4 Promotion of environmental justice in Nigeria: A panacea for a sustainable environment

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1 Introduction

Chapters two and three have helped to understand the specific factors of access to environmental information and the imbalance in the legislation of environmental rights in Nigeria. This chapter examines Nigeria's need for and access to environmental justice as the ultimate basis for environmental sustainability. A holistic approach to environmental justice directly stems from recognising and effectively protecting environmental rights as fundamental and not secondary rights. Though there is a direct provision on environmental protection under Chapter II of the 1999 Constitution of the Federal Republic of Nigeria, wherein the state is required to protect and improve the quality of the Nigerian environment, exploit its resources for the good of the community and ensure sustainable development of the country's natural resources, the incapacitation of the judicial organ of government by Section 6(6)(c) of the same Constitution from adjudicating on environmental matters negates the essence of the constitutional provision. The implication is that the government can neither be questioned nor held accountable through legal action for any violation or threatened violation of the environmental safety provision. It is observed that undeniable cases of environmental injustice in Nigeria majorly stem from activities pertaining to the exploration and extraction of fossil fuels, the hub of which is the Niger Delta Region of Nigeria, where a significant proportion of the country's oil deposits are situated. The region has suffered severe environmental degradation and remains grossly underdeveloped. Over the years, the people's quest for environmental justice has been fraught with numerous challenges, resulting in minimal gains. Further compounding the injustices is the delay in the judicial system, the high cost of litigation, restrictive rules of *locus standi,* and the burden of proof, amongst others. This chapter concludes that besides having environmental laws and institutions, a strong political will on the part of the government and a total change of attitude and re-orientation of the mindset of the people towards the environment is necessary. In addition, efforts made towards environmental sustainability,

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if not anchored in environmental justice, only spell disaster as sustainable development implies respect for the environment and man's rights over the environment. This is necessary in order to reduce the massive destruction caused by the exploitation of nature's resources and ensure their sustainability for the present and future generations.

The advent of industrialisation has contributed immensely to the degradation of the natural environment. Since the industrial revolution, the world's population has increased exponentially, and with population growth, the environment has been profoundly affected. Deforestation, pollution, and global climate change are adverse effects of population and technological expansion. Before 1988, Nigeria directed little or no concerted effort at environmental protection. Apart from the absence of comprehensive or exclusive legislation on environmental protection, there was a total lack of public awareness of issues related to the environment.[1] During the colonial era and for a while after Nigeria's independence from British colonial rule, environmental issues centred on and were primarily concerned with public health regulation, such as the regulation of waste management and sanitation. The protection in this respect was limited in scope and was available piecemeal in several fragments of legislation, and even the government response to most environmental problems was *ad hoc*.[2]

The Koko Dumping incident,[3] tagged as the most catastrophic environmental disaster in Nigerian history, necessitated the federal government to rise from its slumber and take steps towards becoming an environmentally conscious environment. The incident exposed the extent of the laxity in Nigeria's environmental laws, management, and regulations. A turning point was made in enacting legislation addressing environmental pollution and ensuring environmental protection in Nigeria. The then-military government promulgated the Harmful Waste Decree 42 of 1988 to respond to the incident directly. The Minister for Works and Housing is empowered under Section 11 of the Harmful Waste Act to seal up an area or site used to deposit or dump harmful waste. The National Environmental Standards and Regulations Enforcement Agency

1 AG Oludayo *Environmental law and practice in Nigeria* (2004).

2 As above.

3 In September 1987, more than 18 000 barrels of hazardous wastes were dumped in an open site in Koko, a coastal village in the former Bendel State of Nigeria (now Delta State). Due to the high toxicity of the dumpsite, large-scale health and environmental problems were caused to the residents of the Koko community, which led to the hospitalisation of many for ailments ranging from chemical burns, and nausea, to paralysis.

(Establishment) Act (NESREA Act)[4] and other environmental statutes form the backbone of Nigeria's environmental law. Part 2 of the NESREA Act, particularly sections 7 and 8, provides the functions and powers of the agency. However, it must be noted that the oil and gas industry, arguably the greatest environmental threat to Nigeria, is excluded from many of the NESREA Act's provisions.

From the 1999 Constitution, which contains environmental protection provisions in sections 20, 16(2), and 17(2), the Revised National Policy on Environment,[5] the Nigeria Sustainable Development Goals Implementation Plan 2020-2030, and the numerous international conventions to which the country is a signatory, there have been clear attempts by successive governments to incorporate environmental protection measures into their development plans. However, there is still debate about the effectiveness of these various efforts in terms of achieving their major objectives of facilitating socio-economic development while also ensuring the sustainability of the environment.[6] Sustainability in all ramifications demands that current economic activity should not disproportionately burden future generations. Irrespective of the huge natural and human resource base, Nigeria's potential for sustainable development remains unfulfilled. Its future is being threatened by environmental degradation and deteriorating economic conditions that are not being addressed by present policies and actions.

Nigeria depends so much on its oil reserves as oil exports contribute over 80 per cent of its income.[7] But the last four decades of oil exploration in Nigeria, particularly in the Niger Delta region, where a significant chunk of the country's oil reserve is located, have substantially damaged Nigeria's environment.[8] The various oil-producing firms in Nigeria have further worsened the situation. Their activities have not only polluted the environment, but there has also been a grave violation of human rights, not to mention their blunt refusal to discharge their social responsibilities.

4 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 25 of 2007.

5 The Federal Executive Council accepted this amended policy in its current version in February 2017 after initially adopting it in 1991 and then revising it in 1999.

6 JO Leke & EN Leke 'Environmental sustainability and development in Nigeria: Beyond rhetoric of governance' (2019) 14 *International Journal of Development and Management Review* 25.

7 O Uyiosa 'Nigeria's petroleum sector and GDP: The missing oil refining link' (2019) 4 *Journal of Advances in Economics and Finance* 1.

8 AO Adedapo et al 'Crude oil exploration in Africa: Socio-economic implications, environmental impacts, and mitigation strategies' (2022) 42 *Environment Systems and Decisions* 26.

The massive injection of toxic hydrocarbons, high level of oil spillage, and extreme prevalence of gas flaring, which destroys wildlife, seafood, and farmland, have been a source of nuisance to the environment and have led to harmful effects on the health and livelihood of the communities in the region.

Nigeria has several laws, regulations, and institutions to protect the environment. Unfortunately, the environment does not fully benefit from the numerous designated laws and institutions for several reasons. Under Chapter II of the Constitution, which sets out the Fundamental Objectives and Directive Principles of State Policy, the Nigerian Constitution provides for a safe and healthy environment. But, as opposed to a direct right, these provisions are not stated as binding obligations on the part of the state. Unlike other sections of the Constitution, these fundamental principles are directional, declaratory, and non-justiciable by virtue of Section 6(6)(c) of the Constitution. In accordance with this provision, issues pertaining to the environment cannot be enforced in court but are totally dependent on the priorities or political will of the government in power. Case law has thus been increasingly utilised to interpret the provision of the Constitution to provide protection *vis-à-vis* justice via other recognised rights such as the right to life provisions in section 33 of the Constitution. See, for instance, the landmark decision of the Federal High in the case of *Gbemre v Shell Petroleum and Development Company Ltd.*, which will be extensively discussed under the appropriate subheading of this work.[9]

Instituting an action in court to advance a widely shared public interest remains an essential safeguard for the environment, human health, well-being, and sustainable development. Due to the systemic failure of the regulatory agencies to seek justice for victims of oil pollution, individuals and members of the Niger Delta community have undertaken the burden of protecting their environment and well-being through mechanisms that are crude, desperate, and unsafe after failed dialogue. Unfortunately, the process of seeking redress in court has been clogged with legal technicalities such as *locus standi*, the burden of proof, and delays in the judicial process, amongst others, all of which have painfully been exploited by certain unscrupulous multinational corporations resulting in a denial of environmental justice in Nigeria.

The primary purpose of this work is to underline the importance of placing environmental justice at the centre of a sustainable environment. In doing so, the concept of environmental justice is examined in terms of

9 *Gbemre v Shell Petroleum and Development Company Ltd* Unreported Suit FH-C/B/CS/53/05 http://www.climatelaw.org/cases (accessed 26 May 2021).

what it entails and the long struggle for it in Nigeria since the discovery of oil in the Niger Delta Region in the 1950s. This work observes that environmental injustice cases in Nigeria stem from activities pertaining to the exploration and extraction of fossil fuel, the hub of which is the Niger Delta Region of Nigeria, where a significant proportion of the country's oil deposits are situated. This work examines the impact of oil exploration in the region and the environmental degradation caused by multinational oil companies' extractive activities. Given that the concept of environmental justice is centred on environmental rights, environmental protection, and the implementation of environmental laws, this chapter also examines the respect for environmental rights and access to environmental justice in Nigeria.

2 Concept of environmental justice

Environmental justice has increasingly become part of the language of environmental activism, political debate, academic research, and policy-making worldwide.[10] Environmental justice was first conceived in the United States in the mid-1980s within the context of racial and ethnic inequality when it emerged to protect and preserve the natural environment in the face of increasing industrial pollution and environmental destruction.[11] The prominence of the publication of *Toxic wastes and race in the United States*[12] by the United Church of Christ in 1987 suggests that predominantly minority and low-income communities were being exposed to disproportionately higher levels of environmental hazards.[13] Today, studies demonstrating the disproportionate impact of harmful environmental conditions on marginalised communities are widely acknowledged across nations.

Environmental justice is based on the principle that everyone, regardless of race, colour, national origin, or income, is entitled to equal protection from environmental harm and risks. It has become an increasingly important element that underscores equity and fairness towards the disadvantaged individuals, groups, communities, societies, institutions, and nations who bear the cost of environmental harm, damage,

10 G Walker *Environmental justice: Concepts, evidence and politics* (2012) 10.

11 AM Bizuneh et al 'Environmental justice and sustainable development' in WL Filho (ed) *Encyclopedia of sustainability in higher education* (2019) 1 https://www.researchgate.net/publication/335565988_Environmental_Justice_and_Sustainable_Development (accessed 29 June 2021).

12 United Church of Christ *Toxic wastes and race in the United States* (1987).

13 Bizuneh et al (n 11) 1.

or degradation.[14] Environmental justice exists when environmental risks, hazards, investments, and benefits are equally distributed without direct or indirect discrimination at all jurisdictional levels and when access to information, participation in decision-making, and access to justice in environment-related matters are enjoyed by all.[15] Some scholars view enforcing environmental justice as ensuring equal distribution among all members of the society of the burdens of contamination, harmful developments, and the exhaustion of resources. Also, it should promote the increased involvement of the community in any decisions that might affect them.[16]

One definition of environmental justice that not only acknowledges the existence of environmental injustice but also recognises that environmental injustice arises from racial, gender, and class discrimination is that provided by the US Environmental Protection Agency, which stipulates that environmental justice is 'the fair treatment and meaningful involvement of people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies'.[17] In other words, environmental justice requires more than just the recognition of the equitable distribution of

14 S Amadi, O Famodile & M Abdulkadir 'Current issues in environmental justice in the Nigerian society' Institutional paper presented by the Faculty of Law, Baze University, Abuja at the 51st Conference of the Nigerian Association of Law Teachers (NALT) held on 1-6 July 2018 at the Nigerian Law School Headquarters, Bwari, Abuja.

15 T Steger, Central European University, Deptartment of Environmental Sciences and Policy, Budapest, Hungary, Coalition for Environmental Justice, http://www.wecf.eu/ems/download/humanrights_belgrade.ppt (accessed 22 June 2021).

16 D Hervé Espejo 'Environmental justice and sustainable development: Guidelines for environmental law-making' (2010) 7 *French, Global Justice and Sustainable Development* 307 at 308 https://www.researchgate.net/publication/287084287_Environmental_justice_and_sustainable_development_Guidelines_for_environmental_law-making (accessed 22 June 2021).

17 While fair treatment means that no population is subjected to a disproportionate share of the negative human health or environmental consequences of pollution or environmental consequences resulting from industrial, municipal, and commercial operations or the implementation of federal, state, local, and tribal programmes and policies as a result of policy or economic disempowerment. Meaningful participation means that members of the community who may be affected by a proposed activity that will have an impact on their environment and/or health have an appropriate opportunity to participate in decisions about the activity. The public's input, in particular, has the potential to influence the regulatory agency's decision, and the concerns of all parties involved will be taken into account during the decision-making procedure. The decision-makers take steps to seek out and facilitate the participation of those who may be affected by the decision. See US Environmental Protection Agency (Office of Environmental Justice, 2000).

material good and bad, it also requires the recognition and decision-making participation of those imparted.[18]

Environmental justice scholars tend to break down the idea of justice into different dimensions of concern: distributive and procedural justice. Distributive justice refers to allocating or distributing environmental burdens and benefits among relevant parties. Procedural justice refers to the decision-making process, particularly who gets to participate and the degree of participation. A decision-making process is considered fair if all affected people can be informed, express their opinions, and influence decisions. In accordance with Principle 1 of the 1972 Stockholm Declaration, people have

> the fundamental right to freedom, equality and adequate conditions of life, in an environment with a quality that permits a life of dignity and well-being, and we bear a solemn responsibility to protect and improve the environment for present and future generations.[19]

Principle 10 of the Rio Declaration goes further to state that,

> environmental issues are best handled with the participation of all concerned citizens at the relevant level … Each individual shall have appropriate access to information concerning the environment and the opportunity to participate in decision-making processes… Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[20]

Now more than ever, the need for action to make Principle 10 a reality cannot be overemphasised.

Notably, the environmental justice doctrine has flourished and gained widespread acceptance in every corner of the world, particularly in areas with a history of environmental abuse or degradation, like Nigeria.[21] As

18 K Olson-Sawyer 'What is environmental justice? And what does food have to do with it?' Eco-Centric http://www.gracelinks.org/blog/7780/what-is-environmental-justice-and-what-does-food-have-to-do (accessed 22 June 2021).

19 Stockholm Declaration, adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972; UN General Assembly Resolutions 2994/XXVII, 2995/XXII and 2996/XXII of 15 December 1972 (1972), Principle 1.

20 UN General Assembly Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 june 1992) Annex I Rio Declaration on Environment and Development, 12 August 1992, UN Doc A/CONF.151/26 (Vol. I) (1992) (Rio Declaration) Principle 10.

