



CHALLENGES OF ACCESS TO ENVIRONMENTAL JUSTICE IN NIGERIA

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Abstract

The issue of environmental protection has become a topical issue attracting both domestic and international attention given the fact that victims of environmental degradation are entitled to seek redress for the environmental degradation suffered by them. There is an existing conundrum inhibiting the access to environmental justice and these include endemic corruption and judicial obstacles amongst others. Most importantly, the right to a clean and healthy environment is not justiciable under our constitution thereby inhibiting access to environmental justice. The paper argues that unless victims of environmental degradation are allowed to seek redress for their environmental degradation without any inhibition, environmental justice will continue to be mirage and it is therefore, recommended that all inhibiting factors or hurdles to access to environmental justice should be removed to allow victims of environmental degradation to seek redress using appropriate channels.

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Introduction

The issue of environmental protection has become a topical issue attracting both domestic and international attention. It has been given top priority within the framework of both domestic and international Conventions and instruments.¹ The National Environment Standards and Regulations Enforcement Agency Act (NESREA),² in describing the concept of environment has listed its components instruments thus: ‘environment includes water, air, land and all plants and human beings and/or animals living therein and the interrelationships which exist among these or any of them. Thus, ‘environment’ comprises land, air water and all the physical structures surrounding us. Therefore, Environment can be rightly referred in a general sense to as the totality of space, time and socio-cultural setting of man and other living organisms therein.

The quest for global justice ignore the need for global concern for the environment.³ The survival of individuals and the collective survival of nations depend on the existence of a clean, healthy and safe environment. Developing economics, most African nations – for instance, are paradigmatic of experiences in environmental degradation and injustice. A number of countries south of the Sahara, Nigeria inclusive, depend upon multi-national enterprises (“MNEs”) to facilitate the exploitation of their own natural resources.⁴ What constitutes environmental injustice is traceable to a number of causes. Principal among the causes of environmental injustice is the un-regulated modification of land, water, energy and air. When land, water, energy and air are indiscriminately treated, for example, it is not only wildlife that suffers, but

¹The Kyoto Protocol of 1992 and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal of 1989.

² National Standards and Regulation Enforcement Agency (Establishment) (Amendment) Act 2018

³ P. E. Aldinger, ‘Environmental Justice in Developing Countries’ (2014) (26). *The Georgetown International Environmental Law Review*, PP. 345-356.

⁴ There are at least two reasons for this. First, from “the late 1980s, the inauguration of extensive liberalizing reforms of regulatory and legal frameworks, on the basis of World Bank prescriptions, drew a line under the nationalist reform effort. Over the past two decades, the favourable environment the reforms created aided the revival of foreign investment in Africa’s mining industry.” The Economic Commission for Africa also recognizes a second reason, putting it succinctly: “Africa faces numerous entry barriers and a dearth of capacity.” Quote from; Economic Commission for Africa ‘Minerals and Africa’s Development.’ The International Study Group Report on Africa’s Mineral Regimes p.xiii. <https://www.africaminingvision.org/amy-resources/AMV/ISG%20Reporte-egn.pdf> Retrieved 23/9/2028 more expansively, this second reason is that “scale economics and high sunk costs, as well as technological demands, have created high barriers to entry in the mining sector and integrated value chains under TNC (transnational corporation) governance.” See also United Nations ‘Economic Development in Africa: Rethinking the Role of Foreign Direct Investment’ (2005) Being a Paper Presented at the United Nations Conference on Trade and Development P. 38 <http://unctad.org/en/does/gdsafrika20051-en.pdf> Retrieved 23/9/2018



also human life. Deforestation of vast areas of land, in the name of human progress had led to incalculable loss of natural resources on a global scale.

Environmental justice thus seeks to redefine the traditional environmental movement by incorporating the concerns of minorities within environmental policy decision-making, thereby engendering environmental equality or equity as typified by the agitation of the Niger Delta over the region's hazardous, worrisome and pitiable situation and the failure of the superficial institutional remedial actions by successive Nigerian governments to address their genuine concerns.⁵ The main thrust of environmental justice is a shift in focus from the environment to the people, for it underscores the need for environmental protection not to be planned within a vacuum and for environmental goals to take into account social, political and economic realities in environmentally devastated and dislocated regions like the Nigeria Delta.⁶ Environmental degradation has become the bane of the oil and gas industry in Nigeria. When the polluting incidents occur, they leave in their trail, victims whose buildings, farmlands, fishing ponds and sources of drinking water are destroyed.⁷ There are no adequate provisions in extant Nigerian statutes for the right of the victims of oil and gas pollution. Environmental rights are relegated as non-justiciable by the Nigerian Constitution.⁸ As a consequence victims of oil and gas pollution in Nigeria fall back on their common law remedies which are often weakened with the availability of an avalanche of defences to the polluters. The result is that victims of oil pollution go home with insufficient or no remedies.

