

bradscholars

Climate Litigation in South Africa and Nigeria: Legal Opportunities and Gender Perspectives

Item Type	Book chapter
Authors	Obani, Pedi
Citation	Obani P (2024) Climate Litigation in South Africa and Nigeria: Legal Opportunities and Gender Perspectives. In: Boucher K, Etemire U, Field T-L et al (Eds) Climate Litigation and Justice in Africa. United Kingdom: Bristol University Press. Pp 291-312.
DOI	https://doi.org/10.51952/9781529228977.ch013
Rights	(c) 2024 Bristol University Press. This is an Open Access title distributed under the Creative Commons CC-BY-NC-ND license (https://creativecommons.org/licenses/by-nc-nd/4.0/)
Download date	2026-03-12 11:35:30
Link to Item	http://hdl.handle.net/10454/19644

Climate Litigation in South Africa and Nigeria: Legal Opportunities and Gender Perspectives

Pedi Obani

Introduction

Despite a lack of consensus over the meaning and types of climate litigation, the number of climate cases worldwide is on the rise. Across domestic courts in Africa, climate cases have been decided in South Africa, Nigeria and Kenya, with some cases pending before the domestic courts in South Africa and Uganda. These cases mainly involve a direct reference to climate change in the framing of parties' claims. It is, however, possible that a broad consideration of domestic cases involving the environmental impact of hydrocarbon exploration and production would expand the volume of climate change cases across the continent. For instance, although the plethora of oil spillage cases in Niger Delta communities in Nigeria have not been historically argued as climate change claims before the courts, the climate change implications of the oil spill incidents are widely considered in the scholarly literature and public discourse.¹ An in-depth consideration of climate litigation in Africa is imperative, given the high exposure to climate change-related developmental risks of most economies in the continent.² Political economy issues associated with low carbon transitions could disincentivise carbon-dependent economies, such as Nigeria and South Africa.³ Conversely, climate litigation could impose significant liabilities on governments whose (investments) plans for fossil fuel production are inconsistent with the global greenhouse gas emissions targets.

This chapter explores climate change cases from South Africa and Nigeria through a legal opportunity structures (LOS) lens. Understanding the effects of LOS is critical for sustaining

¹ Cases involving the prosecution of suspects of illegal bunkering activities could also be relevant for this purpose. The rationale for this argument is in line with the submission of Morgenthau and Reisch that: "Cases that focus on stopping the upstream drivers of climate change, such as oil, gas, and coal extraction and deforestation, can slow global warming *at least as effectively* as conventional climate cases that aim at securing policy commitments to reduce downstream emissions." See Tamara Morgenthau and Nikki Reisch, 'Litigating the Frontlines: Why African Community Rights Cases Are Climate Change Cases' (2020) 25(1) UCLA J. Int'l L. & For. Aff. 85, 86; Kim Bouwer, 'Substantial Justice?: Transnational Torts as Climate Litigation' (2021) 15 Carbon & Climate Law Review 188.

² UNU-INRA, *Africa's Development in the Age of Stranded Assets* (UNU-INRA 2019)

³ Ipek Gençsü, Ginette Walls, Angela Picciariello and Ibifuro Joy Alasia, 'Nigeria's Energy Transition: Reforming Fossil Fuel Subsidies and other Financing Opportunities' (2022) ODI Working Paper <www.odi.org/en/publications/nigerias-energy-transition-reforming-fossil-fuel-subsidies-and-other-financing-opportunities> accessed 2 January 2022; Jesse Burton, Tara Caetano, and Bryce McCall, *Coal Transition in South Africa - Understanding the Implications of a 2°C-compatible Coal Phase-out for South Africa* (IDDRI & Climate Strategies 2018) <<https://coaltransitions.org/reports/>> accessed 2 January 2022; Kathryn Hochstetler, *Political Economies of Energy Transition: Wind and Solar Power in Brazil and South Africa* (Cambridge University Press 2020)

the climate litigation momentum across countries. Further, the academic literature on climate litigation hardly covers gender issues, even though women's vulnerability to adverse climate change impacts and limited access to resources for adaptation are widely acknowledged. The receptivity of the existing LOS to women's unique experiences affects their ability to engage in climate litigation and prospects for accessing climate justice through the courts. The paper, therefore, undertakes a gender-sensitive analysis of the relevant literature and decisions of courts from South Africa and Nigeria to conceptualise the LOS for climate litigation.

The chapter is in five sections following this introduction. Section 2 identifies the main features of LOS based on the literature: structural and contingent dimensions. Section 3 analyses the LOS for climate litigation in South Africa and Nigeria from a feminist perspective to demonstrate the anomalies women face. Following the analysis is a reflection on the broader implications for LOS (Section 4) and the conclusion (Section 5).

Conceptualising Legal Opportunity Structures (LOS)

Hilson outlines a range of factors impacting a movement's choice of legal or alternative strategies for advancing any cause.⁴ The factors could be intrinsic, external or a combination of both. Intrinsic factors influence the preferable advocacy strategy.⁵ One intrinsic factor is the movement's access to resources such as finances, knowledge, and legitimacy. A second intrinsic factor is the movement's identity; this could be either instrumental or counter/sub-cultural. An instrumental identity is likely to favour lobbying, litigation or other conventional strategies, while counter-cultural and sub-cultural identities are more likely to select direct action. Other intrinsic factors are ideology and values. Anarchists are less likely to utilise lobbying, litigation and similar conventional strategies than movements that respect formal legal institutions.

On the other hand, the accessibility of strategies or platforms (political opportunity) is an essential external factor that may influence the movement's choice.⁶ However, access does not guarantee receptivity, and using (favourable) LOS does not guarantee a successful outcome. The progression from political to legal opportunities is not necessarily linear, and a movement may adopt protest or other alternative strategies following an unfavourable court

⁴ Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 J Eur Public Policy 238

⁵ Ibid

⁶ Ibid; Emilio Lehoucq, 'Legal Threats and the Emergence of Legal Mobilization: Conservative Mobilization in Colombia' (2021) 46 Law Soc Inq 299

decision.⁷ Even “unsuccessful” climate change cases could nonetheless advance narrative building and future success in claims for climate action.⁸

