Challenges of Access to Environmental Justice in Nigeria

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ABSTRACT

The issue of environmental protection has become a topical issue attracting both domestic and international attention. The concept of environmental justice is significant in environmental protection given the fact that victims of environmental degradation are entitled to seek redress for the environmental degradation suffered by them There is an existing conundrum inhibiting the access to environmental justice and these include the weak regulatory regime in the oil and gas industry, the lack of political will by regulatory agencies to enforce oil and gas laws and regulations, the endemic corruption and judicial obstacles amongst others. Furthermore, in seeking redress in Nigerian courts is not problem free. Some of the problems associated with litigation in Nigeria include limited resources of litigants, delays in the judicial process, the strict requirement of locus standi proof, and the overreliance on common law torts such as trespass, negligence and nuisance in suits by litigants (in the absence of an effective framework on oil pollution control or litigation), amongst others. These factors have hindered access to justice, in Nigeria. The authors in conclusion assert that unless inhibiting factors to access to environmental justice are tackled or checked victims of environmental degradation would continue to have their grievances not redressed as a result of these obstacles.

KEYWORDS: The Requirement of *Locus Standi,* Poverty, Delays in the Administration of Justice, Courts Attitude to Victims Claim, Corruption in the Judiciary, Burden and Standards of Proof, Limitation Period, The Right to a Satisfactory Environment

Introduction

Constitutional or legislative human rights must be enforceable in order to be meaningful and there must be an effective remedy where rights are infringed or about to be infringed. For this reason, human rights law, in addition to substantive human rights, generally makes provisions empowering citizens to have recourse to the courts.[1] Accordingly, the ability of citizens and NGOs to enforce their constitutional environmental rights plays a

[1]For example, in Maya Indigenous Communities of the Toledo District vs. Belize, Case 12.053, Report No 40/04 of 12 October 2004, the Inter-American Commission on Human Rights held that by failing to provide for effective consultation and the informed consent of the Maya people when granting logging and oil concessions with resulting environmental damage, Belize had violated the right to property of the Maya people.

significant role in whether these rights have practical effect. While the government has primary responsibility for implementing and enforcing laws, in some cases the government is unable or unwilling to act on its own and access to justice assumes importance in ensuring that guaranteed rights are fulfilled.

A major role of access to justice is that it enables individuals and NGOs to enforce domestic environmental law and may help them shape domestic environmental policy.[2] Access to justice includes both the power of courts to review government actions and omissions and the right of citizens to appeal to the courts for this review. The UDHR and the ICCPR as well as the African and Inter-American regional human rights instruments provide for a right to a fair trial that applies also to environmental matters. A specific right to access to justice in environmental matters is provided in the Aarhus Convention and the North American Agreement on Environmental Cooperation. They both require that the parties ensure certain procedural guarantees or minimum standards, and remedies, and these requirements are set with some degree of details. The 2003 African Nature Conservation Convention also provides for access to justice in environmental matters. Principle 10 of the Rio Declaration provides that ―effective access to judicial and administrative proceeding, including redress and remedy shall be provided. Agenda 21 calls on governments and legislations to establish judicial and administrative procedures for legal redress and remedy of actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organisations with a recognised legal interest.

The Requirement of *Locus Standi*

The requirement is one factor that is often used to preclude access to courts in Nigeria. This could indeed create a formidable obstacle in the quest for the protection of human rights. *Locus standi* is not an easy concept to define but one can say that it means the standing to sue. It refers to the right of a party to an action to be heard in a litigation before a court of law or tribunal or the legal capacity of instituting, initiating or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance.[3] In other words, "for a person to have *locus standi* in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed. Thus, the fact that a person may not succeed in an action does not have anything to do with whether or not he has standing to bring the action".[4]

It is pertinent to mention here that two tests are often used in determining the *locus standi* of a person, namely, the action must be justifiable, and there must be a dispute between the parties. The courts have also taken the position, quite rightly in our view, that it is better to allow a party to go to court and be heard than to refuse him access to the court.[5] This is so because Nigerian courts have inherent powers to deal with vexatious litigants or frivolous claims. Justice should not be rationed.[6] Justice Fatayi-Williams underscored this point when

[2] M T Ladan, *Trend in Environmental Law and Access to Justice in Nigeria*, p.35.
[3] *Alhaji Adetoro Lawal v. Bello Salami and Another* (2002) 2 NWLR pt. 752 p. 687.
See also *Babatunde Adenuga and 5 Others v. J. K. Odumeru and 7 Others* (2003) 8 NWLR pt. 821 p. 163.
A G Akwa Ibom State and Another v. I. G.Essien (2004) 7 NWLR pt. 872 p. 288.
[4] *Ibid.*
[5] The rationale for this rule is to promote respect for the rule of law. See *Senator Abraham Adesanya v. President of the Federal Republic of Nigeria* (1981) 2 NCLR 358.
[6] It should be made available to everybody notwithstanding the person's status or economic standing in society, but see also J. N. Aduba, 'The Impact of Poverty on the Realization of Fundamental Human Rights in Nigeria',

he declared in the case of *Senator Abraham Adesanya v. President of the Federal Republic of Nigeria*[7] as follows:

> ...I take significant cognisance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumor-mongering is a pastime of the market places and the construction sites. To deny any member of such society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution ... access to the Court of Law to air his grievance on the flimsy excuse (of lack of sufficient interest) is to provide a ready recipe for organised disenchantment with the judicial process.

