



CLIMATE CHANGE LITIGATION: AN EMERGING APPROACH TO ENVIRONMENTAL PROTECTION IN NIGERIA

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Abstract

The aim of this paper was to discuss climate change litigation as an emerging approach to environmental protection in Nigeria. It examined the provisions of the Climate Change Act 2021 and decisions of the court at both local, international and foreign levels supporting climate change litigation. It argued that the causes and effects of climate change have triggered the fight against climate change beyond mere regulation. Although there are numerous laws on climate change, their regulation and implementation have become weak. With the available provisions of the law, victims may approach the court through an action in negligence or nuisance against emitters of greenhouse gases or entities saddled with climate change duties. The paper however found that there are limitations to climate change litigation in Nigeria given the complex nature of climate change actions and the general problems facing litigation in Nigeria. It concluded that addressing these limitations requires a strong, transparent and independent judiciary as well as collaboration among key stakeholders. It recommended the amendment of the CCA to expand the rights of victims to seek redress on climate change matters.

Keywords: *Climate Change, Climate Change Litigation, Negligence, Nuisance, Limitations, Greenhouse Gases*

1.0 Introduction

In response to the weaknesses of the global climate governance regime, climate litigation has emerged as a key strategy employed by victims and their representatives to address climate adaptation and mitigation issues.¹ There has been a surge of climate-related cases at various domestic, regional, sub-regional and international tribunals worldwide aimed at compelling climate mitigation policies, ensuring compliance with existing regulations and advocating for equitable and robust policies for both mitigation and adaptation. The litigation approach to environmental protection (especially from the lens of human rights) is gradually evolving.² However, while traditional climate change litigation predominantly targets governments, there is an increasing focus on big corporations in the carbon or fossil fuel industry where their industrial activities contribute to rising greenhouse gas (GHG) emissions and corporate violations of human rights. Evaluating the efficacy of litigation as a tool to protect the Nigerian climatic system requires an examination of Nigeria's climate obligation at the international

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¹ P Obani and E Ekhatior, 'Transnational Litigation and Climate Change in Nigeria'

<<https://www.afronomicslaw.org/category/analysis/transnational-litigation-and-climate-change-nigeria>> accessed 22 September 2023.

² *Ibid.*

level, the legislative framework recognising climate change litigation in Nigeria, some relevant decided cases as well as the limitations that this tool may encounter.

2.0 Definition of Terms

a. Greenhouse Gases

The term greenhouse gases (GHGs) means the constituents of the atmosphere that contribute to the greenhouse effect and includes the following gases:³

- i. carbon dioxide
- ii. methane
- iii. nitrous oxide
- iv. hydro fluorocarbons
- v. per fluorocarbons
- vi. sulphur hexafluoride
- vii. indirect greenhouse gases

b. Climate Change

According to the Climate Change Act 2021 (CCA), the term climate is defined as the average weather condition, as the statistical description in terms of the mean and variability of relevant quantities over a period of time.⁴ Climate Change is statutorily defined as a change of climate, which is attributed directly or indirectly to human activity or natural climate variability that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.⁵ Climate change duties include the statutory obligations conferred on public and private entities to implement climate change actions consistent with the national goal of low carbon climate resilient development, including mitigation and adaptation measures.⁶

c. Climate Change Litigation

Climate change litigation is hereby defined as legal actions taken by individuals, communities, or civil society organisations (CSOs) to seek remedies, accountability, and systemic changes in response to the adverse impacts resulting from human-induced changes in the Earth's climate system. It involves bringing legal claims and pursuing judicial remedies against public and private entities whose actions contribute to climate change. The ultimate objective of climate change litigation is to advance mitigation measures to reduce GHG emissions, promote adaptation strategies to mitigate the impacts of climate change and achieve low-carbon climate-resilient development goals.

³ Climate Change Act 2021, s 35.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

3.0 Drivers of Climate Change Litigation

Climate change litigation is primarily driven by the causes and effects of climate change. The primary causes of climate change can be attributed to both natural and human activities. Natural factors include variability in solar radiation, volcanic eruptions and changes in oceanic and atmospheric patterns.⁷ However, human activities have played a significant role in exacerbating climate change in Nigeria. The largest contributor to GHG emissions is the burning of fossil fuels for electricity generation, industrial processes and transportation. Deforestation and land-use changes, especially for agricultural expansion and logging, have also contributed to increased carbon dioxide levels and loss of carbon sinks.