21 EO Ekhator 'Improving access to environmental justice under the African Charter on Human and Peoples' Rights: The roles of NGOs in Nigeria' (2014) 22 *African Journal of International and Comparative Law* 63 at 65 http://www.tudarco.ac.tz/files/

such, it can be considered a global movement that is no longer restricted to the experiences of ethnic minorities in the United States.[22] However, depending on the context or country in question, the significance of the doctrine may vary. For example, while environmental justice in Africa emphasises access to natural resources, the emphasis is on maintaining the planet's well-being through active public participation in the United States and the United Kingdom. As a result, in the African (or Nigerian) context, a distinct connotation of environmental justice will suffice. Thus, the underlying factors in the environmental justice paradigm in Nigeria include access to, control over, and ownership of natural resources by the inhabitants of the Niger Delta region (where the oil and gas industry is located).[23] Environmental justice is thus, based on the rights to a healthy and safe environment, an equitable share or allocation of natural resources, the right not to be disproportionately affected by environmental policies, regulations, and laws, reasonable access to environmental information, and participation in decision-making in respect of environmental matters.[24] This chapter explains why access to environmental justice in Nigeria can provide a sure foundation for achieving a sustainable environment *vis-à-vis* sustainable development.

3 Impact of oil exploration activities and the struggle for environmental justice in the Niger Delta

The Niger Delta region of Nigeria comprises eight oil-producing states: Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo, and Rivers. The region consists of a total landmass of approximately 70 000 square kilometres, with the third-largest mangrove forest in the world, extensive freshwater swamps, coastal ridges, fertile, dry land, forest, and tropical rainforest characterised by great biological diversity.[25] The Niger Delta is home to approximately 20 million people from several distinct ethnic groups. The ecologically rich and delicate wetlands of the Niger Delta, where the Nigerian oil industry is operationally located, have a dynamic ecosystem rich in freshwater resources with diverse vegetation and a wide variety of flora and fauna. The people in these areas depend on these resources for medicinal purposes, domestic use, raw materials, construction, making furniture, fetching gums, rubber, dyes, fibres, resins, starch, and earning a livelihood.

documents/e-books/law/Environmental%20Justice.pdf (accessed 25 June 2021).

22 As above.

23 As above.

24 As above.

25 DS Olawuyi *The principles of Nigerian environmental law* (2015) 173.

Oil exploration activities in Nigeria began with the discovery of oil by Shell-BP in 1956 at Oloibiri in present-day Bayelsa State in the Niger Delta Region.[26] By 1958, commercial exportation of crude oil began in Nigeria, thus establishing its place not just as an oil-producing nation but as one of the world's major oil exporters and the largest in Africa. By the late 1960s and early 1970s, Nigeria had attained a production level of over 2 million barrels of crude oil daily.[27] With this production level, Nigeria, in 1971, joined the Organisation of Petroleum Exporting Countries (OPEC). It established the Nigerian National Petroleum Corporation (NNPC) in 1977. This state-owned and controlled company is a major player in the upstream and downstream sectors and is the mechanism through which the government maintains control over the oil industry.[28] Oil is the mainstay of Nigeria's economy and has since continuously accounted for over 97 per cent of her foreign exchange earnings[29] and over 80 per cent of her gross domestic product (GDP).[30] Although there have been findings of oil deposits in commercial quantities in many other states in Nigeria, such as Anambra,[31] Benue, and Sokoto, a significantly high level of Nigeria's oil and attendant gas is derived from onshore and offshore fields located in the Niger Delta region.[32]

In spite of the vast amounts of oil-generated revenue, the poor management of the resource has succeeded in truncating the socio-economic and environmental development of the people and the region, as it is considered the most underdeveloped and environmentally degraded

26 M Ajomo 'Law and changing policy in Nigeria's oil industry' in JA Omotola (ed) *Law and development* (1989) 86.

27 See NNPC 'History of the Nigerian petroleum industry' https://nnpcgroup.com/ NNPC-Business/ Business-Information/ Pages/ Industr y-Histor y.aspx#:~:text=By%20the%20late%20sixties%20and,2.5%20million%20barrels%20per%20day (accessed 10 January 2022). See also GO Odularu 'Crude oil and the Nigerian economic performance' (2008) *Oil and Gas Business* at 7 http://www.ogbus.ru/eng/authors/Odularo/Odularo_1pdf (accessed 22 May 2021).

28 F Ojogwu & O Nliam *Petroleum and sustainable development* (2014) 15.

29 Report of the Technical Committee on the Niger Delta (November 2008) http://www.stakeholderdemocracy.org/uploads/Other%20publications/Nigeriareport.pdf (accessed 22 May 2021).

30 MO Ameh 'Too much hype about Nigeria's oil' http://www.hollerafrica.com/showArticle.php?art1d=157&cat1d=2&page=3 (accessed 22 May 2021).

31 In 2003, 30 trillion cubic feet of gas and I billion barrels of crude oil were reportedly found in Anambra State. See 'Nigeria finds oil and gas in commercial quantities in Anambra' *Alexander's Gas and Oil Connections* (4 September 2003) http://www.gasandoil.com/goc/discover/dix33666.htm (accessed 22 May 2021).

32 See PO Oviasuyi & J Uwadiae 'The dilemma of Niger-Delta region as oil producing states of Nigeria' (2010) 16 *Journal of Peace, Conflict and Development* 110 at 111.

region in Nigeria, if not the world.[33] The region's primary causes of environmental degradation stem from over five decades of unsustainable oil and gas exploration, production, and development processes. Because the region hosts the bulk of Nigeria's hydrocarbon reserves, it is inevitable that the highest levels of pollution in the world emanate from there.[34] The resultant effect of such pollution causes major environmental problems and affects the health and socio-economic well-being of the inhabitants of the Niger Delta. The oil operational activities of MOCs located in key ecological areas, including important fishing grounds, mangroves, and tropical rainforests, have led to a loss of biodiversity, environmental destabilisation, and a substantial reduction in aquatic resources in the area.

Nigeria remains one of the top seven[35] gas-flaring countries globally and has maintained this status for nine years.[36] The smoke released is a major contributor to greenhouse gases and is very damaging to the people who live within the vicinity of the flare, as it affects their livelihood and exposes them to an increased risk of premature deaths, stillbirths, child respiratory illnesses, and cancer. The flaring also produces acid rain, which is harmful to vegetation and crops.[37]37 All efforts to end gas flaring have been unsuccessful, as agreed-upon dates to end flaring have changed multiple times. The cumulative effects of gas flaring and oil spills are severe on people and the environment. According to the United Nations

33 See E Emeseh 'Limitations of law in promoting synergy between environment and development policies in developing countries: A case study of the petroleum industry in Nigeria' (2006) 24 *Journal of Energy & Natural Resources Law* 574 at 574; see also World Bank *Defining an environmental strategy for the Niger Delta: Vol 1 – Report of the Industry and Energy Operations Division, West Central Africa Department* (25 May 1995) 2 http://www-wds.worldbank.org/external/default/WDSContentserver/WDSP/IB/2000/11/10/000094946_00082605382641/Rendered/PDF/multi_page.pdf (accessed 22 May 2021).

34 R Ako 'Ensuring public participation in environmental impact assessment of development projects in the Niger Delta Region of Nigeria: A veritable tool for sustainable development' (2006) 3 *Environtropica* 1 at 4-5.

35 Apart from Nigeria, the other countries are Russia, Iraq, Iran, the United States, Algeria and Venezuela. Forty per cent of the world's oil is produced by these seven countries every year and have accounted for roughly two-thirds (65 per cent) of global gas flaring. See The World Bank 'Global gas flaring tracker report' (April 2021) https:// thedocs.worldbank.org/en/doc/1f7221545bf1b7c89b850dd85cb409b0-0400072021/ original/WB-GGFR-Report-Design-05a.pdf (accessed 30 June 2021).

36 The World Bank (n 35).

37 AK Etuonovbe 'The devastating effects of environmental degradation: A case study of the Niger Delta Region of Nigeria' FIG Working Week 2009, Surveyors Key Role in Accelerated Development Eilat, Israel, 3-8 May 2009 at 5 https://www.fig.net/resources/proceedings/fig_proceedings/fig2009/papers/ts01d/ts01d_etuonovbe_3386.pdf (accessed 30 June 2021).

Environmental Programme (UNEP), the clean-up and remediation work that will last between 25 and 30 years may not be realised. Although UNEP has recommended a paltry sum of US$ 1 billion in the initial stages, the actual cost of clean-up, remediation, and compensation for lost livelihoods remains unknown.[38]

In addition to the menace of gas flaring and the high occurrence of oil spillages, other forms of environmental damage and degradation, including flooding, erosion, and saltwater incursion, continue to threaten the survival of the people of the Niger Delta. Other concerns and legal risks that emanate from the exploration of natural resources in the region include insecurity, political instability, loss of lands and aspects of culture, loss of social amenities, and a wanton violation of human rights by the state authorities.[39] These problems have resulted in restiveness, kidnappings, and protests by indigenes of the Niger Delta. It is in light of all these that the people of Ogoni staged a peaceful protest against Shell Petroleum Development Company (SPDC), which is the major operator of the oil field in Ogoni land, and the government of Nigeria challenging the environmental degradation of their lands and the socio-economic and political marginalisation of the people of the area since the inception of the extraction of oil and gas activities in the region.

The struggle for environmental and socio-economic justice can be said to have begun in Nigeria when the Movement for the Survival of Ogoni People (MOSOP), a group that represents the majority of the Ogoni people of the Niger Delta region, under the leadership of Dr Garrick Leton, issued 'the Ogoni Bill of Rights' to both the Federal Government and SPDC in 1990, demanding for emancipation, political control of Ogoni affairs by Ogoni people, possession and use of Ogoni economic resources for Ogoni development, adequate and direct representation as of right for Ogoni people in all Nigerian national institutions and the right to protect and preserve the Ogoni environment and ecology from further degradation. They also sought compensation for the several years of damage to their environment due to oil and gas exploration.[40] Unfortunately, neither the federal government nor Shell responded to the demands of the Ogoni Bill of Rights. Still, the continued hostility between Shell and Ogoniland led to SPDC moving out of Ogoniland until this day. Over the decades,

38 As above.

39 See DS Olawuyi 'Legal strategies and tools for mitigating legal risks associated with oil and gas investments in Africa' (2015) 39 *OPEC Energy Review* 1.

40 S Sobrasuaipiri 'Environmental justice in Nigeria: Reflections on the Shell-Ogoni uprising, twenty years afterwards' (2014) https://royaldutchshellplc.com/wp-content/uploads/1947/04/FinalPaperComp-1.pdf (accessed 28 June 2021).

diverse ethnic society movements[41] in the Niger Delta have been formed to engage successive governments in extensive protests and dialogue to draw the government's attention and the international community to the plight of the people of the region. Examples: the Declaration of the Niger Delta Republic led by Isaac Boro; the Kiama Declaration of 1998;[42] the publication of 'Ogoni Nation Today and Tomorrow' by Ken Saro-Wiwa, the renowned environmentalist and prolific writer who was one of the founding members and the spokesperson of the MOSOP executed in 1995 by the Nigerian former military leader, General Sani Abacha, based on the accusations of inciting the Ogoni ethnic group against the operations of Shell and Chevron multinational oil companies.

Unfortunately, after several years of peaceful dialogue with the government, including the democratic government (which came on board in 1999), efforts have failed to yield the required results.[43] Instead, a cluster of militant organisations with more violent ideologies and approaches sprung up. The two most prominent organisations are the Movement for the Emancipation of the Niger Delta (MEND) and the Niger Delta Peoples Volunteer Force (NDPVF). In the past decade, these militant organisations have claimed responsibility for the incessant hostage-taking of oil workers

41 These include the Conference of Traditional Rulers of Oil Producing States; Concerned Youths of Oil Producing States; the Organization of the Restoration of Actual Rights of Oil Communities; and the National Association of Oil Mineral Producing Communities and Ethnic Minority Rights Organization of Nigeria. Others include the Niger Delta Peoples Movement for Self-Determination and Environmental Protection; the Movement for the Protection and Survival of Oil, Mineral and Natural Gas Producing Communities of Nigeria; the Nigerian Society for the Protection of the Environment; the Niger Delta Peace Project Committee; the Niger Delta Peace and Movement Forum; and the Pan Niger Delta Revolutionary Militia. See F Ayodele-Akaaka 'Appraising the oil and gas laws: A search for enduring legislation for the Niger Delta Region' (2001) 3 *Journal of Sustainable Development in Africa* 12.

42 The Kiama Declaration was a communique issued at the end of a Youth conference held by Ijaw Youths of the Niger Delta in December 1998 at an Ijaw town called Kiama. The document declared that 'all land and natural resources (including mineral resources) within the Ijaw territory belong to Ijaw communities and the basis of our survival'. See Y Omoregbe 'The legal framework for public participation in decision-making on mining and energy development in Nigeria: Giving voices to the voiceless' in Zillman et al *Human Rights in natural resource development* (2002) 573.

43 When it comes to the significant economic development of the Ogoni people following the crisis period, one notable effect for which the Ogoni people's clamour for resource control has yielded is that it prompted the government to increase the federal allocation to oil-producing states from 5 per cent to 13 per cent, though the extent to which this increase directly benefits the local people is arguable considering that the money is paid directly into the State Government account, which makes it even more challenging for the affected communities to benefit directly from the fund.

in the region, including destroying oil pipelines and facilities.[44] Due to the violence and insecurity that daily pervades the region, sustained oil production can hardly be achieved. This has caused Nigeria to lose a considerable chunk of its oil income, running into billions of dollars and some high net investments in its oil and gas sectors.

4 Environmental rights and access to environmental justice in Nigeria

As far back as the 1970s, several scholars and environmental activists have at different times maintained that environmental problems such as climate change, gas flaring, oil spillage, loss of biodiversity, transboundary movement and dumping of hazardous wastes, and intensity of sunshine due to the depletion of the ozone layer are violations of the rights of every individual, living and unborn, to the full enjoyment of life. Scholars and environmental activists have sought to establish a linkage between human rights and the environment, stating that the right to a clean environment is a fundamental human right and a prerequisite for enjoying other existing rights.[45] In *Gabcikovo Nagymoros*,[46] Judge Weeramantry of the International Court of Justice (ICJ) recognised the protection of the environment as a *sin qua non* for numerous human rights, such as the right to health and the right to life itself.

