

## Nigerian Environmental Litigations: Trending Reasons

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### Abstract

The right to safe unpolluted environment is a third-generation rights which is well established in international law and existing international instruments. Countries of the world through their judiciary are elevating this right in enforcing the right to life of their citizens and liberalising access to court on account of alleged infringement on this right to environment which is satisfactory for human development. There have been several instances in the recent past where the right to life has been successfully invoked in the pursuit of environmental claims and protection in different jurisdictions around the world. It is worthy of note that environmental protection was not prevalent at the time first generation rights were first formulated. The courts in some jurisdictions have explicitly recognised the links between human rights and environmental protection and have incorporated the latter into the monitoring and enforcement of the right to life. This paper is focused on trending reasons for environmental litigation in Nigeria. It was found that safe unpolluted environment, remediation and compensation are trending reasons for environmental litigation in Nigeria in recent times. It concluded that the environmental rights should be elevated to a constitutional position it deserves in Nigeria in the light of the decisions of courts locally and globally.

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## **Background to the Study**

Most of the environmental litigations in Nigeria are associated with either gas flaring or oil spills. Gas Flaring is the burning of associated gas that accompanies the extraction of crude oil from oil wells during oil exploration. The associated gas is considered uneconomical to recover by the oil companies and as such it is either flared or vented into the atmosphere. The Organisation of Petroleum Exporting Countries (OPEC)'s statistical report states that Nigeria flares an estimated 22,000 billion standard cubic meters (bcm) of its total reserve which is estimated to be over thirty-six billion barrels (36,220 m b) as at 2007 and a natural gas reserve of over five billion standard cubic meters (5,215 c um).<sup>1</sup> The global carbon dioxide (CO<sub>2</sub>) emissions from flaring amount to nearly 13% of the emissions that countries have committed to reduce under the Kyoto Protocol. For the current production of 4.6 billion cubic feet per day (bcfd), is largely wasted with nearly 55 percent or close to 2.5 bcfd being flared.<sup>2</sup> Oil pollution is caused by any spillage of petroleum or its refined products. The largest spills typically involve a discharge of petroleum or bunker fuel to the ocean from a disabled tanker or a drilling platform, to an inland waterway from a barge or ship, or to land or fresh water from a well blowout or broken pipeline. In addition, some enormous oil spills have resulted from deliberate acts of warfare.<sup>3</sup> Oil spill is the escape or release of a liquid petroleum hydrocarbon into the environment: land, water or air; especially the marine ecosystem or forest due to anthropological activity. Oil spills have direct impact on the environment and the survival of biodiversity in the given ecosphere. It makes for permanent irretrievable damage to the land and water resources of the affected area in a given environment.

### **1. Reasons for Environmental Litigation**

Litigation may arise because a party feels that his rights or obligation is being or is likely to be violated by another. Sometimes the violation could be as a matter of law or authorisation by a government institution or agency or someone licenced or permitted by the government or it's agency. Once a cause of action arises, a party who feels aggrieved may approach the Courts for redress. The reasons for environmental litigation may vary but includes the following:

#### **a) Environmental Protection**

Environmental protection is the prevention of harm or hurt to the human, animal and fauna environment in the form of acts or omissions which tend to change their original status to something other than it had from nature. Environment protection targets prevention of harm or hurt to the environment whether by laws or regulations like sections 104 (1)(b) & 107 of Petroleum Industry Act 2021. When a person or group has reasonable grounds to believe that their environment is being threatened, they can approach the Court to safeguard the environment.<sup>4</sup> Human life consists in a certain environment. When substances are

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<sup>1</sup> Nwamaka Iguh 'Gas Flaring in Nigeria: An Abridgment of Human/Fundamental Rights' (2016) *Researchgate*.1-24.

<sup>2</sup> Rachel Aichele and Gabriel Felbermayr 'The Effect of the Kyoto Protocol on Carbon Emissions' (2013)(32)(4) *Journal of Policy Analysis and Management*731-757.

<sup>3</sup> Unknown author, Environmental Science Chapter 21 "Oil Spill" < <https://ecampusontario.pressbooks.pub/environmentalscience/chapter/chapter-21-oil-spills/> > accessed 6 August 2022.

<sup>4</sup> Sections 33 & 46 CFRN 1999 as amended.

introduced which are scientifically known to be deleterious to human life is to be introduced in a human or animal environment, such can be challenge in line with section 7 of the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007 as amended.