One of the key consequences of climate change is the alteration of rainfall patterns, leading to both prolonged drought and intense flooding.⁸ This has devastating effects on agriculture, as changing rainfall patterns disrupt crop growth and irrigation, which often results in food insecurity and reduced agricultural productivity. Rising temperatures also exacerbate heatwaves, putting vulnerable populations at risk, especially in urban areas with inadequate access to cooling or energy resources.⁹ Coastal erosion and sea-level rise also pose threats to coastal communities, industrial infrastructure, and ecosystems, driving displacement and loss of livelihoods. These impacts are particularly felt by local communities and individuals who depend directly on natural resources for their survival. It is these concerns that drive global regulations to combat climate change and the emission of GHGs.

3.0 Nigeria's Climate Obligations at the International Level

Countries around the world are under obligation to take urgent action to combat climate change and its impacts.¹⁰ Nigeria's climate obligations under international law have evolved over time, especially since its membership in the United Nations (UN). Nigeria is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) 1992 wherein it is obligated to take measures to mitigate climate change and ensure sustainable development. Nigeria is also a signatory to the Kyoto Protocol and also the Paris Agreement 2015 which aims to limit global warming well below 2° C and pursue efforts to keep it within 1.5° C

In pursuance of these international treaties, Nigeria has adopted its Nationally Determined Contributions (NDCs) as part of its obligations under the Paris Agreement. Nigeria's NDCs include targets for reducing emissions, increasing renewable energy use and enhancing sustainable land management practices.¹¹ Nigeria committed to reducing emissions unconditionally by 20% by 2030 and potentially increasing the reduction to 45% with international support.¹² The adoption of the NDCs around the world and their legislative backings at the domestic level have triggered a new wave of approach towards protecting the climate system and the ozone layer.

⁷ C Ezegwu, 'Climate Change in Nigeria: The Impacts and Adaptation Strategies'

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543940> accessed 13 October 2023.

⁸ I A Adedoyin and others, 'Impact of Climate Change in Nigeria' [2011](2)(2) *Iranian Journal of Energy and Environment*;145-152.

⁹ *Ibid.*

¹⁰ Sustainable Development Goals (SDGs), goal 13.

¹¹ Federal Ministry of Environment, 'National Climate Change Policy 2021-2023, preamble.

¹² *Ibid.*, para.2.2.



Thus, foreign and international climate change litigations have gained momentum as a means for stakeholders to hold countries and multinational corporations accountable for climate change impacts. In the case of *Leghari v. Federation of Pakistan*,¹³ the court held that the failure of the Pakistani government to address climate change issues violated the petitioners' rights. Also, the case of *Urgenda Foundation v State of Netherlands*¹⁴ sets a precedent in the Netherlands as the Dutch Supreme Court ordered the government to reduce GHG emissions by 25% below 1990 levels by 2020, surpassing the prior commitment of 17%. This decision in *Urgenda* relied on human rights-based approach presented by *Urgenda*.

Another significant development in foreign climate change litigation occurred in May 2021 when the District Court of The Hague ordered Shell in *Milieudefensie & Ors v. Shell*¹⁵ to cut the CO₂ emissions of the entire Shell group by 45% below 2019 levels by 2030. The judgment emphasized the relevance of a human rights approach in climate change cases. It also considered the view that human rights provide protection against the impacts of hazardous climate change and that companies must respect human rights.¹⁶ The court explicitly referenced the case of *Urgenda* and other human rights instruments and guidelines.

4.0 Legislative Framework on Climate Change Litigation in Nigeria

To meet its global climatic obligations, Nigeria has adopted various domestic legal measures one of which is the Climate Change Act 2021 (CCA). The CCA provides for the mainstreaming of climate change actions in Nigeria and establishes the National Council on Climate Change (NCCC). The CCA to achieve low GHG emissions, inclusive green growth, and sustainable economic development.¹⁷ It seeks to formulate programmes that align with long-term climate change mitigation and adaptation goals while integrating climate change actions into national development priorities.¹⁸ The CCA also prioritizes the mobilization of finance and resources for effective climate change actions, as well as the integration of climate change policies with other related policies for socio-economic development and environmental integrity.¹⁹

In line with Nigeria's NDCs, the CCA sets a target for attaining net-zero GHG emissions by 2050-2070. It highlights the need to identify risks, build resilience and strengthen adaptive capacities to address the impacts of climate change.²⁰ By virtue of section 27 of the CCA, the NCCC is responsible for endorsing and implementing nature-based solutions as an approach to addressing climate change challenges in Nigeria,

Section 34 of the CCA focuses on climate change litigation comprising both civil and criminal actions. Section 34(1) of the CCA establishes offences and penalties for individuals or entities that act in a manner that hinders or undermines the efforts towards climate change mitigation and adaptation