Moreover, it is essential that before seeking redress in court, a plaintiff must show that he has sufficient legal interest in the subject matter of the suit. However, it is in the determination of the term "sufficient interest" that the courts have given a number of decisions, some of which have actually operated against access to justice in the country. Thus in the case of *Chief Irene Thomas and 5 Others v. Timothy Olufosoye*,[8] the plaintiffs who are communicants of the Anglican Communion within the Diocese of Lagos challenged the appointment of Reverend Joseph Abiodun Adetiloye as the new Bishop of Lagos and asked the court to declare it void. The plaintiffs in their statement of claim did not say that they had an interest in the office of the Bishop of the Diocese, or how their interest (if any) had been affected by the appointment of Reverend Abiodun Adetiloye. They averred that they were not interested in a particular candidate but that the process of the appointment of Reverend Adetiloye contravened some provisions of the Constitution of the Church of Nigeria (Anglican Communion).

Presumably, the underlying principle behind the introduction of the doctrine of *locus standi* in our judicial system is to curb the flooding of our courts with frivolous and vexatious cases for litigation and consequently save our judicial system from ridicule. Moreover, it could be to prevent the abuse of courts by mischievous and professional litigations, [9] whereas those with standing and sufficient interest are accorded *locus standi* by the courts. That was the court's holding in *Okotcha v. Herwa Ltd***.**[10]Again, another merit for the application of this doctrine to litigation is that to confer a right of action on every member of community to seek judicial review of government action in particular, will be a burden on the purse of government and even slow down its activities and that of its agencies. Moreover, lack of standing has an equal effect on the jurisdiction of the court to adjudicate on an issue. In *Ogunmokun v. Military Administrator of Osun State*,[11] the court held that when a party to a suit lacks standing, the jurisdiction of the court becomes important. This is because jurisdiction is a radical and crucial question of competence for, if the court has no jurisdiction to hear a case, the proceedings are and remain a nullity, however well conducted and brilliantly decided**.**[12]

Despite the above seemingly glamorous advantages of the application of *locus standi*, the negative impacts abound. Dismissal of a case for want of standing and in fact for some other preliminary considerations, is to give the subordinate legislative or judicial act that has

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in Y. Osinbajo and A. Kalu (eds.*), Democracy and the Law* (Federal Ministry of Justice, 1991), p. 200, on the disability of the poor to press for the enforcement of their basic rights.

[7] SC.1/81 (1981) 2 15/5/1981

[8] (1985) NWLR pt. 18, p. 669.

[9] *Yusuf v. Akindipe* (2000)8NWLR) pt1) p.153

[10] (2000) 15 NWLR (pt 690) 249

[11] (1999)3 NWLR (pt594)261.*Okonkwo v. INEC* (2004) 1 NWLR (pt.854) p.242.

[12] *SPDC (Nig) Ltd v. Maxon* (2001) 9 NWLR (pt 719) p.541

challenged some appearances, the legitimacy it would not otherwise have had. It should be noted that for any environmental litigation struck out for want of standing to sue, the matter remains like that and the law enacted for the protection of the environmental will lack judicial flavour as portrayed in the case of *Oronto Douglas v. SPDC Ltd.*[13]where an opportunity to test the provisions of the EIA Act was lost because of reliance on the doctrine of *locus standi*.

Undue reliance by the courts on *locus standi* had had a toll on a number of environmental cases. The general rule for public nuisance is that the Attorney General is the proper plaintiff where a public right is involved. A private individual does not have the *locus standi* to sue in public nuisance unless the interference with the public right is such that some private right of his, is at the same time interfered with and where no private rights is interfered with, he in respect of his public right suffers special damages peculiar to himself from the interference with public right.[14]The onus is on the victim to prove that he has suffered damages beyond those of the members of the public. In *Amos and 4 others v. Shell B. P. Nig. Ltd.*,[15] the plaintiff claimed damages from the defendant (amongst others) for public nuisance. They alleged that the defendant made a large earth dam across their creek during oil mining operations. They also alleged that this resulted in the flooding of the upstream, while the downstream was dry. Consequently, the plaintiffs were put, at a disadvantage with respect to the use of waterways for navigating barges, rivers crafts, canoes, disruption of commercial activities, use of water for drinking and other commercial purposes. The trial court and the Supreme Court found that the conduct of the defendant amounted to public nuisance. However, there was no evidence from the plaintiffs showing that they suffered damages over and above those suffered by the general public. The action was therefore dismissed. This is in in-spite, of the fact that environmental problems linger and know no personal boundaries or individual enclaves. To this end *locus standi*, remains the plaintiff's most difficult task in environmental litigation involving a public nuisance.