Thus, since environmental problems result in the violation of human rights, environmental protection can best be achieved when it is recognised as a human right and defined in core international human rights instruments.[47] The proponents of this right have expanded and reinterpreted the civil and social rights in the Universal Declaration of

44 See 'Chronology: Attacks in Nigeria's Oil Delta' *Reuters* 4 June 2008 http://www.reuters.com/article/latestCrisis/idUSL04786711 (accessed 22 May 2021).

45 DS Olawuyi (n 25) at 230.

46 *Gabcikovo-Nagymoros (Hungary/Slovakia)* (1998) 37 ILM 162, 206 (Separate Opinion of Judge Weeramantry); see also *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001),where the African Commission on Human and Peoples' Rights also linked environmental protection to the right to life, health, food, and property.

47 D Shelton 'Developing substantive environmental rights' (2010) 1 *Journal of Human Rights and the Environment* 89; S Turner *A substantive environmental right: An examination of the legal obligations of decision-makers towards the environment* (2009); M Paellemarts 'The human right to a healthy environment as a substantive right' in M Dejeant-Pons & M Paellemarts (eds) *Human rights and the environment* (2002) 11, 15; S Atapattu 'The right to a healthy life or the right to die polluted? The emergence of a human right to a healthy environment under international law' (2002) 16 *Tulane Environmental Law Journal* 65*;* K Ebeku 'The constitutional right to a healthy environment and human rights approaches to environmental protection in Nigeria: *Gbemre v Shell* revisited' (2007) 16 *Review of European Community & International Environmental Law* 312.

Human Rights (UDHR),[48] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[49] and other human rights instruments to suggest that the right to a clean environment is an integral part of the fundamental human rights of every citizen. Article 17 of the ICESCR guarantees respect for private and family life and home. Article 3 of the UDHR asserts that 'everyone has the right to life, liberty, and the security of person'. Furthermore, Article 25(1) of the UDHR states that 'everyone has the right to a standard of living, adequate for the health and well-being of himself and his family'. These civil and social rights to life, health, and personal liberty guaranteed by international treaties and municipal legislation, as rightly argued by human rights scholars, would be meaningless in the face of continuous degradation of the environment to the detriment of the people. A positive obligation is, thus, placed on the state to take steps to promote the life expectancy of its citizens. As such, any person whose environment is wrongly degraded can rely on these civil and social rights to enforce his environmental right.[50]

In effect, it is correct to say that the idea of environmental rights refers to the recognition of environmental problems as violations of human rights. Shelton defines it as 'the reformulation and expansion of existing human rights and duties in the context of environmental protection'.[51] Environmental rights have also been defined as the right of the citizen to have a clean, safe, and decent environment and to enforce it in cases of violation by the government or private citizens.[52] Several countries have defined and recognised the right to the environment following calls to recognise enforceable environmental rights in national constitutions and international law.[53] Sadly, under Nigerian law, no constitutional provision directly guarantees 'environmental rights'. This has been associated with the controversial nature of the right to a safe and healthy environment,

48 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (1948).

49 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 193 UNTS 3 (1966).

50 Oludayo (n 1) 590.

51 D Shelton 'Human rights, environmental rights, and the right to environment' (1991) 28 *Stanford Journal of International Law* 103.

52 Oludayo (n 1) 589.

53 Currently over 100 countries have granted constitutional recognition to a right to environment. African Countries include Benin (Benin Constitution, art 27 – Every person has the right to a healthy, satisfying and lasting environment), and Ethiopia (Ethiopia Constitution, Ch III, Pt II, Article 44(1) – All persons have the right to a clean and healthy environment).

just like other new and emerging rights such as the right to development and indigenous rights.[54]

4.1 The Nigerian Constitution

Chapter II of the Nigerian Constitution sets out the Fundamental Objectives and Directive Principles of State Policy (FODPSP). These are policies expected to be pursued to realise national ideals and aspirations and include provisions on protecting the environment and access to justice. Unlike other sections of the Constitution, these fundamental principles are not justiciable. For instance, Section 20 of the Constitution directs the state to 'protect and improve the environment and safeguard the water, air, land, forest, and wildlife of Nigeria'.[55] However, the question arises as to whether a Nigerian citizen can rightly invoke this provision to ameliorate environmental wrongs. In other words, where the government fails, refuses, or neglects to enforce this environmental legislation, can any individual or group whose environment is degraded take steps to institute an action to protect the degraded environment?

In practice, this is not necessarily so, and the reasons for this are not far-fetched. First, enforcement of fundamental human rights according to a particular procedure made under Section 42 of the 1979 Constitution does not admit to any right not enshrined in Chapter IV of the 1999 Constitution.[56] Second, the legal standing of Nigerian citizens to invoke the provision of Section 20 of the Constitution has been whittled down by its non-justiciability.[57] Third, the judicial attitude towards the interpretation of the FODPSP has been somewhat cautious and restrictive.[58] In *Okogie v Lagos State Government*,[59] the plaintiff's application challenged a circular issued by the Lagos State Government purporting to abolish private schools in the state on the ground that the circular infringed on the constitutional rights to receive and impart education guaranteed under Section 36 of the 1979 Constitution was dismissed by the Court of Appeal, who held that the directive principle of state policy in Chapter II of the 1979 Constitution is non-justiciable and must conform to and run subsidiary to the fundamental rights. The Court held that an individual could not rely on FODPSP to assert any legal right.

54 Oludayo (n 1) 589.

55 1999 Constitution of the Federal Republic of Nigeria, Laws of the Federation of Nigeria, 2004, Cap C23, sec 20.

56 *Uzochukwu v Ezeonu II* (1991) 6 NWLR (Pt. 200) 708.

57 Section 6(6)(c) of the Constitution.

58 Oludayo (n 1) 593.

59 (1981) 2 NCLR 337.

It is worth noting that the decision in *Okogie*[60] was greatly influenced by an earlier Indian case, *State of Madras v Champakam*.[61] Incidentally, the Indian courts appeared to have turned around in recent cases, thus setting a new standard in environmental litigation. By the combined provision of Article 32 of the Indian Constitution, the Supreme Court can enforce the rights conferred under the Constitution and issue directions, orders, or writs, including writs like habeas corpus, mandamus, prohibition, quo warranto, and certiorari for the enforcement of any rights conferred under the Constitution. Article 48 of the same Constitution provides that 'the state shall endeavour to protect and improve the environment and safeguard the country's forests and wildlife'. Therefore, the Indian courts disregarded the traditional concepts of *locus standi* and adopted a new genre of litigation that allowed private attorneys to institute actions to protect the environment from degradation. According to the Indian Constitution, all persons have the right to life, which is an absolute right. A clean and wholesome environment is a prerequisite for enjoying that right.[62]

In a few subsequent cases, the Indian Court recognised the right to the environment and invoked the power under Article 32 of the Constitution to issue appropriate orders and directions. Thus, in *MC Mehta v Union of India*,[63] the petitioner, a legal practitioner, filed a writ at the Supreme Court for the prevention of nuisance caused by the pollution of the river Ganga by the discharge of effluents by tanneries and chemical industries on the banks of the river at Kanpur. The Supreme Court ordered its office to serve notice of the suit on all industries concerned. After hearing both sides, it ordered those tanneries that do not have pre-treatment plants approved by the pollution control board to stop the discharge of trade effluents.

In the Philippines, the Supreme Court reached a similar decision in *Minors Oposa v Secretary of the Department of Environment and Natural Resources*.[64] It upheld Section 16, Article II of the 1987 Constitution of the Philippines, which recognises people's right to a balanced and healthy ecology, the concept of generational genocide in criminal law, and the concept of man's inalienable right to self-preservation and self-

60 As above.

61 (1951) SCR 252.

62 The decision in *Rural Litigation and Entitlement Kendra v State of UP* (1996) AIR SC 1057 blazed this trail. In this case, the petitioner, the India Council for Enviro-Legal Action, brought this action to stop and remedy pollution caused by several chemical industrial plants. The Supreme Court ordered a major part of the quarrying activities to be closed.

63 (1987) AIR 1086.

64 33 ILM 173 (1994).

perpetuation embodied in natural law. The Court also referred to Section 15, of Article II of the Philippine Constitution, which obliges the state to 'protect and promote the people's right to health and instill health consciousness among them'. It made ground-breaking pronouncements concerning the right to a clean environment, thus:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether, for it concerns nothing less than self-preservation and self-perpetuation aptly and fittingly stressed by the petitioners, the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be in written Constitution, for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation but also for those to come, a generation which stands to inherit nothing but parched earth incapable of sustaining life. The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.

The above analysis only shows the degree of importance placed on environmental rights in many jurisdictions. Thus, the decision in *Okogie's* case has outlived its usefulness and should no longer be deemed good law, especially concerning environmental protection and resource sustainability. Unfortunately, the Supreme Court maintained its stance in a later case, *Attorney General of Ondo State v Attorney General Federation*,[65] where it held that the provisions of FODPSP in Chapter II of the Nigerian Constitution were non-justiciable. According to the Court, the said provisions are mere declarations that lack the force of law and cannot be enforced by legal process except translated or elevated to the status of law by legislation.

The non-justiciable nature of the recognition given to environmental rights in the Nigerian Constitution continues to fuel calls for the amendment of the Constitution to include a more concrete environmental rights provision, as is applicable in most countries around the world. This is based on the fact that environmental rights are no less important than

65 (2002) 9 NWLR (Pt 772) 222.

fundamental human rights guaranteed under Chapter 4 of the Nigerian Constitution. Presently, claims for enforcement of environmental rights can only be anchored on other existing human rights set out in Chapter IV of the Constitution, such as the right to life, the right to respect for private and family life, the right to acquire and own immovable property, right to dignity of the human person, and the right to freedom of thought, conscience, and religion. Many environmental pollution cases in Nigeria touch on one or more of these rights, and such claims can be anchored on any of these rights. Thus, Nigerian lawyers can draw inspiration from these provisions in the Nigerian Constitution and Article 24(1) of the African Charter on Human and Peoples' Rights, which stipulates the right to a clean environment to advance the right of citizens to a cleaner environment. Of course, this is achievable under Section 12 of the Constitution, which allows for the African Charter to be applicable in Nigerian courts where it has been enacted into law by the National Assembly.[66]

In line with the current expectation of the people from the government to holistically consider and strike a balance between environmental and developmental concerns, it is expected that the Supreme Court will continue in the future, particularly as it relates to the protection of the environment, to be more open-minded and willing to succumb to the liberal interpretation of Chapter II, bearing in mind the need to promote sustainable development goals, ensure public participation, and provide adequate access to environmental justice. For instance, in the case of *Gbemre v Shell Petroleum and Development Company Ltd*,[67] the Nigerian Court, in a radical stance, held that Shell's action in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including a healthy environment) and the dignity of human persons guaranteed by the Nigerian Constitution and the African Charter on Human and Peoples' Rights. Mr Gbemre instituted the case in a representative capacity for himself and each member of the Iwehereken community in Delta State, Nigeria, against Shell Petroleum and Development Company, Nigeria, the Nigerian National Petroleum Corporation (NNPC), and the Attorney General of the Federation. He asked for a declaration that the constitutional rights to life and dignity include the right to a clean

66 In accordance with sec 12(1) of the 1999 Constitution: '[N]o treaty between Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. The African Charter having been so enacted into law by the National assembly has the status of any other laws so enacted and thus enforceable in the Nigerian courts.

67 *Gbemre v Shell Petroleum and Development Company Ltd* Unreported Suit FH-C/B/CS/53/05 http://www.climatelaw.org/cases (accessed 26 May 2021).

and healthy environment. Also, he asked the Court to declare that the continued flaring of gas violated these fundamental rights and that the Associated Gas Re-Injection Act provisions that allow for gas flaring are inconsistent with the constitutionally guaranteed right to life. The Federal High Court in Benin ordered that gas flaring must stop in the Niger Delta Community, as it violates guaranteed constitutional rights to life and dignity. Justice CV Nwokorie ruled that the damaging and wasteful practice of flaring cannot lawfully continue.

The above case is a landmark decision in Nigeria. It sets precedence as the first case wherein the Court applied fundamental human rights to an environmental issue, consistent with the trend in other jurisdictions. The decision also represents a shift in judicial attitudes from emphasising revenue from petroleum exploration and exploitation activities over environmental protection. Unfortunately, neither the oil companies nor the government complied with the current court ruling, and as a result, gas flaring continues unabated with only insignificant fines. Despite the laudable decision made in 2003, Shell's attitude has been somewhat discouraging. The company's strategy has been to hide behind the cloak of an appeal to evade the court's ruling. Efforts by the Legal Resource Department of Environmental Rights Action (ERA) and Friends of the Earth Nigeria (FoEN) to determine the veracity of Shell's claim of appeal were fruitless. The court registry has been unable to locate the case file, which is undoubtedly a damaging testimony undermining confidence in the legal system.[68]

4.2 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights Act represents the most progressive law in human rights protection and contains far-reaching provisions relating to the attainment of environmental rights in Nigeria.[69] This Act has been ratified and domesticated in Nigeria, and its provisions are, therefore, applicable and enforceable.[70] Section 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement)

68 GU Ojo & N Tokunbor 'Access to environmental justice in Nigeria: The case for a Global Environmental Court of Justice' (2016)6 https://www.foei.org/wp-content/uploads/2016/10/Environmental-Justice-Nigeria-Shell-English.pdf (accessed 28 June 2021).

69 Oludayo (n 1) 596-597.

70 This is by virtue of sec 12(1) of the Nigerian Constitution, which provides that: 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.'

Act[71] provides that the African Charter is to be applied and given full recognition by relevant authorities in Nigeria. The Nigerian Supreme Court had the opportunity to decide on the status of the African Charter in the case of *Sani Abacha v Gani Fawehinmi*,[72] where the Court held that the African Charter on Human and Peoples' Rights, though not superior to the Constitution,[73] is an integral part of Nigerian law. Like all other laws, the courts must uphold and enforce their provisions. In cases of inconsistency between it and other statutes, the provisions contained in the Charter will prevail because it is presumed that the legislature does not intend to breach an international obligation. The Court further ruled that the Charter gives every Nigerian citizen rights and responsibilities, which the Court enforced. Consequently, it is arguable that the individual rights in the Charter are justiciable. Our courts can seek to protect them from violations and provide appropriate remedies for the victims.

