THE CASE OF *GBEMRE V. SHELL* AS A CATALYST FOR CHANGE IN ENVIRONMENTAL POLLUTION LITIGATION?*

Abstract

Nigeria is the largest routine gas flaring country amongst members of the Organization of Petroleum Exporting Countries. Despite the routine flaring of gas being banned in Nigeria since 1984, there appears to be a lack of political will on the part of the Nigerian government to follow through and enforce the said ban despite losing billions of Naira which would have been realized form the harnessing and production of the gas routinely flared in the country. With the international community moving to end routine gas flaring by 2030, this paper adopts the use of doctrinal research methodology. It critically analyses and dissects the historic case of Gbemre v. Shell Petroleum Development Company Nigeria Limited which took a unique approach to the perennial gas flaring problem within the Nigerian oil and gas industry, to determine if Nigeria is genuinely ready to end routine gas flaring and assess the judicial and political attitudes to drastically reduce environmental pollution with regards to the oil and gas industry in Nigeria.

Keywords: 'Gas Flaring', 'Environmental Pollution', 'Environmental Litigation', 'Access to Justice,' 'Fundamental Rights'.

1. Introduction

Oil has been hailed as "a fundamental building block of our modern world."[1] According to Yergin, we have gone through "a century in which every facet of our civilization has been transformed by the modern and mesmerizing alchemy of petroleum."[2] Nigeria is an oil producing country. In fact, it is the largest oil producing country on the African continent.[3] As at the end of 2010, it has been stated that Nigeria has the 10th largest proven oil reserve in the world which totals approximately 37.2 billion barrels[4] and it is the eleventh largest oil producer in the world with a production rate of 2.4 million barrels per day (bpd)[5] as well as the sixth largest exporter of oil with a 2010 exportation rate of 2.2

* **AYODELE MOROCCO-CLARKE**, LL.B. (Hons), B.L., LL.M. (CEPMLP, Dundee). Ph.D. (Aberdeen is a Legal Practitioner and Senior Lecturer in the Faculty of Law, Nile University of Nigeria, Abuja, Nigeria. He can be contacted via e-mail at ayomorocco@hotmail.com or ayomorocco@nileuniversity.edu.ng.

[1] J Marshall, 'Who Needs Oil?' (2007) 195 (2611) *New Scientist* at Pg. 28.

[2] D Yergin., *The Prize: The Epic Quest for Oil Money and Power* (New York: Simon & Schuster, 1991) at Pg. 788.

[3] Energy Information Administration, 'Nigeria' [http://www.eia.gov/EMEU/cabs/Nigeria/pdf.pdf. (August 2011) Page 3]. [This reference is from the United States Energy Information Administration (EIA) website] (Last visited on 22/09/2019).

[4] 'Greatest Oil Reserves by Country 2006', Oil & Gas Journal, Vol. 103, No. 47 (Dec. 19, 2005). Also 'Greatest Oil Reserves by Country 2007',[http://www.infoplease.com/science/energy/oil-reserves-2007.html] for 2007 oil reserves list. (Both were last visited on 18/09/2020).

[5] British Petroleum, 'BP Statistical Review of World Energy' (June 2011) [http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011.pdf] Page 8. (Last visited on 22/09/2019). The United States Energy Information Administration estimates that Nigeria's "nameplate oil production capacity to have been close to 2.9 million barrels per day (bbl/d) at the end of 2010..." but due to attacks on infrastructure, the production was less than it could have been. The CIA Factbook currently places Nigeria as the 15th largest oil producer, although it should be stated that the figures stated deal with 2009 records and data. Also, Central Intelligence Agency, *The World Factbook*

million bpd.[6] Nigeria has the largest natural gas reserves in Africa[7] with estimated proven gas reserves of 186.9 trillion cubic feet[8] making it the ninth largest concentration in the world.[9] The Nigerian government gets over eighty percent of its revenue from oil exports. **Nigeria earned $196 billion from oil and gas exports in the four years from 2007 to 2010**.[10] Between 1960 and 2000, oil worth more than Three Hundred Billion Dollars was extracted from the Niger-Delta region of Nigeria.[11]

2. A Brief Historical Background of the Nigerian Oil Industry

The history of oil in what is known as the modern day country called Nigeria can be traced back to 1906 when John Simon Bergheim, who owned the Nigerian Bitumen Corporation (which was a "German entity"[12]), entered into negotiations with the government of the Southern Protectorate of Nigeria and succeeded in obtaining prospecting rights after he had persuaded the government as well as the Colonial Office that "based on his knowledge of the region's geology, petroleum existed in Southern Nigeria and that his company, the Nigeria Bitumen Corporation, could find it."[13] The first exploration activities to discover oil were not started by the Nigerian Bitumen Corporation until 1908 in Araromi/Okitipupa and the British Colonial Petroleum in Okitipupa, in Western Nigeria (about 200 kilometres east of Lagos[14]). However, although exploration continued for about six years, no significant finds were made, and all exploration activities came to a halt in 1914 due to the First World War.[15]

In 1938, roughly twenty years after the end of the first world war, Shell D'Arcy,[16] upon being granted the sole concessionary rights over Nigeria, started new exploration activities. The exploration process

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[https://www.cia.gov/library/publications/the-world-factbook/rankorder/2173rank.html] (Last visited on 22/09/2019).

[6] Energy Information Administration, 'Nigeria: Exports' [http://www.eia.gov/EMEU/cabs/Nigeria/pdf.pdf. (August 2011) page 4. Also Energy Information Administration, 'Top World Tables' [http://www.eia.doe.gov/emeu/cabs/topworldtables1_2.html] (last visited on 12/11/2019).

[7] Energy Information Administration, 'Nigeria' [http://www.eia.gov/EMEU/cabs/Nigeria/pdf.pdf. (August 2011) Page 3.]. [This reference is from the United States Energy Information Administration (EIA) website] (Last visited on 22/09/2019).

[8] The United States Energy Information Administration puts Nigeria's proven gas reserves at 187 trillion cubic feet as at December 2010. Energy Information Administration, 'Nigeria: Natural Gas' (August 2011) Page 6. [http://www.eia.gov/EMEU/cabs/Nigeria/pdf.pdf] (Last visited on 22/09/2019).

[9] *Ibid. Also PwC, 'Assessing the Impact of Gas Flaring on the Nigerian Economy' (2019)* ***[https://www.pwc.com/ng/en/assets/pdf/gas-flaring-impact1.pdf]*** *(Last visited on 27/03/2021).*

[10] J Donovan., 'Nigeria Oil Revenue Rose 46% to $59bn in 2010 on Improved Security' (18 April 2011) [http://royaldutchshellplc.com/2011/04/18/nigeria-oil-revenue-rose-46-to-59bn-in-2010-on-improved-security/] (Last visited on 22/09/2019).

