even by itself makes the said continuous gas flaring a crime having prescribed penalties in respect thereof. In April 2006, the court relieved Shell of its obligation to stop flaring gas on the condition that it submitted to the Court a detailed plan to end gas flaring to end gas flaring by April 30, 2007. See Uchenna Jerome Orji, *supra* note 6 at 159.

<sup>125</sup> *Ibid.* at 163.

This chapter proceeds as follows: the second part highlights the positive impacts of the *Gbemre* case on the Nigerian legal jurisprudence. The third part examines the two unique contextual factors in Nigeria that have caused continuous gas flares despite the ruling of the Federal High Court in the *Gbemre* case: the lack of judicial independence from the interference of the executive arm of government (the state) and the lack of infrastructure needed to re-inject or harness the associated natural gas for conservation/commercial utilization. in the fight against gas flaring/ climate change in Nigeria. The fourth and final part concludes by arguing that the fact that the economic importance of the oil and gas industry and the lack of sufficient gas utilisation/ conservation infrastructure, caused the *Gbemre v. Shell Petroleum Development Corporation* case to have insignificant regulatory impact. These two unique contextual factors in Nigeria make the assumption of litigation as a regulatory approach and a means of victim compensation propagated by several scholars in chapter two of limited utility. These two unique contextual factors in Nigeria make the assumption of litigation as a regulatory approach and a means of victim compensation propagated by several scholars in chapter two of limited utility

### **3.2 THE IMPLICATIONS OF THE JONAH GBEMRE CASE**

The *Gbemre v. Shell Petroleum Development Corporation* case has had positive impacts on the Nigerian legal jurisprudence. They are: the recognition of the civil and Political Right to security from climate change and the establishment of a persuasive precedence on the right to seek redress against corporations and the Federal government for climate change in Nigeria. As discussed in chapter two, some scholars view climate change litigation as a gap filler where there is absent or

insufficient national legislation, litigation can be the gap filler.<sup>126</sup> Nigeria does not have a legislation that specifically deals with climate change. However, the Federal High court judge in the *Gbemre* case stretched the Fundamental Human rights provisions contained in Chapter IV of the constitution to include a civil and political right to security from climate change. Amy Sinden postulates that the *Gbemre* case created an opportunity for existing civil and political rights to form the basis for a claim arising from climate-change induced harms. It is an implicit recognition of the right to security from climate change. The precedent finding the right to life, dignity and personal security, the right to information, and several core rights implicated in the context of environmental harms may be persuasive in the context of future climate change claims.<sup>127</sup> Therefore, where plaintiffs can show that they will suffer some risk of death or personal injury as a result of climate change, they may be able to claim a violation of core civil and political rights to life, dignity, and personal security.<sup>128</sup>

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<sup>126</sup> Michal Nachmany, et al, *supra* note 14.

<sup>127</sup> Amy Sinden, “An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria” in William Burns et al, eds, *Adjudicating Climate Change: Sub-National, National and Supranational Approach* (New York: Cambridge University Press, 2008) at 186.

<sup>128</sup> *Ibid.* at 186

Furthermore, the Nigerian judiciary has always been known to privilege the economic benefits of the country over environmental protection.<sup>129</sup> In *Allan Irou v. Shell BP*<sup>130</sup>, for example, the judge refused to grant an injunction in favor of the plaintiff whose land, fish pond and creek had been polluted by the activities of the defendant because in his opinion, nothing should be done to disturb the operation of trade (that is mineral oil), which is the mainstay of the Nigerian economy. Several other cases, though not so blatantly decided, have tended to follow the unwritten rule that economic considerations should be prioritized over environmental concerns<sup>131</sup> and judges have often exhibited their reluctance to grant injunctions against oil-companies even where oil operations have been discovered to have adversely affected host communities and their environment.<sup>132</sup> The decision of the Federal High Court, in the *Gbemre* case is an indication of the possibility to enforce the socio-economic rights through an integrated approach to human rights in Nigeria.

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<sup>129</sup> Kaniye Ebeku, “Locus Standi in Environmental Nuisance Actions: A Perspective from the Commonwealth” (2005) 17:1 *Env’tl. L. Mgmt.* 14 at 14.

<sup>130</sup> *Allan Irou v. Shell BP*, Suit No. W/89/91 Warri HC/26/11/73 (Unreported).

<sup>131</sup> Amborse Ekpu, “Environmental Impact of Oil on Water: A Comparative Overview of Law and Policy in the United States and Nigeria” (1995) 24:1 *Denv. J. Int’l. L.* 55 at. 92-93. See also, *Chinda v Shell-BP*, (1974) 2 RSLR 1.

<sup>132</sup> Rhuks Temitope, “The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India” (2010) 3:423 *NUJS L. Rev.* 428 at 435. 83 *Ibid* at 436.

### **3.3 CONTEXTUALIZING THE ASSUMPTIONS FOR CLIMATE CHANGE**

#### **LITIGATION**

This part analyses and challenges two core assumptions that support scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm. The assumptions are: a belief that climate change litigation is an effective regulatory approach, and 2) an assertion that climate change litigation is an effective means to secure victim compensation. The intrusion of the executive arm of government into the affairs of the judiciary, coupled with the lack of gas conservation/re-injection facilities mean that the espoused climate litigation benefits discussed in chapter two are not currently realizable in the Nigerian context. To understand the interference of the state in Climate Change Litigation, this part starts by analysing the legal framework and the contextual realities that have hampered the existence of judicial independence in Nigeria.

#### **3.3.1 The State of Judicial Independence in Nigeria**

In Nigeria, the Constitution guarantees the separation of power among the legislature, executive (the state) and the judiciary. The power to hear and decide upon cases is vested solely in the judiciary.<sup>133</sup> The duty of the judiciary is to ensure that justice is attained in the society.<sup>134</sup> “The judicial process is in a sense the heart of any political system even in the most organised

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<sup>133</sup> Constitution of the Federal Republic of Nigeria, 1999 s 287.

<sup>134</sup> Ibrahim Abdullahi, “Independence of The Judiciary in Nigeria: A Myth or Reality” (2014) 2:3 Int’l. J. Public Admin. & Mgmt. Research 55 at 55.

societies...”<sup>135</sup> For the judiciary to effectively carry out this duty, it must be independent. Judges must be able to decide cases fairly and impartially, without any form of pressure or inducement from the legislature, executive (the State) and politicians.<sup>136</sup> As an institution, it is imperative that the judiciary is separate from other arms of government because it forms the foundation upon which democracy grows and develops.<sup>137</sup> This is so because the judiciary is the only arm of government that is responsible for the administration and dispensation of justice in any democratic nation. The existence of a judiciary in a democratic government is justified by the principle of Separation of Powers so as to prevent dictatorship and arbitrary rule.<sup>138</sup>

The Constitution provides a legal framework for judicial independence. Section 17(2) (e) of the 1999 Constitution provides that: “*The independence, impartiality and integrity of the courts of law*

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<sup>135</sup> *Ibid* at 55.

<sup>136</sup> Maduekwe Vincent Chucks, Ojukwu Uche Grace & Agbata Ifeanyi. F, “Judiciary and The Theory of Separation of Powers in Achieving Sustainable Democracy in Nigeria (The Fourth Republic)” (2016) 4:8 *British J Education* 88 at 92.

<sup>137</sup> Daudu J. B., “The Independence of the Nigeria Judiciary in The Light of Emerging Socio-Political and Security Challenges.” (2014), Online: <http://www.nba.org.ng/web/theindependenceofthenigerianjudiciary>.

<sup>138</sup> Okeke Remi Chukwudi & Idike Adeline Nnenna, “The Judiciary and Democracy Consolidation in Nigeria Under the Buhari Administration” (2017) 2:4 *Sci Arena Publications Specialty J Pol & L* 24 at 28.