Another area where *locus standi* has compounded environmental litigation is in the use of tort of trespass to pursue environmental claims. Trespass to land arises from an unjustifiable interference with the possession of the plaintiff's land.[16] The slightest direct physical interference with land in possession of another person is actionable, for example, walking on another man's land. It is not necessary to prove actual physical damage because trespass to land is actionable per se.[17] In *Onasanya v. Emmanuel***,**[18]Omolulu Thomas J. held that trespass is committed when without lawful justification; a defendant directly places or projects any material object upon such land. It is also trespass to place anything upon the plaintiff's land or cause physical object or noxious substance to come into physical contact, with his land. For action in trespass to arise from the placing of an object on the plaintiffs land, such placing must be direct otherwise the action will lie only in nuisance in which case damage must be established to ground liability. This requirement, however, excludes all cases of industrial or human waste discharges not directly introduced into the plaintiff's premises by the defendant.[19] In-spite of this however, for the plaintiff to be entitled to sue, he must be in possession.[20] However, the possession which entitles the plaintiff to sue must beactual and

[13]*Ibid.*
[14]*Dumez (Nig.) Ltd. v. Ogboli* (1972) ALL NLR p. 241
[15] (1977) 6. S. C. p.109.
[16]*Anyabunsi v. Ugwunze* (1995) 6 NWLR (pt 401) 26
[17]*Ashby v. White* (1703) 87 ER 810, *Dabira v. Adelaja* (1973) II CCHCJ p.100
[18] (1973) 4 CCHCJ 1477 at 1481.
[19]*Supra*.
[20]*Oya v. Ikaile* (1995) 7 NWLR (pt 406) p.155, *Lamidi v. Oyedele* (1994) 6 NWLR (pt. 348) 25

effective possessions in order to maintain an action against anyone except the true owner or one who can trace his title to the true owner.[21]

Presumably, the underlying principle behind the introduction of the doctrine of *locus standi* in our judicial system is to curb the flooding of our courts with frivolous and vexatious cases for litigation and consequently save our judicial system from ridicule. Moreover, it could be to prevent the abuse of courts by mischievous and professional litigations,[22]whereas those with standing and sufficient interest are accorded *locus standi* by the courts. That was the courts holding in *Okotcha v. Herwa Ltd*.[23]This amounts to undue reliance on technicalities. Technicalities the courts had warned on several occasions should not be unduly relied upon by courts to short circuit the course of justice. For as Kayode Eso JSC pointed out in the case of *State v Salihu Mohammed Gwonto*,[24] "the court has for some time now laid down as a guiding principle in that it is more interested in substance than in mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities lead to injustice."

Despite the above injunctions, potential litigants had in a number of occasions had their pursuit of justice defeated because of reliance on technicalities by the court. Most notable of such legal technicalities used by the courts being *locus standi*. Technicalities should be down played in environmental litigation. To this end we must in respect of environmental litigation adhere to the views expressed by Chukwudifu Oputa when he said:

> the picture of law and its technical rules triumphant and justice prostrate may no doubt have its admires. But the spirit of justice does not reside in forms and formalities, nor in technicalities, nor in the triumph of the successfully picking one's way between pitfalls or technicalities.[25]

Therefore the court, as Obaseki, pointed out will listen to any person whose circumstances of an oppressive or hostile nature exist and where rights of the citizens guaranteed under the law and Constitution are curtailed or invaded or breached by non-compliance with the constitution[26] However, in the present context for the courts to effectively enforce observance of the tenets of sustainable development and enthronement of an environment free from abuse the issue of *locus standi* should be whittled down to a vanishing point. Although it has been stated by the Supreme Court of Nigeria that why the courts emphasised *locus standi* is that it is a means of protection against busy-bodies, cranks and other mischief-makers,[27] Lord Diplock in the case of *R v. Inland Revenue Commissioner. Exparte National Federal of Self-employed and Small Businesses Ltd* asserted that there would be a grave lacuna in our legal system of law and posits as follows:

> If a pressure group or even a single public-spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

[21]*Nwosu v Otumola* (1974) I ALL NLR (pt 1). 153.
[22]*Yusuf v. Akindipe* (2000) 8 NWLR (pt1) 153
[23]*Ibid.*
[24](1983) 1 AII NLR, 109
[25]As cited by Kayode Eso in *Thoughts on Human rights Norms vis-à-vis The Courts and Justice: An African courtof Domestic Court,* (Lagos, NIALS, 1995) p.26.
[26]As cited by M. Adekunle Owoade p. 113
[27]*Senator Abraham Adesanya v. President of Nigeria*.

> [28]Again, the argument that a liberal or flexible approach to *locus standi* "is to open the flood gate to frivolous and vexatious proceedings,"[29] is no longer tenable. This is so because: it may sometimes be necessary to open the flood gates (especially in Environmental matters) in order to irrigate the arid ground below them and that should cranks and busy bodied flood that courts with vexatious or frivolous application, an appropriate order of cost would… inhibit their litigious ardour."[30]

It is therefore high time our courts re-examine the issue of *locus standi* in environmental matters and an adaptation of such rules to meet the ever-changing needs of the society bearing in mind that environmental problems do not stand still and know no geographical boundaries. This stand- point is further accentuated by the fact that where a pollution victim has been compensated for damage suffered what happens to the damage done to the environment as a result of the pollution. The question is even compounded by the fact that the environment not being a person, but being the bastion of our existence, should be protected by all and sundry. The only way to achieve this is by entrenching environment rights on the citizens and de-emphasizing *locus standi* in environmental protection matters. In other words what is herein suggested is the encouragement or institutionalization of citizen suits.

Poverty

The notion of what it is to be poor, or the minimum income required to lead a decent and respectable life, depends partly on the level of consumption of those round us.[31] The inference is that poverty generally connotes the inability to command basic necessity of life. It also means lack of income to sanctify the essential of life. Poverty, which has been an issue of social concern from ancient times has many roots and causes which is not intended to be discussed in this work. The poverty level of the Nation is very high and this accounts for the standard of living which is still below the hunger level.

