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***DOMESTIC ADJUDICATIVE INSTITUTIONS AND  
SUSTAINABLE DEVELOPMENT IN THE AFRICAN  
CONTEXT: OPPORTUNITIES AND LIMITATIONS***

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# INTRODUCTION: ADJUDICATION AND CLIMATE JUSTICE

- Sustainable Development Goals (SDGs) 2015
- Paris Agreement of the United Nations Framework Convention on Climate Change 2015 (UNFCCC)
  - ‘[O]nly if responsibilities are shared in areas of common interest, assuming the **active collaboration of all social actors**, society itself and enterprise, in collaboration with the state, can today’s social and environmental challenges be met’ (Lozano, Albareda & Ysa, 2008)
- *Johannesburg Principles on the Role of Law and Sustainable Development* adopted by the Global Judges Symposium (2002): ‘an **independent** Judiciary and **judicial process** is vital for the **implementation, development and enforcement** of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the **national, regional and global levels**, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law...’
- ❑ Important Roles of the Judiciary in controlling public and private actors in society
- ❑ ‘Litigation has arguably never been a more important tool to **push policymakers and market participants to develop and implement** effective means of climate change mitigation and adaptation’ (Burger et al, 2017:8)
- ❑ Effective judicial application and enforcement of rights and obligations of segments of society is an essential complement to constitutional and legislative provisions
- ❖ Theoretical Framework for the role of the Judiciary in Climate Justice: Institutional Theory

# **INSTITUTIONAL THEORY, INSTITUTIONS AND CLIMATE JUSTICE**

- ❑ **Institutional theory ‘offers a powerful explanation of both individual and organisational actions and processes’ (Li et al, 2008:328)**
- ❖ **Institutional Theory is based on the notion of ‘institutions’**
  - **‘rules, norms, and beliefs that describe reality for the organisation, explaining what is and is not, what can be acted upon and what cannot’ (Hoffman, 1999:351)**
  - **‘systems of established and prevalent social rules that structure social interactions’ (Hodgson, 2006:2)**
  - **‘formal and informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy’ (Hall & Taylor, 1996:940)**
  - **‘such things as the structure of property rights, the presence of markets, and the contractual opportunities available to individuals and companies’ (Acemoglu, 2009:120)**
- ❖ **Institutions (not only public/governmental agencies) therefore *regulate* behaviour in society**

# **INSTITUTIONAL THEORY AND INSTITUTIONAL CHALLENGES TO CLIMATE JUSTICE**

❖ **Institutional theory suggests two challenges to climate justice and sustainable development: *Behavioural and Contextual***

❑ **Behaviour:**

- **‘[B]ehaviour, whether by individuals or by firms, is affected by the institutional setting in which actors find themselves’ (Ohnesorge, 2007:268)**
- **Behaviour is influenced by ‘a structure in their organisations, institutions, and relationships which makes events clearly interpretable and predictable’ (Hofsted, 1994:116)**

❑ **Context:**

- **Diversity of needs between countries and regions (Kang and Moon, 2012)**
  - **SDGs) 2015 ‘Each country faces specific challenges in its pursuit of sustainable development’ [22]**
- **Context-based differentiated responsibility for climate justice and sustainable development:**
  - **Principle 7 of the Rio Declaration 1992**
  - **Art 3(1) and 4(1) of the United Nations Framework Convention on Climate Change 1992**
  - **SDGs 2015: ‘different national realities, capacities and levels of development and respecting national policies and realities’ [56]**

## **TYPOLGY OF INSTITUTIONS**

□ **Categories of institutions (Scott, (2001, 2008; MacCormick and Weinberger, 2013)**

**A.Regulatory (explicit formal laws, rules and regulations and their coercive enforcement)**

**B.Normative (consciously shared norms, values, beliefs and expectations for behaviour and social interaction)**

**C.Cognitive/Cultural (implicit, unconscious and symbolic interpretative frames)**

## **REGULATORY ROLE OF THE JUDICIARY**

- i. Constitutionalisation**
- ii. Empowerment of individuals and stakeholder groups**
- iii. Protecting vulnerable victims of unsustainable and harmful practices**
- iv. Addressing corporate responsibility**