The impediments to access to environmental justice have been identified by Ojo and Tokunbor and in their opinion, access to justice on a national level is narrowed by weak environmental laws, a lack of independent judicial institutions and the lack of political will to enforce

⁵ G. Torres, 'Changing the Government Views: Environmental Justice.' (2000). (10) 3 *Journal of Environmental Science*, P. 1

⁶ K. B. O. Ejumudo, "The Democracy/Environmental Justice Challenges in Nigeria's Niger Delta and the Developmental Leadership and Governance Culture Imperative (2014) 5 (15) *Journal of Economics and Sustainable Development* P. 113

⁷ T. C. Eze, "An Appraisal of the Justice Ability of Environmental Violations Arising from Pollution in Nigeria's Oil and Gas Industry: Insight from the Cases of *Shell Petroleum Development Company (SPDC) Ltd v Chief Joel Anaro and Others* (2017) and *Joshua Gbemre v SPDC and Others* (2005) (2008) 3 (1) *Journal of Law and Global Policy*, P. 7

⁸ E. G. Orie, "Environmental protection and Fundamental Human Right to life: a review of the Nigerian constitutional provision and the judicial posture" (2014) *NOUN Current Issues in Nigerian Law* 4:148-196.

compliance of extant legal provisions.⁹ In discussing *locus standi* or right to sue in Nigeria the authors state that although environmental degradation impacts severely on the people, the lack of access to justice ensures that the status quo is maintained. For example, there are scientific data and some extant laws to curtail such environmental crimes yet these cases rarely got to court due to technical juridical hurdles such as high cost of litigation especially the high legal fees, the problem of *locus standi*, “right to sue”, or sleeping on your right which means non-enforcement of rights within a stipulated period usually short and to the advantages of oil companies.¹⁰ In Nigeria, in order to have standi to sue, the Plaintiff must exhibit “sufficient interest”, that is an interest which is peculiar to the Plaintiff and not an interest which he shares in common with general members of the public.

The prospects to environmental justice abound and the most weighted upon is the issue of public interest which stands as the major panacea to the issue of jurisdiction. The courts which are an integral part of the justice system forms part of the prospects available for the achievement of environmental justice. To redress the inherent anomalies in the regulatory regime in the oil and gas sector of Nigeria, civil society or activist groups have risen to the challenge. For example, due to the systemic failure of the regulatory agencies to seek justice for victims of oil pollution, the individuals and communities have undertaken the burden to seek redress *via* civil action negotiated settlement.¹¹ This work is intended to address these and many other issues and proffer solutions.

Conceptual Analysis of Terms

Environment:

The word “Environment” is derived from the French word “Environ” which means “surrounding”. According to the World Bank, the environment is the natural and social condition

⁹ G. U. Ojo, and N. Tokunbor, “Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice” (2006) A Publication of the Environmental Rights Action Friends of the Earth Nigeria <http://www.fori.org/press/achieve-ny-subject/economic-justice-resisting-neoliberalism-press/foei-celebrates-anagreement-on-internationally-legally-binding-rules-to-stop-human-rights-violation-by-transnational-corporations>. Retrieved 22/9/2018 P.9

¹⁰ Eze (n.7) P.52

¹¹ E. Emeseh, “The Niger Delta Crisis and the Question of Access to Justice”, in C. I. Obi and S. A. Rustad (eds), *Oil and Insurgency in Niger Delta: Managing the Complex politics of Petroviolence*, (Zed Books, 2011), PP. 55-70

surrounding all mankind including future generations. This definition is futuristic and though not in detail, it specifically touches on the issues of sustainability. Bayode, Emmanuel and Sogbon,¹² restrict their conceptualization of the environment to biophysical components and processes of natural environment of land, water and air, Expanding the above definition, environment would also include all layers in the atmosphere, inorganic and organic matters, socio-economic components and processes of human endeavours. The elements mentioned here have a symbiotic relationship and any distortion of their natural state could affect economic activities. The expressions by these authors seem to leave out the issue of sustainability referred to by the World Bank. Emmanuel and Alakinde,¹³ in lending credence to the above ascertain that land and associated resources, structures, sites, human health, nutrition and safety are also inclusive. It can be deducted that the environment as envisaged by these authors is the natural habitat of man with several components within which various kinds of activities and processes occur. It is compelling to differ from the definition of the foregoing but agree with that of World Bank since it is essential to this work.

The environment plays a pivotal role in the survival of man. To ensure the virility of the environment, there is a yawning need to engineer measures that would safeguard the environment. Hence, the need for laws that regulate and protect the environment. These laws essentially constitute what we know as Environmental Law. It is pertinent that the definition(s) as well as review of this body of law be undertaken. A critical look at the phrase, environmental law, shows that there are two major terms worth deciphering to wit: environment and law. Hence, it has become glaring that no meaningful intellectual discourse of the definition and origin of environmental law can be undertaken without nibbling at the concept of law and the environment.¹⁴ Environment is defined under the Environmental Protection Act 1990¹⁵ as consisting of all or any of the following media namely; the air, water and land, and the medium

¹² O. J. Bayode, A. A. Emmanuel and O. Sogbon, "Environmental Implications of oil Exploration and Exploitation in the Coastal Region of Ondo State Nigeria: A Regional Planning Appraisal, (2011) 4 (3) *Journal of Geography and Regional Planning*. PP 110-121.

¹³ A. A Emmanuel and M. K. Akinde, "Development and cooperation Report 2013 Nature of Environmental Science" *Monograph of Department of Urban and Regional Planning* (Federal Polytechnic Oka). P. 13

¹⁴ H. O.Obioma, "The Impact of the Origin of Environmental Law to the Present-Day Society" (2017) 11 (2) *Arabian Group of Journals Research* P. 54

¹⁵ United Kingdom

of air includes the air within building and the air within other natural or man-made structures above and below ground. From ecology angle, environment is the sum of conditions affecting a particular organism, including physical surroundings, climate and influences of other living organisms. Generally, speaking, the environment from the above definitions is seen from nature, that is the living world, including plants, animals, fungi and all landscape, such as mountains and rivers.