Further, within multilevel governance systems, opportunities (legal or political) could exist at various levels, and a lack of opportunities at one level (for instance, the national) may be compensated by reference to other governance levels. For example, following the Paris Agreement (international level), there has been an increase in the momentum of state action, and legal and political mobilisation at the domestic level. This highlights the role of national institutions in implementing global climate change governance mechanisms.⁹ LOS portrays how the individual’s ability and decision to institute legal action is often a function of the constraints and incentives presented by formal institutions.¹⁰ Within the context of social movement legal mobilization, De Fazio states that: “LOS refers to the features of the legal system which facilitate/hinder social movements’ chances to have their grievances redressed through the judiciary.”¹¹ LOS has two main elements: structural features (ranging from rule on standing, access to legal aid, to courts and justiciability of rights) and contingent features (mainly the receptiveness of the judiciary toward the claims of litigants).¹²

Other relevant structural features include the extent to which existing laws support a cause of action and affect the potential for a successful outcome and rules on legal costs, which could invariably dissuade less-resourced organisations or poorer individuals from instituting action.¹³ Further, in terms of the receptivity of the judiciary, De Fazio asserts:

[A] judicial culture averse to confer certain rights, together with judges and courts mostly impervious to claims promoting those rights, provides an uncongenial scenario for legal mobilization. Vice versa, courts’ judicial activism in favour of certain issues

⁷ Seline Keller and Basil Bornemann, ‘New Climate Activism between Politics and Law: Analyzing the Strategy of the KlimaSeniorinnen Schweiz’ (2021) 9(2) *Politics Gov* 124 DOI: 10.17645/pag.v9i2.3819

⁸ Kim Bouwer and Joana Setzer, ‘Climate Litigation as Climate Activism: What Works?’ (British Academy 2020) <<https://www.thebritishacademy.ac.uk/publications/knowledge-frontiers-cop26-briefings-climate-litigation-climate-activism-what-works/>>.

⁹ Joana Setzer and Lisa C. Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ (2019) *WIREs Climate Change* <https://doi.org/10.1002/wcc.580>; Joost de Moor and others, ‘New Kids on the Block: Taking Stock of the Recent Cycle of Climate Activism (2021) 20(5) *Soc Mov Stud* 619 DOI: 10.1080/14742837.2020.1836617

¹⁰ Lisa Conant and others, ‘Mobilizing European Law’ (2018) 25(9) *Journal of European Public Policy* 1376; Filiz Kahraman, ‘A New Era for Labor Activism? Strategic Mobilization of Human Rights Against Blacklisting’ (2018) 43(4) *Law Soc Inq* 1279; Celeste L. Arrington, ‘Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization’ (2019) 52(2) *Comp Polit Stud* 310

¹¹ Gianluca De Fazio, ‘Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States’ (2012) 53(1) *Int J Comp Sociol* 3 DOI: 10.1177/00207152124393114

¹² Hilson (n 4); Lisa Vanhala, ‘Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK’ (2012) 46(3) *Law Soc Rev* 523. <https://doi.org/10.1111/j.1540-5893.2012.00505.x>

¹³ Lehoucq (n 6)

may signal to social movements that a legal opportunity exists to undertake litigation, activists usually being aware of judges' ideological leaning and planning accordingly their legal tactics.¹⁴

Overall, LOS theory supports a better understanding of the factors within a legal system that influence the choice of litigation in a given context and the enabling factors and deterrents which may result in some individuals or groups being unable or less likely to employ legal strategies. The line between structural and contingent features is sometimes blurred as the latter may be affected by the separation of powers of government and the limits of judicial authority, which are structural or systemic factors. Moreover, there may be a difference in the attitude of different courts within a country. Even with a favourable legal opportunity, intrinsic factors such as a counter-cultural identity may prevent a movement's adoption of litigation as a strategy.¹⁵

It is also important to emphasise that the broader socio-economic, cultural and political context beyond the legal framework is equally critical for understanding the intricacies of LOS. This points to the relevance of the positionality of individuals and groups in relation to the legal system. The historically low representation of women, ethnic minorities, disabled persons and other groups in vulnerable situations, despite recent progress in some aspects, impacts LOS in at least two ways. First, the lack of representation erodes the legitimacy of the system and its robustness to appreciate and respond to the unique underrepresented interests. Second, it may hinder the ability, interest and confidence of excluded groups in engaging with the legal system without legal aid and other relevant support.

Analysis of LOS for Climate Litigation in South Africa and Nigeria

South Africa

South Africa experiences extreme vulnerability and exposure to climate change impacts, ranging from water scarcity to low agricultural productivity, impacts on biodiversity and adverse health outcomes due to high temperatures and the spread of diseases.¹⁶ Further, the heavy reliance on coal adversely affects the environment and human health. It directly threatens the environment and related human rights, mainly through the significant GHG emissions and potential climate change impacts.¹⁷ South Africa ranks top in Africa for the number of climate change cases decided by the domestic courts, suggesting a positive LOS overall.

¹⁴ De Fazio (n 10)7

¹⁵ Hilson (n 4)

¹⁶ Academy of Science of South Africa (ASSAf), *First Biennial Report to Cabinet on the State of Climate Change: Science and Technology in South Africa* (ASSAf 2017) <http://dx.doi.org/10.17159/assaf.2016/0015>

¹⁷ Burton, Caetano and McCall (n 3).

Structural Dimension

Standing

The departure from the rigid common law stance on *locus standi* has significantly improved the prospects for public interest environmental litigation and the ability of various individuals and groups to enforce the government's commitments for climate action under different international and domestic frameworks. Under the common law, a private legal action could only be sustained where individual rights were threatened or violated. However, this became a stumbling block for instituting legal actions to protect the environment and other issues that affect not only an individual's or group's right but the general public interest.

The Constitution of the Republic of South Africa 1996 (the SA Constitution) protects the right of everyone to an environment that is not harmful to their health or wellbeing and mandates the State to enforce this right. By virtue of section 38 of the SA Constitution, anyone acting in their personal interest, or acting on behalf of someone "who cannot act in their own name or a group, or acting in the public interest" or an association representing its members', has a right to institute legal action to protect a right in the Bill of Rights.¹⁸ Moreso, section 32(1) of the National Environmental Management Act 1998 (NEMA) grants any person or group of persons the right to seek appropriate relief in respect of any breach or threatened breach of any provision of the NEMA or other statutory provisions on environmental protection or the use of natural resources. This can be done in the interest of a person or group of persons; on behalf of another person who cannot institute such proceedings for practical reasons or a group whose interests are affected; or in the interest of the public for the protection of the environment. These provisions have enabled increasing public interest climate litigation in the domestic courts (Table 1). While the SA Constitution does not go so far as to protect women's rights, it prohibits discrimination on the grounds of sex or gender. So far, none of the climate cases in South Africa have been instituted on the grounds of women's rights.

