

CLIMATE CHANGE LITIGATION AND THE ACCOUNTABILITY FUNCTION OF JUDGE-MADE LAW IN CONTEMPORARY NIGERIA

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Abstract

*Courts are indispensable for the working and consolidation of the rule of law. They also have a key role to play with regards to making state institutions, powerful individuals, and corporate entities accountable, and ensuring the protection of human rights as established in constitutions, conventions, and laws. The anthropocene epoch and the problem of climate change has in recent times necessitated the clamour for the cultivation of a cadre of judges that understand the intricacies of climate change actions brought before courts for adjudication. One of the world's most acclaimed environmental jurists, Brazil Supreme Court Justice Antonio Benjamin, has described climate change 'as the single most important legal issue facing judges globally'. This underscores the centrality of knowledgeable judges in effective application of evolving environmental law based on an understanding of concomitant science. Nigeria is one of the ten countries categorised by the International Rescue Committee (IRC) as highly vulnerable to climate change impacts. Therefore, it is beyond cavil that judges in Nigeria ought to be equipped to understand and effectively apply the appropriate principles when faced with climate change actions. So far, decisions of national courts in cases such as *Gbemre v Shell Petroleum Development Nigeria* and *Centre for Oil Pollution Watch v NNPC* have been met with some criticism. Consequently, this article examined the legal and institutional factors that are propitious for effective delivery of climate justice in Nigeria. It adopts a comparative approach by analysing other cross-jurisdictional practices.*

Keywords: *Climate Change Litigation; Judge-made Law; Accountability; Environmental Rights; Nigeria; Global South*

Introduction

This article explores the role of courts (judges) in the quest to hold states to account due to climate emergency. It begins by theoretically exploring the centrality of courts to the development of norms inherent in constitutions and bills of rights. This function of courts as bastions for the stabilisation of democratic regimes strategically places them in pole position to appraise our climate reality and do what is required to stem governmental malfeasance which is an aspect of the difficulty in tackling the existential threat of climate change. It analyses emerging case law from Nigeria and other jurisdictions to determine if there is arguably an emerging zeitgeist among judges. The importance of this is to iterate the role of the judge and how they perceive the challenge that is imminent in establishing normative standards bearing in mind the combination of interests of litigants seeking protection of 'present and future generations', and that of governments and corporations that intend to maintain control of economic activity and maximize profits respectively. As Wood argues courts as of necessity serve an

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“engagement role” in which the judge uses problem-solving tools as well as skilled mediation techniques to arrive at broad declaratory relief and remedial plans designed to correct the dysfunction’ which is often characteristic of emerging climate change actions.¹

The urgency and extremity of the climate emergency is no longer deniable. As things stand, the world population is projected to grow from 7.4 billion to 11.2 billion by the year 2100.² Furthermore the most recent report of the Intergovernmental Panel on Climate Change (IPCC) highlights the numerous threats climate change poses to the existence of the planet³ The report reveals that there has been big rise in global warming and the greenhouse gas (GHG) emissions, which are adverse impacts on the planet and its billions of human and plant life.⁴ No part of the planet is immune from the devastating effects of climate change. This has led to droughts, heatwaves, heavy rainfall and cyclones occurring in different parts of the world.⁵ From the perspective of the developing world, they contribute the least emissions, but suffer greatly from the impact of climate change. According to the IPCC, ‘Africa is one of the most vulnerable continents to climate variability and change’.⁶ Thus, humanity’s quest to achieve orderly mitigation of and adaptation to climate change is dependent upon the just application of the environmental rule of law at domestic level and regionally. This is why courts, as this article will reveal, and tribunals are proving to be critical to just application of the environmental rule of law to issues of climate change.

Consequently, this paper examines the role of judges and their accountability function in climate change litigation. The first part of the paper signposts the importance of the accountability function of judge-made law in democracies. The second part of the paper ties climate change to the judge and the critical role they play in unboxing the rights contained in actions for climate change and the attendant relationship with environmental rights as more popularly utilized by litigants. The third part of the paper analyses the case law from Nigeria and how it has changed over the years. The fourth part of the paper analyses emerging jurisprudence from other international courts while the final part concludes.

A. Judges and the Exercise of the Accountability Function

Courts are central to the working and consolidation of agreed normative rules mostly represented in the constitution or working document of any particular society. They are especially critical to the stabilization of democratic regimes by contributing to the rule of law and creating an environment conducive to economic growth. Furthermore, courts are seen the world over as the institutions central

¹ M.C Wood, “On the Eve of Destruction”: Courts Confronting the Climate Emergency’ [2022] 97(1) *Indiana Law Journal*, 239, 242.

² U.N. Dept. of Economic and Social Affairs, World Population Prospects: The 2015 Revision, ESA/P/WP.241, https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf.

³ United Nations, Climate Change 2021: The Physical Basis (Intergovernmental Panel on Climate Change IPCC, 2021) available at <[https:// www.unep.org/](https://www.unep.org/) >

⁴ Ibid.

⁵ Ibid.

⁶ Intergovernmental Panel on Climate Change (IPCC), ‘Special Report on the Regional Impacts of Climate Change: An Assessment of Vulnerability’, (2007), available at <[https:// www.grida.no/climate/ipcc/regional/index.htm](https://www.grida.no/climate/ipcc/regional/index.htm)>, last accessed 10 July 2024. Furthermore, a plethora of reports have highlighted that Africa is overly impacted by climate disasters. For example, rising sea levels and temperature, extreme weather conditions and unpredictable rain patterns are having negative impacts on health, water and food security and development in African countries. Generally, see World Meteorological Organization (WMO), ‘State of the Climate in Africa 2019 (WMO- No.1253) 2020’, available at <[https:// library.wmo.int/index.php?lvl= notice_ disp lay&id= 21778#.X5gi ydPs YiR](https://library.wmo.int/index.php?lvl=notice_display&id=21778#.X5giydPsYiR)>, accessed 10 July 2024.

to making power-holders accountable to democratic rules of the game, and ensuring the protection of human rights.⁷ These are central premises in contemporary democratic theory—assumptions that underlie political reform efforts throughout the world.