According to Hagget,¹⁶ the environment refers to the sum total of all conditions that surround man at any point in time on the earth's surface. In agreement, Miller asserts that the environment could be perceived as the aggregate of external conditions that influence the life of an individual or population, specifically the life of man and other living organisms on the earth's surface.¹⁷ Environment has been classified into four major components. Hydrosphere which includes all water bodies such as lakes, ponds, rivers, streams and ocean etc. Hydrosphere functions in a cycle nature, which is termed as hydrological cycle or water cycle. Lithosphere is the mantle of rocks constituting the earth's crust. The earth is a cold spherical solid planet of the solar system, which spins in its axis and revolves around the sun at a certain constant distance. Lithosphere mainly, contains soil, earth rocks, mountain etc. lithosphere is divided into three layers-crusts, mantle and core (outer and inner). Atmosphere is the cover of the air, that envelopes the earth. It is a thin layer which contains gases like oxygen, carbon dioxide etc and which protects the solid earth and human beings from the harmful radiations of the sun. There are five concentric layers within the atmosphere, which can be differentiated on the basis of temperature and each layer has its own characteristics. These include the troposphere, the stratosphere, the mesosphere, the thermosphere and the exosphere.¹⁸ Biosphere otherwise known as the life layer, it refers to all organisms on the earth's surface and their interaction with water and air. It consists of plants, animals and micro-organisms, ranging from the tiniest microscopic organism to the largest whales in the sea. Biology is concerned with how millions of species of animals, plants and other organisms grow, feed, move, reproduce and evolve over long periods

¹⁶Hagget, cited in S. M. Ucheagbu Environmental Management and Protection, (Presision Printers and Publishers Enugu 1975). PP. 3

¹⁷ G. J. Miller, *Living in the Environment: Concepts, Problems and Alternatives*. (Wad South Publishing Company Inc. California 1976).

¹⁸Mozhi (n.5)

of time in different environments. Its subject matter is useful to other sciences and professions that deal with life, such as agriculture, forestry and medicine. The richness of biosphere depends upon a number of factors like rainfall, temperature, geographical reference etc. these conceptualizations are focused specifically on the natural environment without any mention of the artificial environment.

These authors seem to remove from the purview of the environment man-made environment. Apart from the physical environmental factors, the man made environment includes human groups, the material infrastructures built by man, the production relationships and institutional systems that he has devised. The social environment shows the way in which human societies have organized themselves and how they function in order to satisfy their needs. In this work the concept “environment” adopts is that which refers to the totality of space, time and socio-cultural setting of man and other living organisms therein, whose evolution is natural or man-made. The truth notwithstanding, a concise essential comprehensive of what the meaning of environment entails, as can be sieved from the above definitions is that environment constitutes man, alongside the animate and inanimate creatures, and biological components that surround and/or encompass him. Similarly, one can make bold to say that man is integral component of the environment; take man away from his environment, he becomes emasculated and blotted out of existence.

Justice:

The conceptualization of what constitutes “justice” is predicated on the views or perception of the person attempting to define the concept. Justice is a complex concept that touches almost every aspect of human life. The word justice has been derived from the Latin word “Jungere” meaning to bind or to tie together.¹⁹ There are various schools of jurisprudence which have attempted and are still attempting to define the concept of what constitutes justice. However, they end up in most cases to state what justice does or is all about, but not a clear or unambiguous definition or the word “justice”. According to the positive school, justice is conceived, recognized, and incompletely expressed by the civil law or some other forms of

¹⁹ Definition of Justice www.marriamwebster.com Accessed 1/4/2019

human laws. “Justice” according to the Natural Law School relates to justice defined in a moral as opposed to a legal sense.²⁰ According to the Chambers Dictionary, the word “justice” is defined as; the quality of being just; integrity; impartiality; rightness; the awarding of what is due, the administration of law.²¹ Our superior courts of record have equally attempted to define the concept of justice in a plethora of judicial authorities, thus, Augie, JCA, in *ObajinvsAdedeji*²² stated as follows: Justice means fair treatment and the justice in any case demands that the compelling is not only done but must be seen to be done.’ Justice is the legal or philosophical theory by which fairness is administered.²³

Environmental Justice:

The term “Environmental Justice” otherwise called “environmental equity” has featured prominently in the environmental debate for over three decades, but it only surfaced in the legal parlance in the 1990’s.²⁴ There is a growing evidence of the links between environmental problems and social injustices; Environmental justice is the idea that brings them together. Different scholars have attempted a conceptualization of the term and while there is no generally accepted definition, largely because of the fact that concepts in the social and environmental sciences are confounded by a wooliness. Such conceptualization efforts date back to Brutland Report’s definition of sustainable development that tied together the concern for the carrying capacity of natural systems with the social challenges facing humanity. The report, which is one of the seminal environmental document of the 20th century, is a representative of the growing global awareness of the enormous environmental problems facing the planet and a growing shift towards global environmental action. The focus of the report on Environmental Justice underlies the bold steps recommended for re-examining the problems associated with the critical environment and development, inter-linkage and formulating realistic proposals to solve them do

²⁰ 6 (2008) 3 NWLR (PT. 1073) 1 @ 19-20 R. Otaru, “Access of Justice and Right to Fair Hearing” (2010) *A lecture Delivered at the Nigerian Institute of Advanced Legal Studies* on 2nd Day of December, 2010 P. 1-4

²¹ Chamber’s Dictionary (*Harrap Publishers Ltd, London* 1998) P. 873.