Article 24 recognises the people's right to a satisfactory environment favourable to their development. However, the Nigerian courts' interpretation of Article 24 of the African Charter is yet to be called into question. If and when the situation arises, Oludayo proposes that Nigerian courts will be called upon to resolve one or more questions, including, but not limited to: (1) whether the provision of Article 24 imposes any duty on the state to improve the environment or merely a direction to the state in the formulation of the state's policy on the environment; or (2) whether the provision of Article 24 is self-executory, thereby justifying private action to compel the government to promote environmentally sound policies and, by extension, enforce public violations of environmental law in the event of the state's failure to do so. In deciding on the above issues, Oludayo envisages further that the Court may choose between two possible outcomes. The first option is to hold that the environmental rights envisioned under Article 24 and those contained in the State Directives are non-justiciable rights. As a result, individuals cannot compel the state to act or institute actions to challenge infractions of public environmental rights. The second option is to hold that the provisions of Article 24 are self-executory in that they establishe and guarantee environmental rights that the courts can enforce without the need for any executive or legislative intervention.[74] A choice based on the second alternative will not

71 Cap 10, Laws of the Federation of Nigeria, 1990.

72 (2000) 4 SC (Pt 11) 22.

73 In Nigeria, the Constitution is the Supreme Law of the land, and 'if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'. See secs 1(1) and 1(3) of the Nigerian Constitution, 1999.

74 Oludayo (n 1) 597.

only be perceived as adhering to the current trend in most jurisdictions, as discussed above. Still, it will also ensure environmental justice and provide the groundwork for environmental sustainability in the long term.

In the *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*,[75] the applicant non-governmental organisation (NGO) filed a complaint against the Government of Nigeria for violating the rights of Ogoni people at the African Commission on Human and Peoples' Rights. In interpreting Article 24 of the Charter, the African Commission took cognisance of Nigeria's domestication of the Charter into its domestic law with the result that all rights contained therein can be invoked in Nigerian courts by the citizens and held that Article 24 clearly imposes obligations upon a government to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.[76] The right to enjoy the best attainable state of physical and mental health enunciated in article 16 of the African Charter and the right to a satisfactory environment favourable to development in article 24 also obliges governments to desist from directly threatening the health and environment of their citizens. According to the Commission, the government's compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies before any significant industrial development, undertaking appropriate tracking and providing information to those communities exposed to hazardous materials and activities, and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[77]

Victims of environmental injustices in Nigeria have also turned to the West African regional Court, the Economic Community of West African States (ECOWAS) Court of Justice[78] to seek redress for their plight. By

75 African Commission, 15th Annual Activity Report of the African Commission on Human and Peoples' Rights 2001-2002 (2002) http://www.acpr.org/15thAnnual_Report_AHG.pdf (accessed 26 May 2021).

76 African Commission (n 75) para 52.

77 African Commission (n 75) para 53.

78 The Economic Community of West African States (ECOWAS) is a regional group of 15 countries, founded in 1975 whose objective is to promote cooperation and economic integration of the member states. In pursuit of this objective, the member affirms and declares their adherence to a number of fundamental principles which include the recognition, promotion, and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights

Article 56(2), member states agree to work together to achieve the African Charter's goals.[79] In the case of *SERAP v Federal Republic of Nigeria*,[80] the plaintiff filed a lawsuit against the Federal Republic of Nigeria, alleging human rights violations for the failure of the government to ensure adequate environmental protection in the Niger Delta due to oil spillage. The plaintiff contended that the Niger Delta area had been subjected to extreme degradation and that the activities of the oil industries in the Niger Delta continue to harm the health and livelihoods of the people living in the region, who are deprived of necessities of life such as adequate access to clean water, education, healthcare, food, and a clean and healthy environment.[81] More so,

> that government's obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and the failure of the government to take the concerns of the communities seriously and take steps to ensure an independent investigation into the health impacts of gas flaring and ensure that the community has reliable information is a breach of international standards.[82]

The ECCJ affirmed that the 'environment is essential to every human being' and that 'the quality of human life depends on the quality of the environment'. The Court held that the Federal Republic of Nigeria had

– see arts 3(1), 4(g) of the Revised ECOWAS Treaty. One of the major institutions of ECOWAS is the ECOWAS Community Court of Justice established under arts 6 and 15 of the Revised ECOWAS Treaty. The Court is mandated to ensure compliance with applicable laws and equitable principles while also interpreting and applying provisions of the Revised ECOWAS Treaty and all other subsidiary legal instruments adopted by ECOWAS. The member states, authority of heads of state or government are the parties' eligible to refer matter to the ECOWAS Community Court of Justice and its decision is final and not subject to appeal – art 76(2). The court can also entertain claims from individuals on application for relief for violation of their human rights – art 4(d) ECCJ Supplementary Protocol A/Sp.1/01/05. The decisions and judgments of the Court of Justice are binding on the member states, the institutions of the community and on individuals and corporate bodies who are subject to the jurisdiction of the Court – arts 15(4) & 9(4).

79 Economic Community of West African States (ECOWAS) Revised Treaty of 24 July 1993 https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf (accessed 25 June 2021).

80 JudgmentECW/CCJ/JUD/18/12https://ihrda.uwazi.io/en/document/pftlz3gneo0wxsgq0kdszto6r?page=4 (accessed 18 August 2021); This case arose out of a complaint filed on 23 July 2009 by SERAP pursuant to art 10 of the Supplementary Protocol A/SP.1/01/05 against the Federal Government of Nigeria, the Attorney General of the Federation and several oil multinational corporations (MNCs), in which the ECCJ ruled that it lacked jurisdiction over the oil MNCs and struck their names from the suit, leaving the Federal Government of Nigeria as the sole defendant in the action.

81 *SERAP* para 14.

82 *SERAP* para 17.

violated articles 1 and 24 of the African Charter. The Court found that the duty assigned by Article 24 is 'both an obligation of attitude and an obligation of result', that Article 24 requires the state to adopt legislative or other measures to give effect to the right, and that such measures must be implemented to promote accountability and to ensure adequate reparation for environmental damage. It ordered that the Nigerian government take practical steps within the shortest possible period to restore or remediate the environment of the Niger Delta. The Court further held that the Nigerian government must take all necessary measures to prevent damage to the environment of the Niger Delta and take all measures to hold the perpetrators of the environmental damage accountable for their actions.[83] The Court urges the Federal Republic of Nigeria to fully comply with and enforce this decision in accordance with Article 15 of the Revised Treaty and Article 24 of the 2005 Supplementary Protocol to the Court.[84]

Despite differing opinions on the enforceability, implementation, and domestication of ECCJ judgements in Nigeria, recent ECCJ decisions have created opportunities for victims of environmental injustices or abuses in Nigeria to bypass the existing justice system and seek redress and orders against the Nigerian government by applying directly to the ECOWAS Court. In fact, it can be rightly said that the Nigerian government has become significantly more aware of its obligation to protect the enjoyment of the right to a healthy environment as a result of the ECOWAS court's ruling in *SERAP*. Pressure from SERAP and other organisations on the Nigerian government to take action to clean up the Niger Delta environment and more effectively control environmental pollution was greatly aided by the ECOWAS Court's ruling.[85]

A significant implication of these cases, particularly regarding access to environmental justice, is that the right of the people to a clean and generally satisfactory environment favourable to their development engraved in Article 24 is judicially legitimised. The people can invoke the provision of Article 24 to trigger state action in formulating and implementing sound national environmental policies that will promote and encourage economic growth and sustainable development. In cases of state inaction, these decisions should stimulate and catalyse individual and class actions to challenge historic polluters' age-long degradation of

83 *SERAP* paras 120-121.

84 *SERAP* para 123.

85 OC Okafor et al 'On the modest impact of West Africa's International Human Rights Court on the executive branch of government in Nigeria' (2022) 35 *Harvard Human Rights Journal* 169https://harvardhrj.com/wp-content/uploads/sites/14/2022/05/35HHRJ169-Okafor.pdf

the environment. This position is further strengthened by the provisions of articles 5(3) and 34(6) of the Protocol establishing the African Court of Human and Peoples' Rights (African Court),[86] which confer direct access to individuals and relevant NGOs with observer status to bring applications for enforcement of their rights or institute actions for violation of the Charter rights where the municipal courts fail to apply the provisions of the Charter effectively.[87] The African Commission openly acknowledged this fact in the case of *SERAC v Nigeria*.[88] The primary defect of the protocol is that access to the court is subject to the discretion of the court and state party to submit to adjudication. In most African countries where governments are unresponsive to their citizens, bringing such a state party to the African Court may prove difficult and futile.[89] Even in cases where such a party submits to the jurisdiction of the Court, the implementation and enforcement of the Court's decisions is yet another tug of war, as it could very much be dependent on the priorities or policies of the government in power, as is the 'norm' in Nigeria.

5 Legal/technical juridical hurdles in access to environmental justice in Nigeria

Nigeria has taken positive strides to ratify and domesticate many international conventions and agreements directed towards protecting and preserving the environment. A number of national environmental laws and regulations have also been enacted pursuant to Nigeria's international treaty commitments. In ventilating their grievances, victims of environmental abuse are not allowed by law to resort to self-help, hence the need to turn to courts of competent jurisdiction for justice. Section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria vests in the courts the power to hear disputes on civil rights and obligations of persons. In reality, the dispensation of justice regarding environmental issues is concerned and the attendant implementation of a host of environmental legal frameworks in Nigeria have been quite discouraging. Access to justice is stifled by several issues spanning the presence of lax environmental laws to a lack of an independent judiciary and judicial institutions, a lack of political will to enforce compliance with legal provisions, the slow adjudication of environmental cases, the burden of proof, and the issue of

86 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc OAU/LEGL.EXP/AFCHPR/PROT(III) (1998).

87 NJ Udombana 'Towards the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 101.

88 As above.

89 Oludayo (n 1) 600.

locus standi, all of which impedes access to environmental justice. Some of these issues will be discussed below.

5.1 *Locus standi*

Over the years, NGOs have been at the forefront of seeking environmental justice for the Nigerian people, particularly the inhabitants of the Niger Delta region, who suffer the most from the effects of abuse, pollution, and degradation of the environment arising from the exploitation of oil. One of the most significant constraints on the ability of the NGOs to access justice or seek remedy against such pollution has been their legal right or standing to sue. It is the law that where there is a legal wrong, there is a remedy, as encapsulated in the Latin maxim *Ubi jus ibi remedium*.[90] However, it is also the contemplation of the law that only a wronged person can institute an action in court to remedy such a wrong. Thus, for the court to be clothed with the required jurisdiction to entertain a suit, the plaintiff must have the requisite *locus standi* in the subject of the lawsuit.

The term '*locus standi'* is a Latin word that means 'place of standing' or 'standing in court'. Standing to sue here is not dependent on the merit of a case; it is a condition precedent to a determination on the merits. Therefore, if a plaintiff has no *locus standi* or standing to sue, it is not necessary to consider whether there is a genuine case on the merits; his claim must be thrown out as incompetent.[91] Locus standing denotes the legal right or capacity to initiate an action in a court of law.[92] It is the ability of a party to demonstrate to the court or a competent tribunal that a 'sufficient interest' in or connection to the issue for which he is bringing before the court or tribunal is peculiar to the plaintiff and not an interest which he shares in common with general members of the public.' In other words, the plaintiff must show that he has a legal right, that his legal right has been adversely affected, or that he has suffered or is likely to suffer special damage due to an alleged wrong. This position was reinforced by the Supreme Court of Nigeria in the case of *Attorney-General, Adamawa State v Attorney-General, Federation*[93] when it held that:

90 *Bello v Attorney General, Oyo State* (1986) (Pt 45) 828.

91 *Owodunmi v Registered Trustees of Celestial Church* (2000) 10 NWLR (Pt 675) 315.

92 *Adesanya v President of the Republic of Nigeria & Anor* (1981) 5 SC 69.

93 (2005) 18 NWLR (Pt 958) 581.

> It is not enough for a plaintiff to merely state that an act is illegal or unconstitutional. The plaintiff must also show how his civil rights and obligations are breached or threatened.

This requirement became a veritable and efficient mechanism intended to resolve conflicts between two aspects of the public interest, namely, the necessity of encouraging ordinary citizens to actively participate in the enforcement of the law and the need to dissuade professional litigants and meddlesome interlopers from invoking the jurisdiction of the courts in matters that may not concern them.[94]

Until quite recently, environmental litigation cases, being public law matters within the purview of the state to prosecute private individuals, in the absence of an authorisation from the Attorney General for commencing such action and without showing environmental injury higher and above that suffered by the general public, did not stand a chance at obtaining justice. This principle could be seen as oppressive because of its stiffness or harshness towards victims of environmental abuse. It led to many case dismissals and, consequently, a denial of justice at the mere fact that the right of the person filing suit has not been directly infringed upon. In the case of *Oronto Douglas v Shell Development Company Ltd. (SPDC)*,[95] the plaintiff, a private citizen, sought compliance with the provisions of the Environmental Impact Assessment (EIA) Act in relation to the liquefied natural gas (LNG) project at Bonny being executed by the defendant oil company. The Court held that the plaintiff had no standing to institute the action since he had failed to proffer *prima facie* evidence that his right was adversely affected, any direct injury was caused to him, or that he suffered any injury above that of the general public. This criterion is, with respect, incompatible with sustainable development, which aims to prevent activities that are likely to result in substantial or irreversible environmental damage.[96] If potential litigants cannot demonstrate that the

94 See SA de Smith *Judicial review of administrative action* (1980) 409.

95 (2000) LPELR-CA/L/143/97.

96 Although the Court of Appeal overturned the lower court's decision and mandated a new trial, the latter could not be held as there was nothing more to be tried being that the disputed project had been commissioned while the matter was being heard at the lower court. Nonetheless, it is evident that the Court of Appeal in this case preferred a more lenient interpretation of the standing requirement than the lower court, one that was in fact more pro-poor and anti-oil business. See OC Okafor & B Ugochukwu 'Raising legal giants: The agency of the poor in the human rights jurisprudence of the Nigerian Appellate Courts, 1990-2011' (2015) 15 *African Human Rights Law Journal* 397 http://dx.doi.org/10.17159/1996-2096/2015/v15n2a8 https://www.researchgate.net/publication/295248653_Raising_legal_giants_The_agency_of_the_poor_in_the_human_rights_jurisprudence_of_the_Nigerian_Appellate_Courts_1990-2011 (accessed 31 March 2023).

activity complained of has harmed their interest, they will be barred from proceeding due to lack of legal standing.