In a well-functioning democratic system, the expectation is that the courts are independent and central to making political power-holders accountable. This entails that the courts shall ensure *transparency*; obliging public officials to justify that their exercise of power is in accordance with their mandate and relevant rules (*answerability*); and imposing checks if government officials overstep the boundaries for their power as defined in the constitution, violate basic rights, or compromise the democratic process (*controllability*).⁸

The accountability function of power is a well-contested concept of a modern democratic system at the intersection of law and political theory. Contextualising the concept is therefore necessary, given its origins and vastness of application in theory and practice. Politics as the process of selecting individuals to fill critical institutions in a modern state and a means of interaction between the government and the governed, is fraught with a fundamental problem of power. Earlier classical theorists appreciated the fact that power exists side-by-side with the need for its control. ‘In framing a government . . . the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself’.⁹ Beginning with the ancient philosophers, political thinkers have worried about how to keep power under control, how to domesticate it, how to prevent its abuse, how to subject it to certain procedures and rules of conduct.¹⁰ Currently, the term accountability encapsulates the existential concern for checks and oversight, for surveillance and institutional constraints, on the exercise of power. The term has become widely applicable, utilised by international financial institutions, party leaders, grassroots activists, journalists, political scientists, and legal theorists, who all make references to accountability in their respective disciplines.¹¹

Schedler alludes to the likeness of accountability to answerability, both bearing the characteristic of emphasizing proper placement of power in society. On one side, exercising accountability demands inherent mechanisms for monitoring and oversight. These include fact finding and generating evidence. On the other hand, as a normative concept, accountability subjects power not only to the rule of law but also to the rule of reason. Power should be ‘bound by legal constraints but also by the logic of public reasoning. Accountability is antithetical to monologic power. It establishes a dialogic relationship

⁷ S. Gloppen, R Gargarella and E.Skaar, ‘Introduction: The Accountability Function of Courts in New Democracies’ in S. Gloppen et al (eds), *The Accountability Function of Courts in New Democracies* (Frank Cass Publications, 2004) 1.

⁸ GO'Donnell, ‘Horizontal Accountability in New Democracies’ in A Schedler et al (eds), *The Self-restraining State: Power and Accountability in New Democracies* (Lynne Rienner, 2022) 29 - 51.

⁹ The Federalist Papers, No. 51 cited in A. Schedler, ‘Conceptualizing Accountability’ in A Schedler et al (eds), *The Self-restraining State: Power and Accountability in New Democracies* (Lynne Rienner, 2022) 13.

¹⁰ Schedler, (n 9) above.

¹¹ *ibid.* From the perspective of Global Administrative Law, see D Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law, (2009) *Acta Juridica*, 3; N Krisch and B Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17 *European Journal of International Law* 1 - 13; N Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17 *European Journal of International Law* 247 - 278; C Harlow ‘Accountability as a Value in Global Governance and for Global Administrative Law’ in A Gordon et al (eds) *Values in Global Administrative Law* (Hart Enterprises, 2011) 167 - 185.

between accountable and accounting actors. It makes both parties speak and engages them both in public debate.’¹² On the other side of the coin of accountability lies the matter of controllability and its necessary accompaniment, enforcement. Hence, in addition to its informational dimension (asking what has been done or will be done), and its explanatory aspects (giving reasons and forming judgments), it also contains elements of enforcement (rewarding good and punishing bad behavior). It implies the idea that accounting actors punish contravening behavior and, accordingly, that accountable persons not only tell what they have done and why, but bear the consequences for it, including eventual negative sanctions.¹³

Slaughter describes the increasing cross-fertilization of judgments by an emerging cadre of global judges that realize the importance of comparing notes to address common problems plaguing a globalized world. She aptly describes the phenomenon of ‘global judicialisation’ thus:

One result of this judicial globalization is an increasingly global constitutional jurisprudence, in which courts are referring to each other’s decisions on issues ranging from free speech to privacy rights to the death penalty. To cite a recent example from our own Supreme Court, Justice Stephen Breyer recently cited cases from Zimbabwe, India, South Africa, and Canada, most of which in turn cite one another. A Canadian constitutional court justice, noting this phenomenon, observes that unlike past legal borrowings across borders, judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue. [...]’.¹⁴

As these judges continue to exchange ideas towards setting standards and generating norms for their respective citizenry, albeit as part of a global community, it is anticipated that they acquire the critical level of skill with which to determine existential problems, particularly in the area of environmental governance and climate change. The environment and the complexity of its ramifications to the livelihood of the human being and the economic interests of States and corporations alike, continues to throw up unimaginable protestations in courts around the world. The lack of consensus over a widely acceptable body of rules/standards makes climate change a thorn in the flesh of extant judicial systems at domestic levels and under international law.

Under international law, international courts and tribunals have remained active in the quest to establish globally enforceable environmental standards despite the retinue of international treaties that govern the area. As states and non-state parties approach these international courts, their decisions (judgments or advisory opinions) have contributed to the development of a broad corpus of environmental rules and principles.¹⁵ Reference may be made, for example, to the ‘concept of sustainable development’, which the ICJ referred to as early as 1997 in its Judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,¹⁶ or the obligation to ‘undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary

¹² Schedler (n 9) 15.

¹³ *ibid.*

¹⁴ A. Slaughter, *A New World Order*, (Princeton University Press, 2004), 66.

¹⁵ E. Sobenes, S. Mead & B. Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (The Hague, Netherlands: TMC Asser Press, 2022), vi.