The common language of the people is survival first, thus access to justice right or concern do not mean much or even anything to them, as their pre-occupation is how to feed in these heard times. With the hard times challenges before them, the people are much concern with their existence and survival than on how to access justice In this circumstances, the quest for survival will obviously not include the choice of enforcing their rights, because the means to right wrongs is not available. As a result, the citizens live and contend with all forms of abuses to their rights. Sustainable development is all about all round development, reduction of poverty will obviously will increase access to justice, while increase in poverty level as the situation seems now in the country, poses a bleak future for access to justice.

Delays in the Administration of Justice

There are unnecessary delays associated with the prosecution of case in our courts. Polluting agencies often employ delay tactics to sap the patience and resources of the plaintiff with the hope of eventually making him abandon the suit or at least delay justices6. Example of delay in prosecution of cases can be seen in the case of *Nwadiaro v. Shell Petroleum Development*

[28]*R v. Inland Revenue commissioner, Exparte National Federal of Self-employed and Small Business Ltd.* (1982) AC 617
[29]Adesanya's Case
[30]*R v. Inspectorate of Pollution and Anor Exparte Green Peace No. 2* (1994) 4 All ER, 329.
[31]The International Labor Organization ILO, *Employment, Growth and Basic Needs: A one World Problem*, (Praeger, New York, 1977) p.29.

Co. Ltd.[32] Brief fact of the case is that the plaintiff depends on uti-iyi creek for fishing and access this was blocked by the defendant since 1966 and parties had negotiated and the defendant agreed to pay compensation but never paid. The plaintiff sued in 1985 and the defendant objected on the ground that the suite was statute barred. The trial court agreed and dismissed the suit the plaintiff appealed to the Court of Appeal which held that, it was not statute barred before an order of trial was made.

Consequently, the matter was relisted in 1988 again the defendant filed an application for dismissal of the entire suit which was refused by the trial court. The defendant again appealed to Court of Appeal which heard and dismissed the appeal. The Court of Appeal in strong terms condemned the delay tactics of the defendant. Most litigants complains about incessant delays and some seem to have lost hope in the judiciary because of the delays.[33] Derri[34] stated that number of reason give rise to this delay. This includes:

a) Lawyers Writing Letters of Adjournment of Cases
b) Inability of judges to deliver judgment on time, indiscriminate public holidays, and the rule that once a judge is transferred and a new one takes over, a case has to start de novo. Although, this rule is well intended but has become a factor contributing to delay of trial of cases. No doubt that delay has greatly eroded public confidence in the judicial process and it has also undermined the very existence of our courts. This is in spite of the fact that speedy trial is guaranteed by Section 36(1) of the Constitution of Federal Republic of Nigeria which provides that:

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

It is observed that the constitution did not define the meaning of the expression 'within a reasonable time'. Where any trial lasted more than three to four years such can hardly be said to be within a reasonable time.[35] It may be conceded that some delay be unavoidable since parties are to be given adequate time and facilities to prepare to the administration of justice when delay is inordinate. In the circumstance, it is submitted that courts should sternly consider issue of applications for adjournment of case such that one designed to aid the due process of litigation should be granted while those dictated by sheer laziness or a failure to grasp the real issue should not be entertained.

Courts Attitude to Victims Claim

The attitude of Nigerian courts to litigation particularly to the award of damages which mostly are general in character, also operate as a constraint to litigation as a mechanism for seeking remedies for pollution in Nigeria. For example, in the case of *Shell Petroleum Development Co Ltd v. Teibo*[36] The plaintiff claimed the sum of N64 million as general damages from the defendant for oil spillage into nun river which serve as a source of

[32](1990) 5 NWLR Pt. 150 p.322.
[33] O O Akeredolu 'Access to Justice Problems and Solution' (2003) 2(1) *Ibadan Bar Journal*, p.14.
[34] D K Derri, 'Litigation Problems in Compensation Claims for Oil and Gas Operations in Nigeria' In Emiri and Deinduomo (eds) . p.22
See also N S Okogbule, 'Access to Justice and Human Right Protection in Nigeria. Problems and prospects' (2004)3 *Benin Journal of Public Law* p.34.
[35]*Ibid.*
[36](1996) 4 NWLR pt. 445 p.657

drinking water, fishing and desecration of their juju. Despite the fact that the plaintiff was able to prove the damage alleged by calling experience and knowledgeable expert witnesses, the court awarded a paltry sum of 6 million to the community. Similarly, our courts have developed a rubber stamp syndrome of 'give me an authority for that submission' have become in active in creating such precedents.[37] Nwosu observed further that the legal training in Nigeria do not take into account the realities of the scientific world in which the legal practitioners has to operate. The lawyers and judges are both marooned. The resultant effect is that neither Judge, nor the lawyer as well as the victim are in position to appreciate the cause, effect and remedy from the sophisticated scientific question they need to resolve. Thus they seek shelter in technical rule of procedure while sacrificing substantial justice on alter of their inadequacies.

Corruption in the Judiciary

Nigerian legal system is replete with allegations of judicial corruption at all levels. The socio-economic implication of such corruption is most dangerous than other forms of official corruption.[38] Courts are often said to be the last hope of a common man and if that last hope loses, confidence of the common man, the society has no choice but is likely to return to primitive age. It is observed that serious cases of environmental pollution are often one between an illiterate farmers and a very powerful company for example, a multinational oil company. A corruption prone judge who has little or no integrity may easily be induced by the strong financial muscle of oil multinational company to give a decision that would be favourable to the company. This has greatly undermined litigation as an effective tool for seeking remedies for environmental pollution in Nigeria.