¹³ W.P. No. 25501/2015

¹⁴ [2015] HAZA C/09/00456689

¹⁵ ECLI:NL:RBDHA:2021:5337

¹⁶ *Ibid.*

¹⁷ Climate Change Act 2021, s 1.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*



measures.²¹ This provision allows for the imposition of penalties to deter activities that hinder or obstruct climate change solutions. Section 34(2) of the CCA specifically illustrates the applicability and recognition of climate change litigation in Nigeria. It grants power to the court before which a suit on climate change is instituted to issue orders to prevent, stop or discontinue acts that harm the environment. This provision provides a legal pathway for individuals, organizations or communities to bring grievances related to climate change and seek remedies for environmental damage.

Under the CCA, public officials can be compelled through an order of the court to act in response to harmful actions affecting the environment.²² This adds an essential dimension to climate change litigation in Nigeria as it enables the court to hold public officials accountable and requires them to take necessary actions to prevent or stop activities detrimental to the climate system. This recognition reflects the importance of governmental responsibility and cooperation in addressing climate change issues.

5.0 Climate Change Litigation Cases in Nigeria

Nigeria mirrors the international climate change litigation system where victims, local communities and CSOs approach foreign courts to seek redress against the activities of international oil companies (IOCs) in the Niger Delta region. In a number of cases, the CSOs in Nigeria have strategically employed climate change litigation as a means to influence the government and IOCs in the oil and gas sector. The high rate of cases filed abroad, especially in the home country of the IOCs, affirms the growing reliance on international and foreign litigation to hold the IOCs liable for polluting Nigeria's climate system. These cases are usually filed in foreign jurisdictions such as the Netherlands, USA and UK with the help of international NGOs.

In the case of *Akpan v Shell*,²³ a suit was filed in the Netherlands by CSOs and Niger Delta fishermen affected by oil pollution caused by Shell in three villages in the Niger Delta region. The Dutch court held Shell liable for compensation for the oil spills that resulted from an abandoned wellhead. However, the court dismissed claims regarding a general duty of care. In upholding environmental protection, the court categorically stated that the claim was not only crucial for the victims affected by the spill but also for the wider community and the environment.

Obani and Ekhatior have argued that seeking damages or compensation in foreign courts for environmental violations caused by IOCs does not effectively promote the attainment of goal 13 of the SDGs in Nigeria.²⁴ They further maintained that while foreign and international climate change litigations have contributed to climate change policy development and the protection of victims, relying solely on litigation in foreign courts cannot adequately promote climate change mitigation and adaptation. This is not only due to the difficulty in enforcing foreign judgments in Nigeria but also the expenses incurred in initiating matters in foreign courts. Having said this, we will now focus on the nature of climate change litigation in Nigeria.

²¹ CCA, s 34(1).

²² *Ibid.*, s 34(2)(b).

²³ <<https://elaw.org/af-akpan-v-royal-dutch-shell-plc-0>> accessed 28 September 2023.

²⁴ Obani and Ekhatior (n 1).

Generally, climate change litigation is not yet as grounded and popular in Nigeria as it is in some developed countries. However, there are some decisions that establish principles that impact this species of action in the country. The case of *Gbemre v Shell*²⁵ is often identified as the first case in Nigeria that is related to climate change. In this case, the Federal High Court took a constitutional human rights approach to address the issue of gas flaring. The court recognised the negative impacts of gas flaring on the health and wellbeing of the people of Iwherekhan community in Delta State and therefore ordered the respondent to stop the flaring as it violates the right to a clean and healthy environment.

Also, the pro-climate change approach of the Supreme Court in *Centre for Oil Pollution Watch v NNPC*²⁶ further lends support for climate change litigation in Nigeria. In the words of the Supreme Court:

There is no gain saying in the fact that there is increasing concern about climate change, depletion of the ozone layer, waste management, flooding, global warming, decline of wildlife, air, land and water pollution. Both nationally and internationally, countries and organisations are adopting stronger measures to protect and safeguard the environment for the benefit of the present and future generations.