[11] A Quarto, 'Third World Traveller - In a Land of oil and Agony', *Earth Island Institute*, (Summer 2000) [http://www.thirdworldtraveler.com/Africa/Nigeria_Land_Oil_Agony.html] (Last visited on 22/09/2020). Another Source states that oil has generated an estimated $600 billion since the 1960s. Wurthmann, G., 'Ways of Using the African Oil Boom for Sustainable Development' (2006) (African Development Bank) Economic Research Working Paper Series, No. 84, March 2006.

[12] Nigerian National Petroleum Corporation, 'Development of Nigeria's Oil Industry' [http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/DevelopmentoftheIndustry.aspx] (Last visited on 23/09/2019) .

[13] N K Obasi., 'Foreign Participation in the Nigerian Oil and Gas Industry' [http://www.waado.org/Environment/OilExploration/oilcompanies_history_obasi.htm]. (Last viewed on 23/09/2019).

[14] The former capital of Nigeria and the commercial nerve centre of the country.

[15] Nigerian National Petroleum Corporation, 'Development of Nigeria's Oil Industry' [http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/DevelopmentoftheIndustry.aspx] (Last visited on 23/09/2019).

[16] Which subsequently became Shell Petroleum Development Company of Nigeria.

was once again halted in 1941 - a few years after the Second World War broke out. Exploration was resumed by Shell D'Arcy in 1947.

Over the years, exploration activities were expanded to other regions of Nigeria. These yielded no commercial fruit, although Shell D'Arcy had encountered its first oil showing in 1953 in its Akata 1 well.[17] In 1955 Mobil Exploration Nigeria Incorporated[18] started operations in Nigeria,[19] after it had been granted concessionary rights over the whole of northern Nigeria.[20] Several months after Mobil's operations started, an oil well drilled by Shell D'Arcy[21] in January 1956 within the tertiary Agbada formation[22] at Oloibiri located in the Niger Delta region of Nigeria, resulted in the first discovery of oil in commercial quantities in Nigeria. This discovery resulted about two years later in the production of oil from that field in 1958[23] and the first export of oil from Nigeria in 1958.[24]

3. Pollution within the Nigerian Oil Industry

Despite the fact that Nigeria reaps huge financial benefits from its natural resources, the Nigerian Gas Flare Tracker reported that 25.9 billion Standard Cubic Feet of gas, valued at N460.5billion, was flared between January and November 2019.[25] Twenty years ago, it was estimated that about two and a half billion standard cubic feet of gas was flared daily in Nigeria,[26] making this the highest amount of gas flared by any member of the Organisation of Petroleum Exporting Countries (OPEC). Presently, Nigeria ranks amongst the top ten[27] largest gas flaring countries in the world.[28] The problem of gas flaring in

[17] G C Nwaobi, 'Oil Policy in Nigeria: A Critical Assessment (1958-1992)' [http://129.3.20.41/eps/pe/papers/0501/0501001.pdf] Pg.3. (Last visited on 23/09/2019).

[18] According to the Nigerian National Petroleum Corporation, the company is stated as 'Mobil Oil Corporation. Nigerian National Petroleum Corporation, 'History of the Nigerian Petroleum Industry' [http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx] (Last visited on 23/09/2019).

[19] Nigerian National Petroleum Corporation, 'History of the Nigerian Petroleum Industry' [http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx] (Last visited on 23/09/2019).

[20] Nwaobi, *Ibid.*

[21] Which in April 1956 became Shell-BP Development Company of Nigeria Limited.

[22] Nwaobi, *Ibid.*

[23] G Mbendi, 'Extraction of Crude Petroleum in Nigeria – Licensing History' [http://www.mbendi.co.za/indy/oilg/ogus/af/ng/p0005.htm] (last visited on 12/09/2019)

[24] Nigerian National Petroleum Corporation, 'History of the Nigerian Petroleum Industry' [http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx] (Last visited on 23/09/2019).

[25] International Climate Change Development Initiative Africa, '#EndGasFlaringNG: The Unspoken Dangers of Gas Flaring in Nigeria' [https://medium.com/climatewed/endgasflaringng-the-unspoken-dangers-of-gas-flaring-in-nigeria-by-mista-blak-1b0755452f10] (Last visited on 27/03/2021).

[26] B Omiyi., 'Shell Nigeria Corporate Strategy for Ending Gas Flaring', (This Paper was presented at a Seminar on Gas Flaring and Poverty Alleviation in Oslo, Norway, June 18-19, 2001). [Also http://www.climatelaw.org/gas.flaring/report/section4 /doc4.1.pdf+www.climatelaw.org/gas.flaring/report/section4&hl=en&ct=clnk&cd=4] (Last visited on 11/12/09). Other sources state that as at 2004, over 3.5 billion standard cubic feet (scf) of associated gas was produced in Nigeria in 2000, of which more than 70 per cent was flared. Stating further that as "oil production has increased, Nigeria has become the world's biggest gas flarer, both proportionally and absolutely, with around 2 billion scf, perhaps 2.5 billion scf, a day being flared. This is equal to about 25 per cent of the UK's gas consumption." Friends of the Earth, *Gas Flaring in Nigeria* (Media Briefing, October 2004) [http://www.foe.co.uk/resource/media_briefing/gasflaringinnigeria.pdf] (Last visited on 22/09/2019).

[27] PWC, 'Assessing the Impact of Gas Flaring on the Nigerian Economy' [https://www.pwc.com/ng/en/assets/pdf/gas-flaring-impact1.pdf] (Last visited on 27/03/2021).

[28] The country which does the largest gas flaring is Russia. Walker, A., 'Nigeria's Gas Profits 'Up in Smoke'' (BBC News, 13 January 2009) [http://news.bbc.co.uk/1/hi/world/africa/7820384.stm] (last visited on 22/09/2019).

Nigeria started from the inception of oil production in the country. According to Climate Justice Programme and Environmental Rights Action/Friends of the Earth Nigeria, "flaring of gas mixed up with the crude oil began right at the start."[29]

Gas flaring is not the only problem associated with the oil industry in Nigeria, as the extraction and production of crude oil has resulted in the continuous release of oil into the Nigerian environment. There are reports that show that in a 12 year period,[30] there were over one thousand five hundred incidents of oil spills documented in Nigeria.[31] Furthermore, a report made by the Nigerian Federal Ministry of Environment, the Nigeria Conservation Foundation, the World Wildlife Fund[32] UK and International Union for the Conservation of Nature and Natural Resources (IUCN) states that there has been at least a quantity of oil equivalent to between nine and thirteen million barrels (1.5 million tons) released into the Niger-Delta eco-system. This amount of oil released is the equivalent of fifty Exxon Valdez spills (or around one Exxon Valdez spill per year).[33]

The attendant effect of pollution caused by oil spills and non-stop gas flaring is one which not only affects the environment deleteriously,[34] but which has been the chief cause of human rights violations[35] and poverty of the people who live in communities that lie within the oil rich areas of Nigeria. "Oil companies operating in the Delta have not employed best available technology and practices that they use elsewhere in the world – a double standard."[36]

The pollution and its effects which have continued as a result of oil spills and gas flaring have led various aggrieved individuals, groups and communities affected by the pollution to approach the courts in a bid to seek justice and reparation. This work will hereinafter extensively address and analyse the case of *Gbemre v. Shell Petroleum Development Company of Nigeria Limited & Others*[37] to understand the obstacles potential litigants may face in accessing justice and determine if there are lessons that can be learned from this case.