The rule that only the Attorney General may file lawsuits on behalf of the public has been relaxed in Britain. Now, any person has the legal right to ask the court to stop a certain form of abuse of authority, and by doing so, he may be seen as a public benefactor rather than a bothersome interloper or busybody.[97] If a particular organisation, pressure group, or even one public-spirited tax payer is prevented from bringing the matter before the court to uphold the rule of law and to have the unlawful behaviour stopped, it is argued that there would be a serious gap in the public law system.[98]

The Nigerian courts have also taken a lenient stance on *locus standi*, particularly in situations involving the constitutionality of laws, and there are a myriad of cases in this area. In *Chief Isiagba v Alagbe*,[99] the issue of *locus standi* was raised by way of preliminary objection. The court, per Omosun J, noted that any Nigerian taxpayer had *locus standi* since they had a significant interest in the Constitution's compliance. According to the Court,

> the plaintiff is a citizen of Nigeria. He has alleged that the defendants have contravened the provisions of the Constitution. It is suggested he has no locus standi, that he is a meddlesome litigant and that he has no sufficient interest to enable him to bring the action. His interest cannot be quantified in terms of Naira and Kobo, but certainly, like all Nigerians, he would like to see the provisions of the Constitution observed. To adopt the view that he has no sufficient interest would lead to chaos. I cannot contemplate what will happen if violations of the Constitution go unchecked. It means that anyone with impunity can violate the Constitution, and no one can say so because his private rights have not been injured.[100]

97 Thus, in *R v Thames Magistrates' Court ex parte Greenbaum* (1957) 55 LGR 129, Parker LJ stated that: 'Anybody can apply for it (certiorari), a member of the public who has been inconvenienced, or a particular or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary where, however, it is made by a person who has a particular grievance of his own whether as a party or otherwise, then the remedy lies ex debito justitiae.' See also *Durayappah v Fernando* (1967) AC 337.

98 HRW Wade *Administrative law* (1990) 704.

99 [1981] 2 NCLR 424.

100 *Chief Isiagba* (n 99) 432. See also *Alhaji Adefalu v The Governor of Kwara State* [1984] 5 NCLR 766; *Akinpelu v Attorney-General, Oyo State* (1984) 5 NCLR 557.

Also, in *Ejeh v Attonery-General of Imo State*,[101] the Court ruled that anyone who believes that the Constitution's provisions have been violated may file a lawsuit and request the necessary redress. According to the Court, it is improper for the defendant to contest the plaintiff's *locus standi*, or right to bring a lawsuit, when the purpose of the claim is to preserve the peace and integrity of the law and the country's Constitution. It must however be noted that in respect of this ruling, considering that the Constitution explicitly acknowledges its superiority and specifies that any law that conflicts with it is void to the degree of its incompatibility,[102] the Court's position in this case could not have been any different.[103]

The scope of *locus standi* in cases pertaining to environmental degradation has been expanded to encourage public interest litigation. In the case of *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (NNPC),*[104] the Supreme Court overturned the decision of the Court of Appeal, which held that the appellant had no *locus standi* to bring an action against the NNPC for failure to clean up or reinstate the Ineh/Aku streams (the only source of potable water for the inhabitants of the community) after its corroded pipeline ruptured, fractured, and spewed its entire contents into the surrounding streams and rivers in Abia State, Nigeria. At the trial and appellate court, the respondent argued that the appellant lacked the capacity to sue it and that even if there was negligence on its part in looking after the pipelines, the appellant could not sue it as it was not a member of the community affected by the oil spillage, nor had it been shown that it suffered any damage as a result of the oil spillage. This argument was upheld for the failure of the appellant to show that it suffered any injury due to the respondent's alleged neglect. On appeal to the Supreme Court, it was held that the appellant had the legal right to institute the action.[105] The Court further held that there is no indication

101 (1985) 6 NCLR 390.

102 See sec 1(1) and (3) of the 1999 Nigerian Constitution which provides that: 'This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria … If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.'

103 EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal position' (2009) 9 *African Human Rights Law Journal* 561.

104 (2019) 5 NWLR (Pt 1666) 518.

105 On appeal to the Supreme Court, the Supreme Court invited some senior lawyers known in legal circles as *amici curiae* (Latin for friends of the court) to assist her in determining whether the appellant has *locus standi*. While one side of the argument sought to persuade the Court not to extend the scope of *locus standi* to accommodate an NGO such as the appellant in respect of environmental degradation matters as the appellant is nothing but a mere busybody or troublemaker usurping the rights

in the wording of the Constitution that only the Attorney General has the legal standing or power to enforce the performance of a public duty or institute public interest litigation such as the present suit.[106] According to the Court, it would be wrong for the Court to allow outdated technical rules of *locus standi* to prevent public groups from bringing an action to court to stop unlawful conduct. This decision has expanded the scope of *locus standi* on environmental matters in Nigeria to a large extent. This broad approach adopted by the Court will have some benefits in terms of reducing pollution and improving the enforcement of environmental regulations. The mere possibility that a polluter can be sued motivates regulatory authorities and oil corporations to examine the compatibility of their decisions and operations with environmental law requirements.

In addition to the decision of the Supreme Court in the *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (NNPC),*[107] the provision of the Fundamental Rights (Enforcement Procedure) Rules, 2009[108] removes the barrier of locus standi in respect of public interest litigation, mainly where the subject matter concerns the violation or enforcement of human rights. It provides that:

> The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be struck out for want of locus standi. In particular, human rights activists, advocates, or groups, as well as any non-governmental organisations, may institute human rights litigation,

of the affected citizens to complain, and any such attempt has the effect of not only usurping the powers conferred on agencies and offices like the Attorney General's office established by various State and Federal Laws to protect the environment on behalf of the people, but also the effect of opening the gates to a myriad of frivolous suits which will overwhelm the courts' dockets. The other side of the argument sought to establish the fact that the appellant has the requisite *locus standi* to sue, having shown and demonstrated the required interest to entitle it to sue and that any person with genuine and public-spirited intention should be permitted to approach the court with respect to public interest matters such as the one in the instant case.

106 The Firma Advisory 'Extending the frontiers of the concept of *locus standi* in environmental matters: The Supreme Court's pronouncement in the case of *Centre for Oil Pollution Watch v NNPC* (2019) 5 NWLR (Pt 1666) 518' https://thefirmaadvisory.com/new-blog/2019/5/19/extending-the-frontiers-of-the-concept-of-locus-standi-in-environmental-matters-the-supreme-courts-pronouncement-in-the-case-of-centre-for-oil-pollution-watch-v-nnpc-2019-5-nwlr-pt-1666-518 (accessed 30 June 2021).

107 As above.

108 The Fundamental Rights Enforcement Procedure Rules, 2009 were made by Justice Kutigi, the former Chief Justice of Nigeria by virtue of the powers conferred on him by section 46(3) of the 1999 Constitution of Nigeria. The new rules repeal the former rules of 1979, which constituted a barrier to public interest lawsuits in Nigeria. The rules have made significant contribution in respect of *locus standi*. Preamble 3(e) of the Rules abolishes the *locus standi* rule in Nigeria and encourages public interest lawsuits from a wide spectrum of people and groups.

> and the applicant may include any of the following: (i) anyone acting in his interest; (ii) anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest; and Association acting in the interest of its members or other individuals or groups.[109]

By this provision, the Fundamental Rights Procedure Rules have succeeded in revolutionising environmental justice in Nigeria by widening access to justice, thereby making it possible for aggrieved persons, victims or NGOs and other stakeholders to utilise these Rules in environmental issues. However, the extent to which this provision is in practice applicable in Nigeria in respect of environmental litigation (which is through public interest litigation) will depend on the extent to which environmental right is considered a 'human right' in Nigeria and, therefore, on a par with the other fundamental rights entrenched in Chapter IV of the Nigerian Constitution. Going by the provisions of Section 6(6)(c) of the Nigerian Constitution, which incapacitates the judiciary from determining whether any matter conforms with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution, including environmental issues, and also considering the sacredness of the Constitution,[110] one can only commend the boldness of the Supreme Court in blazing the trail of this new path in its decision.

Considering the level of impunity evident in the exploitation of oil by the various oil companies in Nigeria and the attendant effect their activities have caused on the Nigerian environment, its economy and the livelihood of the Nigerian populace, it can rightly be said that the above decision of the Supreme Court has brought justice closer to the victims of environmental abuse. Therefore, there is an urgent need for the Nigerian Constitution to be amended to upgrade the environmental right from its status as a fundamental objective and directive principle of state policy to a human right capable of being enforceable. This will allow environmental activists to rely strongly on the provisions of the Fundamental Rights (Enforcement Procedure) Rules to institute environmental rights cases before Nigerian courts and the African Court. In addition, it is hoped

109 Fundamental Rights (Enforcement Procedure) Rules 2009, Nigerian Constitution.

110 Section 1(3), 1999 Constitution: 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.

that the Supreme Court's expansion of the concept of *locus standi* in environmental matters will soon extend to all matters of public interest.

5.2 Burden of proof

In Nigeria, the burden of proof in a civil proceeding is placed on the plaintiff.[111] In respect of the person who bears the burden of proof in environmental litigation, the Court of Appeal in *Ogiale v Shell*[112] reaffirmed the position of the law that he who asserts ought to prove his assertion, and this by credible evidence, and the claimant ought to prove his case, relying not on the weakness of the defendant's case but on the strength of his own case. Regarding environmental litigation, the plaintiff bears the burden of establishing that the activities of oil and gas companies are environmentally harmful. This burden must be met by presenting reliable evidence to demonstrate cause and effect, preferably through expert testimony or a witness. This burden is especially high and becomes an arduous task for the plaintiff to discharge, particularly when considering the peculiar and complex nature of environmental systems with their myriad of forces, processes, and interactions. Apart from the fact that those who bear the brunt of environmental degradation are, more often than not, the illiterate, the poor, and the most vulnerable in society, the usually high cost of gathering evidence and the length of time required to obtain such proof are well beyond the financial capability of an average plaintiff. For instance, the United Nations Environment Programme (UNEP) assessment of Ogoniland in the Niger Delta Region spanned over 14 months. During this assessment, it examined 200 sites, reviewed 122 km of pipeline rights of way, conducted 69 soil contaminations, analysed 142 groundwater wells, collected and analysed soil extractions from 780 wells.[113] To carry out the assessment, UNEP had to recruit a team of local and international experts in various disciplines, including contaminated land, water, vegetation, and public health. From the calibre of experts to the cutting-edge equipment at UNEP's disposal, it is doubtful whether any community, let alone an ordinary litigant, can afford to mobilise the resources deployed by UNEP in Ogoniland to obtain the sort of evidence required to prosecute an environmental litigation suit successfully. Yet, UNEP encountered various challenges, from a lack of data or grossly outdated data to a scarcity of resources in many instances. In such circumstances, what chances does an average individual or local community stand in gathering reliable evidence that may lead to a

111 Section 131(2) of the Evidence Act, 2011.

112 (1997) 1 NWLR (Pt 148) 180.

113 United Nation Environment Programme (UNEP) Environmental Assessment of Ogoniland, 2011 (UNEP Report).

successful claim or even confidently proving the same in court? In other words, in the absence of credible evidence, how can the litigant discharge the burden?

In addition, the technical and scientific nature of relevant evidence required in environmental litigation is sometimes exclusively within the knowledge and custody of the defendant.[114] More so, the burden thrust on the plaintiff to prove causation (that is, the degradable act of the defendant resulted in environmental damage, and this environmental damage has resulted in injury to the plaintiff) further reduces the plaintiff 's chances of success *vis-à-vis* justice. The situation worsens further when there is a possibility of more than one cause of injury, as the plaintiffs must prove the particular cause of their injuries and establish a causal link to the defendant's actions.[115] Further, the manipulative strategy employed by defendant companies to deceive regulators and plaintiffs by deliberately withholding or creating misleading information makes it even more difficult for plaintiffs to successfully discharge the burden of proof in environmental litigation. Apart from the wide range of legal defences that, which operate in favour of the defendants, the latter is also better positioned in terms of the financial and technical resources, information, equipment, and expertise at their disposal to conduct adequate scientific testing or analysis required to prove that their actions are not causing environmental damage. For this reason, they tend to carry on with their degradable act without liability.

It, therefore, becomes highly imperative for Nigeria to amend its law and move with the current trend of shifting the burden of proof from the plaintiffs to the defendants in environmental litigation. Once the plaintiff establishes harm linked to the defendant's act, the burden should shift to the defendant to extricate himself from liability by establishing that his act or omission did not cause the harm complained of or any harm to the plaintiff. If the burden is shifted from the plaintiff to the defendant, the chances of success would no longer be thwarted by a lack of financial resources, the non-availability of information, or the lack of expertise needed to gather evidence. Neither will the chances of success be affected by the obscurity of relevant evidence by the defendant who willfully destroys evidence to conceal their culpability in environmental degradation. To a large extent, it will reduce the chances of the defendant

114 NA Odong 'Burden of proof: Real burden in environmental litigation for the Niger-Delta of Nigeria' (2020) 35 *Journal of Environmental Law and Litigation* 193 at 194 https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/25374/JELL35_Odong.pdf ?sequence=1&isAllowed=y (accessed 28 June 2021).

115 Odong (n 114) 211.

companies using unnecessary technicalities of the law and procedures against litigants.

In matters of environmental protection, countries' national legal systems are gradually shifting the burden of proof to the accused once a minimum standard of evidence is provided, and Nigeria should take a clue. At the international level, the rationale for this shift can be traced to Principle 15 of the 1992 United Nations Conference on Environment and Development (Rio Declaration) and Principle 3 of the 1997 Lisbon Principles of Sustainable Governance (the Lisbon Principles). While Principle 15 of the Rio Declaration requires that 'where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent degradation', Principle 3 of the Lisbon Principles provides that, in the face of uncertainty about environmental impacts, 'the burden of proof should shift to those whose activities potentially damage the environment'. At the national level, the United States has applied this approach, for instance, in its food industry, by shifting the responsibility from the regulator to the industry players, who are now required to prove that each imported item is safe and conforms to the FDA's standards. This approach has also been extended to the chemical industry in the United States, where the regulator, the EPA, now requires that chemical companies prove the safety of their chemicals rather than requiring the regulator to test each chemical for safety or otherwise.[116] Ecuador has gone a step further by constitutionalising the shift in the burden of proof from the plaintiffs to the defendants in Section 397(1) of the 2008 Constitution, which provides that in respect of environmental sustainability, 'the burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant'.[117]

Constitutional provisions supersede all other legislation that interferes with or is contrary to its dictates. In Nigeria, the Constitution is supreme, and its provisions have binding force on all authorities and persons throughout the federation.[118] Considering the rigorous process required to amend the Constitution, constitutionalising this shift in the Nigerian Constitution guarantees that any changes to the provision will receive widespread attention and deliberations from all sectors of society as its provisions are in line with Section 1(1), and take precedence over non-

116 S Camporesi & JA Knuckles 'Shifting the burden of proof in doping: Lessons from environmental sustainability applied to high-performance sport' (2014) 15 *Reflective Practice* 106 at 111, cited in Odong (n 114) 222.