The liberalisation of *locus standi* and recognition of public interest litigation by the Supreme Court²⁷ strengthens the provisions of section 34(2) of the CCA as it enables victims of air pollution or climate depletion or their representatives to bring an action in court to stop the pollution, compel public officials to take actions and claim compensation for the injury caused. According to Etemire, the Supreme Court decision in *Centre for Oil Pollution Watch v NNPC* marks a significant shift in the approach of the Nigerian judiciary towards climate change litigation.²⁸ In this case, the Supreme Court explicitly constitutionalized environmental rights and duties, including the enforceability of article 24 of the African Charter on Human and Peoples' Rights 1981, which elevates the status of climate change claims.²⁹ These developments hold a strong hope for the future of climate change litigation in Nigeria, encouraging litigants and courts to push for sustainable and climate-friendly practices from private entities and the government.³⁰

6.0 Climate Change Litigation by Negligence

Climate change actions are often commenced or initiated through the tort of negligence. This is a common law remedy that is applicable in Nigeria. In order to succeed in a climate change suit, a plaintiff must establish three key elements. First, he must demonstrate that the defendant or emitter owed him a

²⁵ (2005) AHRLR 151.

²⁶ (2019) 5 NWLR (Pt. 1666) 518.

²⁷ *Ibid.*

²⁸ U Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' [2021](2) CCLR; 158-170.

²⁹ *Ibid.*

³⁰ Etemire (n 28).



duty of care. Second, he must prove that the defendant breached this duty by causing the emission.³¹ He must show that he has suffered injury or damage as a direct result of the emission.

In climate change litigation by negligence, the plaintiff must show that the defendant owed him a duty of care. The concept of duty of care is based on the principle of avoiding conduct that poses unreasonable risks and danger to others.³² The foundation for establishing this duty is rooted in the neighbourhood principle, which states that individuals must take reasonable care to avoid actions or omissions that could foreseeably harm their neighbours.³³ To determine who qualifies as a neighbour, the court considers those who are closely and directly affected by the defendant's actions.³⁴ In the case of GHG emissions causing property damage, personal injury, and consequential loss, it is necessary to ascertain if the relationship between the emitter and the plaintiff falls within the recognized parameters that impose a duty of care.³⁵ The emitter, as the party with control over the emission, has the ability to regulate GHG production while individuals are unable to prevent climate change on their own.³⁶

Once it is established that the defendant owes a duty of care to the plaintiff, the court then determines whether there has been a breach of this duty. The determination of a breach of duty is a question of fact based on the circumstances of each.³⁷ The legal standard of care is determined through an objective test based on the standard of a reasonable man. The court considers whether a reasonable person in the defendant's position would have foreseen the risk of injury to the plaintiff or others. The court evaluates the magnitude of the risk, the probability of occurrence, the feasibility and cost of mitigation measures, and any conflicting responsibilities.

The third element which the plaintiff must prove is that the duty of care breached by the defendant has caused injury or damage to the plaintiff. Proving harm is essential since climate change actions are not actionable *per se*. The court considers two factors in determining causation: factual causation and the scope of liability. The traditional "but for" test is often applied, where the court assesses whether the damage would have occurred "but for" the defendant's actions or omissions. The plaintiff must establish, on a balance of probabilities, that the defendant's actions directly caused the harm. The court also considers intervening causes and public policy issues when assessing the scope of liability. Defendants may argue that subsequent GHG emissions from other entities acted as intervening causes, which breaks the chain of causation.

7.0 Climate Change Litigation by Nuisance

The tort of nuisance refers to acts that cause inconvenience or damage to the public or individuals. It encompasses public nuisance, private nuisance and statutory nuisance. Public nuisance involves acts that cause inconvenience or damage to the public as a whole. Private nuisance pertains to acts connected with land occupation that interfere with the use and enjoyment of land by others and statutory nuisance,

³¹ *Friends of Earth, Inc. v. Watson* (2005) WL 2035596, 35 ELR 20179

³² John Fleming, *The Law of Torts* (9th edn. 1998)

³³ *Donoghue v Stevenson* (1932) AC 562.

³⁴ *Ibid.*

³⁵ *Spartan Steel & Alloys Ltd v Martin & Co* (1973) 1 QB 27.

³⁶ *Jaensch v Coffey* (1984) 155 CLR 549 at 584.

³⁷ *Imo Concorde Hotel Ltd. v. Anya* (1992) 4 NWLR (Pt. 234) 210 (CA)



which involves acts or omissions declared as a nuisance by law.³⁸ In the United States, actions in public nuisance have been initiated by state and local governments against large industrial contributors to global warming in sectors such as transportation, energy and power.³⁹ In the case of *Connecticut v American Electric Power*,⁴⁰ several states, a municipality and environmental organizations sued power companies for their substantial carbon dioxide emissions. The plaintiffs sought an injunction to limit and reduce these emissions over a period of ten years in order to protect public lands, health and well-being. However, this suit was dismissed on the ground of non-justiciability.