*and easy accessibility thereto shall be secured and maintained*”<sup>139</sup> However, section 17 is contained in the ‘Fundamental Objectives and Directive Principles of State Policy’ whose provisions are nonjusticiable by virtue of section 6(6) (c) of the Constitution. Thus “the high-sounding declaration of section 17(2) (e) of the Constitution has no bite and what could have been a constitutional guarantee of judicial independence is no more than a slogan in Nigeria.”<sup>140</sup> Nevertheless, the Constitution provides a legal framework for safeguarding judicial independence through the mandatory provisions that the appointment and removal of judges by the President and the State Governors be made based on the recommendations of the National Judicial Council.<sup>141</sup>

The President of the Federal Republic of Nigeria bears the constitutional responsibility of appointing the judges in charge of the federal courts<sup>142</sup> on the recommendations of the National Judicial Council subject to the confirmation of the Senate.<sup>143</sup> Other judges in the federal courts

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<sup>139</sup> Constitution of the Federal Republic of Nigeria, 1999 s 17 (2) (e).

<sup>140</sup> Ibrahim Abdullahi, *supra* note 134 at 64.

<sup>141</sup> Okechukwu Oko, “Seeking Justice in Transitional Societies: An Analysis of The Problems and Failures of The Judiciary in Nigeria” (2005) 31:1 Brook J. Int’l. L. 9 at 71.

<sup>142</sup> The judges appointed by the president are: T the Chief Judge of the Federal High Court, the Chief Judge of the High Court of the Federal Capital Territory, the Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory and the President of the Customary Court of Appeal of the Federal Capital Territory.

<sup>143</sup> Constitution of the Federal Republic of Nigeria, 1999 ss 231 (1), 238 (1), 250 (1), 256 (1), 261 (1), 266 (1).

are appointed by the President of the country on the recommendations of the National Judicial Council but without any confirmation from the Senate.<sup>144</sup> At the State level, the appointment of the judges in charge of the state courts<sup>145</sup> are made by the Governor of the State on the recommendations of the National Judicial Council subject to confirmation by the State House of Assembly.<sup>146</sup> However, other judges in the state courts are appointed by the Governor of the State on the recommendation of the National Judicial Council but without any confirmation by the State House of Assembly.<sup>147</sup> Another, measure put in place that protects judicial independence is the establishment of the Federal and State Judicial Service Commissions. These commissions are charged with the duty of advising the National Judicial Council on nomination of persons for appointment as Federal and State judicial officers.<sup>148</sup>

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<sup>144</sup> Constitution of the Federal Republic of Nigeria, 1999 ss 238 (2), 250 (2), 256 (2), 261 (2) and 266 (2).

<sup>145</sup> The Chief Judge of the State, the Grand Kadi of the Sharia court of Appeal and the President of the Customary Court of Appeal.

<sup>146</sup> Constitution of the Federal Republic of Nigeria, 1999 ss 271 (1), 276 (1) and 281 (1).

<sup>147</sup> Constitution of the Federal Republic of Nigeria, 1999 ss 271 (2), 276 (2) and 281 (2).

<sup>148</sup> Constitution of the Federal Republic of Nigeria, 1999 Paragraph 6 (a) of part II of the Third Schedule.

With regards to the removal of federal judges, the Constitution guarantees security of tenure for the judges after their appointment.: they serve until they attain the retirement age.<sup>149</sup> The executive cannot initiate removal or disciplinary proceedings against judges.<sup>150</sup> The President can remove a federal judge on the recommendation of the National Judicial Council. Likewise, the Governor of a state, can only remove the state judges on the recommendation of the National Judicial Council can remove a state judicial officer.<sup>151</sup> However, the constitution also stipulates the conditions for which the appointment of a judicial officer may be terminated. The three grounds upon which a judge may be removed from office are: misconduct, inability to discharge official functions/duties due to an infirmity of mind or body and based on the contravention of the Code of Conduct (for Public Officers).<sup>152</sup>

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<sup>149</sup> Justices of the Supreme Court and the Court of Appeal may retire at the age of sixty-five and shall cease to hold office when they attain the age of seventy. See Constitution of the Federal Republic of Nigeria, 1999 s 291(1) Other judges may retire at sixty but must cease to hold office at sixty-five. See Constitution of the Federal Republic of Nigeria, 1999 Ss291(2).

<sup>150</sup> Okechukwu Oko, “Seeking Justice in Transitional Societies: An Analysis of The Problems and Failures of The Judiciary in Nigeria” (2005) 31:1 Brook J. Int’l. L. 9 at 71.

<sup>151</sup> Constitution of the Federal Republic of Nigeria, 1999 paragraph 21 (d) of part I of the Third Schedule.

<sup>152</sup> Constitution of the Federal Republic of Nigeria, 1999 s 292.

In practice, nonetheless, there are three contextual realities that have eroded judicial independence in Nigeria: undue influence/interference by the state and politicians, the lack of fiscal autonomy and judicial corruption. All these are discussed in subsequent paragraphs in this section.

### **I. Undue Influence/Interference by The State and Politicians**

The state and other politicians interfere with the affairs of the judiciary and judicial independence “remains extremely fragile, implacably assaulted by politicians and corrupt judges.”<sup>153</sup> “The experience in Nigeria reveals that intolerance, contempt for the judiciary and the desire to control and manipulate the judiciary continually swirl within the State (executive).”<sup>154</sup> Government officials exploit the powers to appoint and remove judges to prod judges to bow to their wishes.<sup>155</sup> The power of appointment and removal vested in the President and Governor has been used to

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<sup>153</sup> Okechukwu Oko, *supra* note 141 at 72. For example, members of the Akwa-Ibom State Governorship Election Tribunal in 2003 were dismissed from the bench on the allegation of bribery; chairman of the Tribunal, Hon. Justice M.M. Adamu; Hon. Justice D.T. Ahura, Hon. Justice A.M. Elelegwa and Chief Magistrate O.J. Isede. They were found guilty of receiving large sums of money as bribe from the Governor of Akwa-Ibom State (Babatunde, 2010). In 2005, Hon. Justice Okwuchukwu Opene and Hon. Justice David Adedoyin Adeniji were found guilty of receiving large sums of money in the Anambra South Senatorial District Elections Tribunal (Shehu, 2012). See also Aver, Tyavwase Theophilus, “Judiciary and Democracy, Issues in Contemporary Nigerian Society” (2014) 2:1 Global J Arts, Humanities & Social Sciences 88 at 91

<sup>154</sup> Okechukwu Oko, *supra* note 141 at 72.

<sup>155</sup> *Ibid* at 72.

ensure that only persons loyal or constructively inclined towards the government are appointed and those who do not align themselves with the state's policies or interest are removed.

The state has undue influence on the judiciary and are a threat to judicial independence. "Intimidation and lawlessness by members of the executive especially Governors abound. Governors show contempt to court order when it does not please them and even the legislators."<sup>156</sup>

The relationship between the government and the judiciary makes it much easier for government officials to manipulate judges. Though judges are appointed by the state on the recommendations of the National Judicial Council as stated above, judges depend on the good relations with the government for many of their benefits like housing and transportation.<sup>157</sup> Judges have to contend with the fact that government officials could make their lives difficult by denying them decent housing and transportation if displeased by their decisions and conduct.<sup>158</sup> Former High Court Judge P.O.E. Bassey, after personally experiencing efforts by the government to diminish the authority and independence of judges stated that:

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<sup>156</sup> Ibrahim Abdullahi, *supra* note 134 at 63.

<sup>157</sup> J. Nnamdi Aduba, "Independence of the Judiciary under the 1999 Constitution: A Critique" in Nweze ed., *Justice in The Judicial Process: Essays in Honor of Justice Eugene Ubaezonu* (Enugu: Fourth Dimension Publishing Co. Ltd, 2002) at 390.

<sup>158</sup> A.G. Karibi-Whyte, "The Place of the Judiciary in the 1999 Constitution" (Paper delivered at the All Nigeria Judges' Conference, 1 November 1999 [unpublished] at 101.