### **b) Compensation**

Compensation is sought after and awarded at the end of a successful litigation on environment for destroyed property, lands, fish ponds, water courses and other means of life and livelihood.<sup>5</sup> Compensation is as far as money can do or go in restoring the person or group to the state they were before the damage complained about. Compensation is not always the best for environmental litigation if it is the only relief granted.<sup>6</sup> There are no laws in Nigeria that holds petroleum companies liable for the acts or omission of environmental pollution through their acts or omission in their areas of operation. In fact, the Petroleum Industry Act 2021 had made out an excuse for any company willing to flare and pollute the environment to merely seek and obtain permit of the midstream and downstream petroleum regulatory Authority or the upstream petroleum regulatory Commission. In other words, in the guise of testing, safety practices or other reasons which the Authority or Commission may proffer, petroleum operator may destroy life and environment in Nigeria under the watch of governmental agency and with their leave.<sup>7</sup> The Petroleum Industry Act 2021 did not define what it meant by strategic operational reasons: it only mentioned testing under sub-section b of section 107. In section 104, acceptable safety practice was not defined to create the impression that this was provided for the protection of the environment. This concern is premised on the fact that many administrators had utilised similar provisions under the defunct Associated-Gas Re-Injection Act 1979 to allow irreparable damage to the Nigerian environment and there are no indicators presently<sup>8</sup> to show that the newly created Authority and Commission will not take dressing from their predecessor.<sup>9</sup>

### **c) Remediation**

Remediation is one of the best relief for environmental litigation by international best practices.<sup>10</sup> Remediation, the removal of hazardous contaminants from soil, groundwater,

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<sup>5</sup> *Akpan v SPDC* (2013) Unreported, case number / docket number: C/09/337050 / HA ZA 09-1580, Judgment delivered by the District in Hague 30 January 2013.

<sup>6</sup> TOS Owolabi and Eloamaka Okonkwo 'Compensation for Environmental Pollution and Justice Procurement in the Niger Delta Area of Nigeria: The Mass Media Role' 2014 < [https://www.researchgate.net/publication/301956412\\_COMPENSATION\\_FOR\\_ENVIRONMENTAL\\_POLLUTION\\_AND\\_JUSTICE\\_PROCUREMENT\\_IN\\_THE\\_NIGER\\_DELTA\\_AREA\\_OF\\_NIGER\\_IA\\_THE\\_MASS\\_MEDIA\\_ROLE](https://www.researchgate.net/publication/301956412_COMPENSATION_FOR_ENVIRONMENTAL_POLLUTION_AND_JUSTICE_PROCUREMENT_IN_THE_NIGER_DELTA_AREA_OF_NIGER_IA_THE_MASS_MEDIA_ROLE) > accessed 7 August 2022.

<sup>7</sup> Sections 104 (1)(b) & 107 PIA 2021.

<sup>8</sup> Seeing that sections 104 & 107 had made similar provisions as was in section 3 of the AGRA 1979.

<sup>9</sup> LI Nwokike 'Nigeria Law and Policy Issues in Gas Flaring: A Standard for Gas Utilization or Sacrificial Interest?' (2020)(3)(4) *Sapientia Global Journal of Arts, Humanities and Development Studies* 125-140.

<sup>10</sup> RA Mmadu 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from *Kiobel*' (2013)(2)(1) *Afe Babalola University Journal of Sustainable Development Law and Policy* 149-170.

sediment, and surface water, provides an opportunity to reduce pollution and, thereby, pollution-related deaths.<sup>11</sup> It is the restoration of the environment to its natural state, the status it had before the anthropogenic activities that destroyed or altered that state of nature.<sup>12</sup> It is not a near nature reparation but restitution to the original state of things: back to the natural ecosystem or ecosphere of the human or animal environment whether it be land or sea. Remediation can take years but it is the best. It could require the procuring of biodiversity and harvesting of animal and plants reproductive organisms to restore to nature an environment damaged or destroyed or defaced by petroleum production activities.<sup>13</sup> The environment of the Niger Delta would require years of remediation to come back to a habitable land. This hope is less possible with each passing day as there are no measures half the requirement for remediation of the environment. No scientific or administrator effort (verifiable) is ongoing by the federal government for the remediation of the devastated environment of the Ogoni land in the Niger Delta of Nigeria.<sup>14</sup> The failure of government to remediate and their unwillingness to take any direct action to stop pollution or remediate the polluted areas have left environmentalist to agitating for the environmental rights of the people of the Niger Delta. Ken Saro Wiwa was killed by the federal government after a Kangaroo trial by the military administration then. This 'kill the messenger attitude' of the federal government had not changed. This is factual by the repetition of same or similar provisions of the AGRA in the Petroleum Industry Act 2021.