Burden and Standards of Proof

The success of any litigation depends ultimately on evidence, without which no criminal prosecution or civil suit could succeed. Essentially, the handling of burden of proof may be crucial factor in determining the outcome of environmental litigations. The victims of environmental pollution rely on the vagaries of the common law tort such as negligence, nuisance, trespass and the rule in *Rylands v. Fletcher*[39] to seek for remedy of compensation and damages. Nigeria courts over the years have insisted particularly in deciding pollution related cases on the high standard of proof by the plaintiffs before their claim is upheld. The following cases illustrates how this stringent requirement of proof and other prerequisites such as expert evidence combine to frustrate litigation commenced by individual and communities against polluting industries.

The first case is *Seismograph Services limited v. Onokpasa.*[40] In this case, the plaintiff/respondent who was the proprietor of a college claimed that the defendant's/appellant seismic blast in the area caused cracks to the college buildings. The defendant called three experts witness viz; a chartered structural engineer, geologist and seismologist. The expert called by the plaintiff was skilled enough in the relevant field and testified that the cracks were caused after the blast. The trial court awarded compensation to the plaintiff/respondent. On appeal to the Supreme Court, it was held that the trial judge

[37] L E Nwosu, *Appropriate Mechanism for the Enforcement of environmental Claims. Juriscope. A compilation of Workshop Materials of Alpha Juris*. (Continuing Legal Education series 1st Edition 2001) p. 191 – 192.
[38] Derri (n.54).
[39] (1886).
[40] 20 (1972) All NLR p.347.

ought to have believed the expert witness of the defendant/appellant. Sowemimo JSC (as he then was) stated that:

> 'The contention of each party is of a technical nature therefore such evidence as could support it must necessarily be that of people specially qualified in particular field of service which in this case comprise the knowledge and practice of seismology and civil engineering. It is on the examination of such evidence, as is considered relevant that a determination must be arrived at so as to determine cause of alleged damage.'

Similarly, in the case of *Seismograph Service v. Akporuovo.*[41] The plaintiff claimed that the defendant's operations caused damage to the building and household goods. The trial judge awarded damages to the plaintiff. The Supreme Court reversed on the ground that the respondent did not call any expert to proof that the defendant was liable. Also in the case of *Ogaile v. Shell Petroleum Development Co. Ltd.*[42] the plaintiff's lost their case both at the High Court and the Court of Appeal simply because they could not match the quality of expert evidence given on behalf of the defendant in that cases.[43]

With increase in industrial activities in oil exploration, minerals, mining and manufacturing sectors of the economy and attendant consequences on the environment various legislations are in place to check pollution, most of which are penal in nature and take very little or no account of economic loss or injuries suffered by the victims as a result of the observed gap in some Acts, for example, National Environmental Standard Regulation Enforcement Agency Act which repealed Federal Environmental Protection Agency Act many cases on environmental pollution find their way to the court on tort of negligence or nuisance.

In an action for negligence, the plaintiff has the burden of proof and this is consistent with provision of sections 131 and 132 of Evidence Act[44] which provides for burden and standard of proof. It is observed that the above rigorous rule of evidence has in no small measure help in undermining claims of victims of pollution, for example, in the case of *Seismograph Services v. Mark.*[45] The plaintiff claimed compensation for damages from the defendant for destroying his fishing nets by a seismic boat. At the trial, it was impossible for the plaintiff, an ordinary fisher man to show that the company acted negligently.

On appeal, the Court of Appeal held that the defendant appellant did not breach the duty of care towards the respondent, this is in spite of the fact that seismic boat tore through the fishing nets. It was further held that the plaintiff/respondent did not provide the technical detail of the breach, the case was dismissed. For the victims of environmental pollution, experts' witnesses are difficult to come by and where secured it cost money to carry out test and expert services of the expert in question. It is not every plaintiff that has the money to meet this cost, which is often very prohibitive. It is observed that some of these experts are found in ministries and other agencies but their services cannot be engaged by the victims because of the Regulated and other Professions (Private Practice Prohibition) Act.[46]

It is submitted that section 8(1), (n) and (p) of NESREA Act, 2007 which are to effect that the agency shall develop monitoring networks, enter into agreement with public, private and

[41](1974) All NLR 97 23.
[42](1997) 1 NWLR Pt. 480 p. 148.
[43]*Seismograph Services Ltd v. Ogbeni* (1976) 4 SC 85.
[44]As amended, 2011.
[45](1993) 7 NWLR Pt. 203.
[46]Cap R LFN, 2004.

individual to share basic data on chemical, physical and biological effect of activities on the environment, to collate and make available through publication and other appropriate means basic scientific data and the information pertaining to environmental standards. Paragraph (q) provides for; charge of fees for tests, investigation and other services performed by the agency. This can be explored by victims of pollution other than in oil and gas section. Still on burden of proof, it should be noted that certain pollution does not manifest itself in apparent and vivid terms like harm to human health; it takes time to manifest.

Pollution may be committed today, but the effect may not manifest immediately. It may take a year or more to manifest. Thus proving such harm, if a suit is filed immediately after the commission of the act becomes a problem. If litigation is delayed until the manifestation of the harm, then proving proximity of causation to be entitled to damages against the defendant becomes a problem.