Table 1 Overview of climate cases in South Africa

¹⁸ Section 24.

Case and Year	Issue
<i>EarthLife Africa Johannesburg v. The Minister of Environmental Affairs and Ors</i> (2016) ¹⁹	Failure to consider climate change in environmental impacts statements
<i>Philippi Horticultural Area Food & Farming Campaign, et al. v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape, et al.</i> (2019) ²⁰	Court remanded an administrative decision approving urban development “in the context of climate change and water scarcity”
<i>Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others</i> (2021) ²¹	Decision granting exploration right was subject to review and climate change impacts was an essential consideration in awarding the exploration right.
Pending	

¹⁹ Case No. 65662/16

²⁰ Case No. 16779/17

²¹ (3491/2021) [2022] ZAECMKHC 55

<i>Trustees for the Time Being of GroundWork v. Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd, and Others</i> (2017) ²²	Failure to consider climate change in environmental impacts statements
<i>Trustees for the Time Being of the GroundWork Trust v. Minister of Environmental Affairs, KiPower (Pty) Ltd, and Others</i> (2017) ²³	
<i>The City of Cape Town v. National Energy Regulator of South Africa and Minister of Energy</i> (2017) ²⁴	Intergovernmental dispute over approval for the purchase of solar and wind power from an Independent Power Producer.
<i>SDCEA & Groundwork v. Minister of Forestry, Fisheries, and the Environment</i> (2021) ²⁵	Failure of the government to adequately consider climate impacts and the full cycle emissions in approving a natural gas power plant.
<i>South Durban Community Environmental Alliance v. Minister of Environment and Others</i> (2021) ²⁶	Failure to consider the climate impacts of offshore oil and gas exploration
<i>Africa Climate Alliance et. al., v. Minister of Mineral Resources & Energy et. al. (#CancelCoal case)</i> (2021) ²⁷	Constitutional challenge of the of the government's decision to procure new coal-fired power.

²² Case No. 61561/17

²³ Case No. 54087/17

²⁴ Case No. 1765/17

²⁵ The Sabin Center for Climate Change Law <<http://climatecasechart.com/non-us-case/sdcea-groundwork-v-minister-of-forestry-fisheries-and-the-environment/>> accessed 3 January 2023

²⁶ Grantham Research Institute on Climate Change and the Environment <https://www.climate-laws.org/geographies/south-africa/litigation_cases/south-durban-community-environmental-alliance-v-minister-of-environment-and-others> accessed 3 January 2023

²⁷ Case No. 56907/21

Legal Aid and Representation in the Justice System

There is a significant focus on women's empowerment, capacity building and participation in the environmental sector, including the targeted recruitment of women in South Africa's environmental sector.²⁸ This empowerment narrative is buttressed with examples of women-led environmental conservation initiatives and social mobilisation for climate action.²⁹ While it is vital to avoid essentialising women's experiences as victims or somehow more connected to nature, or imposing on them more responsibilities for climate action, examples of legal mobilization by women underscore the importance of empowerment and enabling structures. Empowerment requires addressing poverty, a significant cause and outcome of women's vulnerabilities to climate change, exclusion from access to and governance of various productive resources and environmental governance structures, and the resulting constraints on women's resilience to climate impacts.³⁰

Sub-Saharan Africa accounts for 62.8% of the world's extremely poor women and girls in South Africa.³¹ Most employed people who live below the international poverty line are also women.³² The prevalence of poverty among women and women-led household adversely affects their capacity to exploit LOS, and as such they require support from legal aid or other forms of third sector funding. No recorded climate change case has been brought by women yet, despite the direct links to environmental impacts and, ultimately, women's productive and reproductive roles. Nonetheless, 'women-led and majority' organisations such as the Centre for Environmental Rights (CER) continue to play a significant role in climate litigation and other projects to support communities to advance environmental justice, democratisation of environmental and development planning and decisions, and challenge coal power plants

²⁸ Submission by South Africa on Gender and Climate Change: Priority Area E on Monitoring and Reporting under the Gender Action Plan (8 May 2019) < [Microsoft Word - SUBMISSION BY SOUTH AFRICA ON GENDER AND CLIMATE CHANGE E1.docx \(unfccc.int\)](#)> accessed 3 January 2022

²⁹ Irene Dankelman, 'Introduction: Exploring Gender, Environment and Climate Change' in Irene Dankelman (eds), (Earthscan 2010). In line with the empowerment narrative, natural disasters, presumably including climate change related crisis, can potentially trigger a change in women's gendered status in the society and transform women into key actors in climate action. See generally Elaine Enarson, Crisis Response and Reconstruction and ILO, 'Gender and Natural Disasters' (2000) IPCRR Working Paper N1 < [Document1 \(ilo.org\)](#)> accessed 3 January 2023; Úrsula Oswald Spring, 'Contextualisation on Gender, Peace, Security and Environment. Earth at Risk in the 21st Century: Rethinking Peace, Environment, Gender, and Human, Water, Health, Food, Energy Security, and Migration' (2020) 18 PMCID: PMC7153461 3 doi: 10.1007/978-3-030-38569-9_1

³⁰ Shireen Haseem, 'Grass in the Cracks: Gender, Social Reproduction and Climate Justice in the Xolobeni Struggle' (Carleton University 2022 Spring Shannon Lecture Series 24 June 2022) < [\(108\) Grass in the Cracks: Gender, Social Reproduction and Climate Justice in the Xolobeni Struggle - YouTube](#)> accessed 2 January 2023.

³¹ UN Women, South Africa <https://data.unwomen.org/country/south-africa> accessed 8th May 2023.

³² Ibid.

projects.³³ Also, feminist initiatives such as the Initiative for Strategic Litigation in Africa (ISLA) that is based in South Africa but has a regional focus, use strategic litigation to advance access to justice and women's rights.³⁴ ISLA's priority themes for litigation are violence against women, sexual rights, and women's socio-economic rights, which can all be impacted by climate change.

Legal Aid South Africa, established under the Legal Aid South Africa Act 2013, provides state-funded legal aid and legal advice, legal representation, and education and information about legal rights and obligations to eligible persons.³⁵ Under this Act, there appears to be a lot of emphasis on access to legal aid in criminal cases however Legal Aid South Africa supports a variety of claims, including land matters. For instance, South Africa's Fifth periodic report under Article 18 of the Convention on the Elimination of Discrimination against Women 1979³⁶ highlights the right to legal representation for indigent persons under detention at State expense. Women and children's rights and land issues have also been earmarked "as deserving of special attention in the provision of" legal aid services. This guarantee does not directly promote women's LOS for climate litigation without detention or climate-induced threats to land rights. Nonetheless, legal aid is available for criminal and civil matters, including women's land rights cases.