One of the whips used by civil servants to force Judges to “behave” is in the allocation of residential quarters . . . the mere fact of making Judges rely on the bureaucratic civil servants as to where to put their heads, with their families, is bad enough. And to hope that judges subjected to such pressures could still be generally independent of their officialdom is an illusion.<sup>159</sup>

The intimidation and manipulation of judges by the state profoundly inhibits the ability of judges to determine cases (especially those that involve the state) objectively and independently. “Judges, fearful of reprisals from government functionaries, seem eager to do whatever is necessary to remain in the government’s good graces, sacrificing in the process the citizens’ fair trial rights.”<sup>160</sup> The judges who function under precarious circumstances tend to succumb to pressures and compromise ethical standards to appease the state just so they can get access to certain amenities. In the same vein, judges that are desirous of getting higher judicial positions often show restraint in cases that involve members of the state (executive) due to their pervasive influence in the judicial selection and promotion processes.<sup>161</sup> “Watching the ease with which the executive manipulates the judiciary and observing the advantages gained by judges who pander to the wishes

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<sup>159</sup> P. O. E. Bassey, *The Nigerian Judiciary: The Departing Glory*, (Nigeria: Malthouse Press, 2000) at 20.

<sup>160</sup> Okechukwu Oko, *supra* note 141 at 38.

<sup>161</sup> “Elevation to the higher bench often does not depend on competence and integrity of the judge as evidenced by their judicial track record. Rather, a judge’s contacts with the powerful have become major determinants of career advancement in the judiciary.” See *Ibid* at 38.

of the state, most judges submit to the cultural orthodoxy of judicial subservience to the political elites.”<sup>162</sup>

## **II. Lack of Fiscal Autonomy**

Another threat to judicial independence in Nigeria is the lack of fiscal autonomy by the judiciary.<sup>163</sup> According to Okechukwu Oko, “both the appearance and reality of independence demand that the judiciary should have complete control over its funds.”<sup>164</sup> However, in Nigeria, the state controls funds allocated to the judiciary, thus impelling judges to “depend on the goodwill of the executive branch for funding.”<sup>165</sup> This occurrence undermines the protections for judicial independence in the Nigerian constitution. The judiciary is also being grossly underfunded as a result of this lack of fiscal autonomy.<sup>166</sup> It has therefore been difficult for the judiciary especially at the state levels, to secure the infrastructure that judges and other court officials need to carry out their duties efficiently.<sup>167</sup> This funding procedure that has left the judiciary at the mercy of the state hinders the ability of judges to carry out their duties effectively and the capacity to resist

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<sup>162</sup> Okechukwu Oko, *supra* note 141 at 38.

<sup>163</sup> Philip C. Aka, “Judicial Independence under Nigeria's Fourth Republic: Problems and Prospects” (2014) 45:1 Cal. W. Int'l L. J. 1 at 31.

<sup>164</sup> Okechukwu Oko, *supra* note 141 at 77.

<sup>165</sup> *Ibid* at 76.

<sup>166</sup> Philip C. Aka, *supra* note 163 at 32.

<sup>167</sup> *Ibid* at 32.

pressures from the state.<sup>168</sup> The potential for interference by the state is heightened the state's control of the funds statutorily allocated to the judiciary.<sup>169</sup> For example, the judges are poorly compensated as a result of the lack of fiscal autonomy and underfunding of the judiciary makes it difficult for judges to function efficiently, thereby causing some judges to become susceptible to corruption as they seek other means to augment their meager incomes.<sup>170</sup>

### **III. Judicial Corruption**

Transparency International recently ranked Nigeria as one of the most corrupt countries in the world.<sup>171</sup> The judiciary has not been immune to the corruption that has bedeviled the others arms and agencies of government.<sup>172</sup> Although several democratic nations all over the world deal with judicial corruption,<sup>173</sup> “slacking moral values, mounting economic hardships and ineffective detection and enforcement mechanisms have turned this aberrant conduct into a full-blown

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<sup>168</sup> Itsejuwa Esanjumi Sagay, *Legacy for Posterity: The Work of The Supreme Court (1980– 1988)* (Lagos: Nigerian Law Publications, 1998) at 55.

<sup>169</sup> Okechukwu Oko, *supra* note 141 at 77.

<sup>170</sup> A. A. Olowofoyeku, “The Beleaguered Fortress: Reflections of the Independence of Nigeria’s Judiciary” (1989) 33:1 J. African L. 55 at 63.

<sup>171</sup> Nigeria was ranked 148<sup>th</sup> out of 180 on it’s Corruption Perceptions Index. See Transparency International, “Nigeria” (2018), online: < <https://www.transparency.org/country/NGA> >.

<sup>172</sup> Okechukwu Oko, *supra* note 141 at 24.

<sup>173</sup> *Ibid* at 25.

national plague.”<sup>174</sup> Judicial corruption—abuse of judicial power for private gain—is a dominant and recurrent feature of the Nigerian judicial system despite the provisions of the Code of Conduct for Judicial Officers, and criminal laws which demand that judicial officers refrain from engaging in unethical and corrupt behavior .<sup>175</sup> Several judges in Nigeria have been accused of being corrupt and accepting bribes especially from politicians.<sup>176</sup> “The degree of the judicial decadence has made it impossible for those who are not politically connected to get justice in the Nigerian courts very difficult.”<sup>177</sup> In essence, judicial independence in Nigeria has been eroded because the judiciary’s dependence on the state at the federal and state levels.<sup>178</sup> It is the attitude and willingness of the

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<sup>174</sup> *Ibid* at 25.

<sup>175</sup> P. O. E. Basse, *supra* note 159 at 38.

<sup>176</sup> For example, members of the Akwa-Ibom State Governorship Election Tribunal in 2003 were dismissed from the bench on the allegation of bribery: they were found guilty of receiving large sums of money as bribe from the Governor of Akwa-Ibom State. In 2005, Hon. Justice Okwuchukwu Opene and Hon. Justice David Adedoyin Adeniji were found guilty of receiving large sums of money in the Anambra South Senatorial District Elections Tribunal. See Aver, Tyavwase Theophilus, *supra* note 153 at 91.

<sup>177</sup> *Ibid* at 91.

<sup>178</sup> J.A. Ajakaiye, “The Constitutional Role of the National Judicial Council with Regard to Collection and Disbursement of Funds to the Judiciaries: Problems and Prospects, (Paper delivered at the All Nigeria Judges” Conference, 2001) at 136.

state to respect the integrity of the judicial process and refrain from interfering with the judiciary that secures the independence of the judiciary rather than the provisions of the Constitution.<sup>179</sup>

### **3.3.2 State Interference in Climate Change Litigation**

Recall from the previous chapter that several scholars writing on the United States of America and Australian experiences have argued that litigation is an effective climate change regulatory mechanism. They claim that judicial decisions can determine greenhouse gas emission policy or provide the victims with compensation, but more importantly, litigation can be used to attract public attention; galvanize ordinary citizens; and pressure governments to reach political solutions via treaties and domestic laws.<sup>180</sup> As stated in chapter two, a favourable court decision allows national or sub-national government to regulate GHG and implement climate policies even where there is no legislation. In jurisdictions like Nigeria, where there is a lack of governmental action to address climate change, domestic actors such as NGOs have taken to the courts because they have not been able to work the regular political or bureaucratic machinery successfully or they hope to use the courts to complement their lobbying campaigns in the hallways of legislative chambers and executive agencies.<sup>181</sup> Alternatively, these social actors perceive the courts to be

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<sup>179</sup> Okechukwu Oko, *supra* note 141 at 73. See also, Berry F.C. Hsu, “Judicial Independence Under the Basic Law” (2004) 34:1 Hong Kong L J 279 at 282.

<sup>180</sup> Jolene Lin, *supra* note 14 at 38.

<sup>181</sup> *Ibid* at 37.

more reputable, impartial and effective decision making bodies than bureaucratic agencies or biased majoritarian political arenas.<sup>182</sup>

The *Gbemre case*, however, is an example of an attempt to use the Federal High Court as a tool of social change and a forum of protests was largely unsuccessful due to the state's interference. For example, the transfer of the trial judge of the Federal High to a different state. The plaintiff appeared in Federal High Court on a date set for hearing but none of the defendants or their representatives showed up. It was discovered then that the judge had been removed from the case and was transferred to another court in Katsina and the case file was not available.<sup>183</sup> Roderick, Co-chairman of the Climate Justice Programme<sup>184</sup> posited that:

[the] fact that the judge has been removed from the case, transferred to the north of the country, and there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law.<sup>185</sup>

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<sup>182</sup> Ran Hirschl *supra* note 75 at 724.