Limitation Period

In the case of *George Thorsfall of others v. Shell B.P. Development Company*,[47] the plaintiff claimed the sum of N100, 000 for damages done to his building arising from defendants oil exploration many years before the trial court held that negligence, the cause of action accrues at the time it was then that the damages were caused even though it consequences may not be apparent then until later, the plea for damages therefore, failed. Usman opined that given the position of law a victim may find it difficult to successfully claim under negligence, if the effect of the pollution does not become immediately obvious. In every common law action, the plaintiff must bring the case within the statute of limitation and establish the causation between the harm and the defendant's conduct.[48] If the plaintiff waits for the acts to become glaring manifest he may be caught by limitation act.[49] In the case of *Gulf Oil (Nig) Ltd. v. Otuba*.[50] The respondent/ plaintiff's brought an action against the appellant/defendant in 1986 to recover damages for pollution of their land, fishing pond swamp etc. As a result of seismic and other oil exploratory activities within their community in 1973, the court of appeal found no difficulty in holding that the cause of action was statute barred. In environmental litigation, limitation could be potentially important and difficult given the period for manifestation of harm or it detection.

Again statutory corporation operating in area where their activities are likely to cause pollution are shielded by special statutory provision which have shortened the period of limitation of actions. For example Section 12(1) of the Nigerian National Petroleum Corporation Act puts the period of limitation at 12 months therefore any claim filed outside the period becomes statute barred. It is observed that limitation of time to bring an action is an unnecessary impediment in the way of victims of environmental pollution in Nigeria.

The Right to a Satisfactory Environment (Non-Justiciability)

A discussion of the right to a healthy environment in any country usually involves an examination of relevant national environmental and human rights instruments to determine

[47](1974) 2 RSLR 126
[48] O G Amokaye, *Environmental Law and Practice in Nigeria* (University of Lagos Press Akoka 2004) p.677.
[49]Cap L LFN 2004.
[50](2002) 12 NWLR Pt. 780 p. 22.

the extent that they expressly or impliedly accord recognition to the right. Presently, none of the environmental legislation in Nigeria including the more recently enacted National Environmental Standards and Regulations Enforcement Agency (Establishment) Act,[51] provided for this right. Therefore, the discussion in this section will naturally gravitate towards the principal human rights instrument in Nigeria vis-à-vis the constitution of the Federal Republic of Nigeria,[52] and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[53]

The Constitution of the Federal Republic of Nigeria 1999 Chapter IV of the Nigerian Constitution does not provide for an express right to environment among its fundamental rights. However, it provides for substantive rights like the rights to life, dignity of human person, private and family life, equality, and property that can be expansively interpreted to include the right to a healthy environment.[54] This is evident in *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others*,[55] where the Federal High Court held that that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community was a gross violation of their constitutionally guaranteed rights to life (including healthy environment) and dignity of human person.

The reinterpretation of these existing human rights for environmental protection is riddled with procedural limitations. These include the claimant establishing injury to his/her health and wellbeing or rights, a failure of which is usually detrimental to the action.[56] In addition, the reinterpretation of existing right is dependent on a progressive judiciary, as the court is required to make a connection between the alleged human rights violation and the environmental problem in question. This qualification cannot be ascribed to many judicial systems in developing countries especially African countries like Nigeria. In addition, the Nigerian Constitution provides procedural rights that can also be mobilised for environmental protection. These include the rights to fair hearing, freedom of expression and the press, and peaceful assembly and association. Constitutional procedural rights when mobilised for environmental protection are enabling rights as they make it possible for people to contribute actively to the protection of their environment.[57]

[51]National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, No. 25 of 2007. It supersedes Federal Environmental Protection Agency (FEPA) Act (Cap F10 LFN 2004) as the principal environmental instrument in Nigeria

[52]Federal Republic of Nigeria Official Gazette, No. 27, Lagos, 5 May 1999, Vol. 86, GN No.66. (Hereinafter the Nigerian constitution).

[53]African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol. 1, LFN 2004. (Hereinafter African Charter Ratification Act).

[54] J Razzaque, 'Human Rights and the Environment: Development at the National Level, South Asia and Africa' *Background Paper* No.4, Joint UNEP-OHCHR. See also Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva, available at http:/ /www2.ohchr.org/english/issues/environment/environ/bp4.htm.

[55]*Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others*, Unreported Suit No. FHC/B/CS/53/05, Delivered on 14 November 2005.

[56]S. Douglas-Scott, 'Environmental Rights in the European Union— Participatory Democracy or Democratic Deficit'.

[57]D Hunter, J Salzman and D Zaelke eds, *International Environmental Law and Policy* (New York: Foundation Press, 2nd ed. 2002).p. 1312.
See also A Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' *Gauteng Region and Another v Save the Vaal Environment and Others*, (1999) 2 SA 709 (SCA).

As aptly argued by Atapattu, the importance of these rights is that they contribute to the development of a decision— making process which is transparent and participatory and which holds the government entity in question accountable for its actions. Applied in relation to environmental issues, these include: the right to have access to information affecting one's environment, the right to participate in decisions affecting the environment, and the right to seek redress in the event one's environment is impaired. Furthermore, the Constitution provides among its Fundamental Objectives and Directives Principles of State Policy, that '(t) he State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'.[58] This provision places a mandatory duty on the State to direct its policies towards achieving the above environmental objective.[59] However, it does not place any corresponding legal right on the citizens to enforce such provision or any other provisions of the Chapter in the event of non-compliance by the State.