¹⁶ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, p. 78, para 140.

context¹⁷ whose binding character under international customary law was affirmed in 2010 by the ICJ in its *Pulp Mills* judgment, and also by the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion¹⁸ of 2011.¹⁹

While progress has been made to some extent in international environmental law, climate change still poses some questions that are far from being resolved under the current regime of international environmental law. The North-South divide remains an impediment towards attaining such singularity of normative purpose in managing climate change globally. The disparity in the global community between the affluent Global North and their lesser developed counter-parts in the Global South has created divisions and at times paralyzed negotiations at the global level.²⁰ Climate Change is currently top of the pile of contentious causative factors of the Global North-South divide, although these tensions date back to the decolonization era. As Atapattu and Gonzalez note:

“North-South conflicts originating in the economic realm have profoundly shaped the evolution of international environmental law and policy. The global North industrialized and developed by exploiting the planet’s natural resources without regard for the environmental consequences. Northern consumption patterns, which are increasingly emulated by Southern elites, have brought the planet’s ecosystems to the brink of collapse and will constrain the development options of present and future generations, particularly in the global South.”²¹

Conversations across a plethora of platforms on the environmental agenda are overwhelmingly dominated by the North-South divide. Many Southern nations view Northern demands for environmental protection as hypocritical, given their enormous ecological footprint and believe that the North owes an ecological debt to the South.²² These tensions persist till date as they lead to the dilution of obligations inevitably stifling negotiations. However, they have also led to the development and application of novel legal principles such as the CBDR. Most environmental treaties are a product of compromises along North-South lines.²³

¹⁷ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, p. 83, para 205.

¹⁸ ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 50, para 145.

¹⁹ Sobenes (n 15).

²⁰ S. Atapattu ‘The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide’. in S. Alam, S. Atapattu, C. Gonzalez, J., Razzaque (eds) *International Environmental law and the Global South* (New York, USA: Cambridge University Press, 2021), 74. See further, S. Atapattu, ‘Environmental Law: A Brief History from the Stockholm Conference to Agenda 2030’ in E. Sobenes, S. Mead & B. Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (The Hague, Netherlands: TMC Asser Press, 2022) 24.

²¹ S. Atapattu, G. Gonzalez, S. Seck ‘Intersections of Environmental Justice and Sustainable Development: Framing the Issues’ in S. Atapattu, G. Gonzalez, S. Seck S (eds) *Cambridge Handbook on Environmental Justice and Sustainable Development* (Cambridge, UK: Cambridge University Press, 2020).

²² Atapattu (2022), n 20 above; J. Patz J et al ‘Climate Change and Global Health: Quantifying a Growing Ethical Crisis’ (2007) 4 *EcoHealth*, 397.

²³ For a discussion on the impact of the Global North-South divide on international environmental law see, S. Alam et al (eds), *International Environmental law and the Global South* (New York: Cambridge University Press, 2015).

B. Climate Change and the role of Judges

While judges are reputed as the arbiters of justice armed with the tool of rule of law towards achieving justice, historically injustice arising from privilege has proven to be an intractable impediment to the just application of the rule of law by judges.²⁴ Men and women vying to be judges once selected may be ill-equipped to exercise the independence necessary to apply the rule of law to end systemic injustice caused by powerful special interests. The scarcity of time with which the rule of law is often needed to catch up with an injustice may be luxurious if the environment is put into perspective time is often needed for the rule of law to catch up to injustice. Consequently, the current climate emergency upends the historically gradual evolution of the rule of law to address injustice. Faced with the climate emergency, judges have little time—perhaps seven years—to apply the rule of law to protect the rights of citizens to a life-sustaining climate. Without unprecedented judicial independence, climate injustice is likely to persist, and usurp the rule of law as the existential phenomenon of climate change ensues. It is therefore apparent that the greatest intergenerational injustice in history, the knowing destruction of a life-sustaining climate, now stands before the world judiciary for solution.²⁵

Being the most serious problem facing humanity and the most important legal issue facing judges globally, climate change merits consideration within the framework of environmental courts. Judges around the world realize the severity of this existential challenge and have forged ahead to start to create a critical mass of judges that are training to be adequately equipped to better scrutinize the labyrinthine nature of climate change actions being increasingly brought by litigants domestically and before international courts around the world. According to Michael Wilson a retired Justice of the Supreme Court of Hawaii, climate change is a social issue with an unprecedented ‘solution horizon.’²⁶ He properly signposts the preeminent problem of climate change and the important role of judges in climate change litigation thus:

“We must attain a solution before we reach the horizon of two degrees. Humanity’s quest to achieve orderly mitigation of and adaptation to climate change is dependent upon the just application of the environmental rule of law -- the legal framework that protects and sustains the environment upon which life depends. Environmental courts and tribunals are proving to be critical to the world judiciary’s just application of the environmental rule of law to issues of climate change.”²⁷

The capacity of judicial institutions to contend with the impending consequences of climate change within the framework of environmental law arguably has some potential.²⁸ Contemporary principles have arisen empowering judges to address the rapid onset of climate change. Intergenerational equity, public trust, the precautionary principle, the prevention principle, the right to a clean and healthy environment, polluter pays and the doctrine of “danger creation” are the propitious progeny of many

²⁴ M.D Wilson, ‘Timely Judicial Recognition and Protection of Climate Change’ The Judges’ Journal, December 8, 2023 available at <Timely Judicial Recognition and Protection of Climate Rights (americanbar.org)> last accessed 8 June, 2024.

²⁵ Wilson (n24).

²⁶ M. D Wilson, ‘Climate Change: The Role of Judges’ available at <Climate Change: The Role of Judges (eufje.org)> last accessed 10 June, 2024.

²⁷ Ibid.