Justiciability

South Africa is a State Party to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. South Africa has committed to climate change adaptation and mitigation goals in its Nationally Determined Contribution (NDC). Consequently, development plans and projects must be carefully accessed to ensure coherence with the country's NDC. Further, NEMA section 24(1), requires that: "[I]n order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed activities must be considered, investigated, assessed and reported to the competent authority charged by this Act with granting the relevant environmental authorisation". The Environmental Impact Assessment Regulations made under the NEMA guide the procedures and criteria for obtaining Environmental Authorisation from the competent authority before the commencement of the

³³ See more at [Pollution & Climate Change – Centre for Environmental Rights \(cer.org.za\)](https://www.cer.org.za). CER has been involved in around 20 cases that directly involve challenges to decisions on coal-fired power plants projects , gas developments, or air pollution and emissions standards, most of which are not captured in the mainstream global climate change databases.

³⁴ [Cases - ISLA \(the-itsla.org\)](https://www.the-itsla.org)

³⁵ Section 3 of the Legal Aid South Africa Act 2013.

³⁶ Article 18 mandates states to report on the implementation measures which they have adopted for the Convention and their progress.

specified activities that could significantly affect the environment. Relevant to the application process for environmental authorisation are the constitutionally guaranteed rights to information (section 32) and administrative justice (section 33). These rights have been operationalised through the Promotion of Access to Information Act 2000 (PAIA) and the Promotion of Administrative Justice Act 2000 (PAJA) respectively.³⁷

Under the rules on legal standing already highlighted, various individuals and legal persons can institute private action to protect these rights. In the case of *EarthLife Africa Johannesburg v. The Minister of Environmental Affairs*,³⁸ the applicant, a non-profit organisation for environmental matters, instituted the action to challenge the Minister's approval of a new 1200 MW coal-fired Thabametsi Power Project because of the project's climate impacts. The applicant was an interested and affected party with the legal standing to institute a review of environmental decisions on its behalf as an interested and affected party, and in the interest of the public and environmental protection under section 24(4)(v)(a) and section 32(1) of NEMA.³⁹ Relying further on the legal provisions on administrative review,⁴⁰ the applicant challenged the decision of the Minister of Environmental Affairs, who upheld the environmental authorisation granted by the Chief Director of the Department of Environmental Affairs (who was the third respondent) for the development of a coal-fired power station. The applicants subsequently approached the high court to review the initial environmental authorisation and the Minister's decision on the appeal. Given the circumstances, the court considered it appropriate to remit the matter to the Minister for a reconstituted appeal process to consider whether the potential climate change impacts of the project should affect the granting of an environmental authorisation.⁴¹

In the case of *Philippi Horticultural Area Food & Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape*,⁴² the respondent Minister and the City of Cape Town took steps to approve urban development in the Philippi Horticultural Area (PHA). The applicants asked for the court to review the environmental authorisation (EA) and exemption granted for the development project based on section 6(2)(e)(ii) of the PAJA; this was because relevant considerations including the

³⁷ The PAIA provides access to certain information held by public bodies and by private bodies, while the PAJA was enacted to implement the right to administrative justice concerning any decision or failure to decide by an organ of state exercising a power under the Constitution, or any legislation.

³⁸ Case number: 65662/16 [2017] ZAGPPHC 58

³⁹ Para 3

⁴⁰ The PAJA, section 6, stipulates grounds for a judicial review of administrative action to include where the competent authority fails to comply with a mandatory and material procedure or condition, and the act was procedurally unfair, amounts to a failure to decide within the prescribed period or, if no period is specified, without an unreasonable delay.

⁴¹ Paras 117, 122

⁴² Case No. 16779/17

impacts of the proposed development on the aquifer/groundwater and climate change were not taken into account in granting the EA and the related exemption applications. The applicants also contended that the decisions taken were not rationally connected to the information available to the decision-maker, as required under section 6(2)(f) of the PAJA. They successfully sought a declaration that the scoping and environmental impact assessment process was “insufficient/fatally flawed/non-compliant”.

Contingent Dimension

The courts’ receptivity to climate cases in South Africa, is supported by an enabling domestic legal and regulatory framework and good LOS. In reaching its decision in the Thabametsi case, the court, relying on South Africa’s commitments under the Paris Agreement, held that climate change is a relevant consideration for the project’s environmental review.⁴³ The court also found non-compliance with section 240(1) of NEMA because the Chief Director had relied on a statement that the climate change impact of the project was relatively low without a climate change impact assessment. The Thabametsi judgment significantly expanded the LOS in climate cases by recognising: (a) the need for environmental impact assessment, including the broader climate impact of each project with potentially significant climate impacts, as well as assessment of the impact of climate change on the project’s viability; (b) the environmental regulator’s duty to independently exercise its discretion on approval of a project with significant climate change impacts, and (c) the need to determine the measures that are required to reduce emissions and climate impacts of the project as part of the decision-making process. In subsequent cases, the courts have relied on this decision, as well as existing constitutional rights and environmental and administrative laws to review environmental authorisations for projects where potential climate impacts have not been considered⁴⁴ and mandate air pollution regulation for coal infrastructure.⁴⁵

Nigeria

Nigeria is a major exporter of oil and gas in Africa; the oil and gas sector accounts for around 10% of the Gross Domestic Product (GDP) and petroleum exports generate approximately 86% of the country’s total export revenue.⁴⁶ Nigeria’s historical emissions from 1850 until 2010

⁴³ Paras 90 and 91.

⁴⁴ For instance in the PHA case.

⁴⁵ For instance in the deadly air litigation, *The Trustees for the time being of Groundwork Trust & Anor. v The Minister of Environmental Affairs and Ors.* Case No: 39724/2019 [DeadlyAir-High-court-judgment-18-March-2022.pdf \(cer.org.za\)](https://www.cer.org.za/wp-content/uploads/2022/03/DeadlyAir-High-court-judgment-18-March-2022.pdf)

⁴⁶ NAN, Oil accounts for 10% GDP, 86% export earnings – Sylva (The Guardian 9 August 2021) <<https://guardian.ng/news/oil-accounts-for-10-gdp-86-export-earnings-sylva/>> accessed 2 January 2023

are estimated at 2,564.02 million tonnes (Nigeria's NDC), less than 1% of total global emissions as of 2010 (Nigeria's NDC). Climate change impacts in the form of extreme weather events and violent conflicts are already occurring across the country.⁴⁷ Despite litigation over the environmental and human rights impacts of pollution from the oil and gas industry, particularly in the Niger Delta region, there is only one climate case on record for Nigeria in the mainstream climate litigation databases. While this raises questions about categorisation,⁴⁸ this also raises questions about the state of LOS for climate cases in the country.