The reason for this state of affairs is because of section 6 (6) (c) of the Constitution which provides that '(t)he judicial powers vested in (the courts)… shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution'. The above stipulation was judicially interpreted in *Okogie (Trustees of Roman Catholic Schools) and other v Attorney General, Lagos State*,[60] which is based on equivalent provision of the erstwhile 1979 Nigerian constitution. The case dealt with the constitutional issues of the Plaintiffs' fundamental right under section 32(2) of the 1979 Constitution to own, establish and operate private primary and secondary schools for the purpose of imparting ideas and information, and the constitutional obligation of the Lagos State government to ensure equal and adequate educational activities at all levels under section 18(1), Chapter II of the 1979 Constitution.[61] On reference to the Court of Appeal, the Court while considering the constitutional status of the said Chapter stated:

> 'While section 13 of the Constitution makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, section 6 (6) (c) of the same Constitution makes it clear that that no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore, that section 13 has not made Chapter II of the Constitution justiciable. I am of the opinion that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of Constitution or any other statute in such a way that the provisions of the Chapter are observed, but this is subject to the express provisions of the Constitution.'

[58]Nigerian Constitution, S. 20. These Fundamental Objectives and Directive Principles are essentially a set of guidelines designed to secure the 'national' targets of social well-being, social justice, political stability, and economic growth in accordance with the espoused vision of the Preamble to the Constitution. See Dejo Olowu, 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees', (2006) *Saskatchewan Law. Review* p.69-56.

[59]*Okogie (Trustees of Roman Catholic Schools) and other v Attorney General, Lagos State*, (1981) 2 NCLR 337.

[61]In pursuit of this objective, the State government purported via a circular letter dated 26 March 1980 to abolish the operation of private schools in the State.

The reasoning in the above decision was affirmed in the later case of *Adewole v Jakande*.[62] The effect of these decisions is that the provisions of Chapter II of the Nigerian Constitution are now regarded as mere declarations or 'cosmetic constitutional provisions' while their constitutional weight lies at the moral level.[63] Indeed, in the Okogie case, Justice Mamman Nasir, President of the Court of Appeal (as he then was) expressed the view that the arbiter for any breach of the provisions of Chapter II is the legislature or the electorate. However, the Okogie case suggests that the provisions of the Chapter can be made justiciable by appropriate implementation legislation provided the fundamental rights of any citizen or any other expressed constitutional provision are not infringed. The Nigerian judicial attitude to the Directive Principles is influenced by the initial position of the Indian Supreme Court with regard to the justiciability of article 48A of the Indian Constitution, which is similar to section 20 of the Nigerian Constitution. The Court's decisions in the 1950s established that article 48A and other provisions of Part IV of the Indian Constitution relating to the Directive Principle, are not justiciable as a result of article 37 which provides that the Directive principles 'shall not be enforceable by any court'. Presently, the judicial position has changed in India starting with the decision of the Supreme Court in *Minerva Mills v Union of India*, which elevated the constitutional status of the Directive Principles. It is from the philosophy underlying the elevated status of the Directives Principles, that the Supreme Court began interpreting fundamental rights under Part III in the light of the provisions of Part IV. In the area of environmental protection, the Court has recognised the right of every Indian to live in a healthy or pollution free environment by utilising the environmental provisions of Part IV to flesh out the constitutional right to life.

As observed by Dam and Tewary: In recognising the right to a clean environment, the Court drew inspiration from article 48-A enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under article 51A of the Constitution. This recognition of the right to a clean environment and, consequently the right to a clean air and water was a culmination of the series of judgements that recognised the duty and same had been reaffirmed by the Nigerian Supreme Court in Attorney-General, *Ondo State v Attorney-General, Federal Republic of Nigeria*,[64] involving the constitutional validity of the Corrupt Practices and Other Related Offences Act No. 5 of 2000 and its Independent Corrupt Practices and Other Related Offences Commission (ICPC). Both the Act and ICPC were established to enforce observance of the Directive Principle set out in section 15(5) of the Constitution.[65] The Court held that '[a]s to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy, section 6 (6) (c)... says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them ... the Directive Principles can be made justiciable by legislation'.[66]

[62]*Adewole v Jakande*, (1981) 1 N.C.L.R. 152.
[63]P Oluyede, *Constitutional Law in Nigeria* (Nigeria: Evans Brothers, 1st ed. 1992).p.174.
[64]*Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria*, (2002) 9 Sup. Ct. Monthly 1 (Nig. Sup. Ct.) [Ondo State].
[65]In holding that the Act and the commission were constitutional and valid, the apex court referred extensively to the Fundamental Principles in Chapter II of the Nigerian Constitution. As stated by the Court, 'it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy.... The ICPC was established to enforce the observance of the Directive Principle set out in S. 15(5) of Chapter II, which provides that 'The State shall abolish all corrupt practices and abuse of power'.
[66]See -*General, Ondo State v Attorney-General, Federal Republic of Nigeria*.
This position tallies with the almost uniform position of the state courts in the United States that general constitutional environmental provisions are ineffective save with the aid of additional legislative enactment (see