²⁸ Retired Justice Wilson of the Hawai Supreme Court argues that the capacity of courts to leverage extant environmental law framework to wrestle the impending consequences of climate change is ‘proving to be strong and resilient’; Wilson (n 26) above.

foundational legal devices – including Principle 1 of the 1992 Rio Declaration, Sustainable Development Climate Action Goal 13 of the 2015 United Nations Sustainable Development.²⁹

Because climate change and the attendant destruction of a life-sustaining environment for future generations is a near possibility, the issue has become the ‘greatest intergenerational injustice’ facing the world judiciary. As the secretary general of the United Nations warned in December 2021, the devastation to human culture wrought by global warming to 1.5 degrees Celsius will far exceed the human suffering and economic disaster caused by the COVID-19 pandemic. He also identified climate change as the single greatest threat to the natural environment and human societies “the world has ever experienced.” At the most recent United Nations climate convention in November 2022, the UN Secretary-General warned the gathering of more than 100 princes, presidents, and prime ministers that “we are on a highway to climate hell with our foot on the accelerator.”³⁰ Despite these warnings by the foremost global international organization, the unanimous clarion call of impending environmental disaster issued by all but two of the countries of the world at the 2015 Paris Agreement has gone unheeded. The declaration of 193 states plus the European Union that the environmental collapse constituting an existential threat to the survival of humanity will likely occur if global warming since preindustrial times reaches 1.5 degrees Celsius remains unheeded.³¹

As early as 1991, the Supreme Court of India recognized the constitutional right to a healthy environment in the celebrated case of *Subhas Kumar V. State of Bihar*.³² The court held that the “Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life”.³³ Furthermore, jurisprudence from India has produced decisions that protect the right of the sacred Rivers Ganga and Yamuna to legal protection as ‘legal persons/living persons’.³⁴ The High court of the state of Uttarakhand also found the rivers to “have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.”³⁵ Recently, the principle of intergenerational equity was recognized by the Supreme Court of the Philippines to grant *locus standi* to children who represented the interests of future generations in protected forests that were the subject of large-scale illegal deforestation.³⁶

²⁹ Ibid.

³⁰ UN Secretary General’s Remarks to High-level Opening of COP 27’, 7 November, 2022 available at <Secretary-General's remarks to High-Level opening of COP27 | United Nations Secretary-General> last accessed 14 June, 2024.

³¹ Wilson (n24).

³² (AIR 1991 SC 420) available at <Subhash Kumar vs State of Bihar and Ors on 9 January, 1991 (indiankanoon.org)>

³³ (AIR 1991 SC 420) available at <Subhash Kumar vs State of Bihar and Ors on 9 January, 1991 (indiankanoon.org)>

³⁴ *Mohd. Salim v. State of Uttarakhand*, Writ Petition (PIL) No.126 of 2014, decided on 20.03.2017, available at <<https://www.nonhumanrightsproject.org/content/uploads/WPPIL-126-14.pdf>>

³⁵ The court’s decision was grounded upon Articles 48-A and 51A(g) of the Constitution of India, which provide that the State “shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country” and that citizens of India have the duty “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures,” respectively.

³⁶ *Oposa vs. Factoran*, G.R. No. 101083 July 30, 1993, available at <<http://hrlibrary.umn.edu/>>

While considerable strides are being made through judge-made law in some global south countries, some of the world's largest carbon emitters are not quite sure which direction they intend to go. While China and India, have developed extensive environmental court systems to supply judges with specialized knowledge of environmental law and related science, the United States which is the country with the second largest carbon footprint, has only one environmental court with broad state-wide criminal and civil jurisdiction encompassing regulation of land, air and water-- Hawai'i.³⁷ The handful of other environmental courts in the United States are of limited civil or municipal jurisdiction.³⁸

Climate change has been a source of division for the United States Supreme Court (USSC). In 2007 a majority of the USSC recognized that the federal government had abdicated its responsibility by failing to regulate greenhouse gases,³⁹ but a different majority in 2016 indefinitely halted the implementation of government's efforts to reduce carbon emissions from existing power plants.⁴⁰ In *Juliana v. United States*⁴¹ climate change litigation in the United States brought judicial attention to the application of the principle of intergenerational equity. In the suit, a group of children argued that the United States is causing them ongoing harm by failing to act on climate change.⁴² The District Court of Oregon, in confirming that the youth plaintiffs had standing to sue the federal government, relied on the Dutch case of *Urgenda Foundation v. State of the Netherlands*⁴³.

In *Urgenda*, the Hague District Court found that, due to the alleged failure of the Dutch government to comply with its carbon mitigation responsibilities under the COP 21 agreement, the Urgenda Foundation had standing to assert claims on behalf of Dutch citizens. The court's ratio was based on a recognition that the alleged failure of the government was a violation of a public trust responsibility to protect its citizens from the imminent danger caused by carbon-caused warming of the atmosphere. Ordinarily, Urgenda's claim should fail under the "danger creation"⁴⁴ argument as there is no direct

³⁷ Wilson(n26).

³⁸ The state of Vermont established the nation's first environmental court in 1990, but it only exercises civil jurisdiction.

³⁹ See *Massachusetts v. EPA*, (549 U.S. 497, 534) (2007). In *Mass. v. EPA*, the U.S. Supreme Court heard a challenge brought by states, local governments, and environmental organizations to the Environmental Protection Agency (EPA)'s decision to deny a petition for rulemaking to regulate greenhouse gas emissions from motor vehicles under the federal Clean Air Act. *Id.* at 504. The court concluded that the "risk of catastrophic harm" from climate change-induced sea level rise on Massachusetts "though remote, is nevertheless real" and "would be reduced to some extent" if EPA were to regulate greenhouse gas emissions as petitioners desired. *Id.* at 526. After upholding petitioners' standing to bring the suit, the court concluded that EPA had a statutory obligation to consider whether greenhouse gases caused or contributed to climate change. *Id.* at 534 ("EPA has offered no reasoned explanation for its failure to decide whether greenhouse gases cause or contributed to climate change.").

⁴⁰ *West Virginia v. EPA* (136 S.Ct. 1000) (2016).

⁴¹ *Juliana v. United States*, (F. Supp. 3d __, 2016 WL 6661146) (D. Or. Nov. 10, 2016).