²² (2008) 3 NWLR (Pt. 1073) 1 at 19-20

²³ Walen Alec (2015-01-01) Zalta Edward No Ed. “Retributive Justice” (Summer 2015 ed.) Accessed 1/4/2019

²⁴ R. Lazarus, *Pursuing Environmental Justice: the Distributional Effects if Environmental Protection*. (*Macmillan Publishers; London* 2000). P. 17

as to actualize the aspirational goal of the world community to protect and enhance the environment.²⁵

Environmental Justice therefore focuses on the disproportionate sharing of environmental benefits and burdens between different states, institutions, organisations, groups and individuals as the case is with the Niger Delta that has suffered from marginalization and oppression in the face of its centrality to the economic growth and development of Nigeria. Taking a more critical view on the concept of Environmental Justice, Bullard²⁶ posited that Environmental Justice is based upon the recognition that environmental costs and benefits are not in a fair and equitable manner and that traditional environmentalism has not been sufficiently concerned with very divergent local situations and the plight of minorities. The term is therefore concerned mainly with the side effects of production activities, such as the siting of waste disposal facilities, the proximity of industrial pollution and workplace exposure to industrial toxins and the socio-economic consequences occasioned by it as McDermott²⁷ rightly articulated. Environmental justice thus seeks to redefine the traditional environmental movement by incorporating the concerns of minorities within environmental policy decision-making, thereby engendering environmental equality or equity as typified by the agitation of the Niger Delta over the region's hazardous, worrisome and pitiable situation and the failure of the superficial institutional remedial actions by successive Nigerian Governments to address their genuine concerns.²⁸ Environmental Justice is about positive discrimination because it seeks to achieve a redistribution of the costs of Environmental Justice so as to lower the disproportionately high burden borne by some segments of society like the highly marginalized and pauperized Niger Delta. In effect, it is shifting the focus of environmental protection towards taking into account the needs of the poorer Sections of society that have suffered the environmental consequences of industrialisation more than others.²⁹ This holds true for the environmental paradoxical situation of the Niger Delta that is bearing the burden of the generating revenue, yet environmentally

²⁵ *Ibid*

²⁶ R. D. Bullard, *Confronting Environmental Racism: Voices from the Grassroots*. (Free Press, London 2000). P. 45

²⁷ C. J. McDermott, "Balancing the Scales of Environmental Justice" (2004) (6) 2 *FORDHAM* P. 62.

²⁸ G. Torres, "Challenging the Government Views: Environmental Justice" (2000) 10 (3) *Journal of Environmental Science*. P.31

²⁹ G. Gadgil, E and Guha, "Ecological Conflicts and the Environmental Movement in India" in D. Ghai (ed) *Development and Environment-Sustaining People and Nature*. (Macmillan, New Delhi 2004) P.53

degrading and socio-economically dislocating consequences of oil exploration and production activities without any imaginably comparative adequate and justifiable compensation in the light of developmental benefits. It also addresses the extent of linkages between environmental and social injustice and asks whether it is practicable to tackle both social exclusion and environmental problems through integrated policies and development.

Environmental Justice seeks to achieve an accommodation or balance between access to environmental costs or burdens (pollution, unemployment, social and economic dislocation and crime) and environmental benefits (nutrients food, clean air, water, health care, education, transportation and safe jobs). Environmental Justice, which is not a panacea to all social problems, especially as environmental and social goals can be in conflict, has two fundamentally basic premises; first, that everyone should have the right and be able to live in a healthy environment, with access to enough environmental resources for a healthy life and second, that it is predominantly the poorest and least powerful people who are missing these conditions. These two premises connote environmental rights and responsibilities that focus on the inevitability of ensuring that a healthy environment exist for both the present and future generations and that countries, organisations, institutions and individuals do not create environmental problems or distribute environmental resources in ways that damage other people's health.

Environmental Justice equally protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care and affirmed the need for urban and rural environmental policies aimed at cleaning up and rebuilding cities and provide fair access for all the full range of resources which is lacking in the case of Nigeria. The essence of Environmental Justice is the capacity of the earth to satisfy the intra and inter-generational needs of society and it recognizes that access to clean and healthy environment is a fundamental right of all human being.³⁰ Recently, there have been some extensions of the Environmental Justice concepts to include studies where the environment and nature are used as factors to make the conditions for social justice.³¹ The paradigm shift of Environmental Justice as concepts explored to questioning inequality, participation, and access to one of policy framing

³⁰W. P. Cunningham, M. A. Cunningham, and B. W. Saigo, (2007). Environmental Science: A Global McGraw-Hill, Toronto P.542

³¹ D. Schlosberg, "Theorizing Environmental Justice: The Expanding Sphere of a Discourse, (2013) 22:1 Environmental Politics, PP. 37-55.

has recently been stressed. Such that the principles of Environmental Justice concept have, as a consequence, begun to be featured within policy rhetoric and the work of mainstream institutions operating in varied places and at different scales of governance. Similarly, this shift of the concept from the discussions of distribution, participation and recognition to that of a more globalized tool for policy and sustainable development has gained acceptance.