Structural Dimension

Standing

Historically, the restrictive common law rules on legal standing have also applied in Nigeria, restricting the prospects for public interest litigation for environmental protection. However, in the case of *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation*⁴⁹ the Nigerian Supreme Court upheld the right of everyone, including NGOs to institute legal action for performance of statutory obligations or enforcement of legal provisions for environmental protection. The facts of the case are briefly that the appellant, a registered non-governmental organisation in Nigeria, instituted an action for the reinstatement, restoration and remediation of the environment in Acha autonomous community of Isukwuato Local Government Area of Abia State of Nigeria. The environmental degradation was allegedly caused by oil spillage resulting from the respondent's negligence. The Court of Appeal upheld the decision of the trial court striking out the suit for lack of *locus standi*. On further appeal, the Supreme Court overturned the decision. Eko, J.S.C., on the issue of *locus standi* in environmental protection litigation, found as follows:

Once in his pleadings (the Plaintiff shows) his genuine interest, as the present appellant has, it is disclosed that the defendant is transgressing the law or is about to transgress it by his objectionable conduct which injures or impairs human lives and/or endangers the environment the plaintiff, be he an individual or an NGO should be accorded the

⁴⁷ Carbon Brief, The Carbon Brief Profile: Nigeria (21 August 2020) <<https://www.carbonbrief.org/the-carbon-brief-profile-nigeria>> accessed 2 January 2023

⁴⁸ See discussion in Bouwer (n 1).

⁴⁹ [2019] 5 NWLR [Pt.1666] p.518

standing to enforce the law and thereby save lives and the environment.⁵⁰

NGOs such as Friends of the Earth, Nigeria/Environmental Rights Action have already been instituting transnational climate cases for Nigerian host communities, in the home country of carbon majors.

The liberalisation of the rule on standing will improve the prospects for private entities and NGOs to initiate climate litigation before domestic courts, also on behalf of women and girls. To date, the plethora of cases for environmental protection and remediation of degradation from oil spillage and gas flaring, mainly from the Niger Delta region in Nigeria, have been instituted primarily by either men (in a personal or representative capacity) or NGOs. The major litigations related to oil exploration and production activities in the Niger Delta that women have instituted focus on allegations of complicity in human rights abuses by Royal Dutch Shell. The cases: *Wiwa v. Royal Dutch Petroleum*,⁵¹ *Wiwa v. Anderson*,⁵² *Wiwa v. Shell Petroleum Development Company*,⁵³ and *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*,⁵⁴ have each occurred in a foreign jurisdiction and have been prosecuted by the affected women with the support of international NGOs.

Legal Aid and Representation in the Justice System

The Legal Aid Council, Nigeria was established in 1976. The Legal Aid Act 2011 enables the provision of free legal advice and representation and alternative dispute resolution for eligible persons. The legal aid applies to specific, restricted criminal cases, but also civil cases including claims for breach of fundamental human rights, employee's compensation, and civil claims linked to eligible criminal matters under the Legal Aid Act. The restricted categories limit the prospects of applying legal aid to climate cases and environmental protection broadly in Nigeria. This significantly limits the LOS for poor women and other eligible members of society who cannot fund their climate litigation without financial and legal assistance.

Justiciability

Nigeria is a Party to the UNFCCC and the Paris Agreement. Nigeria's Nationally Determined Contributions (NDC) are designed to deliver 20% unconditional and 45% conditional emissions reductions by 2030. The right to environment is not expressly recognised in the Constitution of Nigeria. Although environmental protection provisions under the fundamental

⁵⁰ p. 601

⁵¹ 226 F. 3d 88 - Court of Appeals, 2nd Circuit 2000

⁵² Center for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al* <https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> accessed 2 January 2023

⁵³ Ibid

⁵⁴ 569 US 108 - Supreme Court 2013

objectives and directive principles of state policy are rendered non-justiciable by virtue of section 6(6)(c) of the Nigerian Constitution, the African Charter on Human and Peoples Rights guarantees the right to a general satisfactory environment. Further, the constitutional guarantee of freedom of information, subject to exceptions that are “reasonably justifiable in a democratic society”, operationalised through the Freedom of Information Act 2011, makes “public records and information more freely available” to the public. This requirement would apply to public records and information on climate change.

Also relevant is the Environmental Impact Assessment Act 1992 (EIA), which requires an environmental impact assessment to be conducted before implementation or authorisation “where the extent, nature or location of a proposed project or activity is such that is likely to significantly affect the environment”.⁵⁵ An environmental assessment is not required where: (a) the executive arm of government considers that the environmental effects of the project is likely to be minimal; (b) the project is to be implemented during a national emergency for which the government has taken temporary measures; or (c) the Agency considers that the project is in the interest of public health or safety.⁵⁶ Though the EIA, section 7, requires the Agency to provide an opportunity to government agencies, the public, experts and interested groups to comment on the environmental impact assessment before giving a decision on an activity that is the subject of the environmental impact assessment, there are concerns regarding the effectiveness of public participation and the incoherence from multiple regulators, particularly in the oil and gas industry that detract from the EIA process. This provision exposes the process to broad discretionary powers by the executive and the risk of abuse.⁵⁷

In the popularly cited climate case from Nigeria, *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*,⁵⁸ the applicants sought declarations from the court that their rights to life and dignity of the human person extended to the right to a “clean poison-free, pollution-free and healthy environment”; continued flaring of gas by the 1st and 2nd respondents violated the applicants’ rights to life and dignity. The applicants also relied on the EIA regulations. Additionally, they argued that the Associated Gas Re-injection Act provisions permitting continued gas flaring were unconstitutional. Section 3(1) of the Associated Gas Reinjection

⁵⁵ Environmental Impact Act 1992 (EIA), section 2(2). The list of mandatory study activities under the EIA Act includes oil and gas fields development; construction of off-shore pipelines over 50 kilometres long; construction of facilities for oil and gas separation, processing, handling, and storage; construction of oil refineries; and construction of steam generated power stations burning fossil fuels and having a capacity of more than 10 megawatts. See EIA, Schedule Para 12.