117 Section 397(1) of the Ecuador Constitution, 2008.

118 Section 1(1) of the 1999 Constitution (as amended).

constitutional legislative processes. Nigeria should therefore aim to meet global benchmarks by establishing these constitutional strongholds, which will guarantee environmental protection and sustainability and ensure fairness and justice to the plaintiffs who bear the brunt of environmental degradation.

6 Non-legal obstacles against access to justice in environmental matters

The ability of any group, particularly the impoverished, to effectively exercise their agency in human rights lawsuits and other challenges is seen to be shaped by a number of objective elements. These elements could be considered non-legal obstacles against access to justice in law courts, and they include, amongst others, financial constraints, illiteracy, a lack of knowledge of existing rights, and the delay in dispensing with matters in the Nigerian courts.

6.1 Financial constraints

Poverty has been tagged as an adversary to human rights, and rightly so, partly because of its interference with people's ability to take action to safeguard their rights.[119] According to Costa, poverty has two aspects: one that deals with socioeconomic goods and services and the other that has to do with one's ability to obtain justice and exercise one's legal rights.[120] What is undeniable is that when poverty exists, especially in its material form, it tends to greatly diminish the human ability to seek justice be it in the courts or through other means. In fact, some could even contend that it is overly optimistic to expect someone to be poor while also having the agency required to pursue legal concerns in a setting like Nigeria.[121]

Litigation is exceedingly expensive in Nigeria, as it is in many other legal countries with comparable geographical conditions. Making the first move to challenge a violation of human rights is not something that most would-be litigants in Nigeria do casually. It necessitates a thorough examination and comparison of the costs and potential rewards. Even in cases where costs and benefits can be balanced, the fact that the prospective poor litigant is in a precarious economic situation frequently makes the

119 Okafor & Ugochukwu (n 96) 403.

120 See FD Costa 'Poverty and human rights: From rhetoric to legal obligations: A critical account of conceptual frameworks' (2008) 9 *Sur - International Journal on Human Rights* 83.

121 Okafor & Ugochukwu (n 96) 404.

expenses weigh more heavily on them than any potential benefits.[122] More so, even if poor litigants expect to prevail in their cases at the courts of first instance, they must take into account the cost of upholding those victories on appeal in the event that the pertinent opposing party elects to exhaust all available appeals. As cases move up the jurisdictional ladder, the likelihood that the cost of maintaining attorneys and travelling to and from venues will increase exponentially.[123]

For the impoverished, even the sheer belief that the achievement of victory in court is no guarantee that the government will implement the judgement, makes an attempt at appellate journeys more or less an elite entitlement. Thus, for the local communities that have been impoverished by oil and gas exploration and production, the financial capacity to hire legal counsel, pay the cost of filing and service of court documents, or even engage the services of expert witnesses to prove their cases can be considered a herculean task. This situation was recognised by the Court of Appeal per Justice Niki Tobi in *General Oil Limited v Oduntan*[124] when he stated that:

> It is common knowledge that litigation is a very expensive thing in this country, and the present economic situation has made the position worse. Filing fees have over the years risen. So are fees for counsel.

This is also further reaffirmed by Brems and Adekoya[125] who assert that:

> Protecting or enforcing one's rights in a court of law in Nigeria can be very expensive. Litigants have to bear several costs, such as filing fees, which in some cases depend on the plaintiff 's claim. An additional cost that should not be underestimated is that of transportation to and from court, for each sitting. For people living in poverty, access to justice can indeed be hindered by the impossibility of physically reaching the court building. The inability of people living in poverty to bear any expense for transport often forces people to walk to the court …

The cost of legal representation is yet another factor to be considered. For instance, it will cost at least N50 000 to hire a lawyer in a case involving

122 Okafor & B Ugochukwu (n 96) 405.

123 See NS Okogbule 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' (2005) 2 *Sur-International Journal on Human Rights* 101 https://www.scielo.br/j/sur/a/cw3P7DkTxbwncFJTWXJ5dNK/?lang=en (accessed 31 January 2023).

124 (1990) 7 NWLR (Pt 63) 433.

125 E Brems & CO Adekoya 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' (2010) 54 *Journal of African Law* 258.

the enforcement of fundamental rights.[126] While this is currently less than $100, the cost is still far more than the majority of Nigerians with modest incomes can afford to spend. The filing, service, and other administrative fees that the potential applicants will be responsible for are not included in this sum. The ability of the poor and not-so-poor to exercise their agency to seek legal remedies for violations of their human rights may be hindered by these costs. Apart from the fact that environmental litigation suits are not within the services covered by legal aid that provides services to indigent citizens of the country, the oil companies against whom the environmental claims are made have enormous financial resources to engage the best legal services and pay for the services of expert witnesses, which more often than not works to the detriment of the vulnerable local communities.

6.2 Illiteracy/ignorance

Illiteracy has long been recognised as a major obstacle to the effective enjoyment of human rights.[127] Despite several development plans and programmes by succeeding governments that emphasise the value of education in Nigeria, the socio-economic makeup of the nation has made it impossible for the great majority of Nigerians to have access to it. The current breakdown of public education, particularly universities, has made this issue worse by turning education into an exclusive good that the bourgeoisie can only access through private institutions. But the importance of education and its effect on the independence of citizens cannot be overemphasised. Unlike an illiterate person, a man with education will be able to adjust to the realities of the situation with ease and possess the mental capacity to insist on the enforcement of his rights. Education enhances his ability to maximise the opportunities and resources in his environment.[128] An accurate observation was made in the excerpt from Mr René Maheu's speech, Director-General of UNESCO, at the World Conference on Human Rights, held in Teheran on April 23, 1968, that one must be able to read before anything else. The importance of literacy to the enjoyment and/or enforcement of human rights was captured in the following words:

> Before man can truly make his responsible freedom a reality, he must be able to understand the world around him, to communicate with others, to receive, transmit and compare experience, knowledge and intention … To try to understand, in order to try to choose and to determine what one wants, one

126 As above.

127 UNESCO *Illiteracy and human rights* (1968).

128 Okogbule (n 123) 106.

> must first be able to read. In times when men are more and more dependent on the intermediary of signs, to be unable to read means isolation in the world; and this is true despite the proliferation and propagation of images – and incidentally we do not realize sufficiently to what an extent those images refer to ideas which cannot be handled with precision without the written word. Isolation from the world, and therefore isolation in the world, solitude, darkness, impotence, without command of any means of finding a place in accordance with one's own ideas in the environment, of choosing one's own work, of defending one's rights, of ordering one's needs and, a fortiori, of influencing by deliberate choice the changes taking place in that environment … An illiterate is unaware of the law which could protect him, for example, of the guarantees provided for in the Universal Declaration in matters relating to policing and justice, marriage, work, participation in and supervision of the management of public affairs. He is completely at the mercy of others.[129]

It is, therefore notable that while education has the power to liberate people from ignorance, poverty, and disease, its absence has profound psychological, political, and economic implications that can severely restrict access to justice anywhere in the world. In Nigeria, awareness of and enforcement of fundamental rights have been severely hampered by ignorance and illiteracy. This is partly because the Nigerian Constitution (the basis upon which every other law derives its validity) is exclusively written in English, the official language of the nation; it has not been translated into any of the major local tongues spoken by the populace. Illiteracy is the quality or condition of being unable to read or write, and while this is a major problem all over the world,[130] the situation in Nigeria is far from encouraging, as the current statistics for 2022 report captured the illiterate population at 31 per cent.[131] While this current figure represents a significant reduction from the hitherto statistics of 38 per cent in 2015, this still equates to about 60 million illiterates in a country of over 200 million people. As a result, given Nigeria's degree of illiteracy, illiterates, including functional illiterates, are generally unaware of their fundamental rights as outlined in the Constitution or are otherwise ignorant of human rights. Without knowledge of those rights, a person is unlikely to stand up for

129 As above.

130 Around the world, 880 million persons have been classified as illiterate, and it is estimated that almost 90 million adults in the United States are functionally illiterate, meaning they lack the bare necessities of knowledge to get by in society. See R Nordquist 'Definition and meaning of illiteracy' *ThoughtCo* 6November 2019 https://www.thoughtco.com/what-is-illiteracy-1691146 (accessed 5 January 2023).

131 Q Suleiman 'International literacy day: Adult illiteracy in Nigeria now 31% – Minister' *Premium Times* 6 September 2022) https://www.premiumtimesng.com/news/top-news/552619-international-literacy-day-adult-illiteracy-in-nigeria (accessed 5 January 2023).

those rights or attempt to enforce them.[132] In respect of oil mining activities, the local communities have only a rudimentary or no understanding of the operations of oil firms. Therefore, if they don't know issues that could be contested in court or even the acts of the oil companies that can give rise to a cause of action; they will be left to their woes. Even when the local people know that they can sue oil firms, the time it takes for matters to be resolved in Nigerian courts appears to deter them from doing so.

6.3 Delays and complexities in legal processes

Delays in the legal process significantly plague the course of litigation in Nigeria. In fact, it is a popular claim that the administration of justice in Nigeria is incredibly slow. However, the ability of Nigerians to put up with this situation for so long without giving a long-term solution is, according to Okogbule, something that is difficult to comprehend.[133] Nigerian courts take an average of five to ten years to resolve disputes at the court of the first instance and considerably longer for oil and gas environmental matters.[134] Apart from the Nigerian court system's inherent delays, unfavourable decisions by oil companies are usually appealed against until the matter reaches the Supreme Court. Appeals to the Supreme Court and Court of Appeal can take several years to resolve, and the longer it takes, the more time and resources the plaintiff must invest.

A minimum of two years is required for the Supreme Court to hear an appeal from the Court of Appeal, which does not include the time required to prepare the appeal record.[135] Therefore, a litigant only knows when the Supreme Court initiates appeals, not when they are likely to be conclude. Some cases are illustrative. According to records, a spill in Peremabiri, Bayelsa State, in January 1987 was heard in the High Court in 1992 and the Court of Appeal in 1996;[136] a case heard in the High Court in 1985 in relation to damages sustained on a continuous basis since 1972 was heard in the Court of Appeal in 1994; a case heard in 1987 in relation to damages sustained since 1967 was heard in the Court of Appeal in 1990 and in the Supreme Court in 1994.[137] As a result of the prolonged

132 Brems & Adekoya (n 125) 5.

133 Okogbule (n 123) 99.

134 O Oko 'The problems and challenges of lawyering in developing societies' (2004) 35 *Rutgers Law Journal* 569 at 636.

135 OI Obiokoye 'Eradicating delay in the administration of justice in African courts: A comparative analysis of South African and Nigerian Courts' LLM Thesis, University of Pretoria, South Africa, 2005, at 35.

136 See *SPDC v HRH Chief GBA Tiebo VII* (1996) 4 NWLR (Pt 445) at 657.

137 Ojo & Tokunbor (n 68) 7.

legal process, oil firms usually prefer out-of-court settlements. After over a decade of litigation with no end in sight, the case of *Isaiah v Chevro*n was resolved out of court for a pittance of N20 million as opposed to the N100 million sought by the plaintiff. In the case of *Ekeremor Zion v Shell*, a lower court awarded N30 million in compensation for oil leaks that damaged local farmlands after a three-decade legal fight. In 1995, the case was first filed as a consolidated suit in the Bendel State High Court. The court awarded the plaintiffs damages on May 27, 1997. The defendant was unhappy with the decision and filed an appeal at the Court of Appeal, Benin City. The Court of Appeal dismissed the appeal on May 22, 2000. The appellant was still unhappy and proceeded to the Supreme Court. In 2000, the Supreme Court unanimously denied the appeal, upheld the Court of Appeal's decision, and ordered each set of respondents in the consolidated proceedings against the appellant to pay N500 000 in costs.[138] The reason for these delays is not far-fetched. The Supreme Court is the final arbiter in practically all other types of litigation in the nation, in addition to its authority as the final court in all constitutional disputes. While this presents opportunities for litigants to pursue the course of justice at the highest court, it also unfortunately creates a situation where the highest court's docket is perpetually clogged with a variety of cases, ranging from the grave to the insignificant. In fact, human rights lawsuits, due to their nature and constitutional importance, should ideally be given preference, but they also experience lengthy delays alongside regular appeals. The unbearably high number of cases in the court has a negative impact on both the duration and quality of its decisions.[139] It is for this reason that proposals have been made for the amendment of the Constitution to limit the number of appeals coming before the Supreme Court.[140]

The time it takes to resolve environmental issues related to oil and gas violates the principle of access to justice and does not allow the local communities to use the courts to safeguard the environment better. Apart from awarding insufficient damages to successful claimants in oil and gas environmental disputes, the judicial arm of successive governments has more often than not aligned with economic considerations in cases involving oil and gas environmental damage. When weighing the benefits and harms, courts have consistently prioritised the requirement for ongoing oil operations and, consequently, the financial benefits to the operating company and the country over and above the need for environmental

138 As above.

139 Okafor & Ugochukwu (n 96) 407.

140 See I Shaibu 'Diversion of funds: CJN blasts governors' *Vanguard* 22 September 2011 http://www.vanguardngr.com/2011/09/diversion-of-funds-cjn-blasts-govs/ (accessed 30 January 2023).

protection.[141] In *Allar Irou v Shell-BP Development Company (Nig) Ltd*,[142] the plaintiff sued for damages suffered due to oil spillage from Shell's pipeline. Although the court held that the defendant was negligent in managing its pipeline, which resulted in spillage, the court refused to grant an order for an injunction against the defendant to forestall future occurrences. According to the court,

> to grant the order of injunction as prayed would amount to asking the defendants to stop operating in the area… it is needless to say that mineral oil is the main source of this country's (Nigeria's) revenue.[143]

This position fiercely maintained by Nigerian courts is incompatible with sustainable oil and gas development, which gives the environment the benefit of the doubt and strives to retain the status quo until the proponent of the activity can demonstrate that it is environmentally safe.[144]

These delays in the judicial process, though largely unnecessary, are, in practice, a departure from the expectations, considering the provisions of the Nigerian Constitution and Rules of Courts, which are intended to expedite the resolution of claims. The Constitution's Article 36(1) guarantees a speedy trial, stating that:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.[145]

The phrase 'within a reasonable time' as used in these subsections is unfortunately not defined by the Constitution. However, in *Gozie Okeke v The State*,[146] the Supreme Court per Ogundare JSC stated four factors to be taken into account when determining whether an accused person's trial was held within a reasonable amount of time, to wit:

141 KSA Ebeku 'Judicial attitudes to redress for oil related environmental damage in Nigeria' (2003) 12 *Review of European Community and International Environmental Law* 199 at 202.