The solution lies in the implementation of the UNEP report on Ogoni-land.<sup>15</sup> Modern method of environmental clean-up should be adopted and adapted for the cleaning of the environment of the Niger Delta. The method should be community participatory and community and Non-governmental Organisations should be part of the decision-making process for the implementation of the modern acceptable method publicly published for the clean-up. It is scientifically ascertained that pollution of the environment by petroleum whether by gas flaring or oil spill takes more years to cure than the intended development to the area. If one compares the cost of environmental remediation to the supposed profit or benefit to the people in the environment, one will after objective analysis opt for an environmentally friendly means or method of harnessing environmental resources in the nature.<sup>16</sup>

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<sup>11</sup> Landrigan et al (2018); World Health Organization (2018).

<sup>12</sup> RL Lorenzetti 'Complex Judicial Remedies in Environmental Litigation: The Argentine Experience'(2017)(29)(1)*Journal of Environmental Law*1-17.

<sup>13</sup> RL Lorenzetti 'Complex Judicial Remedies in Environmental Litigation: The Argentine Experience'(2017)(29)(1)*Journal of Environmental Law*1-17.

<sup>14</sup> Cleverline Brown 'Will Remediation Ever Be Enough? The Overdue Compliance Conversation for Nigeria'(2021)(1)(3)*International Journal of Advanced Multidisciplinary Research and Studies* 20-28.

<sup>15</sup> UNEP, Environmental Assessment of Ogoniland (UNEP, 2011) 1-29 <  
[https://wedocs.unep.org/bitstream/handle/20.500.11822/25282/ogoniland\\_chapter1\\_UNEP\\_OEA.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/25282/ogoniland_chapter1_UNEP_OEA.pdf?sequence=1&isAllowed=y) >accessed 8 August 2022.

<sup>16</sup> RM O'Brien and others 'Remediation in developing countries: A review of previously implemented projects and analysis of stakeholder participation efforts'(2021)(51)(12)*Critical Reviews in Environmental Science and Technology* 1259-1280.

## 2. Human And Environmental Rights in National Courts

A nation's constitution is more than an organic act establishing governmental authorities and competences: the constitution also guarantees citizens basic fundamental human rights such as the right to life, the right to justice and increasingly the right to a clean and healthy environment.<sup>17</sup> National courts around the world in precedent setting cases have affirmed this belief. The judiciary in India, the United States, Pakistan, Tanzania and most recently Nigeria have interpreted the right to life to include a right to a healthy environment.<sup>18</sup> Many of the cases in the national courts have arisen from exploration and management of natural resources in local communities; oil drilling and exploration, mining, forestry operations. It is welcoming to note that the country that has the most experience in linking human rights to environmental protection is India, a developing country. This could be attributable to the fact that most of the actions giving rise to the cases involve the exploration of natural resources in countries with limited regulations protecting the environment or where there are regulations they are not enforced by the national governments. In India, the environmental provisions of the Indian constitution; Article 48A on the protection of the environment and Article 51A on the fundamental duties of the state are both principles of state policy.<sup>19</sup> The Indian court has however linked and enforced these principles with the constitutional right to life, guaranteed by Article 21. The case of *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*<sup>20</sup> was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. The petitioner alleged that unauthorised mining in the Dehra Dun area adversely affected the ecology and environment. The Supreme Court of India upheld the right to live in a healthy environment and issued an order to cease mining operations notwithstanding the significant investment of money and time by the company. Furthermore, in *Subhash Kumar v. State of Bihar*,<sup>21</sup> the Court observed that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' In *Mathur v. Union of India*,<sup>22</sup> the Supreme Court used the right to life as a basis for emphasizing the need to take drastic steps to combat air and water pollution. Further, in the case of *M.C. Mehta v. Union of India*,<sup>23</sup> the Supreme Court directed the closure or relocation of industries and ordered that evacuated land be used for the needs of the community.<sup>24</sup>

At the United States, the case of *Wiwa v. Royal Dutch Company*<sup>25</sup>, a case that is still pending in the US courts, the relatives of the Ogoni 9 murdered activists have instituted this action under

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<sup>17</sup> C Bruch and others 'Constitutional Environmental law: Giving Force to Fundamental Principles in force' (2001)(26) Columbia Journal of Environmental Law 133-160.

<sup>18</sup> Other notable countries are Philippines, Brazil, Chile, Columbia, Ecuador, Bangladesh, and Nepal.

<sup>19</sup> RT Anderson 'Indigenous Rights to Water & Environmental Protection' (2018)(53)(2) *Harvard Civil Rights – Civil Liberties Law Review* 337-379.