The Nigerian constitution does not contain a provision similar to article 51A of the Indian Constitution. Despite this, the Indian judicial decisions constitute persuasive precedents for Nigerian courts. Thus, when confronted with a similar situation, the courts are urged to reinterpret the fundamental rights in the Constitution especially the rights to life, dignity of human persons, private and family life, and property in the light of the provision of section 20, in order to uphold the constitutional right of every Nigerian to live in an environment adequate to their health and well-being.[67] However, the Indian approach when applied to the Nigerian context has a unique drawback. This is due to the fact that since Chapter II of the Nigerian Constitution does not contain a provision similar to article 51A of the Indian Constitution, it will be difficult to extend the constitutional duty of protecting the environment directly to private individuals. This perhaps explains why Gbemre case, which is the only judicial decision on the right to environment in Nigeria, made no mention of section 20 of the Constitution.[68] Nigerian law. This Act now forms part of existing Nigerian legislation recognised under the Constitution and has such effect until modified by the appropriate authority. The domestication of the Banjul Charter in Nigeria extends the corresponding obligations not only to the State (government of Nigeria), but also, to private individuals in Nigeria. Thus, any person who felt that any of the rights provided by the Act including the right to a healthy environment, in relation to him is infringed or threatened by conducts of the State or private individuals can bring an action in any of the Nigerian high courts depending on the circumstances of the case for appropriate relief. Bringing such action under the Act will decrease the over-reliance on the onerous tort rules as litigants or victims do not necessarily have to prove fault or causation, but only the creation of an unhealthy environment. It also obviates the need for the reinterpretation and mobilisation of existing human rights for environmental protection, which as earlier noted is riddled with procedural limitations. Under the Act, the claimant only needs to establish that the degradation resulted or will result in the creation of environment that is not favourable to his health and well-being or socio-economic development. Article 24 and other provisions of the Act are subject to the provisions of the Nigerian Constitution and any other subsequent law repealing or modifying it. The effect of this is that in the event of any conflict between the provisions of the Act and that of the Nigerian Constitution particularly its fundamental human rights provisions, the latter prevails.

Pollard III, 'A Promise Unfulfiled: Environmental Provisions in State Constitutions and the Self-Execution Question', 5 Va. J. Natural Resources Law (1986) as cited in Francois Du Bois, 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties', in Boyle and Anderson ed.
This judicial attitude flowed from the doctrine of 'self-execution'. This doctrine requires a provision to constitute 'a sufficient rule by means of which the right which [it] grants may be enjoyed and protected…without the aid of a legislative enactment' before it will be judicially enforced.
(See State ex rel. City of Fulton v Smith, 194 S.W. 2d 302, 304 (Mo. 1946). Thus, since only provisions couched in prohibitory language are regarded as satisfying this test, the mandatory language of environmental prohibitions in US state constitutions has disqualified them from being regarded as self-executing (Fernandez, 'State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question'?, 17 Harvard ELR 333, 361-365 (1993) as cited in Francois Du Bois, 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties', It should be noted that section 20 of the Nigerian Constitution is also couched in a mandatory language.

[67]Note that some of these rights such as rights to private and family life and property under article 8 of the European Convention and article 1 of Protocol 1 respectively now form the basis of environmental protection in Europe. Robin Churchill, 'Environmental Rights in Existing Human Rights Treaties', in Boyle and Anderson ed., note 8 above at 91-95.

[68]For a criticism of this omission, see O Nnamuchi, 'Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria', (2008) 52(1) *Journal of African Law* p.20.

Conclusion

The challenges of access to environmental justice in Nigeria as examined revealed that the inhibiting factors are *locus standi*, poverty, delays in the administration of justice, limitation period, burden of proof. It was discovered that the attitude of Nigerian courts to litigation particularly to the award of damages which mostly are general in character, also operate as a constraint to litigation as a mechanism for seeking remedies for pollution in Nigeria. In examining corruption as an inhibiting factor it was found that serious cases of environmental pollution are often between an illiterate farmers and a very powerful company for example, a multinational oil company. An under paid judge who has so many responsibilities and so little available funds due to the lack of financial autonomy of the judiciary from the executive arm of government may easily be induced by the strong financial muscle of oil multinational company to give a decision that would be favourable to the company. This has greatly undermined litigation as an effective tool for seeking remedies for environmental pollution in Nigeria. A discussion of the right to a healthy environment was also afforded in this chapter. It was discovered that the Nigerian constitution does not contain a provision that enshrines the right to a healthy environment. This article also examined the enforcement challenges of environmental rights and the huge technicalities that thwart efforts of environmental advocates and victims alike. It was also discovered that despite the amendment of the NESREA Act in 2018, access to environmental justice still appears a pipe dream. In comparing the Nigerian jurisdiction to India, it was revealed that the Nigerian constitution does not contain a provision similar to article 51A of the Indian Constitution which guarantees a right to a healthy environment. Despite this, the Indian judicial decisions constitute persuasive precedents for Nigerian courts. Thus, when confronted with a similar situation, the courts are urged to reinterpret the fundamental rights in the Constitution especially the rights to life, dignity of human persons, private and family life, and property in the light of the provision of section 20, in order to uphold the constitutional right of every Nigerian, to live in an environment adequate to their health and well-being.

Recommendations

It is recommended that;

1. There is a need to incorporate the rights to a sustainable environment into the Nigerian constitution.
2. Environmental justice ought to form a major foundation for environmental litigation.
3. There is need to re-examine the requirement of burden of proof and locus standi to afford better access to justice for victims of environmental pollution.
4. There is need for practical environmental laws reforms to ensure that the environment is placed at the fore especially in relation to the remedy of restitution.
5. Access to environmental justice must not be the privilege of a rich few but must be available to all citizens of the country.