⁴² *Id.*, para. 1. In an action filed by Our Children's Trust, an organization which advocates for United States youth, the children (aged 8 to 19 years and backed by noted climate scientist Dr. James Hansen) allege that the federal government knew that greenhouse gas emissions were destabilizing the climate system and that the government's failure to act on climate change "violate[s] their substantive due process rights to life, liberty, and property," and that the government has "violated their obligation to hold certain natural resources in trust for the people and for future generations." The court concluded that the plaintiffs did have standing because "EPA's action/inaction with respect to the regulation of greenhouse gases allegedly results in the numerous instances of emissions that purportedly cause or will cause the plaintiffs harm," allowing the case to proceed to trial.

⁴³ *Urgenda Foundation v. State of the Netherlands*, The Hague District Court, Chamber for Commercial Affairs, Case No. C/09/456689/HA ZA 13-1396 (June 24, 2015) <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196>>.

⁴⁴ The "danger creation" analysis has been criticized as a deviation from the traditional requirement of tort law that causation be established between the defendant's act and the damage suffered.

causal connection between Dutch emissions and the global problem being created primarily by countries with much larger carbon emissions. That notwithstanding, the Hague District Court recognized that climate change is a problem that eludes traditional tort analysis because of its large-scale, generalized impacts.⁴⁵

These judicial developments suggest a rapidly evolving generation of judges that are ready to meet their constitutional, statutory, common law and civil-code duties to protect humanity within its jurisdiction from the devastation of a world under threat from climate change. However, pivotal issues of causation, imminence of danger, sufficiency of evidence of damage, proper remediation, scale of injury, and valuation of cost of carbon emissions vs benefits of carbon emission confront the men and women judges who persevere to achieve a just application of the environmental rule of law to cases involving the most threatening environment crisis ever encountered by the word judiciary.⁴⁶

C. Critical Cases from Nigerian Courts

I. Justiciability and Legal Standing as Pivots of Enforceability: The Conservative Era

The evolution of judicial attitude towards environmental claims in Nigeria has revolved around two key issues: justiciability and *locus standi*. In this regard, Nigerian courts traditionally relied on section 6(6)(c) of the Nigerian Constitution⁴⁷ which declares the rights contained in Chapter 2 to be non-justiciable,⁴⁸ and the old common law rules on legal standing. The effect of this was to render unenforceable human rights claims based on environmental rights, and even where claims were brought under the law of tort, the courts applied the rule of legal standing that required personal harm as a prerequisite for bringing a claim.

There are numerous cases where the courts have stated the general non-justiciability of Chapter 2. For example, the court in *Morebishe v Lagos State House of Assembly*⁴⁹ ruled in this light. However, where claims were brought under a statute enacted pursuant to Chapter 2 of the Constitution, the courts were inclined to enforce such claims. This was the position of the court in the case of *AG of Ondo State v AG of the Federation*,⁵⁰ which though not related to environmental rights, concerned a matter falling under Chapter 2 of the Constitution and is thus instructive for the analysis carried out here.

Regarding legal standing, an apt illustration of this era is the case of *Oronto Douglas v Shell Petroleum Development Company and Ors.*⁵¹ In this case the claimant instituted a suit based on alleged non-compliance with the provisions of the Environmental Impact Assessment Act with regard to the Nigeria Liquefied Natural Gas project. The trial court struck out the case on the ground that the claimant lacked legal standing to institute the suit. Although the Supreme Court later ordered a retrial on the claimant's appeal, the retrial never took place because the project had been completed at that time. Another case

⁴⁵ *Urgenda*, n 45 above, para. 4.89.

⁴⁶ Wilson (n26).

⁴⁷ Constitution of the Federal Republic of Nigeria 1999, Cap 24 LFN (as amended)

⁴⁸ These rights, being economic, social and rights are described as the fundamental objectives and directive principles of the Nigerian State.

⁴⁹ 3PLR/2000/76 HC.

⁵⁰ (2002) CLR 6(D) (SC).

⁵¹ (1998) LPELR-CA/L/143/97.

that failed on the basis of legal standing was the case of *Jumbo v Shell Petroleum Development Company Nig Ltd*.⁵² The courts were also negatively disposed towards representative actions in tort, often on the ground that the individual interests in the environmental asset affected by the harmful conduct differed. Representative claims would succeed only here there was an alignment of interests and harm across the joining claimants. This was the leaning of the court in the case of *Shell Petroleum Development Company Nig Ltd v Chief Otoko and Ors*.⁵³

II. Indivisibility of Environmental Rights and Chapter 4 Rights: The *Gbemre v SPDC* Era

The principle of indivisibility of human rights holds that human rights are interconnected, and the derogation of one affects the enjoyment of the other. This principle has grounded a shift from a strict non-justiciability approach to a contingent justiciability approach in India.⁵⁴ India has provisions similar to Chapter 2 of the Nigerian Constitution and in *Intellectuals Forum, Tirupathi v State of AP*, the Supreme Court observed:

. . . the environmental protection and conservation of natural resources has been given a status of a fundamental right and brought under Article 21 of the Constitution of India. This apart, Articles 48A and 51A(g) are fundamental in the governance of the country and require the state to apply these principles in making laws and further these two articles are to be kept in mind in understanding the scope and purport of the fundamental rights guaranteed by the Constitution including Article 21.

This line of reasoning which draws a connection between fundamental rights and directive principles of State policy was applied in the case of *Gbemre v Nigerian National Petroleum Corporation*.⁵⁵ In that case, the claimant, acting for himself and his community brought a human rights violation suit against the defendant on the ground that its operational activities, especially gas flaring, violated their rights by its harmful effects which included global warming. In the opinion of the court, the rights to life and dignity of the human person guaranteed under sections 33(1) and 34(1) of the Nigerian Constitution, and reinforced by Articles 4, 16 and 24 of the African Charter Act, 'inevitably included the right to clean poison-free, pollution-free and healthy environment'. It also stated that the gas flaring activities of the Defendants in the Claimant's community violated their rights to life. The court made an order commanding the Defendant to cease gas flaring in the Claimant's community, that the Nigerian government permanently bring an end to gas flaring, and that section 3 of the Associated Gas Re-injection Act which permits gas flaring subject to certain conditions, is contrary to the Nigerian Constitution and therefore null and void. Although the Defendants appealed against the decision of the trial court, the appeal was never heard. All attempts by the Claimant to enforce the judgment were also unsuccessful. In the circumstances, co-ordinate and superior courts may differ from the decision because the Supreme Court did not have the opportunity to reach a decision on the facts.