<sup>20</sup> AIR 1985 SC 652.

<sup>21</sup> AIR 1991 SC 420.

<sup>22</sup> (1996) 1 SCC 119.

<sup>23</sup> < <https://www.latestlaws.com/articles/case-analysis-m-c-mehta-v-union-of-india-shriram-industries-case-by-roopali-lamba> > accessed 14 August 2022.

<sup>24</sup> 32 (1996) 4 SCC 351.

<sup>25</sup> < <https://earthrights.org/case/wiwa-v-royal-dutch-shell/> > accessed 14 August 2022.

the Alien Torts Act of the US. The defendants are charged with complicity in human rights abuses and environmental abuses against the Ogoni people in Nigeria. An important hallmark of the case is that the court decided that the plaintiffs can institute an action in a US court for the acts committed outside a US jurisdiction but involving a US citizen or corporation. Article 9 of the Constitution of Pakistan states that no person shall be deprived of life or liberties save in accordance with the law. The Supreme Court in *Shela Zia v. WAPDA*<sup>26</sup> decided that Article 9 includes 'all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally'. The petitioner questioned whether, under article 9 of the Constitution, citizens were entitled to protection of law from being exposed to hazards of electro-magnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. The Court noted that "under the Constitution, Article 14 provides that the dignity of man and subject to law, the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man and right to 'life' are guaranteed under Article 9. If both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."

### **3. Environmental Litigations: Challenges and Prospects**

In the oil sector where environmental degradation is most prevalent, the all-pervading influence of the oil companies and the paternalistic attitude of the judges towards them in matters relating to environmental hazards created by the companies have made the enforcement of environmental laws ineffective. What the judges fail to realise is that economic development can be compatible with environmental conservation.<sup>27</sup> Contrary to the India situation where an act damaging the environment was ordered to cease by the court despite the significant loss of investment that would occur, the situation in Nigeria has been different until quite recently. The Nigerian judiciary has been reluctant to give orders compelling companies whose operations are damaging the environment to cease the actions complained of.<sup>28</sup> The consideration of the potential loss of revenue and investment outweighs considerations for the protection of the environment. This is due largely to the fact that the Nigerian economy is dependent on the revenue from the sale of crude oil.<sup>29</sup> There have been several oil related cases filed in the courts in Nigeria alleging pollution from oil exploration, loss of income, loss of property, contamination of drinking water leading to water borne

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<sup>26</sup> PLD 1994 SC 693.

<sup>27</sup> MA Ajomo, An Examination of Federal Environmental Laws in Nigeria, in MA Ajomo and O Adewale (eds), *Environmental law and Sustainable Development in Nigeria* (Nigerian Institute of Advanced Legal Studies, 1994).

<sup>28</sup> K Ebeku, 'Judicial Attitudes to Redress for Oil Related Environmental Damage in Nigeria' (2003)(12)(2) *RECIEL* 199-208.

<sup>29</sup> J Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers, 2000) 34-36.

diseases. In the cases of *Shell v. Tiebo VII*,<sup>30</sup> *Shell v. Isaiah*,<sup>31</sup> *Seismograph services v. Mark*,<sup>32</sup> *Ogiale v. Shell*,<sup>33</sup> *Shell v. Ambah*.<sup>34</sup>

The feature that runs through all the above-mentioned cases are; they are all claims for compensation for the operation of oil companies in their local communities, they are usually oil spillage claims for loss of income from fishing and farming, pollution of drinking water, damage to farmlands and crops, and damage to health as a result of water-borne diseases. The courts in their various judgements refrained from making orders for the remediation of damages done to the physical environment, the land, and water resources. However, in the case of *Shell v. Farah*,<sup>35</sup> apart from asking for compensation, the plaintiffs specifically asked the court to make an order for the rehabilitation of their damaged land. The court was creative in deciding this case because quite unlike other oil spillage cases in Nigeria where conflicting expert evidence is given for both parties, the court resolved the conflict by appointing two independent experts to assist the court in coming to a decision whether the affected land had been rehabilitated to its pre-impact conditions. *Shell v. Farah* prepared the way for change, it is the first case where the plaintiff prayed the court for compensation and remediation of damaged land and both claims were awarded accordingly.<sup>36</sup> It can be ascertained that there has been a definite shift in the attitude of the Nigerian judiciary. Frayas is of the opinion that there has been a radical change in the approach of Nigerian judges to the law in the sense that that have come to attach greater importance to the substance of the law by exercising their powers favourably in favour of plaintiff victims in deciding oil related environmental damage cases.<sup>37</sup> Okorodudu and Fubara, in their work believed that the present attitude of the judges of awarding monetary compensation without addressing the preservation of the environment might change in the near future,<sup>38</sup> while Kaniye Ebeku<sup>39</sup> is a bit sceptical, he believes that if the Nigerian economy remains dependent on the revenues from oil, "it is doubtful if the courts will abandon the economic approach and move towards a sustainable approach. The recent case of *Gbemre v. Shell*<sup>40</sup> signifies the readiness of the Nigerian judiciary to interpret the constitutional right to life expansively to include the right to a healthy/clean environment. *Gbemre V. Shell: The Beginning of the End of Gas Flaring In Nigeria?* The order of a Nigerian federal high court on the 14th of November 2005 marked an important watershed in the struggle by local communities in Niger Delta of Nigeria to protect their health, environment