[29]The Climate Justice Programme and Environmental Rights Action/Friends of the Earth Nigeria, 'Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity' (Amsterdam: ERA/Climate Justice Programme, 2005). Particularly the separate 'Section 2' titled "Gas Flaring Started Under British Rule, With Its W V 'Double Standards' which could be found at http://www.climatelaw.org/cases/country/nigeria/cases/case-documents/nigeria/report/section2] (Last visited on 23/09/2019).

[30] i.e. between 1970 and 1982

[31]Ted Studies, 'Ogoni and Oil - Nigeria Petroleum Pollution in Ogoni Region', Case No. 149 [http://www.american.edu/TED/OGONI.HTM] (Last visited on 24/09/2019).

[32] WWF.

[33] Federal Ministry of Environment, 'Niger Delta Natural Resource Damage Assessment and Restoration Project: Phase 1 – Scoping Report', (31 May 2006) Federal Ministry of Environment, Abuja, Nigeria Conservation Foundation, Lagos, WWF UK, CEESP- IUCN Commission on Environmental, Economic, and Social Policy [Can be accessed at http://www.docstoc.com/docs/32388620/IMPACT] (Last visited on 06/10/2019).

[34] Acid rain within the region has been attributed to the flaring of gas, while oil spills have resulted in the destruction of flora and fauna and the resultant ecological imbalance that this destruction has brought. Shelley, T., *Oil: Politics Poverty & the Planet* (Claremont: David Philip, 2005) at Pg. 1.

[35] U.S. Non-Governmental Delegation, 'Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta' (A U.S. Non-Governmental Delegation Trip Report, 6-20 September 1999) Pg. 3. [http://www.essentialaction.org/shell/Final_Report.pdf] (Last visited on 24/09/2019).

[36] Federal Ministry of Environment, 'Niger Delta Natural Resource Damage Assessment and Restoration Project: Phase 1 – Scoping Report', *Ibid.*

[37] Suit No. FHC/CS/B/153/2005 (Unreported)

4. The Historic and Landmark Case of Gbemre v. Shell Petroleum Development Company of Nigeria Limited & Others[38] - A Paradigm Shift?

On the 20th of June 2005, eight individuals filed an action against five oil companies, the NNPC and the Attorney-General of the Federation. The suit – *Ikechukwu Okpara & 7 Others v. Shell Petroleum Development Company of Nigeria Limited & 6 Others*,[39] was instituted in the Benin Judicial Division of the Federal High Court. It was brought by the plaintiffs who not only instituted the action in behalf of themselves, but each represented their respective communities.[40]

The plaintiffs in this case sought to enforce their fundamental human rights and asked the court for four declaratory reliefs that included amongst others, a declaration that gas flaring being carried out by the first to sixth defendants in their communities violated their fundamental human rights to life and dignity of human person. They also applied for one injunctive relief to stop the first to sixth defendants from flaring gas in their communities.

The plaintiffs discontinued the suit and it was withdrawn from the court before a hearing date was set for the court to entertain the matter. Though the reason for withdrawing the suit was not made known, it appears that there may have been issues of jurisdiction which might have been raised by the counsel(s) to the defendants as most of the communities are not in Edo State where the action was instituted and the Nigerian Constitution expressly provides that a person whose fundamental human rights have been contravened in a State may apply to a High Court in the state where the violation occurred for redress/relief.[41]

This case proved to be the precursor of the landmark case which was brought by the seventh defendant – Jonah Gbemre – and filed in the same judicial division. The subsequent case brought by Gbemre was instituted by only one plaintiff i.e. Gbemre on behalf of himself and his community (the Iwherekan community).

In July 2005, Jonah Gbemre, on behalf of both himself and his local community, brought an action in the Federal High Court of Nigeria, in the Benin-City judicial division against Shell Petroleum Development Company of Nigeria Limited (the first defendant), the Nigerian National Petroleum Corporation (the second defendant) and the Attorney-General of the Federation (the third defendant). The action brought by Gbemre was both ambitious and novel as it sought amongst other reliefs, an injunction against the defendants from continuing to flare gas in his community.

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[38] *Supra*. The succeeding account about this case has been pieced together from the records of the proceedings of the court in this suit.

[39] Suit No: FHC/CS/B/126/2005 (Unreported).

[40] The suit was brought by Ikechukwu Opara representing the Rumuekpe community (1st Plaintiff), Oku Peter Afagha representing the Imiringi community (2nd Plaintiff), Asemota Dickson representing the Gbarain community (3rd Plaintiff), Che I. Ibegwura representing the Eremah community (4th Plaintiff), Victor Chris Egbe representing the Akala-Olu community (5th Plaintiff), Odimabo Igotefima representing the Idama community (6th Plaintiff), Jonah Gbemre representing the Iwherekan community (7th Plaintiff) and Goddy Ikpoh representing the Eket community (8th Plaintiff). The action was against Shell Petroleum Development Company of Nigeria Limited, Total/Fina/Elf Limited, Nigerian Agip Oil Company Limited, Chevron/Texaco Nigeria Limited, Mobil Producing Nigeria Unlimited, Nigerian National Petroleum Corporation and the Attorney-General of the Federation (who were the first to the seventh defendants respectively).

[41] Section 46(1) of the Constitution. Section 46(2) provides that a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of Section 46 and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled to.

Before the ruling in the suit brought by Gbemre in 2005, it had been the views of some industry observers and scholars that the only remedies open to individuals and communities who suffer damaging environmental effects as a result of the activities of oil companies was financial compensation and/or restoration.[42]The basis for this view is Section 36 of Schedule 1 to the Petroleum Act 1969 which provides for the payment of fair and adequate compensation.[43] It had been generally assumed that due to the importance the oil industry holds in Nigeria in accounting for amounts in excess of ninety percent of the foreign exchange earnings and over eighty percent of the Gross Domestic Product, aggrieved persons or communities were unlikely to be granted an injunction which would stop an oil company from continuing to carry out its exploration and production activities.[44]

Upon application on the 21st of July 2005, Jonah Gbemre was given permission to bring his case. The first hearing of the case was on the 5th of August 2005 and the court adjourned the matter until the 15th of August 2005 for the parties to be properly served papers.