⁵² (1999) 13 N.W.L.R (pt. 633) 57.

⁵³ (1990) 6 NWLR (pt.159) 693.

⁵⁴ (2006) 3 SCC 549.

⁵⁵ Suit No. FHC/CS/B/153/2005 (Unreported).

III. The Inherent Justiciability Era: *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*

As earlier mentioned, the courts have opined that Chapter 2 rights are enforceable when specific statutes have been enacted to give them expression. This means that section 20 of the Constitution which deals with environmental rights is found enforceable by the courts where parliament has exercised its power to actualize its provisions through legislation. This position is because the non-justiciability provision in section 6(6)(c) is subject to a proviso that the Constitution may otherwise provide for the enforcement of the directive principles of State policy. As it is, the African Charter on Human Peoples Right (African Charter)⁵⁶, article 24 of which provides for environmental rights has been domesticated by an Act of parliament as required by section 12 of the Nigeria Constitution.

This view has received judicial assent from the Supreme Court in the case of *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*.⁵⁷ Centre for Oil Pollution Watch commenced legal action against the Respondent, Nigerian National Petroleum Corporation in the Federal High Court, over an oil spillage in Acha Community of Abia State, Nigeria, blaming the incident on the Defendant's negligence. It claimed that the oil spillage had polluted the community, particularly contaminating two streams that provided water to the community. They claimed for the reinstatement, restoration and remediation of the impaired and/or contaminated environment, especially the two streams; the provision of potable water supply to the community as a substitute for the contaminated streams; and provision of medical facilities for the evaluation and treatment of affected victims of the oil spillage. The Supreme Court declared that the Claimant/Appellant had the standing to sue contrary to the Defendant/Respondents contention and ordered the trial court to retry the case. The Court stated that public-spirited groups and individuals may bring actions personally and on behalf of communities. In addition, and concerning the justiciability question, the Supreme Court stated that on the basis of the domesticated African Charter on Human Peoples Rights, section 24 of which provides that 'all peoples should have the right to a general satisfactory environment favourable to their development', section 20 of the Constitution has become enforceable. It justified this position by relying on the section 6(6)(c) proviso. The Supreme Court also drew a link between fundamental rights in Chapter 4 on the one hand, particularly section 33 on the right to life, and Chapter 2 rights on the other hand, including section 20 which deals with environmental rights.

IV. Deducing a Coherent Rule from the Cases

For any area of socio-economic or political life to be rightly described as rule-governed and not arbitrary, it must be capable of being administered by certain rules. This is also what makes law a juridical science; rules that can be applied with a given level of certainty. It is therefore necessary to make a rule out of the judicial pronouncements on the enforcement of environmental rights in Nigeria. An attempt to do that is set out as follows:

⁵⁶ African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M 58.

⁵⁷ [2019] 5 NWLR (PT 1666) 518.

Rule 1

Environmental rights contained in Chapter 2 of the Constitution are instrumental to the fulfillment of the Chapter 4 rights to life and human dignity and are therefore indivisible and to be read together.

Rule 2

Environmental rights contained in contained in Chapter 2 of the Nigerian Constitution are enforceable where the National Assembly has exercised its legislative power to give effect to them through a statute enacted for that purpose.⁵⁸

Rule 3

Environmental rights contained in Chapter 2 of the Nigerian Constitution are, as a whole, enforceable by virtue of the domestication of the African Charter on Human and Peoples Rights.

Rule 4

To judicially enforce environmental rights under Rules 1 and 2, individuals and communities adversely affected by negative environmental conduct, public-spirited individuals and groups who might not be directly affected but are desirous of protecting the environment as a commonwealth, have legal standing to approach the Nigerian courts having met all legal requirements regarding the rules on private and corporate citizenship, jurisdiction and conflict of laws.

V. Nigeria Climate Change Act: The New Era of Climate-Specific Legislation

Section 34(1) of the Climate Change Act makes it a crime for any individual or entity to act in a manner that jeopardizes mitigation and adaptation efforts. This provision is justiciable as seen in section 34(2) which reads as follows:

34 (2) A Court, before which a suit regarding climate change or environmental matters is instituted, may make an order –

- (a) to prevent, stop or discontinue the performance of any act that is harmful to the environment;
- (b) compelling any public official to act in order to prevent or stop the performance of any act that is harmful to the environment;
- (c) of compensation to the victim directly affected by the acts that are harmful to the environment.

The provisions of section 34 of the Climate Change Act should be read as giving effect to Rules 2 and 3 above being a statutory provision actualising the section 20 environmental mandate of the Constitution (as envisaged by section 6(6)(c) and section 4(2) – (3)) and article 24 of the African Charter on Human and Peoples Rights as domesticated by the African Charter on Human and Peoples Rights Act.