<sup>183</sup> Rhuks Temitope, *supra* note 132 at 438.

<sup>184</sup> The Climate Justice Programme is sponsoring the suit.

<sup>185</sup> Friends of the Earth International Press Briefing, Shell Fails to Obey Gas Flaring Court Order, (2 May 2007), online: <[http://www.foe.co.uk/resource/press\\_releases/shell\\_fails\\_to\\_obey\\_gas\\_fl\\_02052007.html](http://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007.html).

Shell has appealed the decision of the Federal High Court at the Court of Appeal. Although, there is no subsisting order for a stay of execution of the Federal High Court's judgment, the court's order that the respondents should 'take immediate steps to stop further flaring of gas in the applicant's community' is not being obeyed, and all the efforts of the Climate Justice Programme (a London-based international non-governmental organization that is sponsoring the case), have so far failed.<sup>186</sup> Furthermore, at one of the Court of Appeal's hearing, it was also discovered that the case had been wrongly adjourned by the court clerk without any notice to the applicant or his lawyers. The leading judge said that the reason for this would be investigated and the person responsible would be disciplined. However, nothing further has been publicly heard of the matter and no actions have been taken against Shell.<sup>187</sup>

The economic importance of oil in Nigeria is the main reason for the state's interference with the judicial process in the *Gbemre*. Oil and gas is Nigeria's largest and most important industrial sector.<sup>188</sup> It accounts for 80% of the government's revenue and 95% of the country's export

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<sup>186</sup> Kaniye Ebeku, *supra* note 18 at 319.

<sup>187</sup> G. Enogholase, "Benin Court Registrar Under Investigation", Vanguard Newspapers (27 September 2006).

<sup>188</sup> Ever since the discovery of oil in commercial quantities, oil has continuously accounted for 80% of the government's revenue and 95% of the country's export earnings. See Olawuyi Damilola, *The Principles of Nigerian Environmental Law* (Ukraine: Business Perspectives, 2013) at 173.

earnings.<sup>189</sup> Basically, Nigeria has a mono-product economy and the government's dependence on oil as the major source of revenue is a major hindrance to the achievement of zero gas flaring by oil companies in Nigeria.<sup>190</sup> "The government's major concern in the oil industry appears to be the maximisation of oil revenues at all times; any perceived factor that will interrupt oil production is usually treated as a hindrance to the fiscal survival of the state"<sup>191</sup> especially in this current economic climate.<sup>192</sup> Therefore, issues affecting sustainable exploitation and management of non-renewable petroleum resources tend to take a back seat.

Courts can only be used as an effective climate change regulatory mechanism when the judiciary is impartial and free from influence from the state. The fact that *Gbemre* won the law suit on merit is evidence of the judiciary's pragmatism. However, *Gbemre's* lawsuit was not successful at fueling social change because the state still had the power to interfere with the judicial process.

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<sup>189</sup> *Ibid.* at 173.

<sup>190</sup> Uchenna Jerome Orji, *supra* note 6 at 162.

<sup>191</sup> *Ibid.* at 162.

<sup>192</sup> The recent fall in price of crude oil greatly affected the already struggling Nigerian economy. Recently, the world witnessed a huge financial turnaround as the price for oil nosedived. The oil dependent economy of Nigeria was badly stung. With a population of about 186 million, over 100 million people are currently living on less than 1 dollar a day. In less than a year of the fall in oil prices, the poverty level moved from 61% to 72%. See Ripple Nigeria, "Nigeria's Poverty Level Index Hits 72% In 2016" (14 September 2016), online: <<https://www.ripplesnigeria.com/nigerias-poverty-level-index-hits-72-2016fitch-reports/>>.

For example, the injunction issued by the Federal High Court has not been enforced since November 2005.<sup>193</sup> The inability of the Federal High Court to enforce its judgment is evinced in the court relieving Shell of its obligation to stop flaring gas in April 2006 on the condition that it submitted to the Federal High Court a detailed quarterly step-by-step plan to end gas flaring to end gas flaring by April 30, 2007. However, the Nigerian Court of Appeals restrained the Federal High Court from sitting on May 31, 2006 - the date set for personal appearances regarding the proposal to end gas flaring.

The most pivotal aspects of social movements seeking change involve the indirect effects and uses of litigation. As earlier stated, litigation by itself may not always result in instantaneous and extensive results, but it can be part of an effective political strategy to achieve social change.<sup>194</sup> Courts can be used as avenues for social change and a forum of protests.<sup>195</sup> They are "forum[s] in which the struggle for societal change occurs. Even when public interest lawsuits prevail in courts, often their most lasting legacy is not the relief ordered by the courts, but the lawsuit's contribution to the ongoing community discourse about an important public issue."<sup>196</sup> In other words, judges are the creators and managers of complex forms of ongoing relief, which have widespread effects on persons not before the courts. Therefore, the continuous involvement in administration and

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<sup>193</sup> For example, the injunction issued by the Federal High Court has not been enforced since November 2005. See Eferiekose Ukala, *supra* note 7 at 109.

<sup>194</sup> Susan Gluck Mezey, *supra* note 91 at 5–6.

<sup>195</sup> Jules Lobel, *supra* note 92 at 479-480.

<sup>196</sup> *Ibid.* at 480.

enforcement of their judgments is imperative.<sup>197</sup> It is expected that their judgments have impact outside the courtroom. Thus, the true success of litigation goes beyond merely winning the case in the courtroom.<sup>198</sup> Nonetheless, for victims of climate change litigation to get justice, the judiciary must be independent. Independence of the Judiciary guarantees justice to the citizen and upholds the rule of law, human rights and democratic systems. In the absence of Independence of the Judiciary, the principle of the rule of law will not be upheld.<sup>199</sup> The next part will analyse the absence of the rule of law in Nigeria.

## **I. The Absence of the Rule of Law**

The absence of rule of law when dealing with environmental matters involving transnational oil companies (TNCs) is a major obstacle to ending gas flares in Nigeria. According to Eferiekose Ukala, the influence of the state on the judiciary in the *Gbemre* case was a violation of the rule of law. Without the observance of the rule of law, climate change litigation in Nigeria will be unable to end gas flares.<sup>200</sup> A legal system governed by the rule of law, *inter alia*, ensures that there is equality before the law, and the judiciary is independent.<sup>201</sup> The restraint of tyranny is one of the most important elements of the rule of law. According to Eferiekose Ukala, what is obtainable in

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<sup>197</sup> Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976) Harv. L. Rev. 89:1 1281 at 1282–1284.

<sup>198</sup> Jules Lobel, *supra* note 92 at 480.

<sup>199</sup> Maduekwe Vincent Chucks, *supra* note 136 at 92.

<sup>200</sup> Eferiekose Ukala, *supra* note 7 at 113.

<sup>201</sup> *Ibid* at 114.

Nigeria is a “rule by corporation” rather than the operation of the rule of law.<sup>202</sup> The ‘rule by corporation’ is a system of government where corporations influence the government and the government subsequently influences the courts. In this rule by corporation, oil companies do not obey regulations or court orders that are unfavourable to their operation with fear of being penalized. In Nigeria, oil companies are penalized minimally. Put differently, the oil companies are granted impunity. The Nigerian courts are not free of “arbitrary and tyrannical government” when it comes to dealing with environmental matters because the executive branch (cooperatively with the TNCs), control the legal system. The phenomenon is best exemplified by *Kenule Saro-Wiwa* case in which the executive branch gave the judiciary unlimited power to punish people from the Niger Delta that were deemed traitors to the oil industry.<sup>203</sup> Although the *Kenule Saro-Wiwa’s* case was under a military government, it is important to discuss it because it delineates the approach of the executive branch with regards to influencing the judiciary. Comparing the facts of the *Kenule Saro-Wiwa* case to the *Gbemre* case also reinforces the theme of a highly influenced judiciary in environmental-litigation cases.