The suit brought by Gbemre (the plaintiff) sought the following reliefs:

a) A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person inevitably includes the right to clean, poison-free, pollution-free and healthy environment.
b) 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 plaintiff's community is a violation of the applicant's fundamental rights to life (including healthy environment) and dignity of human person.
c) A declaration that the failure of the first and second defendants to carry out an environmental impact assessment in the plaintiff's community concerning the effects of their gas flaring activities, is a violation of the Environmental Impact Assessment Act.
d) A declaration that the provisions of section 3(2) (a) (b) of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations S.1. 43 of 1984 under which continued flaring of gas in Nigeria may be allowed are inconsistent with the plaintiff's rights to life and/or dignity of human person enshrined in the Constitution and are therefore unconstitutional, null and void.
e) An order of perpetual injunction restraining the first and second defendants from further flaring gas in the plaintiff's community.

Unlike most previous actions against oil companies operating in Nigeria, the plaintiff in this case did not seek an award of monetary compensation for the actions of the defendants which had had devastating consequences on his community.

It was the plaintiff's evidence that the first and second defendants[45] have been engaged in massive, relentless and continuous gas flaring in the plaintiff's community resulting in serious pollution to the air, respiratory diseases, and generally endangering and impairing the health of the members of the

[42] Y Omorogbe., *Oil and Gas Law in Nigeria*, (Lagos: Malthouse Press Limited, 2001) p151.
[43] Regulation 21 of the 1969 *Petroleum Regulations* uses the term fair compensation, while Regulation 23 uses the term adequate compensation.
[44] O Adewale., 'Judicial Attitude to Environmental Hazards in the Nigerian Oil Industry', in *The Petroleum Industry and the Nigerian Environment*, Proceedings of the 1985 Seminar, Department of Petroleum Resources (Environmental Planning and Protection Division) at 44.
[45]The second defendant is a joint venture partner with the first defendant in its oil exploration and production activities, although the first defendant is the operator under the joint venture.

community. It was the plaintiff's case that the continued flaring of gas exposed people of the community to an increased risk of premature death, respiratory illnesses, asthma and cancer.

The plaintiff also entered evidence that the flaring polluted their food and water as well as reducing crop production, adversely impacting on food security and causing acid rain which in its turn corrodes the corrugated roofing sheet of the houses in the community. Having been served the court documents, Shell put in an appearance in court[46] on the 15th of August 2005 but asked for an adjournment in order to study the papers and make adequate response. The application was granted and the matter was adjourned by the court to the 6th of September 2005. On the adjourned date, the court did not sit, leading to a further adjournment to the 16th of September 2005. From the 16th of September 2005, counsel for the first and second defendants (Shell and the NNPC) notified the court that they intended to bring a preliminary objection challenging its jurisdiction to hear the matter and said that they wanted their objection to be determined before the court heard the plaintiff's application.

Sometimes in Nigerian litigation, preliminary objections and interlocutory applications might be used by parties as a form of delaying tactics in which application after (sometimes frivolous) application is brought in the course of a substantive suit and this has the effect of delaying and extending the hearing and in effect the determination of the substantive matter. It is in no way being suggested here that the counsel for the first and second defendants brought their application to challenge the court's jurisdiction in a bid to delay proceedings.

The judge however, mindful of the effects interlocutory applications could have on the suit, stated that he intended to give only one ruling covering all the issues raised by the parties, thus, the first and second defendants' preliminary objection would not be heard first but would be heard as part of their reply to the plaintiff's original application to enforce his fundamental human rights and seek both declaratory and injunctive reliefs. Counsel for the plaintiff was ordered to make his arguments and this was done. Upon resting, the Counsel for the first and second defendants started his reply but applied to the court for an adjournment before he was finished. The third defendant was neither represented nor did he enter an appearance in court. The application for adjournment made by the defence counsel was granted by the court.

On the 14th of October 2005, when the case came up for hearing, the first and second defendants applied to the court for a stay of proceedings on the grounds that they were appealing the decision of the court not to hear and decide their preliminary objection first. The court did not grant a stay on the proceedings, but the case was adjourned to the 24th of September 2005 to allow the first and second defendants continue their reply which had been started on the 16th of September 2005. On the 24th of October 2005, the first and second defendants instead of continuing with their reply to the plaintiff's application brought fresh lengthy arguments for a stay of proceedings/ indefinite adjournment while their appeal was heard at the Court of Appeal. The judge stated that the defendants' argument was the longest argument he had ever heard on an adjournment application and gave a ruling refusing the application for an indefinite adjournment/ stay of proceedings. The court ordered the first and second defendants to finish their reply to the plaintiff's case.

Upon seeing that their application which had been brought was unsuccessful, the learned Senior Advocate of Nigeria T. J. Okpoko, who was the counsel on the record for both the first and second

[46] The counsel which was retained by the first defendant (Shell) also represented the second defendant (NNPC).

defendants made an oral application to the court to resign from the case. This had the guaranteed effect of securing an adjournment albeit not an indefinite one, as had been sought by the defendants. On the next adjourned date, the same counsel who had orally applied to resign as counsel to the first and second defendants put in an appearance in court and informed the court that he was remaining and continuing as the counsel to the first and second defendants. According to him, his clients wanted him to continue. Furthermore, he pointed out to the court that he did not formally file his resignation in writing as is required by the Rules of Court. Instead of continuing his reply, the defendants' counsel informed the court that because the first and second defendants were concerned that they would not be given a fair hearing by the present judge, they wanted the case transferred to a different judge and were thereby filing an application for an injunction to stop the judge hearing the case. This application was turned down by the court and the defendants' counsel was ordered to continue his reply to the plaintiff's application which he started on the 16th of September 2005. Instead of continuing, the counsel for the first and second defendants requested for a further adjournment saying that he was fatigued. This proved too much for the plaintiff side and the counsel to the plaintiff vehemently objected to the adjournment and any further delay to the case. The judge ruled that since the first and second defendants were unwilling to reply to the plaintiff's case, the court was not going to grant any further adjournment or give the defendants any more time to make a reply. Since the counsel for the first and second defendants refused to continue his reply, the court declared the case closed and ordered that the case stood adjourned to the 14th of November 2005 for judgment.

On the 14th day of November 2005, the Honourable Justice C.V. Nwokorie of the Federal High Court gave his judgment on the suit. His judgment encompassed both the substantive suit which was brought by the plaintiff/applicant (on behalf of himself and as representative of the Iwherekan Community in Delta State, Nigeria) as well as the preliminary objection that was entered by the first and second defendants/respondents.