D. Lessons from other courts

Regional courts around are increasingly being viewed as platforms where climate litigants can seek remedy. In times past, these courts were approached by litigants from a purely human rights perspective. However, litigants now realise the power of human rights framework as a tool to ensure the adherence

⁵⁸ CFRN, s 6(6)(c); item 60(a), part 1, Second Schedule.

of states to questions over the right to a healthy environment and most recently the quest for intergenerational equity to save the planet for future generations. In *La Oroya v. Peru*⁵⁹ the Inter-American Court of Human Rights (IACtHR) the city of La Oroya which is populated by some 30,000 filed a suit challenging the activities of the metallurgical complex Complejo Metalúrgico de La Oroya which has been operating in this city. The applicants claimed that since 1922 its metallurgical activities have affected 30,200 hectares of vegetation, as well as the air, soil and water in La Oroya, causing it to be one of the 10 more contaminated cities in the world.⁶⁰ Out of the 80 alleged victims that filed the complaint case 2 of them lost their lives as a consequence of these health complications.⁶¹ Because of this, the Court found the State of Peru responsible for the violation of the right to a healthy environment (RHE), the right to health, the right to personal integrity, the right to life, the right to access to information, the right to political participation, children's rights, and the obligation of progressive development of article 26.⁶²

In its landmark decision, the IACtHR applied an ecocentric approach by reinforcing the right to water free from pollution and the right to breathe clean air as substantive rights to a healthy environment.⁶³ Furthermore, the court that the right to a healthy environment should have the status of a peremptory norm of general international law.⁶⁴ According to the court several States have recognised the right to a healthy environment on several occasions, which entail an obligation of protection for the International community as a whole. This the court has consequences on the current climate crisis that threatens the survival of species, the international protection of the environment requires the progressive recognition of the prohibition of conducts that negatively affect the environment as a peremptory norm of general international law, a *jus cogens* norm.

Also noteworthy is the reference of the court on the importance of the "legal expressions of the International Community, whose superior universal value is indispensable to guarantee essential or fundamental values". Since the protection of "the interests of future and present generations", as well as the conservation of the environment against its degradation, are fundamental for the survival of humanity, the Court suggests that the RHE should be considered as a *jus cogens* norm.⁶⁵

Under the African human rights system, decisions of regional courts/bodies and sub-regional courts have mostly seen matters brought under an anthropocentric approach to the rights contained in the African Charter on Human and Peoples' Rights. Africa is mostly regarded as a promising regional avenue for climate change-related complaints-note least because it is distinctively vulnerable to climate

⁵⁹ *Inhabitants of La Oroya v. Peru* (IACtHR). Judgment of November 27, 2023. Series C No. 511, available at <I/A Court H.R., Case of La Oroya Population v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 27, 2023. Series C No. 511. (corteidh.or.cr)>.

⁶⁰ Since at least the 70s, several reports have warned about the dangers and risks that the activities of the CMLO meant for the health of La Oroya's population and environment, including the prevalence of respiratory diseases. Ibid. para. 76-84.

⁶¹ Para.219.

⁶² Para. 266.

⁶³ Para. 120 - 121.

⁶⁴ Para. 129.

⁶⁵ Ibid, ; P.T Vera, 'The Right to a Healthy Environment in La Oroya v. Peru: A Landmark Judgement of the IACtHR' Opinio Juris Blogpost, 25 May, 2024 available at <The Right to a Healthy Environment in La Oroya v. Peru: A Landmark Judgement of the IACtHR - Opinio Juris> last accessed 30 June, 2024.

harms.⁶⁶ However, as the *Gbemre Case* shows above, domestic avenues are being increasingly explored,⁶⁷ particularly through the lenses of environmental rights as is the case in Nigeria.⁶⁸ These domestic courts are explored for various reasons which are not limited to civil society's growing awareness of the adverse impact of climate change on human rights and emerging domestic laws and policies on climate change litigation.⁶⁹ However, some predict that these climate change cases are bound to increase due to extant national, regional and sub-regional avenues available to litigants.⁷⁰

On the regional level, Article 24 of the African Charter on Human and Peoples' Rights (African Charter) remains a viable avenue for climate change litigants as it provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. Therefore, contrary to other regional human rights courts, the African Court may be approached by States or litigants to directly review a State's compliance with its obligations to respect and protect the human right to a healthy environment, which can encompass climate change issues.⁷¹ For instance, in *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria* the Ogoni claimed that the Nigerian government had violated Article 24 in failing to prevent pollution and facilitating operations of oil corporations in Ogoniland. While no reference to the climate was made in the parties' pleadings or the Court's judgment, there is a connection to climate change insofar as oil companies contribute to greenhouse gas emissions.⁷²

The lack of climate cases to date may be attributable to obstacles on the domestic level such as weak legislative frameworks, slow judicial processes or limited financial resources. Such circumstances would typically impede prospective litigants from exhausting domestic remedies to then seize the African human rights system.⁷³ In this vein, Etemire argues that this is so mainly because the judiciary in Nigeria, and most of Africa, has less appetite to seriously discuss seemingly abstract issues and also due to cases taking a long time to go through the system.⁷⁴

⁶⁶ V. Suedi and M. Fall, 'Climate Change Litigation Before the African Human Rights System: Prospects and Challenges', (2024) 16 Journal of Human Rights Practice, 146, 147. See also M. Addaney, E. Boshoff, and B. Olutola, 'The Climate Change and Human Rights Nexus in Africa', (2017) 9(3) Amsterdam Law Forum, 5–28; K. Bouwer, 'The Influence of Human Rights on Climate Litigation in Africa' (2022) 13(1) Journal of Human Rights and the Environment, 157–77; L. Kotze, and A. Du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' (2020) 50(3) Environmental Law, 615–63.

⁶⁷ U. Etemire, 'Climate Litigation in Nigeria: Challenges and Opportunities' in F. Sindico, and M. M. Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects*, (Cham: Springer, 2021), 409–426; T. Humby, 'The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v. Minister of Environmental Affairs' [2018] 30(1) Journal of Environmental Law, 145–55.

⁶⁸ E. Ekhator and E.O Okumagba, 'Climate Change and Multinationals in Nigeria: A Case for Climate Justice' in K. Bouwer, U. Etemire, T. Field, A. O. Jegede (eds), *Climate Litigation and Justice in Africa* (Bristol, UK: Bristol University Press, 2024), 262.

⁶⁹ Suedi and Fall, note 66 above. See for instance, South Africa Carbon Tax Act (Act No. 15/2019); Nigeria Climate Change Act 2021; Kenya Climate Change Act (Act No. 11/2016); Uganda National Climate Change Act 2021).

⁷⁰ Ekhator and Okumagba, n 68 above, 272.