⁵⁶ EIA section 14(1)

⁵⁷ Olusegun A. Ogunba, ‘EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings (2004) 24(6) Environ Impact Assess Rev 643

⁵⁸ FHC/B/CS/53/05

Act expressly prohibits gas flaring, but section 3(2)(b) empowers the Minister to issue a certificate which allows oil and gas companies to flare gas haven paid the prescribed fees. Subsequently, in 2018, the Flare Gas (Prevention of Waste and Pollution) Regulations was introduced to reduce the environmental and social impacts of gas flaring and ensure social and economic benefits from gas flare capture. The Regulations vest the Federal Government of Nigeria with the right to take all associated natural gas free of charge at the flare, stipulate the commercialisation process for flare gas, while prohibiting the flaring of gas, except under a certificate issued under the Associated Gas Re-Injection Act.

In a similar vein, the Petroleum Industry Act 2021 also enables the relevant authority to permit gas flaring but requires operating companies to submit natural gas flare elimination and monetisation plans among other provisions for environmental protection and restoration.⁵⁹ These statutory provisions would enable legal action to compel action by the government and oil and gas companies to mitigate and prevent the adverse impacts of the oil and gas sector on humans and the environment by eliminating gas flaring, managing the adverse impacts of their operations through an environmental management planning process,⁶⁰ and funding environmental remediation.⁶¹ The legal relevance of the provisions enabling justiciability of climate and environmental ‘wrongs’ cannot be overemphasised, as Nigeria ranks among the top ten countries accounting for 75% of total gas flaring globally⁶² and the environment and human health particularly in the Niger Delta region where most of the oil and gas exploration occurs has been severely degraded by the sector.⁶³

Additionally, Nigeria’s Climate Change Act 2021 (CCA) offers a framework for mainstreaming climate actions, including a carbon budgeting system, and imposes climate obligations on public entities and private entities having at least 50 employees. It establishes a National Council on Climate Change and specifies 2050 – 2070 as the timeline for realising the

⁵⁹ Petroleum Industry Act 2021 (PIA), section 108.

⁶⁰ PIA section 102.

⁶¹ PIA section 103.

⁶² World Bank, 2022 Global Gas Flaring Tracker Report (World Bank 2022) <<<https://www.worldbank.org/en/topic/extractiveindustries/publication/2022-global-gas-flaring-tracker-report>> accessed 2 January 2023

⁶³ The Bayelsa State Oil & Environmental Commission, An Environmental Genocide: Counting the Human and Environmental Cost of Oil in Bayelsa, Nigeria (The Bayelsa State Oil & Environmental Commission 2023) < [AN ENVIRONMENTAL GENOCIDE \(bayelsacommission.org\)](https://www.bayelsacommission.org)> accessed 28 May 2023.

country's net-zero greenhouse gas emissions target.⁶⁴ The CCA further provides for women's participation in climate governance which also advances the goal of the National Action Plan on Gender and Climate Action for Nigeria to mainstream gender considerations in domestic initiatives, programs and policies for climate action.⁶⁵ These gender-inclusive legislative and policy provisions enable a positive structural dimension of LOS for climate litigation for women in Nigeria.

Contingent Dimension

Nigerian courts have displayed a mixed attitude in climate cases. In *Gbemre*, the Federal High Court in Benin upheld the applicant's arguments to declare gas flaring unconstitutional. The court issued an injunction against the continuance of the practice in the applicants' community by the respondents. The Federal High Court in Port Harcourt reached a different outcome in the case of *Ikechukwu Okpara & 3 Others v. Shell Petroleum Development Company of Nigeria Limited*,⁶⁶ where the plaintiffs sought similar relief as in *Gbemre*. The court adopted a narrow interpretation of constitutional and statutory rights guarantees, holding that: (a) the fundamental rights provisions did not apply to Section 2(2) of the Environmental Impact Assessment Act and Section 3(2)(a) and (b) of the Associated Gas Re-Injection Act; (b) under the Fundamental Right (Enforcement Procedure) Rules did not apply to the provisions of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act; and (c) the term "dignity of his person" under Section 34(1) of the Constitution did not extend to community group rights.⁶⁷

Under the CCA, courts have the power to issue a range of orders in cases involving climate change or environmental matters, including orders: "(a) to prevent, stop or discontinue the performance of any act that is harmful to the environment; (b) compelling any public official to act in order to prevent or stop the performance of any act that is harmful to the environment; (c) compensation to the victim directly affected by the acts that are harmful to the environment."⁶⁸ This further strengthens the potential for climate litigation to enhance to advance climate action and remedy adverse environmental impacts, in addition to other

⁶⁴ Climate Change Act 2021, section 1(f). Remarkably, this is at variance with the government's stated climate policy objectives, such as: Nigeria's Long-Term Vision, in response to Article 4.19 of the Paris Agreement, indicative of the end of the century as the target for achieving net zero in various sectors of the economy, including energy and oil and gas.

⁶⁵ Department of Climate Change – Federal Ministry of Environment, National Action Plan on Gender and Climate Change for Nigeria (Federal Ministry of Environment 2020)

⁶⁶ Suit No. FHC/PH/CS/518/2005 (Unreported)

⁶⁷ Ayodele Morocco-Clarke, 'The Case of *Gbemre v Shell* As A Catalyst for Change in Environmental Pollution Litigation?' 12(2) NAUJILJ 28 < [The case of *Gbemre v. Shell* as a catalyst for change in environmental pollution litigation? | Nnamdi Azikiwe University Journal of International Law and Jurisprudence \(ajol.info\)](#) > accessed 2 January 2023

⁶⁸ Climate Change Act 2021, section 34.

statutory and common law remedies. The practical effect of this yet to be seen, as there has been no litigation involving the Climate Change Act yet.

Broader Implications for Women and LOS for Climate Litigation

Given the variety of factors that often limit women's access to formal justice institutions, women's legal opportunity warrants special consideration.⁶⁹ Over the past decades, the gendered nature of climate change has been increasingly recognised, both within global institutions for climate change governance (as highlighted in the Preamble of the Paris Agreement) and in national policies for mainstreaming gender in climate change governance and the environmental sectors broadly. In analysing the LOS available to women, it is necessary to adopt an intersectional approach to recognise the differential experiences of women based on their characteristics, access to resources and other structural factors. Moreover, despite liberal rules on legal standing, justiciable legal rights and a receptive judiciary, there could be other structural limitations affecting vulnerable groups' ability and the decision to engage in legal mobilization, such as a lack of legal aid.