In dismissing the objection of the first and second defendants as to the court's jurisdiction over the lawsuit, the judge ruled that the Federal High Court has the inherent jurisdiction to grant leave to the plaintiff to apply for the enforcement of his fundamental right to life and dignity of the human person as guaranteed by Sections 33 and 34 of the Constitution of the Federal Republic of Nigeria 1999.

As sought by the plaintiff, the court declared 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,[47] inevitably includes the right to a clean poison free, pollution free and healthy environment.

It was the declaration of the court that the actions of the 1st and 2nd defendant in continuing to flare gas in the plaintiff's community, in the course of their oil exploration and production activities, is a violation of the plaintiff's fundamental human right to life. This includes the right to a healthy environment and dignity of the human person.[48] The court further declared that the failure of the 1st and 2nd defendants to carry out environmental impact assessments in the plaintiff's community concerning the effects of their gas flaring activities is a violation of Section 2(2) of the Environmental Impact Assessment Act[49] (which

[47] Chapter A9 Volume1 Laws of the Federation of Nigeria 2004.
[48] As guaranteed under Sections 33(1) and 34(1) of the Constitution and reinforced by Articles 4, 16 and 24 of the African Charter on Human Procedure Rules (Ratification and Enforcement) Act.
[49] Chapter E12 Volume 6 Laws of the Federation of Nigeria 2004.

states that where the extent, nature or location of a proposed project or activity is such that is likely to significantly affect the environment, its environmental impact assessment shall be undertaken in accordance with the provisions of the Act). The court stated that this contributed to the violation of the plaintiff's fundamental human rights to life and dignity of human person.[50]

Justice Nwokorie also made the declaration that the provisions of Section 3(2)(a) and (b) of the Associated Gas Re-injection Act[51] as well as the provisions of Section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations,[52] under which the continued flaring of gas may be allowed in Nigeria, are inconsistent with Sections 33(1) and 34(1) of the Constitution and Article 4, 16 and 24 of the African Charter on Human and Peoples Right (Ratification and Enforcement) Act which guarantee the plaintiff's right to life and dignity of human person.

Section 1(3) of the Constitution provides that if any Law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void. As a result of finding Section 3(2)(a) and (b) of the Associated Gas Re-injection Act as well as Section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations inconsistent with the Constitution, the court declared both provisions null and void.

In addition to the making the declarations, the court granted a restraining order against the 1st and 2nd Defendants (including their servants and workers) from further flaring gas in the plaintiff's community. The court also ordered the Attorney-General of the Federation to immediately set into motion necessary processes for the enactment of a Bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Regulation Act and the Regulations made thereunder to quickly bring them in line with the provisions of Chapter 4 of the Constitution which guarantees fundamental human rights.[53]

As no reliefs as to damages or compensation were sought by the plaintiff, the court made no award of damages or any compensation although it had the power to grant ancillary reliefs as it deemed fit.

The decision of the court was ground-breaking on different levels. It was the first time ever that a Nigerian court had applied and extended the guaranteed fundamental human rights enshrined in the Nigerian constitution to an environmental case. It was also the first time that a court had held and declared that the gas flaring actions of oil companies amounted to a crime. In addition to the foregoing, no court had ever granted a restraining order on an oil company with regards to the continuation of exploration and production acts resulting in pollution nor ordered that pollution or flaring by an oil company in any community must stop.

This decision was applauded by industry observers and environmental activists as brave and historical. Sceptics however cautiously referred to it as ambitious and questioned the practicality of such a ruling bearing in mind how important the oil industry is to the country.

[50] Pages 2 and 3 of the Judgment.
[51] Chapter A25 Volume 1 Laws of the Federation of Nigeria 2004.
[52] Section 1. 43 of 1984.
[53] Page 4 of the Judgement.

Shell ignored the judgment of the court, as despite the judgment of the 14th of November, it did not stop flaring gas in the Iwherekan Community leading to contempt of court proceedings being filed on the 16th of December against Shell and the NNPC for disobeying the order of the Federal High Court.

On the 10th of April 2006, the Federal High Court granted a conditional stay of execution of its previous order regarding the immediate stoppage of flaring in the plaintiff's community. The conditions the court attached to the stay were as follows -

(i) Shell and NNPC were allowed a period of one year from the 10th of April 2006 to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of the Federal High Court.

(ii) The Managing Director of Shell Nigeria, the Group Managing Director of the NNPC, the Nigerian Petroleum Minister and the Company Secretary of NNPC were ordered to submit a detailed phase-by-phase technical scheme of arrangement, scheduled in such a way as to achieve a total non-flaring scenario in all their on-shore flow stations by the 30th of April 2007.

(iii) The Managing Director of Shell Nigeria, the Group Managing Director of the NNPC, the Nigerian Petroleum Minister and the Company Secretary of NNPC were ordered to appear before the judge to present the same in open court on the 31st of May 2006.

The matter thus stood adjourned to the 31st of May 2006. It is interesting to note that in delivering the ruling on granting a conditional stay of execution, the court on the 10th of April 2006 widened the scope of its ruling from the case which had previously been brought by the plaintiff over flaring activities in the Iwherekan community. The stay of execution order specifically related to the end of flaring in Nigeria as a whole (not just the plaintiff's community). This can be seen from the first condition and the mention in the second condition of all the (first and second defendants') onshore flow stations.

Dissatisfied with this ruling, the first and second defendants made an appeal (to the Nigerian Court of Appeal) against the one year stay of execution and the conditions attached therewith. On the 23rd of May, the Court of Appeal deliberated over the appeal brought by the first and second defendants. The justices of the Court of Appeal saw it necessary to give an order directing that the Court, which had granted the stay of execution, should not sit on the 31st of May 2006. This had the effect of erasing the third condition that had been imposed by the lower court for the personal appearances of the officials of the first and second defendants as well as the Petroleum Minister.

The Court of Appeal in Benin City adjourned the suit to the 26th of September 2006 to hear the jurisdiction appeal of the first and second defendants. On the appointed date, the plaintiff and his counsel turned up at the appellate court only to discover that the matter was not listed on the court's list as it had been surreptitiously adjourned by court staff to 10th October 2006 with neither the knowledge nor consent of the justices of the court and without the plaintiff or his counsel being put on notice of the new adjournment.