# CONSTITUTIONALISATION (INDIRECT)

- **‘[T]he practical answer is that *the law is what the judge says it is*’ (Lord Reid, 1972:22)**
- **Recognising climate justice as a constitutional ideal via explicit human rights constitutional provisions (anthropocentrism): *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) (High Court)**
- **Using regional and international human rights instruments to interpret explicit constitutional provisions (anthropocentrism via international instruments)**
  - ***Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment)* (2015) - European Convention on Human Rights 1950**
  - **Principle 1 of the 1972 Stockholm Declaration on the Human Environment (United Nations, 1973): ‘Man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights– even the right to life itself’.**
  - **1987 Brundtland Report (United Nations, 1987): ‘Every human being has the right to a clean and safe environment conducive to their health and well-being’.**
  - ***Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* (article 4 of the African Charter (right to life) applied by the African Commission on Human and Peoples Rights to promote environment protection)**
- **Using international instruments to sustain biocentrism (e.g. environmental impact assessment statutory provisions)**
- **Interpreting customary practices: *Agbai v Okogbue* (1992): ‘[A]ny customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarous and should not be enforced by our courts’ (Supreme Court of Nigeria)**

# STAKEHOLDER EMPOWERMENT

- **United Nations Conference on Environment and Development 1992, Principle 10: ‘Environmental issues are best handled with the **participation of all concerned citizens**, at the relevant level. At the national level, each individual shall have appropriate **access to information** concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.’**
- **‘Rights cannot exist as free-floating abstractions, but need **rights’ holders**, for the function of rights...is to mark out protected areas for the **benefit of someone or something**, and so the concept of a right without a rights-holder is a contradiction in terms’ (Merrills, 1996:31)**
- **‘Individual rights are political trumps held by the individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them’ (Dworkin, 1978:12)**
- **Contrast: Locus Standi and other procedural impediments**

# ADDRESSING VICTIM VULNERABILITY

- **Understanding Climate Justice Victimhood and Vulnerability**
- **Victims: Present and future generations; Planet**
  - **Brundtland Report (United Nations, 1987:43): Countries should ‘ensure that the environment and natural resources are conserved and used for the benefit of present and future generations.’**
  - *Greenpeace Nordic Association & others v Norway Ministry of Petroleum and Energy (2016)*
  - *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources (1994, The Philippines)*
- **Vulnerability is ‘the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave Inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power’ (*Frame v Smith (1987)*, Wilson J., Canada).**
- **Providing corrective and distributive justice in the substance and procedures of adjudication**
- **Using regional and international instruments/best standards to determine reasonableness of conduct and duty of care**
  - *Fijabi v Nigeria Bottling Company Plc (2018)*
  - ☐ **Contrast: Restrictive approaches to Causation and Locus Standi**

# ADDRESSING CORPORATE RESPONSIBILITY

- ‘Only if responsibilities are shared in areas of common interest, assuming the active collaboration of all social actors, society itself and **enterprise**, in collaboration with the state, can today’s social and environmental challenges be met’ (Lozano et al, 2008:35-36)
- ‘In most cases, the success of the company is dependent on its ability to continue damaging the environment’ (Lord Avebury of UK House of Lords in legislative debates in 2006)
- Gas flaring and oil companies in Nigeria’s Niger Delta region
  - *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005)
  - *SERAP v Federal Republic of Nigeria* (2012)
- Contrast transnational claims and *forum non conveniens*:
  - *Kiobel v Royal Dutch Petroleum Co.* (2013, US Supreme Court)
  - *Okpabi v Royal Dutch Shell Plc* (2017, EWHC, Fraser J): ‘There is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a Nigerian company.’