142 Judgement was delivered on 26 November 1973 (unreported suit W/89/71, Warri High Court).

143 As above.

144 Ojogwu & Nliam (n 28) 296.

145 In the same vein, art 36(4) of the 1999 Constitution provides that whenever any person is charged with a criminal offence, he shall be entitled to a fair hearing within a reasonable time by a court or tribunal.

146 (2003) 15 NWLR pt 842 p 25.

> the length of the delay, the reasons given by the prosecution for the delay, the responsibility of the accused for asserting his rights, and the prejudice to which the accused may be exposed.[147]

Nonetheless, a trial lasting more than three to four years cannot be considered to be 'within a reasonable time'.[148]

While some of the delays are inherent in the system (such as highly technical and complex rules of procedure), others are brought on by the administrators of the system the attitude of the court staff, the attorneys and even the judges themselves. As rightly observed by Okogbule,[149] lawyers writing letters of adjournment of cases, judges and magistrates are being unable to deliver judgments on time, failure of the police or prison authorities to produce accused persons in court for trial, and the practice of cases starting *de novo* upon the transfer of judges are some of the factors that could contribute to delays in the administration of human rights justice in Nigeria. It is opined that a determined judge could easily resolve some of these issues. For instance, a letter from a lawyer requesting an adjournment is scarcely a superior order to the judge in question. Thus, rather than give in to intimidation from some of these attorneys, the court must only accept such excuses of absence if they are persuaded that they were written in good faith and not solely to delay or hinder the case's progress. The Supreme Court took a strong stance against such defences in the case of *Shell v Udi*,[150] when an oil corporation was sued for harming fish ponds and valuable trees while conducting oil exploration activities. In this case, the oil company's attorney's basis for asking for an adjournment was no other reason than that he had to go to a legal conference. The trial judge sided with the plaintiff and disallowed the adjournment. The decision was upheld by the Court of Appeal, which stated that

> the grant of an adjournment in a case is a matter wholly within the discretionary competence of the court, which the court should exercise in line with the particular facts and circumstances of the case.[151]

The issue of certain judges failing to deliver their judgments on time can also be resolved by judges themselves, especially because the time required to write up decisions once hearings are over is constitutionally regulated. In accordance with Section 294(1) of the Constitution, every

147 *Gozie Okeke* (n 146) 85.

148 Okogbule (n 123) 100.

149 Okogbule (n 123) 99.

150 (1996) 6 NWLR (Pt 455) 483.

151 Okafor & Ugochukwu (n 87) 412.

court established thereunder shall render its judgment in writing no later than 90 days following the close of the evidence and the conclusion of the final arguments and shall deliver duly authenticated copies of the judgment to all parties to the cause or matter decided upon within seven days of the judgment's delivery. It is, therefore the duty of judges to abide by this constitutional requirement. On the other hand, in spite of the strong and relentless advocacy for the expeditious resolution of disputes, the importance of giving all parties a chance to present their arguments before the court makes a final decision cannot be overstated. I couldn't agree more with the observations of Justice Mikailu in the case of *Prince James Osayomi v Governor of Ekiti State*,[152] that

> Every party is entitled to a fair hearing and there should be no over speeding and no stampeding in order to enable the trial court arrive at a just decision. Justice delayed is justice denied but justice rushed may result into justice being crushed.

7 Environmental justice as a panacea for environmental sustainability

Some of the formulations of the concept of sustainable development refer to 'sustainability', 'environmental sustainability', and 'sustainable approach'. One of the fundamental principles of sustainable development is access to justice. Thus, to ensure sustainability in Nigeria, every person affected by oil and gas development activities, particularly in the Niger Delta Region, which is the focus of this work, should be able to seek redress in the court.

The term 'sustainability' has no universally agreed definition. It is an evolving concept, and members of various professions have made efforts to give meaning to the term within the context of those respective professions. To sustain, in dictionaries, means 'give support to', 'to hold up', 'to bear', or 'to keep up'.[153] Sustainable is an adjective for something that can be sustained, something that is 'bearable' and 'capable of being continued at a certain level'. Thus, sustainability is seen as how something is kept at a certain level.[154] Presently, considering the host of environmental and social problems with which societies around the world are confronted, the term sustainability has been increasingly used in a specific way to address the

152 (2005) 2 NWLR pt 909 p 67.

153 Youmatter 'Sustainability – What is it? Definition, principles and examples' https://youmatter.world/en/definition/definitions-sustainability-definition-examples-principles/ (accessed 28 June 2021).

154 As above.

issue of human sustainability on planet Earth. It is considered the process or ability of humankind to avoid the depletion of natural resources to maintain an ecological balance that prevents a continued decrease in the quality of life in modern societies.[155]

Environmental sustainability is concerned with interacting with the environment responsibly, conserving natural resources, and protecting global ecosystems. In other words, environmental sustainability requires environmental resources to be protected and maintained for future generations.[156] Because decisions relating to the environment and the impact emanating therefrom are usually not felt immediately, a key element of sustainability is its forward-looking nature. Thus, environmental sustainability requires ensuring future generations have the natural resources available to live an equal, if not better, way of life than current generations.[157] It is the process of living within the limits of available physical, natural, and social resources in ways that do not interfere with the ability of living systems in which humans are embedded to thrive in perpetuity. It is a condition of balance, resilience, and interconnectedness that allows human society to satisfy its needs while neither exceeding the capacity of its supporting ecosystems to continue to regenerate the services necessary to meet those needs nor by our actions diminishing biological diversity.[158]

While sustainability seems to have a stronger focus on the present and on keeping things above a certain level, sustainable development, on the other hand, focuses more on a long-term vision. Environmental sustainability is often considered within the context of sustainable development. This goal-oriented normative concept stipulates the need to reconcile the conflicting goals of economic development, environmental protection and social progress. The concept of sustainable development first emerged in the 1960s when environmentalists started debating the impact of economic growth on the environment. Since then, different definitions of sustainability and sustainable development have been put forward and discussed, but the most popularly adopted definition of sustainable development was first written in 1987 in the United

155 As above.

156 T Pettinger *Environmental sustainability – Definition and issues* (2018) https://www.economicshelp.org/blog/143879/economics/environmental-sustainability-definition-and-issues/ (accessed 28 June 2021).

157 United Nations Environment Programme 'Sustainability' https://www.unenviornment.org/about-un-environment/sustainability (accessed 28 June 2021).

158 J Morelli 'Environmental sustainability: A definition for environmental professionals' (2011) 1 *Journal of Environmental Sustainability* 5 http://scholarworks.rit.edu/jes/vol1/iss1/ (accessed 28 June 2021).

Nations Brundtland Commission Report: *Our Common Future*, prepared for the World Commission on Environment and Development. Here sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[159] Other international instruments like the 1946 International Convention for the Regulation of Whaling,[160] the 1972 Stockholm Declaration,[161] the UN Charter of Economic Rights and Duties of States,[162] and the World Conservation Strategy: Living Resource Conservation for Sustainable Development (WCS), 1980[163] contained some elements of sustainable development before it became more popular in Our Common Future by the World Commission on Environment and Development (WCED) in 1987. The 1992 Rio Declaration and Agenda 21[164] both provide an overview of sustainable development, which serves

159 United Nations General Assembly *Report of the World Commission on Environment and Development: 'Our common future'* UN Doc A/42/427 (1987). Although this definition has been severely criticised for being anthropocentric in that it focuses too much on development rather than sustainability and in meeting the needs of human beings without a reference to other species and ecosystems, and generally makes no reference to environmental protection, it has been opined that the fact that the needs of the future generations are taken into consideration invariably implies that such development must be sustainable. This reasoning is anchored on the fact that if the adoption of a sustainable approach to development results in the protection of other species and the environment in its entirety, then it is inconsequential if the definition that allowed for such protection is anthropocentric in nature.

160 See the Preamble of the Convention which provides that: '[R]ecognizing the interest of the nations of the world in safeguarding for *future generations* the great natural resources represented by the whales' stocks' (emphasis mine).

161 See for instance Principle 1 of the 1972 Stockholm Declaration, which states, among other things, that 'man … bears a solemn responsibility to protect and improve the environment for present and future generations…' See United Nations *Report of the United Nations Conference on Human Environment, Stockholm 5-16, June 1972* (1973) https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/PDF/NL730005.pdf?OpenElement (accessed 24 August 2023).

162 UN General Assembly Res 3281 (XXIX), UN GAOR, 29th Sess, Supp No 31(1974) 50 https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf (accessed 24 August 2023). Article 30 provides that the protection, preservation, and enhancement of the environment for the present and future generations is the responsibility of all states, and states are obliged to establish their own environmental and development policies in conformity with such responsibility.

163 Here, conservation is defined in para 4 of the introduction as 'the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations'. IUCN 'World conservation strategy: Living resource conservation for sustainable development' (1980) https://portals.iucn.org/library/efiles/documents/wcs-004.pdf (accessed 24 August 2023).

164 See particularly Principle 3 of the Rio Declaration, which states that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations', and Principle 4 which states that 'in order

as the foundation for the five environmental instruments established at the United Nations Conference on Environment and Development.[165]

Sustainable development is now embraced as the global standard for measuring governments' developmental objectives and performance worldwide. From the Millennium Development Goals (MDGs) that emerged in 2000 to the subsequent Sustainable Development Goals (SDGs) in 2015, the concept has significantly progressed from mere political rhetoric to actual action or practice. Member States of the United Nations (including Nigeria) are expected to harmonise the SDGs into their development agendas. Sustainable development practices and policies were included in environmental governance in Nigeria as a result of the adoption of the National Policy on the Environment and the Objectives and Strategies for Nigeria's Agenda 21. Both programmes seek to include environmental considerations in the planning of future growth across all governmental and private spheres.[166] However, the legal standing of sustainable development under Nigerian environmental law rests on the rulings of Nigerian courts. If the courts have not made such declarations, then determining its legal standing depends on whether it is incorporated into a soft law or enforceable municipal environmental legislation. Indeed, in the context of such legislation, the legal status of sustainable development will additionally depend on whether it is included in the Preamble, recitals, or operative portion and, in the latter, whether it is stated in a general or specific mandatory language.[167] Additionally, to ensure that sustainable development is properly implemented and upheld under Nigerian environmental law, it must be explicitly and directly incorporated into the Constitution of the Federal Republic of Nigeria as a fundamental component of the right to life and the applicable

to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it'. See also paragraph 1, Chapter 1 of Agenda 21, which states that 'humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health, and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environmental and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems, and a safer, more prosperous future…'.

165 This includes, the Rio Declaration, Agenda 21, Convention on Biological Diversity, United Nations Framework Convention on Climate Change (UNFCCC), and the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests.

166 EE Okon 'The legal status of sustainable development in the Nigerian environmental law' (2016) 7 *Afe Babalola University Journal of Sustainable Development Law & Policy* 104 at 116.

167 Okon (n 166) 111.

constitutional environmental provisions. Section 20 of the Constitution, which contains the fundamental environmental provisions, must also be transferred from Chapter II to Chapter IV on fundamental human rights.[168]

The Supreme Court of Nigeria, in the case of *Chief Adebiyi Olafisoye v Federal Republic of Nigeria*[169] ruled that the provisions of Chapter II of the 1999 Constitution are justiciable if the National Assembly enacts legislation on them in accordance with Item 60(a) of the Exclusive Legislative List of the Second Schedule to the 1999 Constitution.[170] This is the explicit implication of Section 15(5) of the 1999 Constitution, which states that the state shall abolish all corrupt practices and abuse of power, being implemented by the National Assembly through the Corrupt Practices and Other Related Offences Act 2000 (ICPC Act).[171] Therefore, it is no longer valid to assert that the state's environmental obligations under Section 20 of the Constitution are not justiciable after the NESREA Act was passed, which established the National Environmental Standards and Regulations Enforcement Agency and granted it authority to enforce environmental standards, regulations, rules, policies, and guidelines in Section 1(2). In consequence, Section 1(1) and (2) of the NESREA Act have transformed an ordinary legal concept of the environment enshrined in Section 20 of the Constitution into a legal obligation or responsibility.[172]

While there are environmental provisions in the 1999 Constitution, there is no particular clause on sustainable development, nor can the legal status of sustainable development be determined from the abundance of environmental laws in Nigeria. Reference can, however, be made to the National Policy on Environment and the NESREA Act, because of their broad impact on many facets of the environment. The Federal Government's first National Policy on the Environment (NPE), which was introduced on November 27, 1989, underwent a thorough revision in 1999, incorporating fresh ideas, new rules, and modifications into the environmental governance outlined in the Rio Declaration on Environment and Development and the other 1992 Rio instruments. The NPE's general objective is to ensure environmental protection and the conservation of

168 As above.

169 [2004] 4 NWLR [Pt 864] 580.

170 The sub-item provides thus: 'the establishment and regulation of authorities for the Federation or any part thereof – (a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'.

171 See *Attorney-General of Lagos State v Attorney-General of the Federation* [2003] 12NWLR [Pt 833] 241; *Chief Adebiyi Olafisoye v Federal Republic of Nigeria* [2004] 4 NWLR [Pt 864] 580.