Kenule Saro-Wiwa, was an indigenous human rights activist who led several peaceful protests against the gas flaring practice of Shell in Ogoni (a community in the Niger Delta area of Nigeria). The Nigerian military government imprisoned and executed Kenule Saro-Wiwa and 8 other people (known as the Ogoni 8) who organized the protests against gas flaring under the military dictatorship of General Sani Abacha. General Sani Abacha appointed a military tribunal consisting

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<sup>202</sup> Eferiekose Ukala, *supra* note 7 at 114.

<sup>203</sup> *Ibid.* at 114.

of military personnel who belonged to the executive branch of government to preside over the case. The military-tribunal personnel were also members of the executive branch of government that authored the Civil Disturbances (Special Tribunal) Decree, No. 2 of 1987, the Decree that was used to prosecute Kenule Saro-Wiwa and the other 8 Ogoni protest organizers.<sup>204</sup> The executive branch did not want to lose the profits derived from Shell's exploration of oil. The *Kenule Saro-Wiwa* case exemplifies arbitrary rulings in environmental matters and illustrates the judiciary's failure to respect the concept of the rule of law. Even after Nigeria's subsequent shift to a democratic form of government, the courts have not been purged from undue influence from the executive branch and TNCs.

As witnessed under the *Kenule Saro-Wiwa* case, Shell also had undue influence in the *Gbemre* case. This is evident in the transfer of the presiding trial judge by the democratic president (Olusegun Obasanjo), and the reported loss of the case file a few months after the judge ordered Shell to stop flaring gas.<sup>205</sup> The missing case file and the judge's transfer may appear to be a mere coincidence; however, one familiar with the Nigerian justice system may not be surprised by these

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<sup>204</sup> The military dictator appointed the tribunal which consisted of military personnel (who belonged to the executive branch of government) to preside over the case after he determined that Kenule Saro-Wiwa was involved in "civil disobedience." See Civil Disturbances (Special Tribunal) Decree, No. 2 of 1987 § 1(1)(a)–(d). See also Martin-Joe Ezeudu, "Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court" (2011) 11:1 AHRLJ 23 at 33.

<sup>205</sup> Eferiekose Ukala, *supra* note 7 at 116.

sudden events. The question then becomes whether these actions were intentionally taken to impede the proceeding and whether the *Gbemre* case was deemed to be a threat to the status quo. It could be inferred that the judge was transferred to halt the *Gbemre* case. This inference is also supported by the fact that after the judge was transferred and the case file was reported lost, Jonah Gbemre was arrested and detained by Nigerian soldiers.<sup>206</sup> The soldiers who arrested Gbemre are the same soldiers who guard the gas-flaring sites.<sup>207</sup> It may seem like Gbemre's arrest is not connected to the problems of the judiciary however, it is the same military that interfered with the *Kenule Saro-Wiwa case*. Furthermore, just like the *Kenule Saro-Wiwa case*,<sup>208</sup> Gbemre's arrest (to instill fear in him) during a community interactive forum<sup>209</sup> on the impact of gas flaring suggests that the judge's transfer and the missing case file were not a mere coincidence. The government went beyond silencing the Federal High Court by transferring the judge, to attempting to silence Jonah Gbemre. The *Gbemre* and *Kenule Saro-Wiwa* cases elucidate the military's modus operandi.

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<sup>206</sup> *Ibid.* at 116

<sup>207</sup> *Ibid.* at 116

<sup>208</sup> Amnesty International, *Was Shell Complicit in Murder?* (28 November 2017), online: <<https://www.amnesty.org/en/latest/news/2017/11/was-shell-complicit-in-murder/>>.

<sup>209</sup> Environmental Rights Action/Friends of the Earth, Nigeria, *Gas Flaring: Arrest of Activists, Journalists*, (2 September 2008), online: <http://archiv.labournet.de/internationales/ng/soldateneinsatz.pdf>.

The military, therefore, continues to influence the judiciary. Whilst the actions of the military in gas flaring cases under the current democratic government are not as brutish as their actions were under military regime when the *Kenule Saro-Wiwa* case was decided, citizens opposed to gas flaring continue to be punished by the military. For example, a report by Amnesty International in May 2009 states that:

[T]he Nigerian military continues to carry out attacks by land, air and sea on the oil-rich Niger Delta. Reports indicate hundreds, possibly thousands, of Nigerian civilians may be dead. Entire villages have reportedly been burned to the ground . . . [recent occurrences such as this have] received little international attention. Aid groups and journalists have been blocked from entering the remote region, which is accessible only by boat.<sup>210</sup>

The military has acknowledged these recent attacks but claims that the "attacks have only targeted militant camps as part of a peace-keeping effort."<sup>211</sup>

The report mentioned above depicts how the current democratic government has reduced the publicity of the ongoing harassment in the Niger Delta region. These current military attacks are similar to events in Ogoni land in the 1990s when communities in Ogoni were raided, houses were

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<sup>210</sup> Juan Gonzalez, *Massive Casualties Feared in Nigerian Military Attack on Niger Delta Villages*, Democracy Now! (21 May 2009), online: <<http://www.democracynow.org/2009/5/21/nigeria>>.

<sup>211</sup> Amy Sinden, *supra* note 127 at 177.

burned, and people were killed in the guise of “peacekeeping efforts”<sup>212</sup> Consequently, the new democratic government is resistant to environmental-rights activism. Considering the similitude between the military regime and the current democratic regime, the current legal system in Nigeria may still not be held accountable for environmental issues such as gas flaring, because "a legal strategy for holding government accountable . . . should invoke the power of the judiciary as an enforcement arm of government."<sup>213</sup> Therefore, unless the Nigerian government and judiciary are extricated from the influence of the TNCs, litigation strategies to end climate change will have no ‘teeth.’

### **3.3.3. The Absence of Infrastructure for Gas Conservation and Utilization**

The lack of basic gas utilization and conservation infrastructure is identified as the greatest hindrance to ending the practice of gas flaring and maximizing the natural gas potentials of Nigeria.<sup>214</sup> This lack of infrastructure has led to the failure or ineffectiveness of several legal and policy framework put forward by the government to achieve complete flare down at the well

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<sup>212</sup> Human Rights Watch, *The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria* (1 July, 1995), online: <<http://www.unhcr.org/refworld/docid/3ae6a7d8c.html>>.

<sup>213</sup> Mary Christina Wood, “Atmospheric Trust Litigation”, in Rodgers, Jr. & M. Robinson-Dorn eds, *Climate Change Reader* (Durham: Carolina Academic Press, 2011) at 40.

<sup>214</sup> Stephen C. Nwanya, “Climate change and energy implications of gas flaring for Nigeria” (2011) 6:3 *International Journal of Low-Carbon Technologies* 193 at 194.

heads.<sup>215</sup> For example, the Associated Gas Re-Injection Act,<sup>216</sup> failed largely due to the absence of infrastructure for gas utilisation.<sup>217</sup> Notwithstanding the penal sanctions contained in the Act, TNCs were unable to comply with the stipulated gas flare out date because of the lack of gas utilisation infrastructure; there was only one gas re-injection plant owned by Mobil.<sup>218</sup>

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<sup>215</sup> *Ibid.* at 3.

<sup>216</sup> The first attempt to specifically address gas flaring which was made in 1979.

<sup>217</sup> Section 3(1) of the Act mandated oil companies to stop gas flaring from January 1, 1984 (gas flare out date). They were to "reinject gas into the earth's crust and/or submit detailed plans for gas utilization." Under section 3(2) of the Act, the Minister of Petroleum Resources was given the discretion to grant gas-flaring permits where he/she is satisfied that the utilisation or re-injection of gas is inappropriate or not feasible in any field subject to certain conditions or the payment of certain levies. The Act provided that the penalty for the violation of the provisions of section 3(1) was a forfeiture of the concessions granted in the particular field where the offence was committed. In addition, the Act authorized the Minister to withhold any entitlements of an offending company towards the cost of completion or implementation of a desirable gas re-injection scheme. See *Associated Gas Reinjection Act No. 25, 1979 s 4*.