The literature suggests ways of understanding the impacts of climate change on women's productive and reproductive roles and wellbeing,⁷⁰ which have also informed the approaches to gender mainstreaming in legal and policy frameworks.⁷¹ Without this understanding, the outcome is that the existing LOS for climate litigation remains poorly suited to respond to the underlying differences in the climate change-related impacts, needs and priorities of women and girls and could exacerbate gender inequities. Further, women's limited access to land and other productive resources in patriarchal governance structures common in indigenous communities and health impacts, displacement and security constraints from climate change

⁶⁹ CEDAW, 2017. Concluding observations on the combined seventh and eighth periodic reports of Nigeria. CEDAW/C/NGA/CO/7-8 24 July 2017

⁷⁰ See for instance Cecilia Sorensen and others, 'Climate Change and Women's Health: Impacts and Policy Directions (2018) PLoS Med 15(7): e1002603. <https://doi.org/10.1371/journal.pmed.1002603>; World Health Organization (WHO), *Gender, Climate Change and Health* (WHO 2014)

⁷¹ See generally UN Women, *Explainer: How gender inequality and climate change are interconnected* (2 February 2022) < [Explainer: How gender inequality and climate change are interconnected | UN Women – Headquarters](#)> accessed 2 January 2023; Chidiebere J. 'Patriarchy and Women Vulnerability to Adverse Climate Change in Nigeria' (2019) 9(1) SAGE Open <https://doi.org/10.1177/2158244019825914>; Pedi Obani, *Gender and Africa's Low-carbon Transition* (Green Finance Platform 2020) <<https://greenfinanceplatform.org/blog/gender-and-africa%E2%80%99s-low-carbon-transition>> accessed 2 January 2023; Joana Pedro, Cassandra Devine and Marie Wallner, *Gender, Climate and Finance: How Investing in Women can Help Combat Climate Change* (UN Environment Programme- Finance Initiative, 4 November 2022) < [Gender, climate and finance: How investing in women can help combat climate change – United Nations Environment – Finance Initiative \(unepfi.org\)](#)>

compound their vulnerability.⁷² Additionally, women are underrepresented in the ownership structures, workforce and governance of male-dominated sectors such as the oil and gas industry.⁷³ These may be linked to the intrinsic factors that affect political or legal mobilization. Consequently, some women may lack the skills and resources to utilise an otherwise favourable LOS for climate litigation.⁷⁴

The mainstream climate litigation databases do not disaggregate the cases on account of the gender of the parties. As such, it is not possible to get a full picture at this stage of existing LOS affect women’s legal mobilization in response to climate change. Nonetheless, there have been a few examples of climate litigation instituted by women, predominantly from Europe and Asia, which are instructive for understanding the related LOS issues. One of the cases that has already been decided – at least in the domestic courts - on gender and climate change is the case of *Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*. The *KlimaSeniorinnen* case has been heard by the European Court of Human Rights on human rights grounds, which is also becoming an essential legal strategy both within and outside the European Union (Table 2). Overall, the outcome of climate change cases focused on women’s rights would be instructive for understanding the legal opportunity for human rights-based climate litigation by other vulnerable groups, as this area of law is far from settled (Table 2).⁷⁵

Table 2 Pending climate change cases for involving the rights of women and youths, respectively

Case name	<i>Mbabazi and Others v. The Attorney General and National Environmental Management Authority</i> ⁷⁶
Jurisdiction and Filing Date	Uganda, 2012
Summary of Claims	The applicants are seeking a declaratory and injunctive relief on behalf of four Ugandan minors based on the government’s constitutional duty as a public trustee of the country’s natural resources.

⁷² Ibid

⁷³ Seema Arora-Jonsson, ‘Virtue and Vulnerability: Discourses on Women, Gender and Climate Change (2011) 21 Glob Environ Change 744; International Labour Organization, Skills for a Greener Future. Key Findings (International Labour Organization 2019); IRENA, Renewable Energy: A Gender Perspective (IRENA 2019)

⁷⁴ Zerisene Habtezion, *Overview of Linkages between Gender and Climate Change* (UNDP 2013)

⁷⁵ No. A-2992/2017

⁷⁶ Civil Suit No. 283 of 2012. See also Our Children’s Trust, Youth.Gov: Uganda <<https://www.ourchildrenstrust.org/uganda>> accessed 2 January 2022

Comments on LOS	Mixed: Successful institution of the claim in court in 2012 is indicative of judicial receptivity, however hearing in the matter is still pending.
Case name	<i>Maria Khan v. Pakistan</i> ⁷⁷
Jurisdiction and Filing Date	Pakistan, 2018
Summary of Claims	A group of women have filed a constitutional petition against the government of Pakistan on their behalf and on behalf of future generations. Their claim includes human rights violation due to the government's inaction on climate change.
Comments on LOS	Favourable: Government's climate obligations under international and domestic laws and policy frameworks (structural); previous pronouncements of domestic courts on the commitments for climate action and human rights protections (judicial receptivity)
Case name	<i>Cláudia Duarte Agostinho and others v 33 States</i> ⁷⁸
Jurisdiction and Filing Date	European Union, 2020
Summary of Claims	The applicants, six Portuguese youths, relying on human rights grounds have filed a complaint in the European Court of Human Rights against the failure of Portugal and 32 other high emitting countries in Europe to take more ambitious climate action.
Comments on LOS	Favourable: Human rights protections under the European Convention on Human Rights; accessibility of the European Court of Human Rights

The *Verein KlimaSeniorinnen Schweiz* case illustrates the difficulties presented by *locus standi* for a group of elderly women. The applicants relied on scientific evidence of their vulnerability to climate change impacts – increased mortality rate from heatwaves compared to similar-aged men – to challenge the failure of the Swiss government to reduce greenhouse gas emissions by 2020 to an extent that supports the realisation of the global temperature targets. They relied on the legal duties of the Swiss government under the Paris Agreement; the provisions of the Swiss Federal Constitution on the right to life (Art. 10 para 1 FC), the principle of sustainable development (Art. 73), the precautionary principle (Art. 74, para. 2;