The presiding judge, Justice Aderemi after confirming from the courts records that indeed the matter had been adjourned to the 26th of September 2006 and not the 10th of October 2006 apologized to the parties and said that the court would investigate the circumstances in which the matter was illegally

adjourned, promising to deal with any court official found to be involved in the fraudulent adjournment.[54]

As the Court of Appeal had not overturned the ruling of the Federal High Court, counsel for the plaintiff attended the Federal High Court on the 30th of April 2007, which was the deadline date stipulated by the court as the second condition for the stay of execution of its order of the 14th of November 2005. The defendants were supposed to achieve a total non-flaring scenario in all their onshore flow stations by this date. At the Federal High Court, counsel for the plaintiff discovered that the first and second defendants had not complied in any way with the ruling of the court. They had failed to submit to the court a detailed scheme to stop the flaring of gas. It was however a greater shock to discover that the judge who had presided over the suit at the Federal High Court[55] had effectively been removed from the case after he was transferred to another Judicial Division of the Federal High Court in the northern part of Nigeria.[56] Neither the defendants nor their counsel showed up at the court and for unfathomable reasons, the court file was nowhere to be found.

Thus, a final nail was put in the coffin of this case. No one is sure about what exactly proved the catalyst for the unexpected turn of events. It cannot however be ruled out that the government thought it wise to transfer the judge because of the upheaval he had caused with his landmark decision. A transfer was an effective way of stubbing out the smouldering remains of a case which had been keenly watched by international observers and which appeared to have caused the Nigerian government and oil industry some embarrassment.

One clue may be to revisit the reaction of the government via the Petroleum ministry after the original judgment was delivered by Justice Nwokorie. Mr. Emmanuel Agbegir who was a spokesman for the Nigerian Minister for Petroleum said about the effect of the court's order –

"Certain situations are just impossible.[57] To immediately stop flaring would mean a complete shut down of oil production and I don't think that would be in Nigeria's interest."[58]

It might be argued that the removal of a judge does not necessarily signify the end of a suit as the case should normally be transferred to another judge. The problem however is that another judge may not be predisposed to take on the government in the bold manner that Justice Nwokorie did or may easy cower and bow to the pressure which the mighty Shell and NNPC may wield on the court with numerous interlocutory applications, requests for adjournments and other delaying mechanisms. Moreover, a different judge may take a different approach to this type of suit and this can clearly be seen from another case[59] which was brought by members of communities which are on the receiving end of the deleterious effects of flaring within the Nigerian oil industry.

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[54] As at the time of writing this, there has been no new development on the case in the Court of Appeal, nor any findings as to the fraudulent amendment made by the court.
[55] Justice C V Nwokorie.
[56] Katsina State.
[57] Emphasis supplied.
[58] Petroleum Africa, 'Industry Says Impossible to Comply with Court Ruling' (17 November 2005), [http://www.petroleumafrica.com/en/newsarticle.php?NewsID=818&PHPSESSID=b13487e84871c4bd149bc00f34894e63]. (Last visited on 24/09/2019); Also, Ahemba, T., *Nigeria Can't Stop Flaring Right Now, Industry Says*, (16 November 2005) Planet Ark World Environmental News, [http://www.planetark.org/dailynewsstory.cfm/newsid/33493/story.htm] (last visited on 24/09/2019).
[59] *Ikechukwu Okpara & 3 Others v. Shell Petroleum Development Company of Nigeria Limited & 5 Others* [Infra].

It is trite that laws which cannot be enforced are bad laws and should not be promulgated. It is also well acknowledged that judges are supposed to refrain from making orders where it is clear that such orders are incapable of being obeyed or enforced. The practicality of such orders has a bearing on the way the judiciary is perceived and ultimately it has a bearing on the efficacy of the judiciary in a society. Some people may conclude that the judgment delivered by Nwokorie, J. on the 14th of November was a bad judgment as it was incapable of being enforced[60] and thereby made a mockery of the entire judicial process.

Another argument which might be raised against the Gbemre judgment was that it was a default judgment of sorts since the defendants did not put forward their arguments in defence of their case. This however would not be a valid argument as the law states that everyone should be notified of the case against them and given a fair chance to present his case and defend himself. Where a defendant has been given ample opportunity as was done in this suit to present his case and he chooses not to do so because the court refused to adopt his approach in the matter, the court can legally reserve and deliver a valid judgment which may or may not be upheld in the appellate court should the defendant choose to appeal the judgment. Litigants should not be encouraged to trifle with the court or hold the court to ransom in a suit. Attitudes by any party to a suit which is calculated to intimidate the court and/or undermine the authority of the court should be strongly discouraged and a clear message sent out to others that the courts will not condone such behaviour irrespective of how powerful or rich a litigant may be.

5. Aftermath of the Gbemre Case

In the aftermath of the Gbemre case, there has been another ruling delivered by the Federal High Court, this time in the Port Harcourt Judicial Division. This ruling was given in the case of *Ikechukwu Okpara & 3 Others v. Shell Petroleum Development Company of Nigeria Limited & 5 Others*.[61] The suit had been instituted by four[62] of the plaintiffs in the original suit which had been filed in the Benin Judicial Division before Gbemre instituted a new suit as a single plaintiff. This suit had the same defendants as in the original suit except Mobil Producing Nigeria Unlimited.

Like the original case and the Gbemre case, the plaintiffs brought the suit for themselves and as representatives of their respective communities. The thrust of this case was similar to that of Gbemre. The reliefs sought were virtually identical, as the plaintiffs asked the court to grant a perpetual injunction against the defendants from flaring gas in their communities. They similarly asked for declarations that the flaring of gas in their communities violated their fundamental human rights to life and dignity of human person enshrined in the Constitution and reinforced by the African Charter on Human Procedure Rules (Ratification and Enforcement) Act and also prayed the court for a declaratory order that the provisions of Section 3(2)(a) and (b) of the Associated Gas Re-injection Act[63] as well as the provisions of Section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations[64] under which

[60]Reference is once again made to the statement of Emmanuel Agbegir which he made as spokesperson for the Minister of Petroleum where he said certain situations are impossible while referring to the judgement in the Gbemre case.
[61]Suit No. FHC/PH/CS/518/2005 (Unreported).
[62]Ikechukwu Opara representing the Rumuekpe community (1st Plaintiff), Che I. Ibegwura representing the Eremah community (2nd Plaintiff), Victor Chris Egbe representing the Akala-Olu community (3rd Plaintiff) and Odimabo Igotefima representing the Idama community (4th Plaintiff).
[63]Chapter A25 Volume 1 Laws of the Federation of Nigeria 2004.
[64] Section 1. 43 of 1984.

oil companies were allowed to continue to flare gas, were null and void due to inconsistency with the Constitution.

Here, as in the Gbemre case, the defendants filed notices of preliminary objections. In the notices, the jurisdiction of the court was challenged by the first, fifth and sixth defendants. This is where the similarity between both cases end.