Adola defines Environmental justice as, “any undue imposition of environmental burdens on innocent bystanders or communities not parties to the activities generating such burdens”.³² In essence, Environmental Justice is premised on right to a healthy and safe environment; an equitable share or allocation of natural resources; the right not to suffer disproportionately from environmental policies, regulations and laws; and reasonable access to environmental information coalesced with participation and environmental decision making. Furthermore, Environmental Justice is akin to environmental rights; the concept of environmental rights has attained some level of international recognition and there is an international recognition of the concept of environmental rights.³³

Challenges of Access to Environmental Justice in Nigeria

Access to Environment Justice: The Inhibiting Factors

A major role of access to justice is that it enables individuals and NGOs to enforce domestic environmental law and may help them shape domestic environmental policy.³⁴ Access to justice includes both the power of courts to review government actions and omissions and the right of citizen to appeal to the courts for this review. The UDHR and the ICCPR as well as the African and Inter-American regional human rights instruments provide for a right to a fair trial that applies also to environmental matters. A specific right to access to justice in environmental matters is provided in the Aarhus Convention and the North American Agreement on Environmental Cooperation. They both require that the parties ensure certain procedural

³² F. O. Adeola, “Cross-national Environmental Injustice and Human Rights Issues: A Review if Evidence from the Developing World: (2000) 43 American Behavioral Scientist PP. 686-706, at 688.

³³ O. Odigie, “Environmental Justice and Poverty Alleviation: Road map to Sustainable Development in Nigeria” (2012) 1 *Journal of Law and Public Policy* 152-82

³⁴ M. T. Ladan, *Trend in Environmental Law and Access to Justice in Nigeria*, LAP LAMBERT Academic Publishing (2012)P. 35

guarantees or minimum standards, and remedies, and these requirements are set with some degree of details. The 2003 African Nature Conservation Convention also provides that effective access to judicial and administrative proceeding including redress and remedy shall be provided. Agenda 21 calls on governments and legislation to establish judicial and administrative procedures for legal redress and remedy of actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organisations with a recognized legal interest.

Locus Standi

It is not easy to define *Locus Standi* but one can say that it basically means the standing to sue. It refers to the right of a party to an action to be heard in a litigation before a court of law or tribunal or the legal capacity of instituting, initiating or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance.³⁵ In other words, “for a person to have *locus standi* in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed. Thus, the fact that a person may not succeed in an action does not have anything to do with whether or not he has standing to bring the action.”³⁶ A person should be allowed to ventilate his grievances in the court rather than inhibiting him or her using the requirement of *locus standi* as a weapon. This is so because Nigerian courts have inherent powers to deal with vexatious litigants or frivolous claims. Undue reliance by the courts of *locus standi* had a lot to do on a number of environmental cases. The general rule for public nuisance is that the Attorney General is the proper Plaintiff where a public right is involved. A private individual does not have the *locus standi* to sue in public nuisance unless the interference with the public right is such that some private right of his, is at the same time interfered with and where no private rights is interfered with, he in respect of his public right suffers special damages peculiar to himself from the interference with public right.³⁷ The onus is on the victim to prove that he has suffered damages beyond those of the members of the

³⁵ *Alhaji Adetoro Lawal v Bello Salami and Another* (2002) 2 NWLR Pt. 752 P. 687 see also *Babatunde Adenuga and 5 others v J. K. Odumeru and 7 others* (2003) 8 NWLR Pt. 821 P. 163. *A G Akwa Ibom State and Another v O. G. Essien* (2004) 7 NWLR Pt. 872 P. 288

³⁶ *Ibid*

³⁷ *Dumez (Nig) Ltd v Ogboli* (1972) ALL NLR P. 241

public. In *Amos and 4 others v Shell B.P Nig. Ltd.*,³⁸ the Plaintiff claimed damages from the defendant (amongst others) for public nuisance. They alleged that the defendant made a large earth dam across their creek during oil mining operations. They also alleged that this resulted in the flooding of the upstream, while downstream was dry. Consequently, the plaintiffs were put at a disadvantages with respect to the use of waterways for navigating barges, rivers crafts, canoes, disruption of commercial activities, use of water for drinking and other commercial purpose. The trial court and Supreme Court found that the conduct of the defendant amounted to public nuisance. However, there was no evidence from the plaintiffs showing that they suffered damages over and above those suffered by the general public. The action was therefore dismissed. This is in in-spite, of the fact that environmental problems linger and know no personal boundaries or individual enclaves. To this end *locus standi*, remains the plaintiff's most difficult task in environmental litigation involving a public nuisance.