# **NORMATIVE ROLE OF THE JUDICIARY**

**Internalisation  
of Values**

**Transmission  
of Values**

# INTERNALISATION OF CLIMATE JUSTICE VALUES

- **Internalisation: the sense of compliance through voluntary acceptance triggered by personal motivations (Viljoen, 2007:23)**
  - **Motivational postures are ‘sets of beliefs and attitudes that sum up how individuals feel about and wish to position themselves in relation to another social entity...Postures are subjective – they bind together the cognitive, emotional and behavioural components of attitude. They provide the narrative within which the authority’s message is given meaning. They have coherence for the self and are socially acceptable to significant others’ (Braithwaite, 2009:20).**
- **US Judge Benjamin Cardozo (1921:167): ‘Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man, whether he be litigant or judge.’**
- **Sir Terence Etherton (UK judge) (2010:740): Noted potential influence of judges’ ‘personal outlook based on personal experience, and their judicial philosophy’**
- **E.g.: Approach to economic arguments in favour of gas flaring**
  - ***Gbemre v Shell Petroleum Development Company Nigeria Limited (2005)***
  - ***BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation and Land Affairs BP (2004, South African court): ‘Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns.’***

# TRANSMISSION OF CLIMATE JUSTICE VALUES

- ❑ **Universalisation: Application of Universal or Best International Standards**
- **Acknowledging ‘reflex effect’ of regional and international instruments:**
  - *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment) (2015)*
- **Basing reasoning on provisions of regional and international instruments**
  - *Muojekwu v Ejikeme (2000, Tobi JCA): ‘In view of the fact that Nigeria is a party to the [Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)], courts of law should give or provide teeth to its provisions.’*
- **Using regional and international instruments to tackle ‘regulatory arbitrage’ (UNEP, 2016) exploited by corporations and other social actors**
  - *Abacha v Fawehinmi (2000, Nigeria’s Supreme Court): ‘The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act... is a statute with international flavour. Being so, therefore, [sic]...if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the Legislature does not intend to breach an international obligation...But that is not to say that the Charter is superior to the Constitution...’*
- ❑ **Glocalisation (Balanced Duality)**
  - **Universalisation helps to ‘create a template which can be applied only if we infuse them with the factual circumstances of a given society, of its own patterns of disadvantage, the structure of its ruling elites, and its prevailing symbolic meanings of stigma’ (Sadurski, 2004:154)**
  - **Contextual Adaptation: Think global, act local**
  - **SDGs: ‘different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities’ [59]**
  - **SDGs: ‘Each country has primary responsibility for its own economic and social development’ [63]**

# COGNITIVE/CULTURAL ROLE OF THE JUDICIARY

1

**Reshaping local practices**

2

**Applying local customs and beliefs to promote climate justice**

3

**Promoting effective glocalisation**

- Development can be country-specific and reflect culturally-adapted practices (Robertson, 2009)

# JUDICIAL ATTITUDE AS AN OBSTACLE TO CLIMATE JUSTICE

- ❖ **Attitude:** ‘a relatively enduring organisation of beliefs, feelings, and behavioural tendencies towards socially significant objects, groups, events or symbols’ (Hogg and Vaughan, 2005:150)
  - The US ‘Federal courts too often have been **cautious and overly deferential** in the arena of environmental law, and **the world has suffered for it**’ (*Juliana v United States of America*, 2016, Judge Aiken)
- a. Focus on Explicit Constitutional and Statutory Provisions**
- b. Locus Standi and Procedural Impediments**
- c. Focus on Compensatory Remedies**
- d. Delay in Adjudication**
- e. Inconsistent Communication**
- f. Inadequate acknowledgment or lack of consideration of wider institutional context**
- g. Limited appreciation of regional and international instruments**