All the defendants in this particular suit were represented by counsel.[65] The main grounds of the second defendant's notice of preliminary objection were that the plaintiff's application was bad for a misjoinder of causes of action and also that the Constitution and the African Charter on Human Procedure Rules (Ratification and Enforcement) Act do not create a communal right nor permit the joinder of several Applicants in an application for the enforcement of a fundamental right. These grounds were echoed by the third and fourth defendants who both stated that the fundamental rights were conferred on citizens in their individual and personal capacity and the Fundamental Human Rights Enforcement Procedure Rules under which the Plaintiff brought his suit cannot be used in a representative action.

In this case, the judge adopted a different approach to that followed by Nwokorie, J. in the Gbemre case. He did not ask all parties to the suit to file and make their respective arguments so that he could deliver a ruling on all issues raised. He chose to allow the defendants to raise their objections and argue their cases before he entertained the plaintiff's fundamental right application as if the objections were upheld, there would be no reason to entertain and address the plaintiff's suit. The plaintiff was given the right to reply to the objections raised by all defendants.

On the 29th of September 2006, the court delivered its ruling on the preliminary objections raised by the defendants and held that the Constitution and the Fundamental Right (Enforcement Procedure) Rules do not bar nor forbid an applicant from seeking declaratory reliefs.[66] However, regarding two of the declaratory orders sought by the plaintiffs wherein they sought a declaration that –

> (a)the failure of the first to fourth defendants to carry out an environmental impact assessment in the plaintiffs' communities is a violation of Section 2(2) of the Environmental Impact Assessment Act and contributed to the violation of the plaintiffs' right to life and dignity of human person; and
>
> (b) Section 3(2)(a) and (b) of the Associated Gas Re-injection Act and Section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations under which the continued flaring of gas in Nigeria may be allowed are inconsistent with the plaintiffs' right to life and/or dignity of human person enshrined in Sections 33(1) and 34(1) of the Constitution and the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and are null and void due to this inconsistency;

The court upheld the objections of the first, third, fourth and sixth defendants and held that Section 2(2) of the Environmental Impact Assessment Act and Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act are not rights covered by the fundamental rights provisions of the Constitution. It was

[65] Unlike in the Gbemre case where the Attorney-General of the Federation did not put in an appearance and was unrepresented.
[66] Page 10 of the Judgment.

held that these two reliefs sought cover the interpretation of the Environmental Impact Assessment Act and the Associated Gas Re-Injection Act and could not be initiated by way of the Fundamental Right (Enforcement Procedure) Rules.

The court further held that rights created under the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act do not fall under "fundamental rights" as envisaged under Section 46(1) of the Constitution and cannot be initiated through the Fundamental Right (Enforcement Procedure) Rules.[67]

In addition to the foregoing, the court also stated that Section 34(1) of the Constitution expressly used the term "dignity of **his person**"[68], laying emphasis on the word "his" and concluded that it was not the intention of the draughtsman to include a community in a singular term.

The court refused to be bound by the case of *Aliyu v. Judicial Service Commission, Kaduna State & Another*,[69] which the plaintiffs used in support of their argument,[70] stating that that case was distinguishable as the provisions of the law which the Supreme Court considered therein were different. The judge also refused to follow the decision of the court in the case of *Gbemre v. Shell Petroleum Development Company of Nigeria Limited & 2 Others*[71] stating expressly that since the decision was by a court of co-ordinate jurisdiction, it was not binding but could be of persuasive authority. In this instance, the court held that it had not been bound by the decision in the Gbemre case.[72] It was the court's view that not everyone in the community would have suffered the same ill or had a common grievance or complaint. The court referred to the plaintiffs' verifying affidavit wherein it was stated that some natives of the communities had died and countless others were suffering various sicknesses occasioned by the effects of gas flaring and held that the procedure was incompetent on the ground of non-joinder of parties. In support of its stance, the court relied on the case of the *Registered Trustee of Faith Tabernacle Congregation Church Nigeria & Others v. Uche Ikwechegh*,[73] where the Court of Appeal held that "If an individual feels that his fundamental right or human right has been violated, he should take action personally for the alleged infraction, as rights of one differs in content and degree from the complaints of the other. it is a wrong joinder of action and incompetent for different individuals to join in one action to enforce different causes of action. In the instant case, the people supposedly represented by the respondent have different causes of action. The respondent cannot validly sue on their behalf in a representative capacity."

[67] Pages 12 and 13 of the Judgment
[68] Emphasis supplied.
[69] [1998] 14NWLR Pt. 584 (1). This case can also be found at [1998] 12 SC at Pg. 20.
[70] In the *Aliyu* case, the Supreme Court had to deal with the issue of whether the term "person" used in the *Public Officers Protection Act (CAP 379, Laws of the Federation of Nigeria 1990***)** was restricted to natural persons or if it extended to juristic personalities and corporations. Relying on the provisions of *Section 3 of the Interpretation Law (CAP 52, Laws of Northern Nigeria 1963)* and *Section 18(1) of the Interpretation Act (CAP 192, Laws of the Federation of Nigeria 1990),* the Supreme Court (per Iguh, J.S.C.) stated that the term "person" extends to juristic or legal persons and corporations. Thus, the plaintiffs in the *Ikechukwu Okpara* case argued that the use of the phrase "dignity of **his person**" in Section 34(1) of the Constitution also applies to a community. However, and the court did not agree with the plaintiffs' submission in this regard.
[71] *Supra.*
[72] Page 20 of the Judgment.
[73] [2000] 13NWLR Pt.683 (1).

The court also relied on the case of *Okechukwu v. Etukokwu*,[74] where the Court of Appeal held that, "A family as a unit cannot commence an action for infringement or contravention of Fundamental Rights under the provisions of Chapter IV of the Constitution of Nigeria 1979 or under Fundamental Right (Enforcement Procedure) Rules 1979 because the expression every individual, every person, every citizen and a citizen show clearly that a family unit is not anticipated or contemplated under the provisions of Chapter IV of the Constitution of Nigeria 1979."[75]

The court stated that the Rules allow parties who have initially filed separate applications to consolidate their applications but held that Sections 33 and 34 of the Constitution create personal rights and these rights "cannot enure to a community but to each person in the community who feels his right has been infringed.…"[76]

The court upheld the preliminary objections of the defendants and struck out the suit. It is pertinent to note that the court did not make any pronouncement regarding the last relief sought by the plaintiff which prayed for an order of perpetual injunction restraining the defendants from further flaring gas in the plaintiffs' communities. This may be explained on the ground that the court did not look into the merit of the entire application of the plaintiff as a whole and did not dismiss the plaintiffs' suit. The suit was struck out because it was incompetent due to the plaintiffs not complying with conditions precedent to making an application to enforce fundamental human rights and because of other procedural defects.