Environmental claims based on the tort of trespass have also suffered a setback as a result of the requirement of *locus standi*. Trespass to the land arises from an unjustifiable interference with the possession of plaintiff's land.³⁹ The slightest direct physical interference with land in possession of another person is actionable, for example, walking on another man's land. It is necessary to prove actual physical damage because trespass to land is actionable per se.⁴⁰ in *Onasanya v Emmanuel*,⁴¹ Omolulu Thomas J. held that trespass is committed when without lawful justification; a defendant directly place anything upon the Plaintiff's land or cause physical object or noxious substance to come into physical contract, with his land. For action in trespass to arise from the placing of an object on the plaintiffs land such placing must be direct otherwise the action will lie only in nuisance in which case damage must be established to ground liability. This requirement, however, excludes all cases of industrial or human waste discharges not directly introduces into the Plaintiff's premises by the defendant.⁴² In-spite of this however, for the plaintiff to be entitled to sue, he must be in possession.⁴³ However, the

³⁸ (1977) 6 S. C. P. 109

³⁹ *Anyabunsi v Ugwunze* (1995) 6 NWLR (Pt. 401) 26

⁴⁰ *Ashy v White* (1703) 87 ER 810, *Babira v Adelaja* (1973) II CCHCJ P. 100

⁴¹ (1973) 4 CCHCJ 1477 at 1481

⁴² *Supra*

⁴³ *Oya v Ikaile* (1995) 7 NWLR (Pt. 406) P. 155, *Lamidi v Oyedele* (1994) 6 NWLR (Pt. 348) 25

possession which entitles the plaintiff to sue must be actual and effective possession in order to maintain an action against anyone except the true owner or one who can trace his title to the true owner.⁴⁴

Despite the above injunction, potential litigants have in a number of occasions had their pursuit of justice defeated of reliance on technicalities by the court. Most notable of such legal technicalities used by the courts being *locus standi*. Technicalities should be downplayed in environmental litigation. It has now become imperative for our courts to reconsider the issue of the requirement of *locus standi* in environmental claims litigation to enable victims of environmental pollution to freely ventilate their grievances in the courts of law and obtain redress.

Poverty

Poverty is perhaps one of the most important socio-economic factors constituting a hindrance to environmental claims litigation in Nigeria. Poverty may connote inability to command basic necessity of life or lack of income to meet the essentials of life. The poverty level of the Nation is very high and this accounts for the standard of living which is still below the hunger level. Infallibility to procure an expert witness to testify and prove the environmental claims against the defendant may be caused by poverty of the Plaintiff. The case of *Seismograph Services Ltd v Onokpasa* is illustrative⁴⁵ in this case Mr. Onokpasa the proprietor of Trinity College in Sapale claimed that the appellant's seismic blast in the area shook and caused cracks to the college building. The appellant company called three experts witnesses who said the blast could not have caused the damages. The respondent called no expert witness because he could not afford one. But his witnesses said after the blasts, the crack emerged on the building. The trial High Court awarded him compensation. But this judgment was set-aside on appeal to the Supreme Court, which held that the trial judge ought to have believed the expert witnesses of the defendant against the lay witnesses of the plaintiff as their evidence had more technical probative value. Furthermore, a party or community who suffered environmental degradation may not have the financial muscle to procure the services of a lawyer to file the necessary processes in court

⁴⁴ *Nwosu v Otumola* (1974) 1 ALL NLR (Pt. 1) 153

⁴⁵ (1992) 4 SC. 123

Delay in the Administration of Justice

Delay in the administration of justice may also constitute an inhibiting factor in environmental claims litigation thus resulting in denial of environmental justice. Sometimes litigants employ delayed tactics in the prosecuting of cases. Examples of delay in prosecution of cases can be seen in the case of *Nwadiaro v shell Petroleum Development Co. Ltd.*⁴⁶ Brief fact of the case is that the plaintiff depended on uti-iyi creek for fishing and access, this was blocked by the defendant since 1966 and parties had negotiated and the defendant agreed to pay compensation but never paid. The plaintiff sued in 1985 and the defendant objected on the ground that the suite was statute barred. The trial court agreed and dismissed the suit the plaintiff appealed to the Court of Appeal which held that it was not statute barred an order of trial was made. Consequently, the matter was relisted in 1988. Again the defendant filed an application for dismissal of the entire suit which was refused by the trial court. The defendant again appealed to Court of Appeal which heard and dismissed the appeal. The Court of Appeal in strong terms condemned the delay tactics of the defendant. Most litigants complain about incessant delays and some seem to have lost hope in the judiciary because of the delays.⁴⁷

A number of reasons may lead to delay in the administration of justice. These include⁴⁸

- (a) Lawyers Writing Letters of Adjournment of Cases
- (b) Inability of judges to deliver judgment on time, indiscriminate public holidays, and the rule that once a judge is transferred a new one takes over, a case has to start *de novo*.

Judicial Attitudes to Environmental Claims

Sometimes, the attitude of the courts to environment claims litigation particularly to the award of damages which mostly are general in character, also operate as a constraint to litigation as a mechanism for seeking remedies for pollution in Nigeria. The case of *shell Petroleum*

⁴⁶ (1990) 5 NWLR Pt. 150 P. 322

⁴⁷ O. O. Akeredolu, "Access of Justice Problems and Solutions" (2003) 2 (1) *Ibadan Bar Journal*, P. 14

⁴⁸ D. K. Derri, "Litigation Problems in Compensation Claims for Oil and Gas Operations in Nigeria" in Emiri and Deinduomo (eds). P. 22. See also N. S. Okogbule, "Access to Justice and Human Right Protection in Nigeria. Problems and Prospects" (2004) 3 *Benin Journal of Public Law* P. 34.