⁷¹ E. Buys and B. Lewis 'Environmental Protection through European and African Human Rights Frameworks' (2022) 26(6) International Journal of Human Rights, 949, 969.

⁷² R. Ako, 'Environmental Justice in Nigeria's Oil Industry: Recognizing and Embracing Contemporary Legal Developments' in R. V. Percival et al. (eds), *Global Environmental Law at a Crossroads*, (Cheltenham: Edward Elgar, 2014), 160 - 176.

⁷³ Suedi and Fall, n 66 above, 147.

⁷⁴ I. Kaminski, 'The Unique Character of African Climate Litigation', 7 February, 2024, The Wave Blog, available at <The unique character of African climate litigation (the-wave.net)> last accessed 30 June, 2024.

In light of Etemire's assertion above, climate change in the African context has arguably been a secondary consideration in comparison to broader and more commonplace environmental disputes that occur within the context of land, property rights or natural resources. A recent example is the *Ogiek case* before the *African Commission on Human and Peoples' Rights v. Republic of Kenya 2017* ('Ogiek')⁷⁵. In a suit brought by the Indigenous Ogiek of Kenya, the Court stated that the preservation of the Mau Forest could not justify the lack of recognition of the Indigenous status of the Ogiek, nor the denial of the rights associated with that status. It also confirmed that the Ogiek could not be held responsible for the depletion of the Mau Forest, and that preservation of the ecosystem could not justify their eviction from or the denial of access to their land.⁷⁶

While cases of this nature at the regional level demonstrate a readiness of the courts to protect environmental rights as enshrined in the African Charter, it remains to be seen how the courts may approach climate change actions when they are eventually faced with it.

Conclusion

As a former US high court judge alludes to 'the evolution of the environmental rule of law from emerging legal instruments to accepted judicial precedent will accelerate as the severity of carbon-induced global warming grows.' Judges so far seem aware, whether sufficiently or not, that it is time for precedence with which to form a body of judge-made law that allows the climate change litigant to air their grievances and concerns on the climate emergency. The approaches as argued in this chapter vary from jurisdiction and are determined also by the readiness of the litigant as well as the state. There are domestic courts that combine an ecocentric and anthropocentric approach to holding states and corporations to account as is the case in jurisdictions like India. In Nigeria, Ekhatior and Okumagba argue that decisions in *Gbemre*, and especially *COPW*, arguably suggest a greater appreciation of the environmental realities in Nigeria and the need to improve access to environmental justice (including climate justice) and environmental rights in Nigeria. Furthermore, the liberalization of the locus standi rule, and the recognition that the right to the environment is justiciable and enforceable in Nigeria, the courts are promoting environmental justice (and climate justice) in the country. This will enhance the ability of the victims of environmental injustice and climate change to rely on the courts to enhance access to justice for vulnerable individuals and communities in Nigeria – thus, arguably, promoting the three dimensions of environmental justice and climate justice – distributive, procedural and recognition.⁷⁷

It is however important that stopgaps such as the slow judicial process need to improve. Fagbohun argues that there is need for infractions and violations that are often allowed to pass on grounds of procedural technicalities to be resolved. When these procedural technicalities such as limitation clauses, pre-action notice requirements as well as the difficulty in proving causation are of greater emphasis by

⁷⁵ Application No. 006/2012, Judgment 22 June 2022; See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Application number 276/2003, 25 November 2009, African Commission on Human and Peoples Rights.

⁷⁶ See case analysis in L. Claridge and D. Kobei, 'Protected Areas, Indigenous Rights and Land Restitution: The Ogiek Judgment of the African Court of Human and Peoples' Rights and Community Land Protection in Kenya' (2023) 57(3) Oryx, 313 - 324.

⁷⁷ Ekhatior and Okumagba, n 68 above, 273.

the courts, it encourages and gives room for corrupt enforcement agencies, public officials and regulatory officials to apply the law totally at their discretion, singling out “special treatment” on the basis persons whom they like, dislike or who refuse to cooperate with them. These obstacles, if they persist, may impede environmental justice.⁷⁸

At the regional level, under the African human rights system, the expectation is that climate litigants, mostly empowered by the African Charter and its provisions on environmental rights, will approach the respective regional courts and bodies to seek judicial position on critical climate change issues in their respective jurisdictions. With regards to the IACtHR and the ECtHR, there appears to be a contrast in their approaches. Analysis above shows that the former regional court is more expansive in its interpretations event to the point of considering the right to a healthy environment as peremptory norm of international law. On the part of the latter court, the April 9 decisions show that while there is need to protect the rights of climate litigants, the court is careful not to send the message that it can on its own determine state action on the issues surrounding climate change.

Finally, it is fundamental that courts are alive to the possibilities that exist and the need to sharpen their understanding of the intricacies of climate change. Different platforms exist for judges to cross-fertilize their jurisprudence with each other while being mindful of their specificities of their respective jurisdictions. Platforms such as the Global Judicial Institute on the Environment (GJIE)⁷⁹ exist as an avenue for strengthening the vanguard of judges who must decide the plight of those who resort to the courts for relief from climate change. Led by judges for judges, its mandate is to equip judges whose interest is the environment. Regardless of jurisdiction or court-assignment, judges who wish to capacity-build for decisions involving the environment are eligible for membership. Ultimately, a well-equipped judge is central to the entrenchment of a system of rule by law. This singular feature of a democratic state is the lifeline of an accountable and self-restraining state. At this critical juncture when there is need for normative answers to climate change, the court may serve as fodder to jolt States out of their somnolence towards effective climate action.

⁷⁸ O. A Fagbohun, ‘Understanding Nigeria’s Environmental Justice System’ being presentation at C.O Anah, SAN Memorial Colloquim, 27 October 2022, (on file with authors), 20.

⁷⁹ GJIE was formally established at the International Union for the Conservation of Nature World (IUCN) Environmental Law Congress in Rio de Janeiro on April 29, 2016. Thereafter, it was approved by the IUCN World Congress in Honolulu in September 2016.