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<sup>30</sup> (1996) 4 NWLR (Pt 445) 657.

<sup>31</sup> (1997) 6 NWLR (Pt 508) 236.

<sup>32</sup> (1993) 7 NWLR (Pt 304) 206.

<sup>33</sup> (1997) 1 NWLR (Pt 480) 148.

<sup>34</sup> (1999) 3 NWLR (Pt 593) 1.

<sup>35</sup> (1995) 3 NWLR (Pt 382) 205.

<sup>36</sup> (1995) 3 NWLR (Pt 382) 148.

<sup>37</sup> J Frynas, *Ibid.* 219.

<sup>38</sup> MT Okorodudu, *Law of Environmental Protection: Materials and Text* (Ibadan, 1998) 607.

<sup>39</sup> K Ebeku, 'Judicial Attitudes to Redress for Oil Related Environmental Damage in Nigeria' (2003)(12)(2) *RECIEL* 199-208.

<sup>40</sup> Federal High Court, Benin 14 November 2005, Unreported Suit No FHC/B/CS/53/05, *Gbemre v. Shell* (Judge C.V.Nwokorie) <<http://www.climatelaw.org/cases>> accessed 2 August 2022.

and their farmlands, and to bring an end to gas flaring. Mr Gbemre in a representative capacity for himself and for each and every member of the Iwehereken community in Delta State Nigeria against Shell Nigeria, Nigerian National Petroleum Corporation (NNPC) and the Attorney General of the Federation. The Applicants sought the following reliefs from the court: a declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act; a declaration that the actions of the first and second defendants in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter. The court further declared that the 1st and 2nd Respondents; Shell Nigeria and NNPC were to be restrained from further flaring of gas in the applicant's community and were to take immediate steps to stop the further flaring of gas in the applicant's community.

The decision of the Court were as follows: that the constitutionally guaranteed fundamental rights to life and dignity of human persons provided by Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Art. 4, 16 and 24 of the African Charter on Human Procedure Rules (Procedure and Enforcement) Act Cap A9 Vol.1 Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean poison-free, pollution free and healthy environment; that the actions of the 1st and 2nd Respondent in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter; that the provisions of Section 3(2)(a) and (b) of the Associated Gas Reinjection Act, Cap A25 Vol. 1, Laws of the Federation of Nigeria 2004 and Section 1 of the Associated Gas Reinjection (continued flaring of gas) Regulations Section 1.43 of 1984 under which the continued flaring of gas in Nigeria maybe permitted are inconsistent with the Applicant's Right to life and/or dignity of human person enshrined in the constitution and the African Charter and are therefore unconstitutional, null and void by virtue of Section 1(3) of the Nigerian Constitution.

*Gbemre v. Shell* is a precedent setting case in Nigeria. It is the first judicial authority to declare that gas flaring is illegal, unconstitutional, a breach of the fundamental human right to life and it should cease.

### **Conclusion**

There are decisions both local and foreign which explained in clear unambiguous term the dangers associated with flaring gas and unmitigated remediation of oil spills. The adverse

impact on the environment and the ecosystem affecting negatively the Eco diversities which enhances life of human and animals as well as other species of environmental lives that depends on such biodiversity to exist. Our Courts have been more firm and decisive on environmental matters and issues as they trend in the modern society than the executive which tend to make policies contrary to environmental political realities but focusing more on economics of gains for development than life of the borrowed future generations. This attitude of the executive is not only reckless and but *genocidal* as it is anti-sustainability of environmental resources and their sustainability. Stakeholders must put hands on deck to checking the excesses of the policies and laws implementation team to fostering the implementation of environmental laws and regulations to soot environmental health and life of all, both humans and animals in our world for the sakes of the future generations whose earth we have borrowed in trust.

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