Development Co. Ltd v Teibo is illustrative.⁴⁹ The plaintiff claimed the sum of ₦64 million as general damages from the defendant for oil spillage into nun river which serve as a source of drinking water, fishing and desecration of their juju. Despite the fact that the plaintiff was able to prove the damage alleged by calling experience and knowledgeable expert witnesses, the court awarded a paltry sum of ₦6 million to the community. Similarly, our courts have developed a rubber stamp syndrome of “give me an authority for the submission” have become in active in creating such precedents.⁵⁰ Nwosu observed further that the legal training in Nigeria do not take into account the realities of the scientific world in which the legal practitioners has to operate. The lawyers and judges are both marooned. The resultant effect is that neither Judge, nor the lawyer as well as the victim are in position to appreciate the cause, effect and remedy from the sophisticated scientific question they need to resolve. Thus they seek shelter in technical rule of procedure while sacrificing substantial justice on alter of their inadequacies.

Corruption in Judiciary

Corruption has eaten deep into the fabric of all sectors of the nation including political economic and social sectors. The judiciary is not an exception. Allegation of corruption has been levelled against judicial officers including their subordinates and administrative staff. Corruption can take any of the following forms bribery, gratification, granting of injunction in breach of the principles governing the grant, refusing to grant an injunction without a just cause, frivolous adjournment of cases, delay the issue of certain copies of judgment in order to delay appeal, tampering with court exhibits, assumption of jurisdiction on frivolous grounds and uneven assignment of cases, etc.⁵¹

Problem of Burden of Proof

The issue of burden of proof may be an important factor in determining the success or failure of any environmental claim litigation Environmental justice may not be accessed if the victim who

⁴⁹ (1996) 4 NWLR Pt. 445 P. 657

⁵⁰ L. E. Nwosu, *Appropriate Mechanism for the Enforcement of Environmental Claims, Juris cope.A Compilation of Workshop Materials of Alpha Juris*. (Continuing Legal Education series 1st Edition 2001) P. 191-192

⁵¹ I. B. Lawal “Judicial Corruption in Nigeria: An Appraisal (2005) 1(1) *Journal of Public and International Law*, 42

has suffered environmental degradation is required to prove harm done to him by the polluter and he lacks the requisite technological knowledge or expertise to do so. In respect of civil liability under common law principles, the major issue to be dealt with is that of fault principle. This basically has to do with the burden of proof. The burden of proof shifts to the person who alleged he has suffered damage occasioned by the degradation of the environment by the oil company. It is for the victim to prove that the oil company is responsible for the loss or damage suffered by him. He must prove that the defendant oil company owes him a duty of care. The problem is that no satisfactory guidelines have been evolved in relation to proof of the existence of duty if care.⁵² Despite Lord Atkins effort at evolving a duty of care through the use of neighbor and reasonable foreseeability test, it is clear that “the duty to be careful only exist where the wisdom of our ancestors have decreed that it shall exist.”⁵³ The tort of negligence, nuisance and the rule in *Rylands v Fletcher* have not been of much assistance to the victims of oil pollution. In *Seismograph Services Ltd v Saturday Mark*⁵⁴ Mr. Mark a fisherman sued the defendants claiming compensation for his fishing nets and boat damages by the defendant’s vessel in Akaza waters in AkwaIbom. He alleged that the vessel tore through his nets, on which he affixed net floaters and buoys to ward approaching vessels of the presence of nets along the path. However, he gave no particulars of the negligent acts of the defendants. The trial, judge gave judgment in his favour, holding that the principle of *res ipsa loquitur* applied to shift the burden of proof on the defendants to explain the damage which they did not. The court of Appeal held otherwise. It held that failure by Mark’s lawyers to give particulars of the defendant’s negligence in his statement of claim was fatal to his suit.

Going further, it is pertinent to state that harm done to the environment as a result of environmental pollution may not manifest itself immediately the pollution occurs, it may take time to manifest. Therefore, this also contributes to the problem of proving harm if the civil action is commenced after the commission of the act as the harm will not be visible.⁵⁵ In

⁵² U. E. Udok, “Environmental Degradation in the Niger Delta: A Critique of Existing Laws for Curbing the Degradation. (2007) 1 Nigerian Environmental Law Review, 64

⁵³ *Donoghue v Stevenson* (1932) AC 562 at 579

⁵⁴ (1993) 7 NWLR Pt. 304 P. 203

⁵⁵ S. Adams, “Law of Policy om controlling Environmental Pollution: National and Global challenges” (2010-2014) 9(2) UNIJOS Law Journal, 173

Seismograph Services Ltd v Onokpasa,⁵⁶ the respondent as plaintiff found himself in such a situation. As a result of the defendants/Appellants rock blasting activities near the school, his school building developed cracks. Unfortunately, the effects of the blasting activities become visible after some weeks of the cassation of the appellants Seismic activities. Regrettably, the court held that the respondent had failed to link the cracks on his building to the blasting activities of the appellants regard being had to the time lag between the blasting activities of the appellant and the appearance of cracks on the respondents building.

Statute of Limitation

In common law, the Plaintiff must bring the case within the statute of limitation and establish the causation between the harm and the defendant's conduct. The Plaintiff may be caught by the limitation period if he wants the acts to become out rightly manifest.⁵⁷ Going further, statutory corporation operating in the area where activities are likely to cause pollution are shielded by special statutory provision which have shortened the period of limitation of actions. Under the repealed Nigerian National Petroleum Corporation Act,⁵⁸ any claim filed after 12 months from the date the cause of action arose became statute barred. However, it may seem as though such provision is not contained in the Petroleum Industry Act 2021 except that the provisions of the Public Officers Protection Act are made applicable under the Act.