Private nuisance also allows affected individuals to take legal action against acts or omissions that interfere with their use or enjoyment of land or associated rights.⁴¹ This can include situations where works are carried out to mitigate climate change effects such as the construction of rock walls or levee banks by public authorities to control rising sea levels. If these works are inadequately located, designed, or executed, they may worsen the problem or shift it to other areas. Affected landowners may file a private nuisance against the public authority. In the case of *Open Space Inst. v American Electric Power Co*,⁴² environmental organizations that owned and preserved land in New York sued electric power companies for being significant carbon dioxide emitters. Like the case of *Connecticut*, this case was dismissed on the ground of non-justiciability.

8.0 Limitations of Climate Change Litigation in Nigeria

Despite the potential for climate change litigation to address environmental issues in Nigeria, there are certain limitations associated with proving causation in such cases. One of the primary challenges is attributing specific harm to individual emissions.⁴³ Climate change is a complex global phenomenon, and establishing a direct causal link between specific actions or emissions and the resulting harm can be a daunting task. It requires comprehensive scientific analysis and evidence that establishes a clear connection between the actions or omissions of the defendant and the specific harm suffered by the plaintiff.

This burden of proof can be particularly challenging in cases where multiple sources contribute to climate change, which makes it difficult to pinpoint and establish individual or corporate responsibility. Also, the long-term nature of climate change and its cumulative impacts can make it challenging to establish a direct cause-effect relationship between specific emissions and the harm suffered. These limitations highlight the need for interdisciplinary collaboration between scientists, legal experts and policy-makers to address the evidentiary challenges associated with climate change litigation in Nigeria.

Another important aspect of climate change litigation in Nigeria is the role of local communities in seeking justice for the impacts they experience. Indigenous peoples often bear the brunt of climate change as their livelihoods and cultural practices are closely tied to the environment. However, there is a lack of awareness and knowledge of climate change litigation and environmental rights among the

³⁸ J B J Preston, 'Climate Change Litigation' (A Ppaer presented to Judicial Conference of Australia Colloquium 2008).

³⁹ *Ibid.*

⁴⁰ 406 F Supp 2d 265 (SDNY, 2005).

⁴¹ Preston (n 38).

⁴² 04-CV-05670 (SDNY, filed on 21 July 2004).

⁴³ J. Smith and D. Shearman 'Climate Change Litigation: Analysing the Law, Scientific Evidence and Impacts on the Environment, Health and Property' (2006) p.17.

general population. Many individuals are unaware of their legal rights and the legal avenues available to address climate change-related issues. This lack of awareness poses a significant barrier to accessing the judiciary and seeking justice for climate change impacts.

Also, there is often a lack of trust in the judiciary due to corruption, political interference and a perception of bias. This lack of trust can discourage individuals and communities from pursuing climate change litigation in Nigeria and resort to foreign courts. Nigeria heavily relies on oil revenue, and as a result, the interests of the IOCs may be prioritised over the environmental concerns raised in litigation. Finally, lengthy court processes, adjournments and the backlog of cases can discourage litigants from exploring the courts in Nigeria.

9.0 Conclusion and Recommendations

Climate change litigation has become a legally recognised strategic tool for environmental protection as it pushes for sustainable development in the face of climate challenges. The provisions of section 34(2) of the CCA coupled with the decisions of the court in *Gbemre v Shell, Centre for Oil Pollution Watch v NNPC* and other foreign-related cases pave the way for a more inclusive and proactive approach to addressing climate change through litigation. This line of legal authorities recognises public interest litigation and vests the court with the power to make an order to stop or discontinue the emission of GHGs, compel any public official to stop or prevent the performance of any act that is harmful to the environment and to order compensation to the victim directly affected by acts harmful to the environment. This article has also explored the torts of negligence and nuisance as legal mechanisms through which victims or CSOs may commence such actions. However, there are limitations to climate change litigation in Nigeria and addressing them requires a strong, transparent and independent judiciary as well as collaboration among legal experts, climate scientists and policymakers.

To facilitate climate change litigation in Nigeria, the following recommendations should be considered:

- i. A specialised environmental court should be established with a fast-track procedure and staffed with judges and personnel skilled with legal and technical knowledge about climate change.
- ii. The National Assembly should amend the CCA to include procedural means through which victims of GHG emissions can seek redress against the emitters and violators of climate change duties.
- iii. Nigeria should diversify its economy and consider investment in renewable energy resources. This can reduce the excessive reliance on the fossil fuel industry and significantly minimise GHG emissions arising from such industry.