⁷⁷ No. 8960 of 2019

⁷⁸ (39371/20)

and the European Convention on Human Rights provisions on the right to life (Art. 2) and the right to respect private and family life (Art. 8). In the first instance, DETEC alleged that the applicants lacked legal standing as their “rights had not been affected as required by Art. 25a APA, and did not enter into the case”.⁷⁹ In dismissing the appeal, the Federal Supreme Court held that the appellants’ rights did not appear sufficiently endangered by the alleged failings of the government. Remarkably, in addition to relying on LOS, the applicants have also relied on the substantive obligation to protect future generations by adopting an ambitious climate policy as part of the strategy for mobilising support within the political system.⁸⁰

Within the context of the two focus countries for this chapter, women remain underrepresented in climate litigation. In South Africa, climate litigation has been led mainly by environmental non-governmental organisations, and brought under enabling domestic administrative law, and constitutional and statutory provisions. Most cases have either challenged the process for authorisation of coal-fired power stations and urban development or the failure of the administrative authority to conduct adequate climate change impact assessment before granting environmental permission (and subsequent amendments). The respondents are mostly government departments and private investors in the energy project at the centre of the litigation. In Nigeria, the prominent climate litigation was challenging gas flaring on human rights grounds. The relatively positive outcome in the *Gbemre* case did not translate into a pro-environmental outcome in the *Ikechukwu Okpara* case. Further, gas flares are still prevalent in the Niger Delta region of Nigeria, policy reforms such as the Flare Gas (Prevention of Waste and Pollution) Regulations 2018 are increasingly focused on gas flares commercialisation.⁸¹

Despite some indications of positive structural factors and judicial receptivity, women are still underrepresented in climate litigation. While there are no formal barriers, the underrepresentation of vulnerable groups, particularly women and children, in climate litigation is evident, especially in Nigeria. Most climate cases have been predominantly instituted or prosecuted by men or NGOs. The underrepresentation of women is unsurprising given that their access to and control of natural resources and property in traditional societies often depends mainly on their relationship with male authority figures, including their male relations or community head. Women, particularly those who are poor and live in rural areas where oil

⁷⁹ Ibid, 2.

⁸⁰ Keller and Bornemann (n 9)

⁸¹ Engobo Emeseh, ‘Mainstreaming Enforcement for the Victims of Environmental Pollution: Towards Effective Allocation of Legislative Competence under a Federal Constitution’ (2012) 14(3) *Environ Law Rev* 185 doi:10.1350/enlr.2012.14.3.157

and gas extraction often occurs, are therefore unlikely to directly control or have the capacity to exercise decision-making for climate litigation independently. The limited access to legal aid compounds the challenge.

Overall, three trends emerge from the cases analysed in this paper. The trends can give some insights into elements for successful climate litigation and women's limitations in adopting legal strategies for climate justice. First, the litigants who access the courts are often environmental NGOs or well-resourced individuals with the legal standing to maintain the action. Climate litigation, therefore, stands to benefit from improvements in access to justice and the removal of the legal barriers to litigation that populations in vulnerable situations experience. To this end, the relaxation of the common law rule on legal standing in environmental protection litigation – as has occurred in Nigeria – improves access to the courts for individuals and NGOs interested in litigating.

Second, climate change litigants increasingly rely upon domestic legislation (including administrative law and environmental protection legislation) and international climate change agreements to inform legal arguments. This trend underscores the importance of advocacy for climate change mitigation and adaptation legislation and the need to ensure that the domestic legal framework integrates ambitious climate action targets linked to the international climate change discourse. It is further essential to ensure that existing LOS are protected and any underlying barriers to participating in environmental impact assessment processes, pursuing judicial review and accessing any other judicial mechanisms for climate action are addressed in the interest of women and other vulnerable groups.

Third, a favourable decision by the courts can only fully impact on climate action through enforcement. Inaction or non-implementation of court decisions by the responsible actors undermines the impact of litigation on the mitigation of emissions. This was for instance, reflected in the approval of high-emitting projects without sufficient climate change assessment in South Africa and the continuation of gas flaring in Nigeria. In light of this, the enforcement of court decisions should also be considered a crucial dimension of LOS because non-compliance with court decisions may lead to the erosion of public confidence in the judicial process.

Conclusion

Following the global climate litigation trend, Africa will likely experience increased legal mobilisation for climate action. Strategies for climate litigation across Africa have consisted of

challenging either proposed or approved high GHG emissions infrastructure or development based on the legal validity of their environmental impact assessments process; opposing high GHG emitting activities on account of the impacts on fundamental rights; and directly seeking to compel the government to take proactive steps for climate action based on public trust doctrine and the protection of the interest of present and future generations. Given the central role of fossil fuels in the energy mix and economic development of countries such as South Africa and Nigeria, litigants seeking GHG emission regulation and the closure of fossil fuel exploration and production activities are likely to meet significant resistance from some quarters. Nonetheless, there is a rise in renewable energy and energy efficiency laws and policies, and innovative funding mechanisms such as green bonds, which could inform additional strategies for successful climate litigation.

Three lessons are evident from the South African and Nigerian cases. The success of climate litigation depends on positive LOS. The mainstreaming of women's rights in climate change policy in South Africa has not yet translated into a significant rise in women instituting climate litigation, though women-led organisations such as CER are driving climate litigation. Nigeria's situation also indicates judicial receptivity to environmental litigation, and the new legal and policy instruments on climate change and gender are promising for LOS. However, there are few recognised 'climate' cases and of all the cases brought against fossil fuel interests in Nigeria, none have been brought by women. The advances in climate change laws and rules on legal standing need to be supported with access to legal aid for women who lack the resources to pursue climate litigation.

Even where there are structural enablers of LOS for climate litigation, the outcomes of the cases may not advance climate action for other reasons. The spectrum of climate litigation may encounter different LOS within the same jurisdiction, as indicated by the differences in the court decision in the *Gbemre* case and the *Ikechukwu* case from Nigeria Federal High Court. As seen in South Africa, the impacts of judicial receptivity and administrative review on EIA grounds may be limited where the respondents demonstrate recourse to climate impacts for their decision. The resulting threats to climate action underscore the importance of the legislature and executive demonstrating a solid commitment to reducing greenhouse gas emissions, particularly from the energy sector, which accounts for a significant portion of emissions in South Africa and Nigeria.

Finally, it is necessary to disaggregate the climate litigation discourse in ways that allow for understanding the context of vulnerable groups and the strategies most likely to address their vulnerabilities to climate change impacts and advance their climate justice interests. Particularly for vulnerable groups such as women, it is also essential to ensure access to

resources and the mitigation of intervening inequalities which mitigate intervening inequalities that could impede legal mobilisation for climate justice.