Right to a Satisfactory Health Environment (Non-Justiciable)

The non-justiciability of the right to a satisfactory health environment is another stumbling block to the access to environmental justice in Nigeria. Although the right to a healthy environment has been explicitly recognized in both international and regional conventions, it has not been adequately provided for under the 1999 constitution of the Federal Republic of Nigeria. The provisions of Section 20 of the 1999 Constitution of the Federal Republic of Nigeria, enjoining the State to protect and safeguard the environment, are classified under the Fundamental Objectives and Directive Principles of State Policy and rendered non-justiciable by virtue of

⁵⁶ (1972) 4 D. C 123

⁵⁷ See *Gulf Oil (Nig.) Ltd v Otuba* (2002) 12 MWLR (Pt. 780) 22

⁵⁸ Section 12. Section 310 of the Petroleum Industry Act, 2021 repealed the NNPC Act (1977) No. 33 Cap N123 LFN 2004

Section 6(6) (c) of the same constitution. Invariably, no citizen of Nigeria can seek redress under the provisions of the said Section 20 of the Constitution. As at date, the African Charter of Human and Peoples' Rights is the only instrument applied in Nigeria which provides for the peoples' right to a healthy environment. The provisions of this charter have been adopted and incorporated verbatim under the African Charter on Human and peoples' Rights (Ratification and Enforcement) Act 1983. Sections 16 and 24 of the African Charter provide for the right to a healthy and satisfactory environment. Regrettably, in spite of the elaborate provisions of the Charter, section 6 (6) (c) of the Constitution continues to pose a threat to the realization of the right to a healthy environment. This is because section 16 and 24 are inconsistent with the provisions of Section 6 of the Constitution which compartmentalises the right to a healthy environment as belonging to those rights that are un-enforceable by the Nigerian courts. However, there is a clear link between environmental pollution and human rights, as the enjoyment of one right spearheads the enjoyment of the other.⁵⁹ Therefore, the right to a healthy environment should be elevated to the right to life in order to make it enforceable under section 33 of the constitution of the Federal Republic of Nigeria. This issue was considered in the celebrated case of *Jonah Gbemre v Shell*⁶⁰ where the court held that a violation of the right to a healthy environment is a violation of the right to life

Although the right to a clean and healthy environment is not justiciable under section 6 (6) (c) of the Constitution of the Federal Republic of Nigeria, nevertheless, based on the pronouncement of the Federal High Court in the celebrated *Jonah Gbemre* case,⁶¹ it can be elevated to the right to life which is guaranteed under Section 33 of the Constitution in order to make it justiciable.⁶² This is in line with what is obtainable in India, South Africa and Belgium. Nigerian courts must be willing to adopt an expansive interpretation to the right to life under section 33 of the Constitution as adopted by the Federal High Court in *Jonah Gbemre v Shell*.⁶³ This bold

⁵⁹ E. G.Orie,(2014) (n 8).

⁶⁰(2005) AHRLR 151

⁶¹ *Ibid*

⁶² E. G.Orie, (2014)(n8)

⁶³ *Ibid*

declaration of the Judge is commendable and worthy of emulation by other members of the Bench⁶⁴ and was reaffirmed in the case of Oil Pollution Watch V. NNPC.⁶⁵

Conclusion and Recommendations

Access to environmental justice is the hallmark of the society's effort at environmental protection. The people in the oil producing communities in Nigeria have suffered untold hardship occasioned by persistent oil pollution which have affected their means of livelihood. The existing regulatory frameworks are ineffective to address the environmental degradation in their communities. Most of them if not all do not make provisions for payment of adequate compensation to victims of environmental pollution. The alternative is to seek judicial intervention for their grievances to be addressed. However, there are enormous challenges in this process which have affected their access to environmental justice. This paper has already identified these challenges to the access to environmental justice and hereby proffer the following recommendations for the way forward.

- i. Extant laws on environmental pollution need to be overhauled to afford better protection for victims of environmental pollution. It ought to provide stiffer sanctions that would effectively deter polluters.
- ii. There is a need to incorporate the rights to a sustainable environment into the Nigerian Constitution.
- iii. Environmental justice ought to form a major foundation for environmental litigation.
- iv. There is need to re-examine the requirement of burden of proof and *locus standi* to afford better access to justice for victims of environmental pollution.
- v. Judges ought to change the present realities of environmental litigation by adopting functional approaches devoid of bureaucratic technicalities. This is to ensure quick dispensation of justice.
- vi. There is need for the establishment of specialized court (Environmental Court) to handle environmental pollution cases.

⁶⁴E. G. Orie, (2021). COVID-19 Pandemic, Migration and Human Rights Protection in Nigeria. *National Open University of Nigeria International Journal of Migration and Global Studies (IJMGS)*, 1(1):133-162. <http://ijmgs.nou.edu.ng/volume-1-number-1/>

⁶⁵Centre for Oil Pollution Watch V. NNPC [2019] 5 NWLR (Pt.1666) 518

- vii. In some cases, punishment for environmental damage should be based on strict liability to dispense with the requirements of burden of proof.
- viii. Environmental rights violations should be made justiciable as it is in other jurisdictions to enhance access to environmental justice.