172 Okon (n 166) 122.

natural resources for sustainable development.[173] Sustainable development as a program of action in the NPE is at best a soft law. However, under Section 2 of the NESREA Act, the agency, shall, subject to the provisions of the Act, have responsibility for the "… sustainable development of Nigeria's natural resources in general". Going by this provision, sustainable development is expressed as the rule of law, and the agency is obligated to ensure its enforcement, particularly with the combined effect of sections 1(2)(a) and 7(a) of the NESREA Act, which provides that the agency shall be the enforcement agency for the purpose of ensuring compliance with environmental standards, regulations, rules, laws, policies and guidelines, which of course includes ensuring compliance with the sustainable development of Nigeria's natural resources.

Sustainable development calls for concerted efforts towards building an inclusive, sustainable and resilient future for people and the planet. To achieve sustainable development, it is crucial to harmonise the three core elements of economic development, social inclusion, and environmental protection, which comprise the three pillars of sustainable development. These elements are interconnected, interdependent, mutually reinforcing, and crucial for individuals' and societies' well-being. While sustainable development recognises the legitimacy of economic growth as a means of alleviating poverty in the developing world, such economic growth must remain within the bounds of what is ecologically sustainable because the environment provides both the resources for economic activity as well as the ecological services necessary for the sustenance of human and non-human life on earth. Thus, for a process to be sustainable, it should not exceed the limit of the environment's carrying capacity. In other words, it should not cause irreversible change to the environment, should be economically viable, and should ultimately benefit society.

On the other hand, environmental justice refers to the right of present and future generations to a safe, healthy, and sustainable environment. Environmental justice is achieved when minority and low-income individuals, communities, and the general population enjoy the same degree of protection from environmental and public health hazards and participate in or enjoy equal access to decision-making that affects their environment. Failure to provide justice for marginalised groups exacerbates the inability to resolve the looming environmental crisis.

173 Nigeria National Policy on the Environment (Revised 2016) hereinafter referred to as NPE 2016 https://faolex.fao.org/docs/pdf/nig176320.pdf (accessed 24 August 2023).

Environmental justice is also a fundamental procedural principle of sustainable development. It requires access to environmental information, which is a prerequisite for informed public participation in decision-making and monitoring government activities concerning the environment. It also requires fair and timely public access to remedies and compensation in pollution or environmental degradation cases. It is the procedural component that contributes to achieving the socio-economic and environmental goals of sustainability.

Environmental justice and sustainable development are interdependent and are both necessary to create an equitable environment for all.[174] Environmental justice and sustainable development are based on recognising that environmental degradation harms human beings and the environment. They are both intended to address the significant impact of such degradation on human health and well-being.[175] SDG Goal 16 is closely related to the ambitions of environmental justice in that it explicitly aims to achieve access to justice for all. It 'calls for non-discriminatory laws and policies for sustainable development – to ensure that the SDGs leave no one behind'. It also requires states to provide inclusive decision-making processes, public access to information and equitable access to justice.

The oil and gas industry is central to sustainable development in many national economies, being a key driver of socio-economic development. Despite the industry's contribution to sustainable development in Nigeria, its activities, operations, and products could potentially negatively impact an extensive range of areas covered by the SDGs, including communities, ecosystems and economies. For such activities to be sustainable, there must be integration and balancing environmental and socio-economic development in the exploration and exploitation of oil and gas reserves. This will ensure that the economic aspect of the oil and gas activity is done within the environment's ecological carrying capacity while also maintaining social progress and development.[176] Sustainability lies at the centre of environmental protection, social progress and economic growth. Development is not sustainable without any of these components (environmental protection, social progress, and economic growth). We can achieve true sustainability by adequately balancing economic, social and environmental needs and concerns. Without a sustainable environment

174 Morelli (n 158) 15.

175 Morelli (n 158) 18.

176 Ojogwu & Nliam (n 28) 135.

to provide a resource foundation, it would be difficult or impossible to imagine having a sustainable society.[177]

It isn't straightforward to maintain sustainable development without having environmental justice. No nation can achieve sustainable development if it lacks environmental justice. Environmental problems in the Niger Delta that have arisen due to the exploration and production of oil and gas development activities are undoubtedly justice (economic, social and environmental) concerns. Unfortunately, the problems have reached far beyond what could have been imagined. As documented by the United Nations Report of 2011, the environment of the Niger Delta is so polluted that it could take 25 to 30 years to reverse the associated sustainability consequences of the pollution. It has been ten years since that report was released, and the search for environmental justice in the region continues. Not only have we had new oil spills and gas flaring cases, but the fair and meaningful participation of the region's people in decision- making processes, in line with international best practices, is another component of environmental justice still fundamentally lacking in the area. Sustainability can only be well comprehended through environmental justice. Environmental justice, which includes participatory decision- making and protecting vulnerable groups from harmful environmental impacts, must be seen as an intrinsic component of environmental sustainability.

8 Conclusion

This chapter observes that environmental injustice in Nigeria stems from oil and gas exploration and production activities that have degraded the land, particularly the Niger Delta Region, worsened the health of the inhabitants of the community and reduced their attempts at improving their quality of life without proper compensation to the local communities. People are forced to live in these areas where lands, rivers, and the atmosphere are avoidably polluted because they have nowhere to move outside their ancestral lands. This constitutes a gross violation of any notion of environmental justice and a total disregard of the people's right to life and dignity by local authorities, multinational oil companies, the Nigerian government, and accomplices.

The governing system run by the Nigerian government is mainly financed by the oil industry, which to a great extent supports environmental injustice.[178] Nigeria's reliance on oil and gas puts the country in a

177 Morelli (n 158) 4.

178 Unfortunately, the oil wealth that accrues on the land is divided between the Nigerian

vulnerable and increasingly unsustainable position, particularly in the face of heightened economic challenges. Although the Nigerian Constitution allows the federation to benefit from the nation's natural resources, sustainable policies and laws guided by environmental justice principles would significantly alleviate the current unpleasant situation of economic insecurity, poor health, strife, and decay in the Niger Delta region. Considering the magnitude of environmental degradation caused by development activities and the deterioration and depletion of natural resources due to excessive consumption, rising population pressures, poverty, and pollution, there is a need for sustainable development to be adopted and implemented as a way of life.[179]

Environmental justice is critical in the fight for a safe environment for the current generation and future humans who will inhabit the planet. As long as Nigeria depends heavily on the revenue generated by the oil industry, the incidence of oil pollution and its attendant environmental degradation will be a challenge for the country's environment. Victims of these polluting activities will seek redress through the courts or resort to extra-judicial means or self-help. Because natural resources are not limitless, the government must develop a fair, effective, and easily accessible system of justice regarding how the natural resources in the environment and the proceeds therefrom can be utilised to ensure sustainability.

The judiciary is critical to the attainment of environmental justice. Judicial powers are vested in courts in accordance with the Constitution. The courts are empowered to adjudicate disputes between government,

government and the oil companies, with very little or no money going to the communities. More often than not, the government's share of the money ends up in the private bank accounts of officials in the executive branch, which explains why the Nigerian government is usually quick to side with foreign oil companies in disputes with local communities.

179 Sustainable development as a way of life under the Nigerian traditional culture dates back to the precolonial era, where the indigenous people maintained unwritten customary laws which regulated the activities of the people particularly as it concerns the conservation of nature and protection of the environment. Apart from customary laws which provided for the communal declaration of certain forests and groves as sacred and the conservation laws on fishing, hunting, water and animals, that recognised the need to conserve these species in the spirit of 'sustainable development', there was also the traditional practice of shifting cultivation in agriculture wherein a portion of land cultivated in a particular was left vacant and uncultivated for a number of years to allow for such portion of land to replenish lost nutrients by reason of the former cultivation. This allowed for the fertility of the land to be maintained for the present and future generations. Notwithstanding the political and socio-economic benefits that came with the discovery of hydrocarbon in Nigeria, the nature of sustainable development hitherto practiced and ingrained in our cultural practices should not be eroded.

natural persons, and corporations, as the case may be.[180] The exploration and production of oil and gas cause environmental pollution that creates fundamental disputes between the oil companies, the government, and the local communities. Access to justice in oil and gas environmental-related claims remains an essential tool to shape the future by ensuring re-occurrence and mandating the proponents of the degradable activities to establish that their activities are environmentally safe. Thus, the courts, driven by the conviction that a clean and healthy environment is intrinsic to the enjoyment of human rights, must live up to their constitutional role or risk the abandonment of environmental victims to society's ultimate detriment. The courts, commonly seen and described as the last hope of the ordinary person, must ensure that their gates of justice are visible to these victims and equally accessible, regardless of their position in the societal pecking order. Although the judiciary is currently limited to operating within the country's Constitution, legislation, and case law, environmental challenges pertinent to the Niger Delta Region transcend historical and legal context. Therefore, judges must weigh the interests of the parties in specific disputes and the interests of the larger community and future generations. Judges must be willing against all odds to exhibit judicial courage, discard the conservative toga of judicial restrictions, and embrace judicial activism, especially in respect of environmental suits, to ensure justice, which allows for sustainability. For instance, the assumption that economic progress or growth must be attained at the expense of the environment must be rejected by judges. New notions such as shifting or reversing the burden of proof, should be considered or explored by the judges in environmental suits. This is especially crucial in dealing with questions of causation and effect. The principle of *in dubio pro natura* should be applied in some cases, which invariably means that matters should be settled in the most environmentally friendly way possible in the event of doubt.

Although sustainable development has been identified as a primary tool for integrating socio-economic development and environmental protection, it still requires an intelligent and broad interpretation of the principle in courts and administrative proceedings for it to be widely applied. To achieve this, there is a need for the judges to be knowledgeable in environmental law, or environment-related causes, and sustainable development. A lack of knowledge or understanding of the courts' technical issues associated with environment-related cases will lead to a situation where the intentions and objectives of well-intended legislation are misconstrued or misinterpreted by the courts, thereby defeating their purpose. In the alternative, introducing specialised environmental courts

180 Section 6 of the 1999 Constitution, as amended.

into our constitutional court system operated by knowledgeable judges in environmental issues and the need for sustainability is recommended. These specialised environmental courts, which should be affordable, will, to a large extent, deal with the myriad of obstacles militating against access to environmental justice in Nigeria, to wit: the high cost of litigation, delays in the administration of justice, not to mention the congestion prevalent in the regular Nigerian courts, thereby restoring the confidence of the people in the judicial process.

At all levels, human rights, social justice, and environmental sustainability require proper legal and institutional frameworks that offer explicit and measurable rules, standards and procedures or mechanisms for effective implementation, compliance and enforcement. In other words, it is one thing to have laws and regulations in place, but on their own, they are insufficient to assure justice or instill sustainable development behaviour, in this case, in oil and gas companies whose exploration activities are responsible for the degradable state of the Niger Delta Region. The importance of enforcement in securing justice and long-term regional oil and gas development and production cannot be overstated. The government should ensure that if appropriate legislation and policies are in place, they do not become paper tigers whose purpose is destroyed after they are enacted. For instance, the recent signing into law of the Petroleum Industry Bill by the Nigerian President, Mohammadu Buhari, signifies a landmark achievement that has ended the two-decade-long journey of the PIB. The Petroleum Industry Act 2021 is to create a regulatory environment that would ensure efficiency and accountability across the oil and gas value chain and reposition the Nigerian National Petroleum Company (NNPC) into a commercially oriented and profit-driven national petroleum company that is accountable to the Federation.

The Act also provides a direct benefit framework that will enable the sustainable development of host communities by creating a Host Communities Fund. However, one of the most contentious issues regarding this is the allocation of three per cent of oil companies' operating expenses for host communities, as opposed to the ten per cent canvassed during the public hearings on the PIB. The three per cent revenue allocation is considered insufficient by relevant stakeholders, who posit that the law was not made in the interest of the oil-producing communities, nor can it guarantee the desired stability and development in the oil and gas sector, considering the enormous environmental damage caused by oil exploration activities in the Niger Delta Region and the challenges the community has had to bear as a result thereof.[181]181 Irrespective of this argument, the leap

181 A Senior Advocate of Nigeria, Chief Mike Ozekhome, in an interview with *The*

from zero to over 500 million dollars as funds for the host communities is indeed a giant step. It may not necessarily be what the communities had hoped for, but it is a historic and commendable achievement – a step in the right direction. This will, to a large extent, help not only in ameliorating the plight of the host communities, who have for several decades endured the negative impacts of the inequitable distribution of oil wealth but also mitigate the human and environmental conditions in the oil-producing regions and assuage the feelings of the host communities towards the oil and gas companies.

On the other hand, nothing stops the Act from being amended in the near future if it proves to be unsatisfactory. The main issue here is not necessarily the amount involved but how well this fund will be managed or prudently and transparently deployed for the benefit of the host communities. Thus, there is a need for a monitoring mechanism to ensure that the allocated funds are judiciously spent for the sustainable development of the host communities.

Environmental justice is a prerequisite for sustainable development. Therefore, environmental justice must be at the heart of any endeavour to achieve sustainability. A clean and sustainable environment is not just a human right but also a clear indication of the existence of environmental justice. Thus, environmental justice ensures environmental sustainability for present and future generations. Global happiness is attained when people recognise that environmental sustainability is intrinsically linked to the need to respect the rights of others to the environment. When any person is unjustly treated, it affects everyone. Thus, injustice to any part of the environment is an injustice to the entire planet. In his famous letter from a Birmingham jail, Martin Luther King, Jr exclaimed:

Punch faulted the President's decision to sign the law and called on state attorneys to challenge the Federal Government at the Supreme Court. According to him: 'How can an Act of Parliament, rather than assuage and ameliorate the sufferings of a beleaguered people, further compound them by reaffirming the people's perilous status as slavish hewers of wood, drawers of water, masseurs of ego and side-line onlookers in the exploitation and use of their God-given wealth through their natural resources?'; see LBM Ebolosue, D Tolu-Kolawole & J Charles 'Petroleum Industry Act: States tackle FG Today as FAAC meets, NBA advises governors' *PUNCH* 19 August 2021 www.punchng.com.cdn.ampproject.org (accessed 20 August 2021).

> [I]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.[182]

In the same vein, every form of injustice, including environmental injustice, is still injustice. Considering the extent of damage already done to the environment because of man's activities, environmental injustice will remain not only 'a threat to justice everywhere' but a threat to sustainable development worldwide, Nigeria included.

182 ML King Jr 'Letter from Birmingham Jail' 1 (1963) http://web.cn.edu/kwheeler/documents/letter-birminghamjail.pdf (accessed 20 August 2021).

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