<sup>218</sup> The second reason for the non-compliance was the failure of the government to contribute its percentage to the cost of the establishment of gas re-injection facilities (This will be extensively discussed in the next chapter). Since the government through the NNPC was the majority partner in the joint venture agreements, it was liable for a commensurate share of the cost of the gas re-injection facilities. Initially, the NNPC was unable to meet its share of costs, and eventually, it

Consequently, the regulation had to be amended in 1984, to provide for continuous flaring and phase elimination of gas flaring. The government has tried to deal with the lack of infrastructure by attempting to incentivise TNCs to invest in the exploitation and utilisation of natural gas reserves projects to curb gas flares by introducing the Nigerian Liquefied Natural Gas (Fiscal

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could not do so on the scale previously envisaged. See Omorogbe Yinka, *Oil and Gas Law in Nigeria* (Lagos: Malthouse Press, 2001) at 59. 37 *Ibid* at 59.

Incentives, Guarantees and Assurances) Act<sup>219</sup> and the Associated Gas Framework Agreement (AGFA).<sup>220</sup> However, all these attempts failed.

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<sup>219</sup> The Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act, otherwise known as the NLNG Act codified fiscal incentives and guarantees made by the federal government to the Nigerian Liquefied Natural Gas (LNG) Company and its shareholders to assure the TNCs that their investments in the development of the LNG plants were secure from the governmental interference; and that the legal regime and the government's fiscal guarantees would not be subject to unilateral amendments or to changing political climates. The LNG companies were granted "pioneer company status" for the purposes of taxation. The companies were a given a tax relief period of 10 years from the date of the first commercial delivery of LNG produced the company to a buyer. The Act also provides that all interests payable by the TNCs to third parties, shareholders and subsidiaries of shareholders are tax deductible. The company and its contractors were exempted from paying import duties and value added tax (VAT) on all machinery and materials for the construction of the LNG plants. See Energy Information Administration, *Country Analysis Briefs—Nigeria* (October 16, 2012), online: < <http://www.eia.doe.gov>> at 15. See also *Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act* s 1(4).

<sup>220</sup> The Associated Gas Framework Agreement (AGFA) provided several incentives including: tax holiday of 5 to 7 years for gas projects; exemption on custom duties and VAT on gas development equipment; investment capital allowance of 15% on gas-related projects; interest deductibility on loans related to gas development projects; and the exemption of dividends accruing to gas projects and investments from tax during the period of years declared as tax holidays. See Omorogbe

All the governmental efforts to provide infrastructure failed due to the difficulty and the large cost it would take to build the necessary infrastructure because of the geographical terrain of the Niger Delta. The terrain comprises mainly of swamps, marshlands, creeks, rivers, and other water bodies.<sup>50</sup> This creates colossal difficulties for TNCs to construct gas transmission facilities that will link oil fields with gas utilisation plants. The challenges potentially increase the cost of investments in gas gathering and utilisation facilities and thereby discourages investments in the gas industry. There are also financial barriers to the implementation of flare reduction projects due to the absence of funds to finance long-term gas gathering, transmission, and utilisation projects. Currently, most Nigerian banks are incapable of financing such huge, long-term, and capital-intensive projects.<sup>221</sup> The banks generally have low lending capacities and loans are given with very high interest rates.<sup>222</sup> Therefore, all these issues have to be dealt with before gas flaring can end in Nigeria.

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Yinka, “Law and Investor Protection in The Nigerian Natural Gas Industry” (1996) *J of Energy & Natural Resources*. L. 14:2 179 at 179.

<sup>221</sup> Ademola Oyejide & Adeolu Adewuyi, *Enhancing Linkages of Oil and Gas Industry in the Nigerian Economy*, Paper presented at Making the Most of Commodities Programme in Cape town, South Africa (March, 2011), online: <[http://www.prism.uct.ac.za/Papers/MMCP%20Paper%208\\_0.pdf](http://www.prism.uct.ac.za/Papers/MMCP%20Paper%208_0.pdf)>.

<sup>222</sup> Uchenna Jerome Orji, *supra* note 6 at 165.

### 3.4 CONCLUSION

Climate change litigation seeks to apply legal rights to affect the outcomes that would either mitigate or reduce greenhouse gas emissions. The ineffectiveness of climate change litigation in the Nigerian context is a product of wider social political and regulatory factors. These actors include the fact that the oil and gas industry is the mainstay of the Nigerian economy; and that there is a lack of sufficient gas utilisation/ conservation infrastructure. The promise of the development that could have been ushered in by the *Gbemre v. Shell Petroleum Development Corporation* has been stalled and its regulatory impact stifled as political, economic and legal realities mute the claims that climate change litigation advocates have verbally made elsewhere. This is a theme that the following chapter will further develop.

## CHAPTER FOUR

### THE POLITICS OF CLIMATE CHANGE IN NIGERIA

“The world as we know it is dying. Our crops, the fishes in our streams, everything is dying. Where is justice?”<sup>223</sup>

#### 4.1 INTRODUCTION

In Nigeria, transnational oil companies engage in the unsustainable practice of gas flaring that contributes to climatic changes and continues to disregard human lives. Litigation has been publicized as not just a means to compensate climate victims and introduce regulation directly through mandate, but it serves as a medium to attract public attention, galvanize ordinary citizens and pressure governments to reach political solutions.<sup>224</sup> As explained in chapter two, the attention surrounding climate change litigation can shape regulation indirectly in the countries where they are instituted through influencing corporate behaviour and social norms.<sup>225</sup> However as the previous chapter established, the *Gbemre* case reveals that in Nigeria, the lack of judicial independence and the lack of access to infrastructure for gas conservation undermines the ability of climate litigation to realise its potential advantage(s). This chapter offers a unique perspective

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<sup>223</sup> A seventy-year old fisherman in Otuegwé village in the Niger Delta community where 800,000-barrel oil spill occur from one of Shell’s pipelines. See Ike Okonta & Oronto Douglas, *Where Vultures Feast: Shell, Human Rights, And Oil in the Niger Delta* (San Francisco: Sierra Club Books, 2001) at 211.

<sup>224</sup> Jolene Lin, *supra* note 14 at 38.

<sup>225</sup> Eric Posner, *supra* note 29 at 1927.

on the limitations of climate change litigation by offering a close look at the relevant corporate forms of agreement that shape oil and gas operations in Nigeria.

Petroleum resources are exploited by transnational oil corporations like Shell Petroleum Development Corporation of Nigeria in partnership with the Federal Government of Nigeria (FGN) through the national oil company, the Nigerian National Petroleum Corporation (NNPC). There are three main forms of partnership that exist between the state and the transnational oil corporations (TNCs): Joint Ventures, Production Sharing Contracts and Risk Service Contract. However, I will focus on the Joint Venture arrangement because it accounts for over 90% of total oil and gas production in Nigeria.<sup>226</sup> This form of commercial arrangement, as will be discussed has had a negative impact on the government's ability to coerce TNCs into obeying gas flaring laws and regulations and enforcing the judgement of the Federal High Court in the *Gbemre case*. This chapter is divided into three parts: the second part will analyse the government's joint venture partnership with TNCs to show that this relationship is one of the reasons behind the lack of political will to address gas flaring in Nigeria. The last part will conclude.

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<sup>226</sup> See Ken Ifesinachi & Aniche E. T., "Oil Joint Venture Partnerships and Nigerian Economy" (2014) 7:1 U. Nigeria J. Pol. Econ. 1 at 2.

## **4.2. THE RELATIONSHIP BETWEEN THE GOVERNMENT AND THE OIL AND GAS INDUSTRY**

In Nigeria, the ownership and control of petroleum resources is vested solely in the Federal Government.<sup>227</sup> Petroleum resources are mainly exploited by transnational oil corporations in a joint venture partnership with the Federal Government of Nigeria (FGN) through the national oil company, the Nigerian National Petroleum Corporation (NNPC). A Joint venture partnership is contractual agreement between the host government and the international oil companies that requires both parties to provide funding for the exploration, development and production of petroleum and the hydrocarbon product is shared in proportion to each party's participating interest.<sup>228</sup> This is the standard agreement between the national oil company ((NNPC) and the transnational oil company (TNCs). Under this arrangement, both NNPC and the TNC jointly hold the Oil Prospecting License (OPL) or Oil Mining Lease (OML) and funding for the exploration, development and production of petroleum are shared in proportion to the participating interest held by each party. The income derived from the operation is also shared in proportion to the equity

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<sup>227</sup> The constitution provides that: "Notwithstanding the foregoing provision of this section, the entire property in the control of all mineral oil and natural gas in, under or upon any land in Nigeria, under or upon the territorial waters and the exclusive economic zones of Nigeria shall be vested in the government of the federation and shall be managed in such manner as may be prescribed by the national assembly". See Constitution of the Federal Republic of Nigeria, 1999 s 44(3). See also *South Atlantic Petroleum Ltd v. Minister of Petroleum Resources* (2006) 10 CLRN 122.