# FOCUS ON EXPLICIT PROVISIONS

- ❖ **Constitutional provisions rarely make reference to climate justice**
  - **Contrast: ‘Traditional’ human rights in Chapter IV of Nigeria’s Constitution**
  - **Contrast: Section 46 of Nigeria’s Constitution and the Fundamental Rights Enforcement Procedure Rules (FREPR) 2009 made pursuant to it**
- **BUT: Jurisdiction of Nigerian courts and tribunals: Constitution, s.6(6)(b): ‘to **all matters** between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for **the determination of any question as to the civil rights and obligations** of that person’.**
- **SO: Robust and proactive interpretation of constitutional provisions**
  - ***Nweke v. State* (2017, Nigeria’s Supreme Court): ‘It is a formidable prescription that [the fundamental rights] provisions should not be subjected to “the austerity of tabulated legalism.” On the contrary, [the provisions]...call for a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to...’**
  - ***Nemi v The State* (1994) and *Abacha v Fawehinmi* (2000): Nigeria’s Supreme Court allowed the enforcement of the African Charter via the Fundamental Rights (Enforcement Procedure) Rules despite lack of specific enforcement procedures in the Charter and domestic legislation.**
  - ***Muojekwu v Ejikeme* (2000, Tobi JCA): ‘In view of the fact that Nigeria is a party to the [Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)], courts of law should give or provide teeth to its provisions.’**

# LOCUS STANDI

- ❖ ***Oronto Douglas v Shell Petroleum Development Company Limited (1998)***
  - **Application to enforce statutory provisions for environmental impact assessment dismissed**
  - **But no explicit statutory provisions barred private claims**
- ❖ **Room for claims by ‘any concerned person’ under Order XIII of Nigeria’s Fundamental Rights Enforcement Procedure Rules 2009 made pursuant to s.46(3) of the Constitution held inapplicable to public interest groups for claims outside the ‘traditional’ human rights provisions in Chapter IV of the Constitution: *The Registered Trustees of the Socio-Economic Rights & Accountability Project v Attorney General of the Federation (2012)***
- **Contrast: Claim by a group set up ‘to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands’ in *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and Environment) (2015)***
- **Contrast: ‘We find no difficulty in ruling that they can, **for themselves, for others of their generation and for succeeding generations, file a class suit.** Their personality to sue on behalf of the succeeding generations can only be based on **the concept of intergenerational responsibility** in so far as the right to a balanced and healthful ecology is concerned...’ *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources (1994, The Philippines)***

# FOCUS ON COMPENSATORY REMEDIES

- ❖ It is important that '[r]emedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body' (*Thomson v Minister for Climate Change Issues* (2017) NZHC)
- ❖ But see reactive nature of compensation: *Ajuwa v. Shell Petroleum* (2011)
  - High Court award of US\$1.5 billion as compensation for oil pollution reversed by Court of Appeal
  - Appeal pending at Supreme Court
- Contrast: Private claims seeking to restrict environmentally harmful activities for future generations:
  - *Juan Antonio Oposa v. Fulgencio S. Factoran Jr* (Supreme Court of the Philippines, 1993)

# **DELAY AND INCONSISTENT COMMUNICATION**

## **□ Undue delay defeats climate justice:**

### **❖ *Ajuwa v. Shell Petroleum (2011)***

- High Court award of US\$1.5 billion as compensation for oil pollution reversed by Court of Appeal**
- Appeal pending at the Supreme Court 9 years after the first instance decision**

## **□ Inconsistent communication**

### **❖ *Ajuwa v. Shell Petroleum (2011)***

### **❖ *Oronto Douglas v Shell Petroleum Development Company Limited (1998)***

# LACK OF CONSIDERATION OF WIDER INSTITUTIONAL CONTEXT



*Motto v Trafigura Ltd (2011,  
EWCA)*



*Agouman v Leigh Day (2016,  
EWHC)*

## **LIMITED APPRECIATION OF REGIONAL AND INTERNATIONAL INSTRUMENTS**

- **Inter-state basis of classical international law**
- **Treaties narrowly interpreted as regulating inter-state relationship**
- **BUT the ‘real object’ of some treaties is to ‘regulate the activities of individuals and private entities’ (Chayes and Chayes, 1995:14)**
  - *Nemi v The State* (1994)
  - *Abacha v Fawehinmi* (2000)

# ***DOMESTIC ADJUDICATIVE INSTITUTIONS AND SUSTAINABLE DEVELOPMENT IN THE AFRICAN CONTEXT: OPPORTUNITIES AND LIMITATIONS***

**– Questions & Comments?**

**• *Thank You!***

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