Since the decision in the Gbemre case, there have been new developments that should indicate a seriousness on the part of the Nigerian government to stop gas flaring. Nigeria signed and ratified the Paris Agreement on climate change which signifies its intention to reduce emissions. Furthermore, Nigeria signed the Global Gas Flaring Partnership's Principles which aims at ending global flaring by 2030.[77]

Domestically, new regulations which deal with gas flaring have been signed into law. On the 5th of July 2018, the Nigerian President who is also the Minister of Petroleum Resources signed the Flare Gas (Prevention of Waste and Pollution) Regulations 2018 into law. These 2018 Regulations were brought into force in a bid to "minimize the environmental and social impact caused by flaring natural gas, protect the environment, prevent waste of natural resources and create social and economic benefits from gas flare capture."[78] The Regulations are meant to combat greenhouse gas emissions through aiming to reduce the flaring and venting of natural gas in Nigeria.[79] However, there are those who are of the opinion that the major objective of the 2018 Regulations is the "the commercialization of

[74] [1998] 8NWLR Pt. 562 (513).
[75] Please note that Chapter IV of the 1979 Constitution is similar to Chapter IV of the 1999 Constitution which encapsulates the fundamental rights.
[76] Page 22 of the Judgment.
[77] Olusola Joshua Olujobi, 'Analysis of the Legal Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector and the Need for Overhauling' 2020 *Social Sciences* 9, No. 8, 132 <https://doi.org/10.3390/socsci9080132> Last visited on 01/08/2021.
[78] W Obayomi, 'Highlights of the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018' (KPMG Insights, 18 October 2018) <https://home.kpmg/ng/en/home/insights/2018/10/Highlights-of-the-Flare-Gas-Prevention-of-Waste-and-Pollution-Regulations-2018.html> Last visited on 01/08/2021.
[79] Olujobi, *ibid*.

associated gas".[80] It came as little surprise that the deadline to end the national flaring of gas by 2020[81] which the government had committed to was not met, as flaring has continued into 2021.

The problem with achieving set targets and goals have always been as a result of inadequate enforcement of laws and policies and weak compliance by those who are supposed to be regulated. The case of *Federal Inland Revenue Service v. Mobil Producing Nigeria Unlimited*,[82] shows in a glaring manner the magnitude of the problem with the regulation of the oil industry in Nigeria. In this case, it was brought to light that Mobil had been flaring gas without the requisite ministerial dispensation which is required under the law. In addition to this, the company had been treating the fines payable for the flaring of gas as expenses which were tax deductible and thus really only paying meagre fines that served as little to no deterrent. Commendable was the decision of the Federal High Court in this case to go against the decision of the Tax Appeal tribunal and hold that such fines cannot be tax deductible.

On the international arena, the Supreme Court of the Netherlands in 2019 in the case of *State of the Netherlands v. Urgenda Foundation*,[83] affirmed that the Dutch government was responsible for management of carbon dioxide emissions for the country and was bound to protect human rights. Furthermore, on the 26th of May 2021, the District Court of the Hague in *Milieudefensie et al v. Royal Dutch Shell*,[84] gave a ruling that Royal Dutch Shell is obliged to reduce the carbon dioxide emissions of the Shell Group (i.e. its global operations/activities[85]) by 45% by the end of 2030 when compared to 2019. The ruling against Shell is a landmark ruling because: (i) this is the first major lawsuit to hold a corporation to the obligations and goals of the Paris Agreement; (ii) it is the first major climate change litigation ruling against a corporation; (iii) the Paris Agreement can be used to impose obligations on private companies and not just sovereign States. It has been stated that the ruling in *Milieudefensie et al v. Royal Dutch Shell* "…is an unprecedented ruling that will have very significant implications for companies operating in the energy industry. It is the first time that the Paris Agreement has been found to impose obligations on private companies and the first time a Court has ruled against a company specifically requiring it to reduce its Co2 emissions. **This certainly underlines a shift in judicial thinking in relation to such environmental and climate litigation**…"[86]

6. Conclusion

It is clear that though Nigeria might not have the most sophisticated or encompassing laws relating to environmental protection, there is the troubling issue of the enforcement of laid town laws, regulations and policies by the government on one hand and the compliance with such laws, regulations and policies by industry actors on the other. Furthermore, the lack of compliance by the government and parties with the decisions, rulings and judgment of courts of competent jurisdiction in Nigeria often shows a dismaying disregard of the judiciary which is often reduced to the role of a toothless bulldog which has plenty bark but little or zero bite. These issues show that there is a lack of political will on the part of

[80] T C Eze, 'Updating the Legal Framework for the Elimination of Gas Flaring in Nigeria' (*African Journal of Criminal Law and Jurisprudence, Vol. 4, 2019*) 183 at 188. <https://journals.ezenwaohaetorc.org/index.php/AFJCLJ/issue/download/64/91> Last visited on 01/08/2021.
[81] Olujobi, *ibid*. Also, Eze, *ibid* at 191.
[82] (Unreported) FHC/L/3A/2017.
[83] ECLI:NL:HR:2019:2006.
[84] ECLI:NL:RBDHA:2021:5337.
[85] This will include the operations of Shell's subsidiaries and consumers in places like Nigeria.
[86] Jonathan Moore, and Grainne O'Callaghan, '*Milieudefensie et al. v Royal Dutch Shell Plc* - The Paris Climate Agreement in Full Force' (02 June 2021, Field Fisher Ireland) < https://www.fieldfisher.com/en-ie/locations/ireland/ireland-blog/milieudefensie_et_al_v_royal_dutch_shell_plc> Last visited on 02/08/2021. Emphasis supplied.

the government to end routine flaring of gas and correspondingly put environmental protection as a priority on its agenda.

The decision in *Gbemre v. Shell*, which delivered an exciting victory for environmental protection, though lauded over fifteen years ago, seems to have been a Pyrrhic victory when viewed over the years. This is because Nigeria continues to routinely flare gas despite it being outlawed by legislation since 1984[87] and despite the subsisting decision in the case of *Gbemre v. Shell*,[88] which said decision has still not been overturned on appeal by either the Court of Appeal or the Supreme Court. The decision in the Gbemre case therefore remains good law and it is hoped that other courts will bravely follow in footsteps of the decision of this case and put environmental protection and the protection of the fundamental rights of people being affected by the actions of the oil industry before financial gain. The Gbemre case shows the herculean task some litigants have to surmount in order to get environmental and fundamental rights justice. It is further hoped that the Nigerian government stops its bluster and actively/expeditiously works towards achieving a zero routine gas flaring[89] target, as this will ensure that crucial funds needed to sustain the economy does not continually go up in smoke and additionally will reduce environmental pollution.

[87] The Associated Gas Re-Injection Act, section 3(1) (Chapter A25 Volume 1 Laws of the Federation of Nigeria 2004).
[88] *Supra.*
[89] Taking an example from countries like Norway.