<sup>228</sup> Osayaba Giwa-Osagie & Emwanta Ehigiato, "Financing Options in the Oil and Gas Sector in Nigeria" (2015) 3:3 J. Energy & Natural Res. L. 218 at 231.

interest of the parties to the venture.<sup>229</sup> Each party can lift and separately dispose its interest share of production subject to the payment of Petroleum Profit Tax (PPT) and Royalty. Since the Joint Venture Agreement (or Joint Operating Agreement) does not create a partnership or company, the JV itself is not taxed. Technical matters are discussed, and policy decisions are taken at operating committees where partners are represented based on equity holding. Joint ventures in Nigeria are unincorporated. They are typically less risky and are easier to unbundle compared to full organizational mergers and they do not create partnerships. In fact, the Joint Venture Agreements specifically states that the Agreement does not create a company or a partnership. JVs currently account for over 90% of total oil and gas production in Nigeria.<sup>230</sup> For example, the joint venture operated by Shell alone accounts for about 50 percent of Nigeria's daily production. There are currently six JVs and the NNPC has the highest percentage.<sup>231</sup>

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<sup>229</sup> *Ibid.* at 231.

<sup>230</sup> *Ibid.* at 231.

<sup>231</sup> NNPC (55%), Shell (30%), Elf Petroleum Production Nigeria Limited (10%) and Nigeria Agip Oil Company (5%); B. NNPC (60%) and Chevron (40%); C. NNPC (60%) and Mobil Producing Nigeria (40%); D. NNPC (60%), Nigeria Agip Oil Company (20%) and Phillips Petroleum (20%); E. NNPC (60%) and Elf Petroleum Nigeria Limited (40%); F. NNPC (60%); Texaco (20%) and Chevron (20%). This form of commercial arrangement, as will be discussed in Part III and IV, has had a negative impact on the government's ability to coerce TNCs into obeying gas flaring laws and regulations.

The joint venture agreements in Nigeria are generally governed by a joint operating agreement (JOA); a Participating Agreement and a memorandum of understanding (MOU). The JOA defines the relationship between the parties with regards to the following: operatorship and obligations; work programme; plans and expenditure; right of assignment by each party; offtake; scheduling and lifting procedures; accounting procedures; budget approval and supervision; project contract procedures; and communications. The Participation Agreement sets out the interests of the parties and provides that income derived from the operation is shared in proportion to the equity interests of the parties to the agreement with each party bearing the cost of its royalty and tax obligations in proportion to equity holdings. The MOU governs the manner in which revenues are allocated between the partners including payment of taxes, royalties and industry margin.<sup>232</sup> One of the TNCs is usually designated as an operator under the joint operating agreement but the NNPC reserves the right to become an operator.<sup>233</sup> The operator is in charge of conducting, managing and controlling the joint venture.<sup>234</sup> The operator selects employees for the operations; keeps accurate

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<sup>232</sup> The Memorandum of Understanding seeks to guarantee certain profit margins to the TNC, when crude oil market price falls below certain thresholds. The Parties have since suspended the application of the MOU provisions since crude oil price now exceeds the reference price of \$30 per barrel. See Klynveld Peat Marwick Goerdeler (KPMG), “Nigeria’s Oil and Gas Industry Brief” (June 2014), online: <<http://www.blog.kpmgafrica.com/wp-content/uploads/2016/10/Nigerias-oil-and-gas-Industry-brief.pdf>>.

<sup>233</sup> NNPC website <<http://nnpcgroup.com/NNPCBusiness/UpstreamVentures.aspx>>.

<sup>234</sup> Yinka Omorogbe, “The Oil and Gas Industry: Exploration and Production Contracts” (Lagos: Malthouse Press, 2001) at 49.

records and books of accounts, opens and maintains a joint bank account for the parties to deposit required funds; and settles claims relating to the operation. Most importantly, the operator prepares proposals for programme of work and budget of expenditure on an annual basis, which is shared on share holding basis.

#### **4.2.1 The Effect of The Government’s Relationship with The International Oil Companies on Climate Change Litigation**

The fact that the Nigerian economy is oil dependent means that it also depends on the TNCs for their investments, skills, infrastructure, revenue, and foreign exchange. This, thus, makes for an economic relationship that caters to the self-interest of each party.<sup>235</sup> This relationship is symbiotic in character, as the companies need the political and legal facilitations of the state while the state needs the revenue and infrastructure of the companies.<sup>236</sup> There is therefore a strong state-corporate relationship. The JV agreement has thus had a negative impact on the government's ability to coerce TNCs into obeying gas flaring laws and regulations because of the costs of gas gathering or re-injection facilities that is to be borne by the government. The NNPC has the highest percentage of participation in its various contracts with the TNCs. The participatory interest of NNPC is 60 per cent in all JVs, except the Shell (SPDC) operated JV, where it is 55 percent.<sup>237</sup> Since Joint venture partnerships currently account for over 90% of total oil and gas production in

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<sup>235</sup> Raymond Izarali, “Human Rights and State-Corporate Crimes in the Practice of Gas Flaring in the Niger Delta, Nigeria” *Crit. Crim.* (2016) 24:3 391 at 395.

<sup>236</sup> *Ibid.* at 395.

<sup>237</sup> Ken Ifesinachi & Aniche E. T., *supra* note 226 at 2.

Nigeria, the NNPC is left to bear the brunt of the cost of oil operations and flare reduction commitments.

Currently, the Federal government has difficulty meeting its cash call obligations due to underfunding and delays in approval of budget. This is because the NNPC is a public corporation and the National Assembly must approve its' budget to fund budget to fund its' participating interest.<sup>238</sup> Following the National Assembly's failure to allocate enough money as cash calls for the NNPC in the country's budget over the years, the arrears of JV cash calls have accumulated to over \$7 billion. According to Ibe Kachukwu—the current state Minister of Petroleum Resources: “If you ask for \$4 billion; they (the National Assembly) will give you \$1.5 billion.” Consequently, efforts to reduce gas flaring have been hindered by the inability of the Nigerian government to meet flare reduction commitments in oil fields being operated under Joint Venture Arrangements with oil companies. As noted earlier, the failure of the government to fulfil its obligations to contribute to the development of re-injection facilities was one of the proximate causes of the failure of the Associated Gas Re-Injection Act of 1979; the same problem still haunts present efforts to tackle gas flaring. Thus, present efforts to tackle gas flaring are hindered by disagreements between the Nigerian government and oil companies over who should bear the cost of deploying gas-gathering or re-injection technologies; oil companies argue that “despite a reduction in flaring, that the practice continues owing to funding shortfalls from their joint-venture

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<sup>238</sup> For example, the overall budget for 2006 JV operations was still awaiting approval three months into the budget year because of the national budget delay. See *Ibid.* at 16.

partner, the NNPC, and this has resulted in deadlock over paying the bill for the costly technology.”<sup>239</sup> Therefore, gas flaring is particularly a cheaper option for the government compared to the development of gas gathering or re-injection facilities considering its current struggles to meet cash call obligations. The government’s complicity in the continued flaring of gas in the Niger Delta is clearly illustrated in a statement issued by SPDC:

The only way to end flaring at flare sites without Associated Gas Gathering equipment would be to stop oil production. This decision cannot be made by SPDC without direct support from other Joint Venture partners, including the government-owned majority partner NNPC. In a letter dated 31 December 2008, the government directed SPDC and other oil companies to continue with production (and therefore flaring) until instructed otherwise.<sup>240</sup>

The oil sector in Nigeria has three stakeholders. These are: the oil bearing communities, the TNCs and the Nigerian government.<sup>241</sup> However, there is a sense in which these stakeholders can be reduced to two because what the Niger Delta region has experienced so far is a collusion of two

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<sup>239</sup> Baumüller, H. et al. “The Effects of Oil Companies’ Activities on the Environment, Health and Development in Sub-Saharan Africa” Chatham House, (August 2011), online:

<[https://www.chathamhouse.org/sites/files/chathamhouse/0811ep\\_report\\_0.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/0811ep_report_0.pdf)>.

<sup>240</sup> Uchenna Jerome Orji, *supra* note 6 at 164.

<sup>241</sup> Shola Omotola, “The next Gulf? Oil politics, environmental apocalypse and rising tension in the Niger Delta.” (2006) Accord Occasional Paper Series 1:3, 3 at 11, online:

<[https://www.files.ethz.ch/isn/99765/op\\_2006\\_3.pdf](https://www.files.ethz.ch/isn/99765/op_2006_3.pdf)>.

players: TNCs and the executive branch of the Nigerian government against the oil bearing communities.<sup>242</sup> Increasingly, the line of demarcation between the TNCs and the government has become blurred. This is because they are united by a common purpose, that is, “capitalist expansionism and the appropriation of surplus value.”<sup>243</sup> This is why Ibeanu contends that “there is little difference between Shell and the Nigerian state.”<sup>244</sup> While the state has a major play in this type of scenario, it is true, as Shell’s executive Chris Finlayson notes, that the corporate sites are what the residents of these communities see more emblematically as the source of their despairs; these sites are more immediate to their observations and are directly involved in the production of the woes of the surrounding communities.<sup>245</sup> But the government, Finlayson notes, is the majority owner in these entities and gets over 90 % of the after-cost income under the “split of the barrel.”

In chapter two, several scholars writing on the effectiveness of climate change litigation in United States of America and Australian argue that that judicial decisions can determine greenhouse gas

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<sup>242</sup> *Ibid.* at 11.

<sup>243</sup> Daniel Egiegba Agbibo, “Between Corruption and Development: The Political Economy of State Robbery in Nigeria” (2012) *J Bus Ethics* 108:3 325 at 338.

<sup>244</sup> Okechukwu Ibeanu, Environmental Change and Security Project Report “Oiling the Friction, Environmental Conflict Management in The Niger Delta, Nigeria” (2000), online: <<https://www.wilsoncenter.org/sites/default/files/Report6-2.pdf>>.

<sup>245</sup> Smith, D. K. S, “Interview with Mr. Chris Finlayson, Regional CEO (Africa), Shell exploration and production” (2005) 6:1 *J. Afric. Business* 185 at 185-191.

emission policy or provide the victims with compensation, but more importantly, litigation can be used to attract public attention; galvanize ordinary citizens; and pressure governments to reach political solutions via treaties and domestic laws.<sup>246</sup> However, despite these claims, the *Gbemre* case was unable to catalyse significant changes in the behaviour of the TNC involved in the case of the lack of political will to address environmental issues in Nigeria which is a function of the Joint Venture relationship between the executive arm of government and the oil and gas corporations.

### 4.3. CONCLUSION

This chapter reveals an alarming truth about the oil and gas operations in Nigeria: the state is in a precarious situation.<sup>247</sup> The form of Joint Venture arrangement in Nigeria, has a negative impact on the government's ability to coerce TNCs into obeying gas flaring laws and regulations. This can be seen in the failure to enforce the judgement of the Federal High Court in the *Gbemre case*. The state did not show any effort to enforce the judgement because state has majority ownership in Shell and other large transnational oil corporations operating in the region, and so a diligent attitude of enforcement by state security would, on the one hand, laud enforcement effort but, on the other, be seen by the state as undermining its revenue supply. The state in other words may have viewed enforcement as self-defeating. The state indulged in the health and environmental harms to its people to placate and keep stable the foreign investments in the petroleum industry.

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<sup>246</sup> Jolene Lin, *supra* note 14 at 38.

<sup>247</sup> Uchenna Jerome Orji, “*supra* note 6 at 162.

## CHAPTER FIVE

### CONCLUSION

The scientific consensus is that swift and profound actions are needed to mitigate and adapt to the impending dangers of climate change. Since Nigeria is one of the countries that is most vulnerable to the catastrophic effects of climate change and environmental degradation, there is an imminent need to tackle climate issues in the country. Climate advocates have employed litigation as a strategy to catalyze action and galvanize support on climate change. Scholars have documented how litigation can be used to fill regulatory gaps, help build social movements, and shift corporate behaviour around issues that affect the climate. Most climate change litigation to date has proceeded in courts in developed countries like the US, Australia and New Zealand.<sup>248</sup> However, litigants in Nigeria and other countries in the Global South have started to make use of burgeoning climate change litigation theories and know how.<sup>249</sup> Despite the scholarly enthusiasm for climate change as an effective tool to reduce environmental harm in the US and American experiences, climate change litigation has had limited success in Nigeria.

In this thesis, I juxtaposed the core assumptions that guide current scholarly enthusiasm for the capacity of climate change litigation to reduce environmental harm based on the experiences in the United States of America and Australia and with the unique contextual factors that have impeded the overarching success of climate change litigation in Nigeria. I found that the major

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<sup>248</sup> United Nations Environment Program, *supra* note 15 at 5.

<sup>249</sup> *Ibid.*

reason for the limited success of climate change litigation in Nigeria the economic importance of the oil industry in Nigeria. Oil is the mainstay of the Nigerian undiversified economy.<sup>250</sup> As such, an effective enforcement of any regulatory deadline or litigation to end gas flaring may produce huge unpredictable economic and political consequences for the government. Another reason for the limited success of climate change litigation highlighted in this thesis is the government's pecuniary interests in the operations of the transnational oil companies (TNCs) due to their joint venture arrangement. Enforcing an environmental regulatory policy that entails significant spending which would reduce revenue or profit, is not in the least a priority for the partners. This is because the government bears a significant portion of the expenditure.<sup>251</sup>

This thesis has shown, by drawing on the *Gbemre and Ogoni* cases, that while such cases might contribute to the ongoing dialogue on gas flaring, the goal of using the courts as forums for social change cannot truly be achieved when a governmental system is plagued by undue influence from the executive branch. Indeed, gas-flaring adjudication has raised public awareness, but the awareness raised may not amount to any real change given that policymakers have failed to ensure that gas-flaring practices end. Although gas flaring or climate change litigation instigates discussion on this critical issue among community members, such discussion is only short lived among policymakers because of their stance of protectionism toward oil companies. With such clouded vision, the government influences the judiciary and has hindered judicial activism.

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<sup>250</sup> Energy Information Administration, Country Analysis Briefs—Nigeria (October 16, 2012), online: <<http://www.eia.doe.gov>> at 1.

<sup>251</sup> Uchenna Jerome Orji, *supra* note 6 at 154.

Consequently, the courts or tribunals either succumb to the government's wishes in protecting the oil companies or tactfully decline to take further action in the case. However, social change cannot be achieved when a court is unwilling to deviate from the status quo. Litigation in Nigerian courts cannot be an effective tool to stop gas flaring due to the presence of state interference in the judicial process. When the court's holding coincides with the executive branch's political agenda, the likelihood that gas flaring litigation puts pressure on policymakers diminishes. Such gas-flaring litigation does not necessarily pressure Nigerian policymakers because; (1) these policymakers have long been aware of the gas-flaring issue and have been reluctant to address the issue. Instead, they deliver empty promises; (2) a citizen's attempt to pressure policymakers is likely to be met with punishment as in the *Kenule* and *Gbemre* cases.

In light of the analysis done, it is important for climate advocates in the global south to carry out in-depth research on unique contextual factors that may affect legal strategies to combat climate change. Although legal strategies proffered by scholars may shape regulation to address climate change and its effects, provide avenues for victim compensation, galvanize public support and shift corporate behaviour in the Global North, they may be of limited utility in the Global South.

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